

(2021) 09 JH CK 0047

In the Jharkhand High Court

Case No : Writ Petition (C) No. 2920 Of 2021

Geomax Mines

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 27-09-2021

Acts Referred:

Constitution Of India, 1950 — Article 14, 32, 226, 300A
Banking Regulation Act, 1949 — Section 21, 34, 35A, 35AA
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13, 13(1), 13(2), 13(3), 13(4), 13(8), 13(3A), 17, 17A
Transfer Of Property Act, 1882 — Section 69, 69A

Citation : (2021) 09 JH CK 0047

Hon'ble Judges : Bishwajit Das, Rahul Dev, Anamika Sharma, Lenin K. Raj, Pandey Neeraj Rai, Rohit Ranjan Sinha, P.A.S. Pati, Rohan Kashyap

Bench : Single Bench

Advocate : Bishwajit Das, Rahul Dev, Anamika Sharma, Lenin K. Raj, Pandey Neeraj Rai, Rohit Ranjan Sinha, P.A.S. Pati, Rohan Kashyap

Final Decision : Dismissed

Judgement

Rajesh Shankar, J.

1. The judgment is being pronounced today through virtual mode.

2. The present writ petition has been preferred for the following reliefs:-

(i) For issuance of direction upon the respondents to give a reasonable time up-to 31.03.2021 until when ordinary commercial parameters become normal on its Cash Credit Loan Account No. 20814015000051.

(ii) For issuance of direction upon the respondents declaring that loan agreement between a lender and lendee is an ordinary commercial agreement of which parties thereto are free to negotiate and decide uninfluenced by the dictate of RBI guidelines which can only provide standards to bind the Banks and financial institutions.

(iii) For setting aside the portion of impugned circular dated 27.03.2020 (Annexure-7 to the writ petition) as extended by the statement/press release dated 22.05.2020 (Annexure-12 to the writ petition) respectively issued by the Chief General Manager of Respondent No. 2 to the extent of terms of circular that the interest shall continue to be accrued during the moratorium period.

(iv) For setting aside the notice dated 30.07.2020 (Annexure-15 to the writ petition) issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, "the Act, 2002") by the Chief Manager of the respondent no.3.

(v) For setting aside the decision regarding classification of Cash Credit Loan Account of the petitioner as NPA.

3. The factual background of the case as stated in the writ petition is that the petitioner-Company approached the respondent no. 3 for Cash Credit loan of Rs.9 crores under working capital loan facility service which was sanctioned by the respondent no.3 on 23.02.2015. In the month of September 2015, the petitioner sought enhancement of Cash Credit loan facility from Rs.9 crores to 15 crores from the respondent no. 3 which was sanctioned on 08.10.2015. In the wake of covid-19 pandemic, the respondent no.2, vide circular dated 27.03.2020, issued Covid-19 Regulatory Package permitting all the commercial banks to grant a moratorium of three months on payment of all instalments in respect of all term loans falling due between 01.03.2020 and 31.05.2020, however it was made clear in the said circular that the interest would continue to accrue on the outstanding portion of the term loans during the moratorium period. The respondent no. 2 subsequently, vide circular dated 17.04.2020, announced certain additional regulatory measures aimed at alleviating the lingering impact of Covid-19 pandemic on businesses and financial institutions in India and instructed all Scheduled Commercial Banks and all- India financial institutions not to implement the 'Prudential Framework on Resolution of Stressed Assets dated 07.06.2019' in respect of accounts which were within the review period as on March 1, 2020. It was further instructed that the period of moratorium i.e. from 01.03.2020 to 31.05.2020 was to be excluded from the calculation of 30 days- timeline for the review period as also in respect of all such accounts the residual review period was instructed to resume from June 1, 2020 upon expiry of which the lenders were provided the usual 180 days for resolution. The respondent no. 2, vide circular dated 23.05.2020, further extended the moratorium period from 01.06.2020 to 31.08.2020 deferring the interest accrued during the said period. The respondent no. 3 issued letter dated 15.07.2020 to the petitioner threatening to recall its Cash Credit loan account alleging unsatisfactory operation and conduct of account and insufficient credit to cover interest debited in account. The respondent no. 3 also issued a notice to the petitioner dated 30.07.2020 under Section 13(2) of the Act, 2002 intimating that its cash credit loan account had been recalled pursuant to classification of the same as Non-Performing Asset (NPA) on 31.03.2020 and called upon it to

pay Rs.15,73,31,486.01/- with further interest at the contracted rate until payment of the same within 60 days from the date of the said notice. The petitioner filed reply to the notice dated 30.07.2020 on 07.09.2020 stating inter alia that it had already paid an amount of Rs.10. crores (approx.) to the Bank. It was further claimed that the respondent no. 3 illegally and retrospectively classified the cash credit account of the petitioner as NPA w.e.f. 31.03.2020 during the lockdown period even though its account was a standard account as on 29.02.2020. It has further been stated that the respondent no. 3 unreasonably and illegally adjusted an amount of Rs. 93,34,921/- against the interest. Thereafter, the petitioner filed a corrigendum on 10.09.2020 to its representation dated 07.09.2020 citing an inadvertent error occurred in mentioning the paid amount to the Bank which was actually about Rs.11 Crores in lieu of Rs.10 Crores (approx.). The petitioner filed a writ petition being W.P.C No. 1045 of 2020 before the Hon'ble Supreme court challenging the RBI guidelines on the issue of levy of interest during moratorium period and the notice issued under Section 13(2) of the Act, 2002 as similar petitions were pending before the Hon'ble Supreme Court led by W.P.(C) No. 825 of 2020 (Gajendra Sharma Vs. UOI). Being aggrieved with illegal and malicious conduct of the respondent no. 3, the petitioner filed a complaint before the respondent no. 2 on 17.09.2020. The petitioner also requested the respondent no. 3 once again on 17.09.2020 to accord an opportunity before disposal of its representation dated 07.09.2020 to demonstrate its undisputed facts. However, the respondent no. 3, vide its letter dated 19.09.2020, rejected the petitioner's representation dated 07.09.2020 observing that the account of the petitioner had been declared as NPA due to non-compliance of the terms and conditions of sanction. The Hon'ble Supreme Court, vide order dated 25.09.2020, dismissed W.P.(C) No. 1045 of 2020 filed by the petitioner observing that the said petition cannot be entertained under Article 32 of the Constitution of India, however, liberty was given to the petitioner by the Apex Court to approach the High Court under Article 226 of the Constitution of India. Hence, the present writ petition.

4. Mr. Bisawajit Das, learned counsel for the petitioner, submits that admittedly the loan account of the petitioner was standard asset without having any default of non-payment as on 29.02.2020 with more than 10 crores already paid towards interest. The respondent no. 3 did not consider the fact that though the mining sector faced tremendous adversities for last 10 years, the petitioner never defaulted even on single occasion in last five years of loan period. It is further submitted that classification of the account of the petitioner as NPA w.e.f. 31.03.2020 is bad in law. To substantiate the said argument, it is submitted that on bare perusal of the different provisions of "Master Circular-Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances (in short, "the Master Circular")" issued on 01.07.2015, it would be evident that none of the conditions were fulfilled in the case of the petitioner. Even clause 4.2.4 of the Master Circular speaks that the classification of an asset as NPA should be based on the record of recovery. Bank should not classify an

advance account as NPA merely due to the existence of some deficiencies which are temporary in nature such as non-availability of adequate drawing power based on the latest available stock statement, balance outstanding exceeding the limit temporarily, non-submission of stock statements and non-renewal of the limits on the due date, etc.

5. Mr. Das also invites attention of this court to the Reserve Bank of India (Prudential Framework for Resolution of Stressed Assets) Directions, 2019 (in short "the Directions, 2019") issued on 07.06.2019 in terms with the provisions of Section 35AA of the Banking Regulation Act, 1949 (in short, "the Act, 1949") for initiation of insolvency proceedings against specific borrowers under the Insolvency and Bankruptcy Code, 2016. It is further submitted that in view of clause 6 of the Directions, 2019, lenders have to recognise incipient stress in loan accounts, immediately on default in non-payment of debt by classifying such assets as special mention accounts i.e SMA-0 when the principal or interest or any other amount is overdue between 1-30 days, SMA-1 for overdue of the same between 31-60 days and SMA-2 if the same is overdue between 61-90 days. As per clause-7 of the Directions, 2019, in the case of revolving credit facilities like cash credit, the SMA sub-categories have to be considered as SMA-1 if outstanding balance remains continuously in excess of the sanctioned limit or drawing power, whichever is lower, for a period of 31 to 60 days and SMA-2 if the period is for 61 to 90 days. It has also been clarified that for cash credit facilities, default means non-payment of debt as also the outstanding balance remaining continuously in excess of the sanctioned limit or drawing power whichever is lower for more than 30 days. It is thus submitted that the respondent-Bank has not followed the Directions, 2019 before declaring the account of the petitioner as NPA.

6. Learned counsel for the petitioner further invites attention of this Court to paragraph-2 of the Covid-19 Regulatory Package dated 27.03.2020, by which all the commercial Banks, co-operative banks, other financial institutions and non-banking finance companies were permitted to grant a moratorium of three months on payment of all instalments in respect of all term loans falling due between March 1, 2020 and May 31, 2020. The repayment schedule for such loans as also the residual tenor were shifted across the board by three months after the moratorium period. Paragraph-3 of the Covid-19 Regulatory Package dated 27.03.2020 further permitted lending institutions to defer the recovery of interest during the period from March 1, 2020 up-to May 31, 2020 in respect of working capital facilities sanctioned in the form of cash credit/overdraft (CC/OD). The accrued interest was also to be recovered immediately after the completion of this period. Further, paragraph-6 provided that the asset classification of term loans which were granted relief under para 2 would be determined on the basis of revised due dates and the revised repayment schedule. Similarly, working capital facilities where relief was provided as per para 3, the SMA and the out of order status would be evaluated considering the application of accumulated interest immediately after the completion of the deferment period as well as the

revised terms. Paragraph- 7 further provided that the rescheduling of payments, including interest, would not qualify as a default for the purposes of supervisory reporting and reporting to Credit Information Companies (CICs) by the lending institutions. CICs would ensure that the actions taken by lending institutions pursuant to the above announcements did not adversely impact the credit history of the beneficiaries.

7. Learned counsel for the petitioner further submits that in "Frequently Asked Questions" (FAQs) on the topic "RBI Allowed Banks to Declare Moratorium on Terms Loans" issued by the Ministry of Finance in which the Indian Banks Association had answered a list of FAQs about the technicalities of the moratorium, it specifically answered to question no. 8 that as a result of relief package, the overdue payments post 1st March, 2020 would not be reported to Credit Bureaus/CRILC for three months. It was further answered that no penal interest or charges would be payable to the banks. Similarly, as per SEBI also the Credit Rating Agencies (CRAs) should not consider the delay as default by listed companies if the same was owing to lockdown conditions arising due to Covid-19. However, the respondent no. 3 did not strictly adhere to the conditions of the Regulatory Package and the FAQs issued by the Ministry of Finance. It is also submitted that "Covid-19 Regulatory Package-Review of Resolution Timelines under the Prudential Framework on Resolution of Stressed Assets" issued by the RBI on 17.04.2020 provides that in respect of accounts which were within the review period as on March 1, 2020, the period from March 1, 2020 to May 31, 2020 shall be excluded from the calculation of the 30-day timeline for the review period. In respect of all such accounts, the residual review period shall resume from June 1, 2020, upon expiry of which the lenders shall have the usual 180 days for resolution. Further, in respect of accounts where the review period was over, but the 180-day resolution period had not expired as on March 1, 2020, the timeline for resolution shall get extended by 90 days from the date on which 180-day period was originally set to expire during pre-covid-19 period. Though the High Courts earlier avoided to entertain the writ petitions filed challenging the notice under section 13(2) of the Act, 2002 on the ground that the aggrieved party had alternative efficacious remedy before the DRT, however during Covid-19 pandemic period, the approach has slightly changed and in view of new guidelines issued in the year 2020 as well as to meet the situations prevailing during covid-19 pandemic period, almost all the High Courts have entertained the writ petitions and have granted relief to the aggrieved parties. As per Covid-19 Regulation, classification of accounts as NPA under normal regulation was under suspension during 6 months moratorium period.

8. Mr. Das also submits that the notice under section 13(2) of the Act, 2002 was issued by the respondent no. 3 to the petitioner alleging non-payment, however the respondent no. 3 subsequently introduced a new ground of violation of the conditions of the loan for which no prior notice was issued to it and as such the impugned action violates the principles of natural justice. The statutory notice under Section 13(2) of the Act, 2002 can only be issued upon satisfaction of two

distinct parameters i.e. default in repayment of debt/interest due and payable and consequent classification of financial assets as NPA. Mere classification of a financial asset by a Banking Company as NPA in compliance of the provision of RBI Master Circular dated 01.07.2015 is not sufficient to invoke Section 13(2) of the Act, 2002 unless there is a default in payment of interest/instalment which was due and payable. Not only Section 13(2) of the Act, 2002 makes non-payment as sine qua non for the issuance of notice under it but the same is also mandated under section 13(3) of the said Act as an important content thereof. If a financial asset is performing as per the terms of finance/loan contract, the Bank cannot classify it as NPA. The respondents have wrongly contended that the issue involved in the present case is similar to that in the case of Small Scale Industrial Manufacturers Association (Regd.) Versus Union of India and Others reported in 2021 SCC OnLine SC 246 decided by the Hon'ble Supreme Court. In the present writ petition, the petitioner's claim is based on its legal right and entitlement arising out of a commercial arrangement between two commercial entities whereas in the cases before the Hon'ble Supreme Court, claims were made for waiver of interest during moratorium period. As such, there is distinction between the present writ petition and the proceedings which were before the Supreme Court. The Bank is fully empowered to resolve issues of compound/penal interest/charge, rate of interest, haircut of amount, tenure of loan, additional loan in exercise of its contractual relationship. The petitioner had also preferred I.A No. 98404 of 2020 dated 28.09.2020 before the Honble Supreme Court intervening in the matter of Gajendra Sharma (supra) and had also filed additional written note in the said case contending that authorization vide RBI circular dated 27.03.2020 and 23.05.2020 to levy and demand interest under loan agreement for moratorium period is de hors the rules and law of contract as also hit by Article 300-A of the Constitution of India. The said issue was not contested by the respondents including RBI and the Central Government before Hon'ble Supreme Court. The respondents had conceded before the Hon'ble Supreme Court that the Disaster Management Act, 2005 (in short, "the Act, 2005") is not for readjustment of any individual private right which takes away any possible debate that the parliament has authorised the authorities under the Act, 2005 to deprive people of their property, interest, right etc.

9. Mr. Das further submits that the impugned circulars dated 27.03.2020 and 23.05.2020 deferring the payment of interest under a loan contract is not proportionate to the regulation of lockdown whereby restrictions were imposed which affected the working of the petitioner-industry. By the impugned action of RBI, the state revenue is protected by one set of regulation at the cost of public whose earnings have been destroyed through another set of regulation. The direction given through regulation to levy interest at later date amounts to interfering with the rules of contract and impeding people's choice, volition and bargain inherently. A contract of loan has two promises i.e operational promise (interest) and capital promise (refund of loan amount). Operational promise is always contingent upon the medium which is legally allowed to be operated. If

medium is frozen and operation is legally enjoined, then promise linked to operation cannot be enforced by law till the period it remained enjoined. It is also submitted that demanding of interest qua enjoined period is against tenets of commercial wisdom which is at the core of any commercial contract without which free consent element will remain absent making the promise to pay interest as void under Chapter II of the Indian Contract Act, 1872. It is contended that six month's moratorium dispensed and excused operational promise and as such the same cannot be enforced at later period. The doctrine of Frustration, Proportionality, Force majeure etc. are the doctrines which apply under contractual field in suitable cases, however all these doctrines would not fit in the present situation where legal injunction has been enforced under the Act, 2005 and as such "doctrine of black-hole" may be applied in the given case. It is also submitted that the impugned circular is primarily for the Bank and borrower and as such the RBI cannot cite depositor's interest etc. being extraneous to contracting parties, at the time of levy of interest. If due to ceasure of operation under the Act, 2005, everyone becomes poorer, then how will the depositors seek insulation from it. If they are to be protected, the person desiring such protection has to bear the burden and not the borrower. Even parliament can't cause deprivation of this nature. If the impugned circulars of RBI are found to be valid on grounds of Banking, Economy, Depositors' interests etc., it will worsen borrower's deprivation having no prior commitment either contractual or legal towards the aforesaid reason. It will rather enrich few banks and depositors etc.

10. Mr. P.A.S Pati, the learned counsel for the respondent no. 3, submits that the account of the petitioner was classified as NPA due to the following reasons:-

- a. The licence of the petitioner for mining has expired in 2017;
- b. No details of long term borrowing was furnished.
- c. No details of nature of receivables was furnished.
- d. Only interest portion was served in the account and transaction in terms of cash credit was not routed through the CC account.
- e. The CC was sanctioned in 23.02.2015 to meet the working capital requirement but the account was not operated in terms of the sanction.
- f. The petitioner submitted stock statement till the month of January 2020 only and thereafter no statement was furnished. The stock was not adequate and as per the stock audit, the sale proceeds were not credited in the account.

11. Learned counsel for the respondent no. 3 further submits that the petitioner was seeking restructuring of the account and the respondent-Bank vide its letter dated 15.01.2020 (sent through email on 16.01.2020) requested the petitioner to submit information/documents. The petitioner did not reply the said letter and as such reminders were sent to it vide email dated 21.01.2020 and 23.01.2020. On 04.03.2020, 18.03.2020, 19.03.2020 and 23.03.2020, emails were again sent to the petitioner requesting therein to submit its reply point wise. On

18.05.2020, email was sent to the petitioner informing that despite several emails and various telephonic conversations, the Bank was still awaiting the petitioner's reply and hence, it was requested to submit plan in proper order regarding its account maintained with the Bank since the period of almost 18 months had lapsed from the date of last renewal of its account which was not done after i.e 28.12.2019. It is also submitted that renewal of account is mandatory on every six months failing which the account is liable to be declared NPA. On 28.05.2020, the petitioner was again informed through email that despite several email communications and telephonic conversations regarding renewal of credit facilities, the required papers/documents to get the account renewed were not submitted. The papers for renewal were required to be submitted two months prior to the expiry of the limit. It was already informed to the petitioner that its limit had expired on 28.12.2019 and the papers were still not received from it. The petitioner was further requested to submit its reply as per Bank's query or adjust the account at the earliest. On 28.05.2020, the petitioner replied the letter of the respondent no. 3 and asked about details of the required documents whereupon on 28.05.2020 itself, the respondent no. 3 responded to the petitioner and sought its reply on 24 points. On 05.06.2020, a reminder email was sent to the petitioner stating therein that as a conclusion of the discussion with the Bank at its Circle Office, Ranchi, the petitioner had agreed to submit all the papers till 06.06.2020. On 10.06.2020, another email was sent to the petitioner that the Bank was still awaiting the reply on the queries. On 19.06.2020, the petitioner was again informed through e-mail to submit the reply to the queries made by the respondent no. 3 as soon as possible. Despite repeated e-mails sent to the petitioner, it failed to meet the queries of the respondent no. 3 and as such the account of the petitioner was classified as NPA. The restriction on classifying the accounts as NPA is enforceable under the Master Circular and not for any other reasons. The FAQ's issued by the respondent no.2 cannot give rise to any enforceable right in favour of a person and the reliance placed by the petitioner on the same is misplaced. It is also submitted that due opportunity of hearing as required under the Act, 2002 was given to the petitioner and its objection was also taken into consideration before disposing of its objection against the demand notice. The Bank is also an organization carrying on commercial activity and is undergoing adverse effect of lockdown due to pandemic. The regulatory policies of RBI ensures balance between the rights of both the borrower and creditor and as such the impugned circulars are lawful and justified. The contention of the petitioner that it is not liable to pay interest during the period of lockdown as the same was contingent to the operation of the petitioner's establishment, is not acceptable since there was no such promise between the petitioner and the Bank. It is lastly submitted that the petitioner has tried to merge different cause of actions in the present writ petition. The action taken by the respondent no. 3 under the Act, 2002 may be assailed before the DRT and the same is not maintainable before this Court there being an equally efficacious/alternative remedy.

12. Mr. Pandey Neeraj Rai, learned counsel for the respondent-RBI submits that there is no restriction on the Banks for extending moratorium and restructuring benefits to any borrower account in accordance with their Board approved policies formulated within the Board's ambit of RBI regulatory guidelines. However, Covid-19 Regulatory Package and Resolution Framework of August 6, 2020 was regulatory dispensation permitted for a specific purpose and the petitioner does not have any vested right to get it extended as per its suitability. Nonetheless, borrowers with stress corresponding to pre Covid-19 period can be considered for restructuring under Prudential Framework for Resolution of Stressed Assets dated 07.06.2019. In view of various provisions of the Act, 1949 and the Reserve Bank of India Act, 1934 (in short, "the Act, 1934"), the Reserve Bank of India is obliged to see that the banking business is being carried with sound principles and it has to facilitate the provisions of banking facilities all over the country. Any relief with regard to rate of interest shall entail costs and it will not be in public interest for the RBI to force such costs on the banks as they are ultimately the custodians of depositors' money and all their actions and the regulations governing them need to be guided primarily by the protection of depositors' interests. Hence, Covid 19 Regulatory Package was issued by the Reserve Bank of India in exercise of its statutory rights and duties under the Act, 1949 and the Act, 1934. The application of interest rates during moratorium period is neither arbitrary, unreasonable nor mutually destructive as amounts raised by banks through deposits are lent to the borrowers at a mark-up which accounts for various costs the banks have to meet, including payment of interest to their depositors and the possibility of some of the loans not being repaid. The interest on advances forms a critical component of income for the banks. If banks do not charge interest, then as a direct implication, they cannot pay to the depositors. This will shake the very foundation of public trust in the banking system. This may eventually lead to massive withdrawal of deposits from the banking system. Any interest waiver may lead to a change in the deposit culture and the depositors may be pushed to shift their deposits from banks to unregulated entities which may not be desirable. It will cripple the ability of the banks to provide credit which is the lifeblood of a predominantly bank-financed economy like ours. Consequently, it will severely hamper any prospect of an early recovery from the current pandemic situation. Without adequate supply of credit required to continue support for the businesses and job creation, there is an increased chance that temporary job losses will morph into permanent job losses for the general public. This could have serious ramifications on the health of the banking sector and more so on financial stability of the country. Further, so far as regulation of banks is concerned, the mandate of the RBI draws upon the considerations of protection of depositors' interest and maintenance of financial stability which also requires that the banks remain financially sound. Since economy is a complex system with numerous moving parts, many of which affect each other in complex ways, the RBI has to be mindful of the unintended consequences of the measures instituted by it. It is further submitted that the RBI has been vested with the responsibility of superintendence and control of the

banking business in the country under the provisions of the Act, 1949.

13. Heard learned counsel for the parties and perused the materials available on record. The petitioner has made two fold challenges; one is to the circulars dated 27.03.2020 and 23.05.2020 issued by the RBI to the extent of charging interest during the moratorium period and another is to the action of the respondent-Bank (the respondent no. 3) declaring the petitioner's cash credit account as NPA as well as consequential action of recovery of secured assets by issuing notices under Section 13(2) and 13(4) of the Act, 2002.

14. So far relief seeking quashing and setting aside the part of the impugned circular dated 27.03.2020 as extended by the circular dated 23.05.2020 issued by the respondent No.2 to the extent that the interest on loan amount will accrue during the moratorium period and the prayer for extension of moratorium period up-to 31.03.2021, is concerned, the learned counsel for the respondents have assiduously contended that these issues are squarely covered by the judgment of the Hon'ble Supreme Court rendered in the case of Gajendra Sharma Vs. Union of India & Another reported in (2021) 1 SCC 210 and Small Scale Industrial Manufacturers Association (supra). The learned counsel for the respondent no. 2 has also submitted that the claim of the petitioner is barred by the principle of constructive res judicata as it could have raised the said issue before the Hon'ble Supreme Court which it failed to do.

15. To appreciate the contention of the learned counsel for the parties, I have gone through the aforesaid judgments. In the case of Gajendra Sharma (supra), the vires of circular dated 27.03.2020 was challenged. In the said case, the present petitioner had also filed an intervention application as well as a written notes of argument. During the pendency of the said case, the Ministry of Finance, Government of India, issued order dated 23.10.2020 whereby a scheme was introduced for waiver of interest i.e. grant of ex gratia payment of difference between compound interest and simple interest for six months to eight categories of loan. The said scheme was also applicable to Gajendra Sharma (the petitioner of the said case) and he was satisfied with the said scheme of the Government. On his satisfaction, the said writ petition was disposed of with a direction to the respondents to take all possible steps for implementing the said decision of the Government. The Hon'ble Supreme Court in the said case however did not touch the issue of vires of circular dated 27.03.2020.

16. However, during pendency of the present case, the Hon'ble Supreme Court decided the case of Small Scale Industrial Manufacturers Association (supra). On bare perusal of the reliefs prayed in different writ petitions involved in Small Scale Industrial Manufacturers Association (supra), it appears that in several cases, one of the prayers was to quash circular dated 27.03.2020 issued by the RBI to the extent of charging interest during the moratorium period. It was also prayed therein to direct the RBI to extend the period of moratorium for another six months without any interest being levied on the loan availed by some of the petitioners/ members of the petitioners' Organisation.

17. Their Lordships, after having elaborately dealing with the scope of Court's interference in the financial matters, rejected the plea of some of the petitioners/ members of the petitioners' Organisation for extension of period of moratorium by another six months holding as under:-

"133. What is best in the national economy and in what manner and to what extent the financial reliefs/packages be formulated, offered and implemented is ultimately to be decided by the Government and RBI on the aid and advise of the experts. The same is a matter for decision exclusively within the province of the Central Government. Such matters do not ordinarily attract the power of judicial review. Merely because some class/sector may not be agreeable and/or satisfied with such packages/policy decisions, the courts, in exercise of the power of judicial review, do not ordinarily interfere with the policy decisions, unless such policy could be faulted on the ground of mala fide, arbitrariness, unfairness etc.

134. There are matters regarding which Judges and the Lawyers of the courts can hardly be expected to have much knowledge by reasons of their training and expertise. Economic and fiscal regulatory measures are a field where Judges should encroach upon very warily as Judges are not experts in these matters.

135. The correctness of the reasons which prompted the government in decision taking one course of action instead of another is not a matter of concern in judicial review and the court is not the appropriate forum for such investigation. The policy decision must be left to the government as it alone can adopt which policy should be adopted after considering of the points from different angles. In assessing the propriety of the decision of the Government the court cannot interfere even if a second view is possible from that of the government.

136. Legality of the policy, and not the wisdom or soundness of the policy, is the subject of judicial review. The scope of judicial review of the governmental policy is now well defined. The courts do not and cannot act as an appellate authority examining the correctness, stability and appropriateness of a policy, nor are the courts advisers to the executives on matters of policy which the executives are entitled to formulate.

137. Government has to decide its own priorities and relief to the different sectors. It cannot be disputed that pandemic affected the entire country and barring few of the sectors. However, at the same time, the Government is required to take various measures in different fields/sectors like public health, employment, providing food and shelter to the common people/migrants, transportation of migrants etc. and therefore, as such, the government has announced various financial packages/reliefs. Even the government also suffered due to lockdown, due to unprecedented covid-19 pandemic and also even lost the revenue in the form of GST. Still, the Government seems to have come out with various reliefs/packages. Government has its own financial constraints. Therefore, as such, no writ of mandamus can be issued directing the Government/RBI to announce/declare particular relief packages and/or to declare

a particular policy, more particularly when many complex issues will arise in the field of economy and what will be the overall effect on the economy of the country for which the courts do not have any expertise and which shall be left to the Government and the RBI to announce the relief packages/economic policy in the form of reliefs on the basis of the advice of the experts. Therefore, no writ of mandamus can be issued.

138. No State or country can have unlimited resources to spend on any of its projects. That is why it only announces the financial reliefs/packages to the extent it is feasible. The court would not interfere with any opinion formed by the Government if it is based on the relevant facts and circumstances or based on expert advice. It is not normally within the domain of any court to weigh the pros and cons of the policy or to scrutinize it and test the degree of its beneficial or equitable disposition for the purpose of varying, modifying or annulling it, based on howsoever sound and good reasoning, only where it is arbitrary and violative of any Constitutional, statutory or any other provisions of law. When Government forms its policy, it is based on a number of circumstances on facts, law including constraints based on its resources. It is also based on expert opinion. It would be dangerous if court is asked to test the utility, beneficial effect of the policy or its appraisal based on facts set out on affidavits.

139. No right could be absolute in a welfare State. Man is a social animal. He cannot live without the cooperation of a large number of persons. Every article one uses is the contribution of many. Hence every individual right has to give way to the right of the public at large. Not every fundamental right under Part III of the Constitution is absolute and it is to be within permissible reasonable restriction. This principal equally applies when there is any constraint on the health budget on account of financial stringencies.

140. It is the cardinal principle that it is not within the legitimate domain of the court to determine whether a particular policy decision can be served better by adopting any policy different from what has been laid down and to strike down as unreasonable merely on the ground that the policy enunciated does not meet with the approval of the court in regard to its efficaciousness for implementation of the object and purpose of such policy decision.

141. With the limited scope of judicial review on the policy decisions affecting the economy and/or it might have financial implications on the economy of the country, the reliefs and submissions stated hereinabove are required to be considered. Whether there shall be a waiver of interest during the moratorium period or whether there shall be sector-wise relief packages and/or RBI should have issued directions which are sector specific and addressing such sector specific issues and/or whether the moratorium period should be extended beyond 31.08.2020 or the last date for invocation of the resolution mechanism, namely, 31.12.2020 provided in the 6.8.2020 circular should be extended are all in the realm of the policy decisions. Not only that, if such reliefs are granted, it would seriously affect the banking sectors and it would have far reaching financial

implications on the economy of the country."

18. Their Lordships further rejected the claim of the waiver of interest during the moratorium period by observing as under:-

"142. Now so far as the relief sought of waiver of interest during the moratorium period is concerned, it is required to be noted that the bankers/lenders have to pay the interest to the depositors and their liability to pay the interest on the deposits continue even during the moratorium period. There shall be administrative expenses also required to be borne by the bankers/lenders.

Continue payment of interest to depositors is not only one of the most essential banking activities but it shall be a huge responsibility owed by the banks to crores and crores of small depositors, pensioners etc. surviving on the interest from their deposits. There may be several welfare funds schemes, category specific and sector specific which might be surviving and are implemented on the strength of the interest generated from their deposits. All such welfare funds would depend on the income generated from their deposits for the survival of their members. Therefore, to grant such a relief of total waiver of interest during the moratorium period would have a far-reaching financial implication in the economy of the country as well as the lenders/banks. Therefore, when a conscious decision has been taken not to waive the interest during the moratorium period and a policy decision has been taken to give relief to the borrowers by deferring the payment of installments and so many other reliefs are offered by the RBI and thereafter by the bankers independently considering the Report submitted by Kamath Committee consisting of experts, the interference of the court is not called for.

143. Now so far as the submission on behalf of the petitioners that the RBI should have issued directions which are sector specific and addressing such sector specific issues is concerned, at the outset, it is required to be noted that as such the Committee headed by Shri K.V. Kamath had gone into such sector specific issues and gave its recommendations. The recommendations of the Kamath Committee have been substantially accepted by the RBI in its circular dated 7.9.2020 which provides for separate threshold for 26 sectors including power, real estate and construction. Even otherwise, it is required to be noted that every sector might have suffered differently and therefore it will not be possible to provide sector specific/sector-wise reliefs. The petitioners cannot pray for sector specific relief by either waiver of interest or restructuring by way of present proceedings under Article 32 of the Constitution of India and the question of such financial stress management measures requires examination and consideration of several financial parameters and its impact.

144. Now so far as the submission on behalf of the petitioners that as per the notifications/circulars/reliefs offered by the RBI and/or Finance Department of the Union of India ultimately it is left to the bankers and it should not have been left to the bankers and the Government/RBI must intervene and provide further

reliefs is concerned, at the outset, it is required to be noted that as such the bankers are commercial entities and since the customer profile, organizational structure and spread of each lending institution is widely different from others, each lending institution is best placed to assess the requirements of its customers and therefore, the discretion was left to the lending institutions concerned. Any borrowing arrangement is a commercial contract between the lender and the borrower. RBI and/or the Union of India can provide for broad guidelines while recommending to give the reliefs.

145. Now so far as the submission on behalf of the petitioners that the relief packages which are offered by the UOI/RBI/Bankers/Lenders are not sufficient and some better and/or more reliefs should be offered is concerned, it is not within the judicial scope of the courts to issue such directions. No mandamus can be issued to grant some more reliefs/packages. As observed hereinabove, the court cannot interfere with the economic policy decisions on the ground that either they are not sufficient or efficacious and/or some more reliefs should have been granted. The Government might have their own priorities and the Government has to spend in various fields and in the present case like health, medicine, providing food etc. Even as per the case of the Union of India and so stated in the counter filed on behalf of the Union of India and the RBI, so many policies have been announced to mitigate the impact of Covid-19 pandemic, which are referred to hereinabove.

146. As can be seen that as such the Central Government has already given various reliefs and by providing various reliefs, they have already expanded huge financial burden. It is required to be noted that pandemic has caused stress to large and small businesses and the individuals who have lost jobs and livelihoods. By and large, everybody has suffered due to lockdown due to Covid-19 pandemic. Even the Government has also suffered due to non-recovery of GST. From the counter filed on behalf of the Central Government, it appears that the Government has announced and offered 'GaribKalyan Package' and 'AatmaNirbhar Package'. The 'GaribKalyan Package' was for Rs. 1.70 lakh crores, involving free food grains, pulses, gas cylinders and cash payment to women, poor senior citizens and farmers. It is reported that more than 42 crore poor people received financial assistance of Rs. 65,454 crores under the said package. The Government has also come out with 'AatmaNirbhar Package' which was for Rs. 20 lakh crores, involving support to MSMEs, Non-Banking Finance Companies, agriculture, sectors allied to agriculture, contractors, street vendors, State Governments, relief in provident fund contribution, extension of subsidy on home loans etc. Therefore, it cannot be said that the Central Government and/or the RBI have not done anything and/or have not offered any reliefs whatsoever. While offering the financial relief packages, the financial constraint and/or financial burden on the government is also required to be considered and borne in mind, which can be considered by the experts and the government and the courts have not expertise to assess the financial burden.

147. From the various steps/measures/policy decisions/packages declared by the Union of India/RBI and the bankers, it cannot be said that the UOI and/or the RBI have not at all addressed the issues related to the impact of Covid-19 on the borrowers. As such, none of the petitioners have specifically challenged the various circulars/policy decisions taken by the UOI/RBI. From the submissions made by the learned counsel appearing for the respective parties, it appears that the borrowers want something more than the reliefs announced. Merely, since the reliefs announced by the UOI/RBI either may not be suiting the desires of the borrowers, the reliefs/policy decisions related to Covid-19 cannot be said to be arbitrary and/or violative of Article 14 of the Constitution of India. It cannot be said that any of the fundamental rights guaranteed under the Constitution are infringed and/or violated. Economic decisions are required to be taken keeping the larger economic scenario in mind."

Finally, at para 149 it has been held as under:-

"149. Therefore, the petitioners shall not be entitled to any reliefs, namely,

(i) total waiver of interest during the moratorium period;

(ii) to extend the period of moratorium;

(iii) to extend the period for invocation of the resolution mechanism, namely 31.12.2020 provided under the 6.8.2020 circular;

(iv) that there shall be sector-wise reliefs provided by the RBI;

and

(v) that the Central Government/RBI must provide for some further reliefs over and above the relief packages already offered which, as observed hereinabove, can be said to be in the realm of the economic policy decisions and for the reasons stated hereinabove and as observed hereinabove granting of any such reliefs would have a far-reaching financial implication on the economy of the country. It appears, whatever best can be offered has been offered for the different fields and to the common people as well as those persons who are affected due to Covid-10 pandemic.

However, the relief/prayer not to charge the penal interest/interest on interest/compound interest during the moratorium period is concerned, it stands on different footing which shall be dealt with herein below."

19. Thus, the Hon'ble Supreme Court has specifically held that there is very limited scope of judicial review on the policy decisions affecting the economy and/or it may have financial implications on the economy of the country. The question as to 'whether the moratorium period should be extended beyond 31.08.2020' is in the realm of policy decisions. It has further been held that if such reliefs are granted, it will seriously affect the banking sector having far reaching financial implications on the economy of the country. Their Lordships have rejected the claim of some of the petitioners/members of the petitioners' Organisation for

waiver of interest during the moratorium period by observing that the bankers/ lenders have the liability to pay interest to the depositors even during the moratorium period. Even small depositors and pensioners survive on interest from the deposits as also the banks have to bear administrative expenses and there are several welfare funds which run on interest from deposits. As such, grant of relief of total waiver of interest during the moratorium period will have a far-reaching financial implication in the economy of the country as well as the lenders/banks. It has also been held that no interference is warranted when a conscious decision has been taken by the RBI not to waive interest during the moratorium period and a policy decision has been taken to grant relief to the borrowers by deferring the payment of instalments.

20. The learned counsel for the petitioner has tried to distinguish the present case with the case of Small Scale Industrial Manufacturers Association (*supra*) contending that the petitioner is not claiming waiver of interest during the moratorium period as was prayed in the said case, rather the claim of the petitioner is that it is not at all liable to pay the interest during the moratorium period since operation of the unit of the petitioner was enjoined by the direction of the competent authorities issued time-to-time under the Act, 2005. He has sought to present a new concept i.e., the "doctrine of black hole" to deal with the present case. It has been contended that the RBI cannot issue directions to the respondent-Bank for charging interest during the moratorium period, rather the same will be governed by the contractual relationship between the petitioner (the borrower) and the respondent-Bank (the lender).

21. I am not convinced with the said argument of learned counsel for the petitioner on the said aspect. The petitioner on the one hand has claimed moratorium which is part of the relief package announced by the respondent-RBI to deal with the situation arising out of Covid-19 pandemic and on the other hand it has challenged the other part of the package which is mere a clarification that the interest will continue to accrue on the outstanding portion of term loans during the moratorium period and the same shall be recovered after moratorium period is over. The package consists of both the moratorium relief and the levy of interest during the moratorium period and the petitioner cannot be permitted to take benefit of one part and deny to accept the other. The Hon'ble Supreme Court in Small Scale Industrial Manufacturers Association (*supra*) has held portion of the relief package whereby interest was sought to be charged during the moratorium period as valid observing that the same is in the depositors' interest as well as in the interest of the growth of the country's economy.

22. One of the contentions of the learned counsel for the petitioner is that the impugned resolution is between the Bank and the borrower and as such the respondent-RBI being extraneous to contracting parties cannot justify the impugned circular for levying interest citing the reason of liability to pay interest to the depositors during the moratorium period. Sections 35A and 21 of the Act, 1949 empowers the respondent-RBI to issue directions to the Banks in the public

interest or in the interest of depositors and the Banks are bound to follow such guidelines of RBI. Thus, the contention of Mr. Das that the RBI had wrongly taken into consideration of the depositors' interest while issuing the impugned regulation, has no leg to stand.

23. Further contention of the learned counsel for the petitioner is that the loan agreement between lender and borrower is an ordinary commercial agreement and the parties thereto are free to negotiate and decide uninfluenced by the dictate of RBI guidelines. The Hon'ble Supreme Court in the case of Small Scale Industrial Manufacturers Association (supra) has also held that any borrowing arrangement is a commercial contract between the lender and the borrower and the RBI and/or the Union of India can provide broad guidelines while recommending to give reliefs. This Court has no confusion with the said principle, however the same will also not improve the case of the petitioner. The moratorium relaxation was provided by the RBI to give some reliefs to the borrowers who suffered during the Covid-19 pandemic period as well as keeping in view different aspects like depositor's interest, economic growth of the country etc. and thought it appropriate not to waive the accruing interest during moratorium period, rather deferred the payment of the same. By the impugned relief package, the RBI has not guided the commercial agreement between the banks and borrowers, rather the moratorium relief and its extent has been explained. Moreover, the petitioner has failed to show any agreement wherein the respondent-bank has undertaken not to charge interest from the petitioner if the operation of the industry is injuncted by any order of the competent authority. A new "black hole doctrine" as suggested by the learned counsel for the petitioner cannot be made applicable in the present case. During the period of Covid-19 pandemic, the government announced lockdown measure to control the spread of coronavirus which affected functioning of all sectors including the industrial sector and even the Banking sector. The Government has come up with various relief packages to let almost all the sectors recover from the said situation. It is true that no package is full proof and some of the persons feeling aggrieved approach the constitutional courts suggesting certain measures which according to them may be suited in the prevailing circumstance. However, the Hon'ble Supreme Court has repeatedly held that the courts should be slow in issuing any direction which is in the realm of economic policy decisions of the government as that may have a far-reaching financial implication on the economy of the country. The said principle has again been reiterated in the case of Small Scale Industrial Manufacturers Association (supra). Their Lordships after taking into consideration the arguments of the parties and looking to the nature of relief sought, have held that whatever best can be offered, has been offered for different sectors keeping in view the interest of the common people as well as those persons who got affected due to Covid-19 pandemic.

24. The principle of constructive res-judicata may however not apply in the present case since in the case of Gajendra Sharma (supra), the issue of vires of circular dated 27.03.2020 was not decided. It is not clear from the record as to

whether the petitioner was party in Small Scale Industrial Manufacturers Association (supra) where the validity of the impugned circular dated 27.03.2020 to the extent of charging of the interest during the moratorium period was decided. However, since the Hon'ble Supreme Court in the case of Small Scale Industrial Manufacturers Association (supra) after making due deliberation on the validity of the impugned circular to the extent of charging of interest during the moratorium period, has set the said issue at rest by upholding the said condition, the doctrine of stare decisis would apply in the present case and this Court is bound by the ratio laid down in the case of Small Scale Industrial Manufacturers Association (supra).

25. The other limb of argument of learned counsel for the petitioner is that none of the conditions for declaring an account as NPA provided in Clauses 2.1.1, 2.1.2 and 2.1.3 of the Master Circular is attracted in the case of the petitioner as admittedly the interest was continuously paid till 29.02.2020 and the account of the petitioner was a standard asset. It has further been contended that even the condition mentioned in Clause 4.2.4 of the Master Circular is not attracted as any temporary deficiency cannot be a ground for declaring an account as NPA.

26. To counter the said argument of the learned counsel for the petitioner, Mr. Pati, learned counsel for the respondent no. 3, has submitted that the petitioner's cash credit account was declared NPA on the ground of violation of terms and conditions of the agreement and not on the ground of default. As such, the respondent Bank has not violated the terms of the regulatory package. As per Clause 2.1.1 of Master Circular, an asset becomes NPA when it ceases to generate income for the Bank. Further, Clause 2.1.2 provides that if an Overdraft/ Cash Credit account remains out of order i.e outstanding balance remains continuously in excess of the sanctioned limit/drawing power for more than 90 days, the loan account shall be termed as NPA. It has further been contended that Clause 4.2.4 of Master Circular though provides that an account shall not be classified as NPA for temporary deficiencies, the Bank should ensure that drawings in the working capital accounts are covered by the adequacy of current assets, since current assets are first appropriated in time of distress. It is further provided that drawing power is required to be arrived at based on the stock statement which is current. However, considering the difficulties of large borrowers, stock statements relied upon by the banks for determining drawing power should not be older than three months and the outstanding in the account based on drawing power calculated from stock statements older than three months would be deemed as irregular. A working capital borrowal account will become NPA if such irregular drawings are permitted in the account for a continuous period of 90 days even though the unit may be working or the borrower's financial position is satisfactory. Sub-clause (ii) of the clause 4.2.4 of Master Circular further provides that regular and ad hoc credit limit need to be reviewed/regularized not later than three months from the due date/date of ad hoc sanction and in any case, delay beyond six months is not considered desirable as a general discipline. Hence, an account which is not reviewed/

renewed within 180 days from the due date/date of ad hoc sanction, the same will be treated as NPA. After referring the aforesaid provisions of the Master Circular, Mr. Pati has further submitted that the petitioner had failed to submit stock statement within the stipulated time even after repeated demand of the Bank. Moreover, it was found by the Bank that only interest portion was served in the account and transaction was not routed through the cash credit account which was in violation of the terms and conditions of the loan. The petitioner submitted stock statement till the month of January, 2020 only and thereafter no statement was furnished. As per the stock audit, the sale proceeds were not credited in the account. Since no stock statement was furnished, the drawing power of the petitioner could not be ascertained and due to suspicious transaction by the petitioner, the Bank classified the account of the petitioner as NPA and as such there is no infirmity in the decision of the Bank.

27. The learned counsel for the petitioner has not controverted the said argument of the respondent no. 3, however he has tried to explain that the notices were issued to the petitioner requiring certain documents only for the purpose of restructuring as requested by it.

28. It appears to this Court that since the petitioner failed to submit the stock statement in spite of repeated demand by the respondent Bank, it lost confidence in the borrower and as per the provisions of the Master Circular, the petitioner's cash credit was declared as NPA.

29. The learned counsel for the petitioner has given much stress to his argument that the interest of the loan amount was regularly credited in the cash credit account and as such there was no valid ground with the Bank to declare the petitioner's account as NPA.

30. Cash credit loan is a capital loan extended by the Banks/financial institutions, which allows the borrower to utilise money without holding a credit balance in an account. The withdrawing power of the borrower is determined based on the stock statement and as such the borrower is obliged to maintain the minimum level of stock in order to safeguard the interest of the Banks/financial institution. The borrower is required to submit the stock statement and other relevant documents periodically for verification of the Banks/financial institutions so as to satisfy them that the money advanced to the borrower is safe. The credit of interest in the account is not sufficient, rather the borrower has to show through the stock statement that the money of the Bank is safe as also to determine that the borrower is capable of generating income for the Bank.

31. In view of the submission of the learned counsel for the respondent no. 3, this Court finds that the petitioner is wrong in contending that none of the grounds for declaring its account as NPA was present with the Bank. Since the Master Circular was framed in exercise of the power conferred under Sections 21 and 35A of the Act, 1949, the Banks are bound to follow the said Circular.

32. The learned counsel for the petitioner has also put reliance on the judgment

of learned Division Bench of Punjab and Haryana High Court rendered in the case of Amar Alloys Pvt. Limited (Regd.) Vs. State Bank of India reported in 2019 SCC OnLine P&H 571.

33. I have gone through the said judgment whereby the learned Court set aside the order of NPA observing that no opportunity was given to the borrower before declaring its account as NPA and remanded the matter to the respondent-Bank to take a decision afresh. However in the present case, ample opportunities were provided to the petitioner to submit the stock statement and other documents for renewal of its account which the petitioner was though obliged to submit as per the Master Circular, but it failed to do so and only thereafter the impugned action was taken against it.

34. So far as challenge to the notice issued under Section 13(2) of the Act, 2002 is concerned, it would be relevant to refer Section 13 of the Act, 2002 for the ready reference in the present case which is quoted as under:

"13. Enforcement of security interest.-

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non -performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

Provided that-

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(3-A) 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 fifteen days 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 under section 17 or the Court of District Judge under section 17A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

-----"

35. Thus, in view of Section 13(1) of the Act, 2002, the secured creditor is empowered to enforce the secured interest without intervention of the court or tribunal in accordance with the provisions of the Act, 2002. Sub-Section (2) of Section 13 of the said Act provides that if the borrower makes default in repayment of secured debt or any instalment thereof and his account has been classified as NPA, then the secured creditor may issue notice in writing to the borrower for discharging his liability to the secured creditor within sixty days from the date of notice.

36. In the case of Mardia Chemicals Ltd. Vs. Union of India reported in (2004) 4

SCC 311, question came up before the Hon'ble Supreme Court as to whether there is absolute bar of any remedy to the borrower before an action is taken under sub-section (4) of Section 13 of the Act, 2002 in view of non obstante clause under sub-section (1) of Section 13 of said Act and the bar of the jurisdiction of the civil court under Section 34 of the said Act. After going through the provisions of Section 69 of the Transfer of Property Act and "Rajamannar Committee Report", Their Lordships have held as under:-

"43. It may, however, be worthwhile to mention here as to why and in what circumstances it had been thought necessary to provide a non obstante clause in sub-section (1) of Section 13 of the Act. In a nutshell, the position as prevailed in 1882 when the Transfer of Property Act was enacted has undergone a sea change. What was conceived correct in the situation then prevailing may not be so in the present-day situation. Functions of different institutions including the banking and financial institutions have changed and new functions have been introduced for financing the industries, etc. New economic and fiscal environment is around more than 100 years later after the enactment of the Transfer of Property Act. In this connection it has been pointed out on behalf of the respondents that the Rajamannar Committee was appointed by the Government of India which submitted its report in 1977 indicating the effect of the changed situation and the relevance of the provisions of the Transfer of Property Act in context thereof. Mr Salve has drawn our attention to the Rajamannar Committee Report as quoted in the Narasimham Committee Report, 1998, which reads as under:

"The Rajamannar Committee appointed by the Government of India gave its report in 1977 pointing out the development of the law of mortgages and explaining how it had become completely anachronistic in the latter part of the 20th century where mortgages had become a very important instrument to facilitate development of commercial credit. The Rajamannar Committee's recommendations, that were extracted in the Narasimham Report (1998) stated:

'... thus a distinction was made in the original schemes as regards mortgages to which Europeans were parties, mortgages where the properties were situated in the Presidency Towns, and mortgages where the mortgages were of native origin and mortgages where the property was situate in the moffussil. This distinction was based on the fact that in the moffussil, it was the moneylenders with their unscrupulous methods, who were, by and large, the persons lending against mortgage of immovable property ... evidently, the situation that prevailed at the time of the enactment of the Transfer of Property Act, 1882, justifies the legislative action of the then Government of India in limiting the right of sale without the intervention of court....

... economic conditions have vastly changed since the enactment of the Transfer of Property Act in 1882. The role of the unscrupulous moneylenders dominating in the field of credit is no longer valid ... with our reliance on institutionalization of credit, the banks and other financing institutions are the major moneylenders

of credit today. In their dealings with their mortgagors, it is anachronistic to assume that they will adopt the role of unscrupulous moneylenders'.

(para 1.2.19)

In fact in extending credit, the necessity for suitable safeguards to banks and other financing institutions is now rightly stressed. It is understandable that the legal framework which is essentially conceived to deal with unscrupulous moneylenders is no longer appropriate to deal with credit given by banks and other financing institutions...."

44. As a matter of fact, the Narasimham Committee also advocates for a legal framework which may clearly define the rights and liabilities of the parties to the contract and provisions for speedy resolution of disputes, which is a sine qua non for efficient trade and commerce, especially for financial intermediation. Even the guidelines of Reserve Bank of India in relation to classifying NPAs, while stressing the need of expeditious steps in taking a decision for classifying and identification of NPAs says, a system be evolved which should ensure that the doubts in asset classification are settled through specified internal channels within the time specified in the guidelines. It is thus clear that while recommending speedier steps for recovery of the debts it is envisaged by all concerned that within the legal framework, such provisions may be contained which may curtail the delays. Nonetheless, dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved.

45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance with notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of

reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act.

46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to the notice under Section 13(2) of the Act, more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13(1) of the Act the creditor is empowered to enforce the security himself without intervention of the court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets, etc.

37. In the aforesaid case, the Hon'ble Supreme Court while considering as to what forum or remedies are available to the borrower to ventilate his grievance, has held that the purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act, 2002 is to give an opportunity to the borrower to submit reply explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 of the Act, 2002 in case of non-compliance of the notice within 60 days. It has also been held that the creditor must apply its mind to the objections raised in reply to such notice and apprise the borrower the reason for not accepting the objections or points raised in reply to the notice served upon him before proceeding to take measures under sub-section (4) of Section 13 of the said Act.

38. After passing of the aforesaid judgment, Section 13(3-A) has been introduced in the Act, 2002 by the Act, 30 of 2004 w.e.f. 11.11.2004 providing that if the borrower on receipt of notice under Section 13(2) of the Act, 2002 makes representation or objection and the secured creditor finds that such representation is not acceptable, then the reason for such non-acceptance shall be communicated to the borrower within fifteen days of the receipt of the representation.

39. In the present case, the notice under Section 13(2) Act, 2002 was issued on 30.07.2020, the representation was filed by the petitioner on 07.09.2020 and the rejection of the representation was communicated to the petitioner on 19.09.2020. Thus, no procedural irregularity appears to have been committed in the decision making process by the respondent-Bank. Moreover, during the pendency of the writ petition, the respondent no.3 has also issued possession notice to the petitioner under Section 13(4) of the Act, 2002 which is amenable to challenge before the Debts Recovery Tribunal under Section 17 of the Act, 2002 and all the pleas raised before this Court challenging the action of recovery of the secure assets can effectively be raised in the said proceeding.

40. In the case of United Bank of India Vs. Satyawati Tondon reported in (2010) 8 SCC 110, the Hon'ble Supreme Court has held as under:-

"5. An analysis of the provisions of the DRT Act shows that primary object of that Act was to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions. This is the reason why the DRT Act not only provides for establishment of the Tribunals and the Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of recovery of the amount determined by the Tribunal or the Appellate Tribunal but also bars the jurisdiction of all courts except the Supreme Court and the High Courts in relation to the matters specified in Section 17. The Tribunals and the Appellate Tribunals have also been freed from the shackles of procedure contained in the Code of Civil Procedure.

6. To put it differently, the DRT Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of banks and financial institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of the civil courts for frustrating the proceedings initiated by the banks and other financial institutions.

43. 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 rigour in matters involving recovery of taxes, cess, fees, other types of 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 a 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, the 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.

44. 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.

45. 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."

41. Their Lordships after going through the earlier judgments in United Bank of India (supra) finally observed as under:

"55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the 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 to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

42. Thus, though the power conferred to the High Court under Article 226 of the Constitution of India to issue directions/orders/writs to any person or authority, including in appropriate cases, any government is very wide and there is no express limitation on exercise of such power, yet the High Court is supposed to have self-imposed restraint in the matters involving recovery of the dues of Banks and other financial institutions as the same may adversely affect their rights as well as keeping in view that the borrower can avail alternative/efficacious remedy by filing application before the Debts Recovery Tribunal.

43. The learned counsel for the petitioner has tried to impress this Court that during Covid-19 period, several High Courts have entertained such writ petitions

and therefore the present writ petition is also maintainable so as to be considered on merit by this Court. I am not convinced with the said argument of the learned counsel for the petitioner who has not been able to show any judgment rendered by the Hon'ble Supreme Court by which it may be construed that the proposition laid down in the case of United Bank of India (supra) has changed. This Court is bound by the said judgment of the Hon'ble Supreme Court. No exceptional circumstance has been found in the present case so as to directly entertain the challenge to the notices issued by the respondent no. 3 under Sections 13(2) of the Act, 2002 and consequential possession notice issued under Section 13(4) of the Act, 2002 against which the petitioner has efficacious/statutory remedy of preferring an application under Section 17 of the said Act before the Debts Recovery Tribunal.

44. The present writ petition is, accordingly, dismissed. Since the notice under Section 13(4) of the Act, 2002 has already been issued to the petitioner by the respondent no. 3, it is at liberty to take recourse against the same before the Debts Recovery Tribunal which shall be considered in accordance with law.