

(2011) 04 GUJ CK 0070

In the Gujarat High Court

Case No : Special Civil Application No. 4366, 4374 of 2011, Letters Patent Appeal No. 122 of 2010 in Special Civil Application No. 8015 of 2009 and 15299 of 2010 and Civil Application No. 541 of 2010 in Letters Patent Appeal No. 122 of 2010

Girish Upadhyay Plant Operator and Others

APPELLANT

Vs

Paschim Petrochem Ltd. and Others

RESPONDENT

Date of Decision : 27-04-2011

Acts Referred:

Companies Act, 1956 — Section 529(1), 529A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 16, 17, 17(1), 17(2), 17(3)
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 13(4), 13(9), 15, 15(1), 15(2)

Citation : (2011) 04 GUJ CK 0070

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Masoom K. Shah, K.I. Shah and Vishwas K. Shah, for the Appellant; Mihir Joshi Sandeep Singhi, for Singhi and Co. for Kotak Mahindra Bank Ltd. in LPA No. 122 of 2010 and SCA No. 15299 of 2010, Hriday Buch and Mehul Vakharia for Respondent No. 3 Union of India in SCA No. 4366 and 4374 of 2011, for the Respondent

Final Decision : Dismissed

Judgement

S.J. Mukhopadhaya, C.J.—In all these cases, as validity of a common provision of law is under challenge and a common question is involved, though they were heard separately, they are disposed of by this common judgment.

2. The Petitioners of all the writ petitions have challenged the constitutional validity of the 3rd proviso to Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 [hereinafter referred to as "the SICA"] as incorporated in the year 2002, which reads as under:

Provided also that on or after the commencement of the Securitization 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.

3. As the decision in the above writ petitions will have a bearing on the decision in Letters Patent Appeal No. 122 of 2010 where proceedings u/s 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [hereinafter referred to as "the SARFAESI Act"], as also the 3rd proviso to Section 15 of the SICA is under challenge, the said appeal was also heard together with the above writ petitions.

4. The Petitioners in Special Civil Application No. 4366 of 2011 are the workmen of Respondent - M/s Paschim Petrochem Ltd. Said Respondent - M/s Paschim Petrochem Ltd. is the Appellant in Letters Patent Appeal No. 122 of 2010. The writ petition in Special Civil Application No. 4374 of 2011 has been preferred by the workmen of Aditya Forge Ltd. M/s Paschim Petrochem Ltd. has also filed a writ petition being Special Civil Application No. 15299 of 2010 challenging the validity of the 3rd proviso to Section 15 of the SICA.

5. The learned Counsel appearing on behalf of the Petitioners, assailing the validity of the 3rd proviso to Section 15 of the SICA, has contended that the said provision is violative of Articles 14, 19(1)(g) and 21 of the Constitution of India as it defeats the entire object and purpose of the SICA, more particularly Section 15. It is contrary to the object and purpose of the SICA which was brought into force in public interest with a view to securing the timely detection of sick and potentially sick industrial Companies owning industrial undertakings and speedy determination by a Board of experts of the preventive, ameliorative, remedial and other measures.

He would further contend that the object and purpose of the SICA of inquiring and declaring a unit as a sick industry, the process of preparing a scheme for such industry, which are the primary duty and objectivity, will get defeated if the 3rd proviso to Section 15 of the SICA holds the field. It creates an unreasonable situation affecting the livelihood of the workmen and other similarly situated creditors and infringing Articles 14, 19(1)(g) and 21 of the Constitution of India.

Highlighting the provisions of the SICA, the learned Counsel would further contend that the umbrella of the Board for Industrial and Financial Reconstruction ["the BIFR" for short] providing balancing interest of all creditors is being taken away by virtue of the 3rd proviso in question. Even the workers, income tax department, Customs & Excise department of the Central Government or Sales-tax department of a State will be precluded to claim their dues and will get nothing from the sale proceedings of the industrial unit, if sold

by the secured creditor prior to winding up.

According to him, by taking measures u/s 13(4) of the SARFAESI Act, the order of sickness made by the BIFR on the basis of the reference will not come to an end; the BIFR being a statutory expert body having expertise in banking, can decide and declare the Company in reference as a sick Company and requires to examine on the front of rehabilitation, to provide nursing treatment and/or to wind up such Company, as the case may be, and, therefore, even for measures u/s 13(4) of the SARFAESI Act, prior permission of the BIFR is required to be obtained.

He would further contend that the 3rd proviso to Section 15 not only defeats the object and purpose of the SICA, but is also contrary to the substantive statutory provision i.e. Section 15 to which it is a proviso.

He would rely on the decision of the Orissa High Court in the case of Noble Aqua Pvt. Ltd. and Others Vs. State Bank of India and Others, wherein the Orissa High Court held that after declaring an industry as sick, at the stage of reference, the 2nd proviso to Section 15 of the SICA is not applicable.

6. Per contra, according to the Respondents, the 3rd proviso to Section 15(1) of the SICA does not discriminate between the secured creditors or even those who have the first charge over the same. Referring to the Statement of Objects and Reasons of the SICA and the Statement of Objects and Reasons of the SARFAESI Act, the learned Counsel for the Respondents would contend that there is no conflict between the two Acts and it does not take away any right of any individual as guaranteed under Article 19 or Article 21 of the Constitution of India.

The learned Counsel appearing on behalf of the Respondents would contend that in absence of any challenge to the Section 41 of the SARFAESI Act and the Schedule appended thereto, the 3rd proviso to Section 15(1) cannot be declared ultra vires.

7. The Sick Industrial Companies (Special Provisions) Act, 1985 came into force with effect from 8.1.1986 and was enacted by the Parliament with the objects and reasons as mentioned hereunder:

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 productivity 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 coordinate 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.

The salient features of the Bill are -

(i)

(ii)

the onus of reporting sickness and impending sickness at the stage of erosion of fifty per cent, or more of the net worth of an industrial company is being laid on the Board of Directors of such company, where the Central Government or the Reserve Bank is satisfied that an industrial company has become sick, it may make a reference to the Board, likewise if any State Government, scheduled bank or public financial institution having an interest in an industrial company is satisfied that the industrial company has become sick, it may also make a reference to the Board;

(iv)

(v)

From the aforesaid Statement of Objects and Reasons, it will be evident that the SICA was enacted not only for the revival and rehabilitation of the potentially viable sick industrial Companies, but was also enacted 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.

8. Chapter III of the SICA relates to "References, Inquiries and Schemes". An industrial Company, if became a sick industrial Company; its Board of Directors is empowered to make a reference to the BIFR for determination of the measures which are required to be adopted u/s 15(1) of the SICA as quoted hereunder:

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 Securitization and Financial 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 Securitization 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.

Under sub-section (2) of Section 15, without prejudice to the provisions of Sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institutional or a State level institution or a scheduled bank may make a reference in respect of any Company, if it has sufficient reasons to believe that the industrial Company has become sick and in such case, the BIFR is required to determine the measures, as evident from Sub-section (2) of Section 15 and reproduced hereunder:

(2) Without prejudice to the provisions of Sub-section (1), the Central Government or the Reserve Bank or a State Government or a public financial institutional or a State level institution or a scheduled bank may, if it has sufficient reasons to believe that any industrial company has become, for the purposes of this Act, a sick industrial company, make a reference in respect of such company to the Board for determination of the measures which may be adopted with respect to such company:

Provided that a reference shall not be made under this Sub-section in respect of any industrial company by -

(a) the Government of any State unless all or any of the industrial undertakings belonging to such company are situated in such State;

(b) a public financial institution or a State level institution or a scheduled bank unless it has, by reason of any financial assistance or obligation rendered by it, or undertaken by it, with respect to, such company, an interest in such company.

9. We have noticed from the Statement of Objects and Reasons that apart from

the Board of Directors of the industrial Company, the Central Government or the Reserve Bank or a State Government or a public financial institution, on being satisfied, can also make a reference to the BIFR. With the aforesaid objects and reasons, Section 15(1) and (2) were enacted by the legislatures. The 2nd and 3rd provisos to Sub-section (1) of Section 15 were inserted with effect from 21.6.2002 by Act 54 of 2002. Under the 2nd proviso, no reference can be made to the BIFR after commencement of the SARFAESI Act, where financial assets have been acquired by any securitization Company or reconstruction Company under Sub-section (1) of Section 5 of the SARFAESI Act. Under the 3rd proviso, even while the reference is pending before the BIFR, after commencement of the SARFAESI Act, 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 the SARFAESI Act, the reference pending before the BIFR shall stand abated.

10. The aforesaid 2nd and 3rd provisos can be given effect only when any reference is made by the Board of Directors. Sub-section (1) of Section 15 will not affect in any manner the right of the Central Government or Reserve Bank or a State Government or a public financial institution or a State level institution or a scheduled bank to make a reference under Sub-section (2) of Section 15. They are so empowered without prejudice to the provisions of Sub-section (1) of Section 15.

Therefore, the argument made on behalf of the Petitioners that the 3rd proviso to Sub-section (1) of Section 15 will take away any power of the Central Government or the State Government rules out merit and cannot be upheld.

11. The 3rd proviso to Sub-section (1) of Section 15 is given effect and thereby the reference pending pursuant to the request of the Board of Directors of the Company, if abated, it will not only help 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, but will also be advantageous to the Central Government or the State Government or the public financial institution or the State level institution or the Scheduled bank to recover the amount either under any Central or State Act, if there is first charge over such secured asset or under Sub-section (4) of Section 13 of the SARFAESI Act. Therefore, the advantage of abatement will not only go to the secured creditors representing not less than three-fourth in value of the amount outstanding, but will also be advantages to the Central Government or the State Government, if there is such Central or State enactment of first charge as also to the financial institutions and banks who can also take measures u/s 13(4) in accordance with the SARFAESI Act. Therefore, no discrimination can be alleged as sought to be highlighted by the learned Counsel for the Petitioners and, therefore, such contention as raised is also rejected.

12. The workmen or a third party do not have any right under the SICA. The sick

industrial Company can claim revival or rehabilitation if such Company is a potentially viable sick industrial Company. If it is a non-viable sick industrial Company, then it is to be liquidated to afford benefit to the workmen and use the funds for payment in favour of the banks and financial institutions, as far as it is practicable. Such right flows u/s 15 read with Sections 16, 17, 18 and 19 of the SICA which relate to inquiry into working of sick industrial Companies (Section 16), powers of BIFR to make suitable order for rehabilitation or winding up (Section 17), preparation and sanction of scheme if it is to be revived (Section 18), rehabilitation by giving financial assistance (Section 19) and in case if the Company is a non-viable Company, then to go for winding up of such sick industrial Company (Section 20). It is only in those cases, the umbrella of protection is prescribed u/s 22, wherein legal proceedings, contracts, etc. stand suspended if the inquiry u/s 16 is pending, or any scheme referred to u/s 17 is under preparation or an appeal u/s 25 is pending. Therefore, it is clear that except the right given to the Company for reference u/s 15, the 3rd proviso does not take away any fundamental right guaranteed either under Article 19 or Article 21 of the Constitution of India. Therefore, the submission as advanced by the learned Counsel that the 3rd proviso violates Article 14 or Article 19 or Article 21 of the Constitution of India cannot be accepted.

13. It is a settled law that presumption is always in favour of the constitutionality of an enactment. In the case of *Chiranjit Lal v. The Union of India* reported in 1950 SCA 869, the Supreme Court laid down certain principles, which may be summarized as follows:

1. The presumption is always in favour of the constitutionality of an enactment, since it must be assumed that the legislature understands & correctly appreciates the needs of its own people, that its experience & its discriminations are based on adequate grounds.
2. The presumption may be rebutted in certain cases by showing that on the face of the statute, there is no classification at all & no difference peculiar to any individual or class & not applicable to any individual or class & not applicable to any other individual or class, & yet the law hits only a particular individual or class.
3. The principle of equality does not mean that every law must have universal application for all persons who are not by nature, attainment or circumstances in the same position, & the varying needs of different classes of persons often require separate treatment.
4. The principle does not take away from the State the power of classifying persons for legitimate purposes.
5. Every classification is in some degree likely to produce some inequality, & mere production of inequality is not enough.
6. If a law deals equally with member of a well-defined class, it is not obnoxious

& it is not open to the charge of denial of equal protection on the ground that it has no application to other persons.

7. While reasonable classification is permissible, such classification must be based upon some real & substantial distinction bearing a reasonable & just relation to the object sought to be attained, & the classification cannot be made arbitrarily & without any substantial basis.

14. We have seen that on the face of the statute (SICA), there is no classification at all and no difference peculiar to any individual or class and not applicable to any other individual or class, is available. The aforesaid proviso does not hit any particular individual class. It has not taken away the power of any equally situated persons nor the said impugned proviso (3rd proviso to Sub-section (1) of Section 15), discriminate between the two equals.

15. As discussed above, the Parliament enacted SICA with an object of revival and rehabilitation of potentially viable sick industrial Companies. It also intended to liquidate non-viable sick industrial Companies to realize the amount due to banks and financial institutions, to the extent possible. In the year 2002, the Parliament having noticed that the financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy and that the banking industry is progressively complying with international prudential norms, but having noticed that there are certain areas in which the banking and financial sectors do not have a level playing field as compared to other participants in the financial markets in the world and there is no legal provision for facilitating securitization of financial assets of banks and financial institutions, and that our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms, on the basis of the recommendations of the Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government, enacted "The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002" to regulate securitization and reconstruction of financial assets and to enable the banks and financial institutions to realize long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets, without taking recourse of a Court of law, empowered the banks for such recovery. The Parliament was conscious of the statutory right which a sick industrial Company enjoyed under Sub-section (1) of Section 15 of the SCIA to make a reference to the BIFR for its revival and rehabilitation and the umbrella of protection as given u/s 22 of the SICA. With a view to empower the banks and financial institutions, and without any hindrance, including the protection to which a sick industrial Company is entitled under Sub-section (1) of Section 15 read with Section 22 of the SICA, while certain conditions were imposed on secured creditors under Sub-section (9) of Section 13, allowed the secured creditors to take recourse of one or more measures as mentioned in Sub-section (4) of Section 13 of the

SARFAESI Act, and also empowered to amend certain enactments, including the SICA, as evident from Section 41 of the SARFAESI Act read with Schedule enclosed with the SARFAESI Act, as shown hereunder:

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

THE SCHEDULE (See Section 41)

Year Act No. Short title Amendment 1986

The Sick Industrial Companies (Special Provisions) Act, 1985 In Section 15, in Sub-section (1), after the proviso, insert the following:

xxx xxx xxxx

16. From the aforesaid provisions, it will be evident that the right as was guaranteed under the Act, viz. Sub-section (1) of Section 15 of the SCIA to the Board of Directors of a sick industrial Company, was scuttled by Section 41 read with Schedule of the SARFAESI Act. However, in case of financing of a financial assets by more than one secured creditor, certain conditions were imposed under Sub-section (9) of Section 14 of the SARFAESI Act, as follows:

13. Enforcement of security interest.-

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights concerned on him under or pursuant to Sub-section (4) unless exercise of such rights is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956);

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realize security instead of relinquishing his security and proving his debt under proviso to Sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529A of that Act;

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor

and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator.

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator;

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any,

Explanation, - For the purposes of this Sub-section,-

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date ;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

17. The SARFAESI Act was enacted on the basis of the recommendations of the Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms which were to consider the need for changes in the legal system in respect of these areas.

18. In the case of Bhavesh D. Parish v. Union of India reported in AIR 2000 SC 2047, the Supreme Court noticed that the amended law was introduced after taking into account the recommendations of successive committees of experts, who had studied the functioning of the bodies. Having noticed so, the Supreme Court observed that in the matter of economic policy, the Supreme Court does not interfere with the decision of the expert bodies which have examined the matter.

In the said case, the Supreme Court noticed the earlier decision of the Supreme Court in the case of R.K. Garg v. Union of India reported in AIR 1981 SC 2138, wherein the following observations were made:

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 problem 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 458 where Frankfurter, J. said in his imitable 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.

19. In the case of *In Re: The Special Courts Bill, 1978*, the Supreme Court held as follows:

(3) The constitutional command to the State to afford equal protection of its laws sets a goal not attainable by the invention and application of a precise formula. Therefore, classification need not be constituted by an exact or scientific exclusion or inclusion of persons or things. The Courts should not insist on delusive exactness or apply doctrinaire tests for determination the validity of classification in any give case. Classification is justified if it is not palpably arbitrary.

(4) The principle underlying the guarantee of Article 14 is not that the same rules of law should be applicable to all persons within the Indian territory or that the same remedies should be made available to them irrespective of differences of circumstances. It only means that all persons similarly circumstanced shall be treated alike, both in privileges conferred and liabilities imposed. Equal laws would have to be applied to all in the same situation, and there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is substantially the same.

(5)

(6) The law can make and set apart the classes according to the needs and exigencies of the society and as suggested by experience. It can recognize even degree of evil, but the classification should never be arbitrary, artificial or evasive.

(7) The classification must not be arbitrary but must be rational, that is to say, it must not only be based on some qualities or characteristics which are to be found in all the persons grouped together and not in others who are left out but those qualities or characteristics must have a reasonable relation to the object of the legislation. In order to pass the test, two conditions must be fulfilled, namely, (1) that the classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others, and (2) that that differentia must have a rational relation to the object sought to be achieved by

the Act.

20. In view of the aforesaid decisions, after recommendations of Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government, after all deliberations, if the Parliament thought it fit to amend Sub-section (1) of Section 15 of the SICA by inserting 2nd and 3rd proviso thereto; such decision relates to strengthening the banking and financial sector in the filed for recovery of its dues, or facilitating securitization of financial assets of banks and financial institutions, no interference is called for.

21. Further, in absence of challenge to Section 41 of the SARFAESI Act and the Schedule appended with the SARFAESI Act, the Petitioners cannot challenge the 3rd proviso to Sub-section (1) of Section 15 of the SICA.

22. The aforesaid 3rd proviso to Sub-section (1) of Section 15 of the SICA was challenged before the Delhi High Court in the case of Creative Home Fashions Ltd. v. Union of India reported in (2011) 106 SCL 343. Therein a Division Bench of the Delhi High Court while upholding the 3rd proviso to Sub-section (1) of Section 15 observed as follows:

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 in mentioning of the Article. Hence, the said ground is bereft of any substance.

23. In view of the discussions as made above, while we uphold the 3rd proviso to Sub-section (1) of Section 15 of the SICA, find no ground to interfere with the judgment and order dated 11.1.2010 passed by the learned Single Judge in Special Civil Application No. 8015 of 2009, whereby the learned Single Judge observed as under:

26. This Court is also in agreement with the decision given by the above High Courts (supra) with regard to interpretation to third proviso to Section 15(1) of SICA, 1985 as introduced by Act 54 of 2002 and Section 41 and Schedule to SARFAESI, Act 2002 and other provisions of Sections 35, 37 etc also of SARFAESI Act, 2002, and therefore, contention of learned advocate for the Petitioner that it is incumbent upon Respondent Bank to obtain permission u/s 22 of SICA, 1985 fails. It is held that "reference" under Chapter III of SICA is a genus and inquiry u/s 16, orders u/s 17 and measures for revival and rehabilitation of sick industrial company under Sections 18 and 19 of the Act are species and, therefore, though order u/s 17 (1), (2) or (3) of the Act, as the case

may be is passed, reference under Chapter III of the Act continues to hold field and remain pending but, once a measure u/s 13(4) of SARFEASI Act, 2002 is taken, by virtue of insertion of un-numbered third proviso to Section 15(1) by Act 54 of 2002, reference stands abated and, therefore, no permission u/s 22 of SICA, 1985 is necessary. All other objections about validity of deed of assignment by the creditor bank in favour of KMBL and further relevant pleas can be taken before the DRT, where recovery proceedings filed by the bank are pending.

24. In absence of any merit, all the writ petitions, Letters Patent Appeal and the Civil Application are dismissed, but there shall be no order as to costs.