

(2010) 12 P&H CK 0096

In the Punjab And Haryana At Chandigarh

Case No : Company Petition No. 129 of 2004 (O and M) and Civil Writ Petition No. 12067 of 2010 (O and M)

Kotak Mahindra Bank Ltd.

APPELLANT

Vs

Coventry Coil-O-Matic (Haryana) Ltd. and Another

Coventry Coil-O-Matic (Haryana) Ltd. and Another Vs Kotak
Mahindra Bank Ltd.

RESPONDENT

Date of Decision : 16-12-2010

Acts Referred:

Banking Regulation Act, 1949 — Section 21, 35A
Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 23 Rule 1
Companies (Court) Rules, 1959 — Rule 24, 48, 96, 99
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3A), 13(4), 14
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 17(2)

Citation : (2011) 105 SCL 274

Hon'ble Judges : Hemant Gupta, J

Bench : Single Bench

Advocate : Jai Shree Thakur, in Company Petition No. 129 of 2004 O and M, R.C. Setia and S.S. Behl, in Civil Writ Petition No. 12067 of 2010 O and M, for the Appellant; R.C. Setia and S.S. Behl, for Respondent No. 1, Arun Jain and Sanjiv Kaushik, for the workmen in Civil Writ Petition No. 129 of 2004 (O and M), L.M. Suri and Deepak Suri, for Respondent No. 1, Anand Chhibbar and Rajiv Ranjan for Respondent No. 2, Ajay Kaushik, for Respondent No. 5, Manish Jain and Jai Shree Thakur, in Civil Writ Petition No. 12067 of 2010 (O and M), for the Respondent

Final Decision : Dismissed

Judgement

Hemant Gupta, J.—This order shall dispose of CP No. 129 of 2004 filed by a secured creditor, the ICICI Bank Limited now by Kotak Mahindra Bank Limited, seeking winding up of M/s Coventry Coil-O-Matic (Haryana) Limited (for short hereinafter referred to as `the Company') and Civil Writ Petition No. 12067 of 2010 filed by the Company against the proceedings u/s 13 of the Securitization

and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act') initiated by the assignees of Industrial Development Bank of India (for short 'the IDBI') and the Industrial Finance Corporation of India Ltd. (for short 'the IFCI'). Both sets of the proceedings arise out of same facts which are being enumerated in the succeeding paragraphs.

2. On 25.1.1990, the Company submitted a proposal for term loan to the then Industrial Credit and Investment Corporation of India Ltd., later known as ICICI Bank (for short 'ICICI'), for starting a manufacturing unit. The sanction was granted for the financial assistance with pari-passu charge in favour of the consortium of Banks including ICICI, IDBI and IFCI. The financial facilities amounting to Rs. 9,25,66,743/- were granted inclusive of Rupee Term Loan and Foreign Currency Loan etc.. As per the agreements, the amount was payable in installments, the last of them being payable in 1998. The loan share of ICICI was 38.28% amounting to Rs. 3.55 Crores; IDBI's loan share was 34.45% amounting to Rs. 3.28 Crores and that of IFCI was 26.27% amounting to Rs. 2.43 Crores.

3. The Company submitted an application for registration of the Company as a sick company with Board for Industrial and Financial Reconstruction (for short BIFR) constituted under the Sick Industries (Special Provisions) Act, 1985 (for short 'the SICA') on 28.10.1994. Such application was declined on 6.12.1994 for the reason that the 5 years have not elapsed from the commencement of the commercial production. On completion of five years from the date of commercial production, the Company again sought intervention of the BIFR and on 2.1.1998, the BIFR declared the Company as a sick Company. The Company was directed to submit a package in terms of Section 17(2) of the SICA. It was on 16.10.1999, the Company submitted a revival package in consultation with ICICI Bank Ltd. The BIFR approved reconciliation package of the Company on 27.12.1999. The order passed by the BIFR envisages the payment of the entire amount of principal and 20% simple interest as on 31.3.1999 and interest @ 15% from 1.4.1999 up to the date of settlement. The relevant extracts from the order read as under:

3. Shri S. Pathak, Assistant Manager, ICICI, submitted that the settlement scheme proposed by the Company was discussed in a meeting of institutions held on 4.3.1999. The settlement envisaged payment of entire principal and 20% simple interest as on 31.3.1999 payable in quarterly installments within a period of 3 years ending March, 2002 and the settlement amount would carry interest @ 15% from 1.4.1999 upto the date of settlement. He also submitted that institutions had also agreed at the subsequent meeting of senior executive (SEM) held on 16.7.1999 that the repayment schedule of the settlement amount would be extended by one quarter.

4. As per the Company, the dues as worked out by the scheme are as follows:

Principal (in Rupees)

Simple interest @ 20%(in Rupees)

Total (in Rupees)

ICICI

3.55 crore

0.88 crore

4.43 crore

IDBI

3.28 crore

0.96 crore

4.24 crore

IFCI

2.43 crore

0.68 crore

3.11 crore

9.26 crore

2.52 crore

11.78 crore

5. It is pleaded by the Company that it could not pay the amount as envisaged in the scheme before the BIFR up to 31.3.2002 despite best efforts though the Company continued making payments even after 31.3.2002. As per para 32 of the writ petition, the payment of Rs. 11,01,88,705 is said to be made between November, 1997 to October, 2005. The Company asserted that it has paid a sum of Rs. 12.80 crores against the loan of Rs. 9.25 crores. The amount paid is inclusive of Rs. 11.01 crores after the BIFR determined that an amount of Rs. 11.78 crores is payable by the Company, to the original lenders i.e. the consortium of Banks.

6. It was on 4.10.2001, BIFR closed the proceedings against the Company after returning a finding that the net worth of the Company has turned positive and the Company has ceased to be a sick industrial company. It recorded that the company has discharged its major financial obligations. However, the non-fulfilled obligations under the approved package would continue to remain in operation.

7. It is pleaded by ICICI in its petition for winding up of the Company that the BIFR has granted certain concessions and reliefs to the Company. But in spite of

the reliefs and concessions, the Company has failed and neglected to pay outstanding dues of the Petitioner amounting to Rs. 3,29,92,998.08 as on 30.4.2004. The Petitioner is further entitled to interest from May, 2004 till the amount is liquidated. The statement of claims in respect of the five loan accounts were detailed in Annexure P.3. It is pleaded that the Petitioner has served a statutory notice dated 30.4.2004. In reply dated 17.5.2004, the Company asserted that the notice is bad and invalid and has been issued with suppressed facts and bias. The Company denies liability of the payment of the alleged sum of Rs. 3,29,92,998.08.

8. M/s Kotak Mahindra Bank Limited filed CA No. 456 of 2005 as an assignee of ICICI Bank Ltd. to be substituted as Petitioner. The said application was allowed by this Court on 25.5.2006. It was observed that the question of maintainability of the petition for winding up is required to be decided at the time of its decision and not at the time of disposing of the miscellaneous application.

9. Earlier, the petition for winding up was ordered to be admitted on 26.5.2005 as the company did not file any reply or written statement, in spite of opportunities granted. An application for withdrawal of admission bearing number CA No. 459 of 2005 was filed but withdrawn on 8.7.2005. The order of admission was then challenged by the Company in Company Appeal No. 13 of 2008 with an application for condonation of delay in filing of such appeal. The said appeal was dismissed on 1.8.2008. On 7.8.2008, the learned Company Judge issued directions for advertisement of the petition by publication in the newspapers and the Official Gazette. The Company Appeal No. 15 of 2008 was preferred against the said order. The said appeal was also dismissed on 10.2.2009 with a detailed speaking order. The SL Ps against the orders passed by this Court in Company Appeal Nos. 13 and 15 of 2008 was withdrawn on 4th May 2009 when the counsel for the Company stated that the Company proposes to file an application before the Company Judge opposing the publication of the factum of admission. It was thereafter, the Company filed objections on 28th May 2009 against the admission order and against the order of publication. The said application bearing CA No. 364 of 2009 was dismissed by the learned Company Judge on 29.5.2009. Company Appeal No. 33 of 2009 against the said order also stands dismissed on 28.7.2009.

10. After the said orders were passed, the Company again filed CA No. 503 of 2009 objecting to the order of winding up pursuant to the publication in the newspapers. 48 staff and sub-staff have filed CA No. 514 of 2009 opposing the winding up, inter- alia, on the ground that the objectors are the employees of the Company for the last 17/18 years and are working as Managers, Deputy Managers, Assistant Managers, Engineers, Supervisors, workmen and drivers. The Petitioner-creditor has filed reply to the said objections and sought the order of winding up after dismissal of the objections filed by the workmen as well as by the Company.

11. The record of the case has a written statement dated 27.7.2005, though

there is no order permitting the said written statement to be taken on record nor there is any indication that on which date such written statement was filed. But along with the said written statement, the Company has appended its 14th, 15th and 16th Annual Reports for the years 2001-02, 2002-03, 2003-04. In the Balance Sheets for the year ending on 31.3.2002 (14th Annual Report Annexure R.3), the secured loan as per Schedule-C, is said to be Rs. 9,22,00,300/-. Such was the position as on 31.3.2001 as well. In the Balance Sheet for the year ending 31.3.2003 (15th Annual Report Annexure R.4), the secured loan as per Schedule-C is stated to be Rs. 8,72,00,000/-. The 16th Annual Report, Annexure R.5 is for the year ending 31.3.2004, the secured loan as per Schedule-C of such report is Rs. 8,02,01,700/-. Though in the written statement, the Company has denied that it is indebted to the Petitioner in the sum of Rs. 2,38,46,263/- towards the principal amount and Rs. 91,46,735.08 towards interest, but the Company has not attached any document or the statement of accounts that payments due to the secured creditor has been discharged in its entirety or that the account has been settled.

12. The M/S Dhir & Dhir Asset and Securitization Company Limited subsequently renamed as Alchemist Asset Reconstruction Company Ltd (here-in-after referred to as "The Alchemist"), as an assignees of IFCI and IDBI - the other secured creditors, initiated proceedings against the Company under the SARFAESI Act. The Company filed CA No. 526 of 2009 in the petition for winding up for restraining Alchemist from proceedings as an assignee of the IDBI and IFCI. The Alchemist also filed an application CA No. 528 of 2009 on 20.8.2009 to implead itself as Respondent. It also sought to opt out of the winding up proceedings on the basis of the deeds of assignment dated 5.3.2008 and 12.8.2008. M/s the Alchemist also relied upon a notice dated 12.12.2008 to the Company, u/s 13(2) (Annexure A.2) of the SARFAESI Act.

13. The Company Court passed an order on 21.8.2009 that the present management of the Company shall not be dispossessed and the Deputy Commissioner shall not pass any order u/s 14 of the SARFAESI Act. The Company in the reply to the application by the Alchemist submitted that it has bought the alleged debt from IFCI in March, 2008 for Rs. 3.04 crore and from IDBI in August, 2008 for Rs. 4.01 crores. As against the assignment of the debt for such value, the Alchemist is claiming Rs. 133 crore as the amount due to IFCI only. It is pointed out that the financial institutions have avoided to furnish the details and extracts from their books of accounts as to how the various payments made by the Company from time to time have been adjusted in their books and that the financial institutions did not reconcile the accounts. It is further averred that as per the Reserve Bank of India (for short 'the RBI') guidelines of 'One Time Settlement', the amount due as per the Company comes to Rs. 2.62 lacs which too is said to be time barred. It is also pointed out that the Alchemist have inflated its claim and proceeded u/s 13 of the SARFAESI Act, without waiting for adjudication of liability of the Company in OA No. 57 of 2008 filed by it before the Debt Recovery Tribunal (for short 'the DRT'). The Company disputed its

liability so as to permit, the Alchemist to invoke the provisions of SARFAESI Act.

14. An appeal bearing Company Appeal No. 41 of 2009 filed by the Alchemist aggrieved against the order passed on 21st August, 2009 was dismissed by the Division Bench on 16.2.2010. In the Special Leave to Appeal, the matter was remitted to the Company Court for deciding the said claim of the Company as per the directions contained therein. However, on 28.7.2010, the Company withdrew its aforementioned application with liberty to continue with the writ petition against the action initiated by the Alchemist under the SARFAESI Act.

15. M/s Alchemist filed an affidavit, which was assigned CA No. 530 of 2009, wherein it opted out of the winding up proceedings and intended to realize its security outside winding up instead of relinquishing its security and proving its debt. The Company in its reply to the CA No. 530 of 2009 dated 14.10.2009 stated in para (C):

C. It is not in dispute that Respondent No. 1-Company CCHL has already paid a sum of about Rs. 12.80 crore to the original lenders (ICICI, IFCI, IDBI) against loan of about Rs. 9.25 crore. This amount of Rs. 12.80 crore include payment of about Rs. 11.01 crore paid by CCHL after the liability was freshly fixed as Rs. 11.78 crore by the BIFR. When the RBI's OTS guidelines came into operation in 2005, the Company applied for OTS under the same. The original lenders never rejected the OTS application. However, they kept avoiding to furnish the details and extracts from their books as per Bankers Book Evidence Act showing as to how they had adjusted and appropriated amongst themselves the various payments made by the Company to them from time to time. They did not reconcile the accounts. In the absence of requisite details from the lenders, the Company calculated the dues as per the RBI's guidelines for O Ts by taking into consideration the date of 1.4.1993 on which one member of the consortium (IDBI) declared the asset as NPA and by assuming, in view of requirement of Clause/Section 4.15 of General Conditions (No. GC-I86) of the loan agreement that the lead institution ICICI must have appropriated the various payments amongst IFCI and IDBI, the other members of the consortium.

16. The Company has attached balance sheets for the years ending 31.3.2006, 31.3.2007 and 31.3.2008 with CA No 503 Of 2009. The amount due and payable as per the balance sheet as on 31.3.2006 is Rs. 9,03,99,369/-; Rs. 9,07,58,063/- as on 31.3.2007 and Rs. 9,59,67,001/- as on 31.3.2008. Such amount in the Balance Sheets in accompanied with a note. The note recorded as on 31.3.2008 is the most exhaustive of all the notes, which reads as under:

C) The lead institution ICICI filed a winding up petition in Punjab & Haryana High Court on 8.10.2004, which was admitted on 26.5.2005. In the interim, on 25.4.2005, ICICI assigned its debts to Kotak Mahindra Bank Ltd. (KMBL) and the same has been objected to by the Company.

KMBL vide letter dated 30.11.2005, demanded a sum of Rs. 5,10,05,177/- from the Company. This was duly replied and objected to by the Company.

Being a Medium Enterprise and its loan account having become doubtful NPA with outstanding balance of less than Rs. 10 crores (on the date the a/c was classified as doubtful NPA), the Company submitted an application in March, 2006 for One Time Settlement (OTS) under the One Time Settlement (OTS) scheme of RBI vide its circular dated 3.8.2005 titled as "Guidelines on One Time Settlement Scheme for SME Accounts" read with RBI's circular dated 22.11.2005 (vide which the RBI made the said Guidelines dated 3.9.2005 applicable to Financial Institutions also).

The OTS application was submitted by the Company to IDBI on 8.3.2006 and to IFCI on 9.3.2006, well before the deadline of 31.3.2006 (with ICICI Ltd., the Company took up the matter separately in Winding-Up proceedings in Punjab & Haryana High Court). As per the language of the said OTS guidelines and as per the mandate of Section 21 & 35A of the Banking Regulation Act and as per the judgments of the Courts, the said OTS guidelines are mandatory and are binding upon the Banks and Financial Institutions.

The IDBI replied vide their letter dated 21.4.2006, classifying the Company's loan account as doubtful NPA in its books of accounts as on 1.4.1993 and demanding Rs.396 lakhs as full and final payment of their dues. The IFCI replied vide letter dated 23.3.2006, classifying the Company's account as doubtful NPA as on 31.3.1995 and demanded Rs. 465.66 lakhs as full and final payment of their dues.

The Company replied to IDBI's and IFCI's letters vide letter dated 21.5.2006 and 22.5.2006 respectively, wherein the Company raised grievance that the amount demanded by IDBI and IFCI in their letters dated 21.4.2006 and 23.3.2006 respectively were worked out by ignoring the clarifications given by the State bank of India, Mumbai to its officers on the said RBI OTS circular.

The Company participated in a joint meeting called by IDBI on 19.6.2006. In this Joint Meeting, IFCI and KMBL were also present to discuss the OTS. During the meeting the members of the consortium were asked to send a statement of the apportionment of the dues and payment that had been made by the Company, so that a final proposal could be presented to the consortium members, after applying the RBI Guidelines. In view of RBI's Guidelines and Circulars, which have statutory force, the proposals of the F Is were not sound and valid. The Company after making adjustments already paid to the consortium members, the net amount payable would come to only Rs. 2,62,126/- (after apportioning the amounts paid to ICICI in proportion to the respective exposures of IDBI and IFCI in the term loans). This was conveyed by the Company to IDBI, IFCI and KMBL through detailed letter dated 1.7.2006.

The Financial Institutions (F Is) failed to take any positive action for One Time Settlement as per the RBI's guidelines and circulars. Instead of complying with the RBI's guidelines and the various requests made by the Company in respect to One Time Settlement in accordance with relevant RBI guidelines, KMBL

shockingly sent a baseless and false legal notice dated 31.7.2006, demanding total Rs. 4,75,63,748/-. This was duly replied and objected by the Company.

However, the F Is were still not forthcoming with the relevant papers, documents and records showing as to how they arrived at the sums demanded by them from the Company. In these circumstances, the Company filed an Inter-Pleader Suit in the District Court, Delhi on 10.5.2007. The Company prayed for directing the F Is to interplead together concerning Rs. 2,62,216/- which was the amount actually due and payable to the F Is after adjusting the amounts already paid and after applying the relevant RBI Circulars. The Company offered to deposit the said amount in the Court.

However, the Court came to a decision that the matter between the same parties is already pending in the Debts Recovery Tribunal (DRT), Delhi and that the Company can agitate all these points and its claims, if any, in the pending proceedings in the DRT, Delhi. With these observations, the suit was disposed off on 17.5.2008.

It came to light during Inter-Pleader suit proceedings that the KMBL had filed Recovery Suit in the DRT, Delhi on 23.1.2007 for recovery of Rs. 4,72,06,961/-, but the same was not intimated to the Company prior to filing of inter-pleader suit. The said DRT suit is still pending.

Vide letter dated 24.2.2007, the IDBI issued default notice and demanded a sum of Rs. 7,80,26,765/-. Same was protested by the Company by its legal counsel's communication dated 5.4.2007.

In the meanwhile, vide letters dated 14.5.2007 and 4.6.2007, the IFCI recalled their loan and invoked the personal guarantee for a sum of Rs. 84,49,38,818/-. Same was protested by the Company on 18.6.2007.

Vide letter dated 20.3.2008, the IFCI assigned the debt to Dhir & Dhir Asset Reconstruction Securitization Company Ltd. The same was objected by the Company.

The Division Bench of Punjab & Haryana High Court, before whom the order of Single Judge (Company Court) admitting the winding up petition was challenged on 7.4.2008, dismissed the appeal of the Company vide order dated 1.8.2008 on the ground of delay. On the basis of this order of Division Bench, the Company Court vide order dated 7.8.2008 passed an order for publication regarding the factum of admission. Being aggrieved, the Company is in the process of filing appeal in the Division Bench of Punjab & Haryana High Court, against order dated 7.8.2008.

As such the amounts mentioned herein should not be taken as admission of any liability on the part of the Company over and above Rs. 2,62,126/- as the matter is still sub-judice.

As stated above, matters being sub-judice, interest & other charges on Secured

Loans in the Accounts being unascertainable as on date, write back/provisions of the same will be made as and when the matters are finally settled.

The said note is in fact, the entire stand of the Company in the present proceedings. Therefore, if the stand of the company in these proceedings is not accepted, the consequence is that the company is defaulter in payment of its dues to the secured creditors and its defence in the petition for winding up is not a bona fide defence.

17. The Company has earlier filed CWP No. 17151 of 2009 on 9.11.2009, claiming directions to the secured creditors and their assignees to calculate dues and liability in accordance with one time settlement guidelines of RBI. The said writ petition was withdrawn on 27th November 2009 with liberty to the Company to approach the DRT. The company has not challenged in the said writ petition the notice u/s 13(2) of the SARFAESI Act issued on 12.12.2008 and notice of possession u/s 13(4) issued in the month of August, 2009 though such claim could be included in the said writ petition.

18. In CWP No. 12067 of 2010, filed on 6th July 2010, the Company has challenged the show cause notice dated 12.12.2008 (Annexure P-23) u/s 13(2) and notice dated 5.5.2010 u/s 13(4)(d) (Annexure P-31) of the SARFAESI Act. In the said notice (Annexure P.23), Schedule-D gives the details of the entire loan accounts of the IFCI with principal outstanding as on 15.11.2008 and rates of interest charged on each account. The amount of principal and the interest claimed therein is in terms of the loan agreement executed by the Company with the said financial institution. The Schedule-E gives the statement of dues as on 15.11.2008 due to IDBI. Such outstanding amount is as per terms of the one time settlement. Annexure P.24 is the reply submitted by the Company to the show cause notice, whereas Annexure R.9 dated 12.1.2009 and 6.2.2009 are the reasons communicated to the Company in terms of Section 13(3A) of the SARFAESI Act.

19. It is inter-alia, pleaded that 250 workers and staff are employed in its Rewari Factory and the company is one of the major suppliers of automotive springs to the leading automobile manufacturers of India including Maruti Suzuki India Ltd. It is pleaded that the Banking Regulations Act, 1949 empowers the RBI to determine the policy and lay down guidelines to be followed by the Banking Companies. The directions issued by the RBI have statutory force. SARFAESI Act, also gives powers to the RBI and no Company can carry its business of securitization and assets without obtaining a licence from the RBI. It is pleaded by the Petitioner-Company that the loan amount disbursed by Consortium of Banks with ICICI being lead institution was Rs. 9,25,66,743/-. It is also pleaded that the Company made several payments to the Financial Institutions, but due to market forces and reasons beyond the Company's control, it defaulted in making payments. The Company made the following payments upto 31.3.1993:

To ICICI - Rs. 50,95,696/- To IDBI - Rs. 36,76,745/- To IFCI - Rs.

22,51,963/- Rs.1,10,24,404/- In addition to said amounts, another sum of Rs. 43,00,000 is paid to ICICI on 24.4.1993.

20. In para No. 43 of the writ petition, the following details regarding amount payable, amount actually paid, amount deemed to be paid and balance payable, have been given, which read as under:

Amount payable as on 1.4.1993 as per RBI's OTS Guidelines*

Amount actually paid after 1.4.1993*

Amount deemed paid after 1.4.1993

Balance payable

A

B

C

A-C

IDBI

3,96,00,000

2,11,63,180

3,64,11,967

31,88,033

IFCI

3,09,53,559

1,38,19,397

2,57,37,883

52,15,676

ICICI

3,98,97,272

7,52,06,128

4,80,38,855

(-)81,41,583

Total

11,04,50,831

11,01,88,705

11,01,88,705

2,62,126

In the said table, the calculation given by the Company in column A are its own calculations whereas, the payments made by it and as shown in Column B are not disputed by the secured creditors.

21. The Company asserts that RBI has issued the guidelines to all Public Sector Banks on 3rd September 2005 for settlement of dues of borrowers where the loan amount has become doubtful NPA prior to 31.3.2004. By subsequent circular dated 22.11.2005, guidelines have been made applicable to the financial institutions as well. It is pleaded that the financial institutions are bound to calculate and settle the dues of borrowers in terms of the Supreme Court judgment in *Sardar Associates and Others Vs. Punjab and Sind Bank and Others*, . The Company sought to enter into One Time Settlement in terms of the said circular vide communication dated 9.3.2006 addressed to IFCI. Similar letters were written to IDBI on 8.3.2006. It was mentioned that ICICI has filed a petition for winding up therefore, there was no point in pursuing further with ICICI. IFCI sought a sum of Rs. 465.66 lacs as per the RBI One Time Settlement guidelines vide communication dated 22.3.2006, whereas the IDBI demanded a sum of Rs. 396 lacs vide letter dated 21.4.2006. The Company disputed the amount claimed by IFCI and asserted the sum to be Rs. 52,15,677/- is due to the ICICI and Rs. 31,88,033/- to IDBI, after considering the master circular of RBI on "Prudential Norms in Income Recognition, Asset Classification and Provisioning pertaining to Advances" dated July 17, 2004.

22. The stand of the Company is that the Company's loan account ought to have been categorized as Non Performance Assets (for short `NPA') prior to 1.4.1993. The Company has also pointed out that on 19.6.2006 in the joint meeting of the Company with the Officers of the IFCI, IDBI and Kotak Mahindra Bank, the financial institutions were of the view that they would accept the One Time Settlement on the condition that the Company shows its willingness to deposit 100% principal amount, as per the balance sheet of the Company for the year 2004-05. The company was to submit an acceptable proposal to the creditors to be received by them by 4.7.2006. The minutes of the meeting were sent to the Petitioner by IDBI on 23rd June 2006, but the Petitioner disputed such minutes primarily on the ground of insertion of clause regarding requisite details of the various payments made by the Petitioner. The company allegedly submitted One Time Settlement application on 1.7.2006 and calculation of Rs. 2.62 lacs as per RBI's guidelines and requested the financial institutions to settle the alleged dues accordingly. It is stand of the Company that such request for one time settlement was never rejected by the financial institutions. The Company filed a suit before the Delhi High Court that the Company is liable to pay Rs. 2,62,126/-. Such suit was withdrawn on 17.8.2006. The Company is said to have filed CWP Nos. 4719 and 4732 of 2007 before this Court to settle dues as per RBI's circulars but the same were withdrawn on 29.3.2007 with liberty to avail other

remedy in accordance with law. IFCI claimed a sum of Rs. 465.66 Lacs vide its letter dated 30.4.2007. The company filed an inter-pleader suit before District Court, Delhi on 10.5.2007 for obtaining a decision as the lender/person to whom the payment of Rs. 2,62,216 should be made. The said suit was disposed of in view of the invocation of jurisdiction by the secured creditors of the Debt Recovery Tribunal on 17.5.2008.

23. The Alchemist has initially filed a short affidavit dated 24.7.2010 in the writ petition that the entire principal amount along with accrued interest in respect of loan amount disbursed during the years 1990-92 was to be paid as per the authorization schedule dated 15.2.1998. The Company had filed a settlement arrangement u/s 17(2) of the SICA admitting total liability of Rs. 35.65 crores (IFCI Rs. 9.95 Crores; ICICI- Rs. 12.18 Crores and IDBI Rs. 13.52 Crores) as on 31.3.1999. The Company has offered to settle its liability envisaging 100% of the principal amount of Rs. 9.25 crore along with 20% of the accrued simple interest aggregating Rs. 11.78 crore (IFCI Rs. 311.20 Lacs, ICICI Rs. 443 lacs and IDBI- Rs.423.40 Lacs). The lender agreed to waive Rs. 23.87 crore subject to the Company adhering to the terms of settlement in quarterly installments within a period of three years i.e. by 31.3.2002 along with interest @ 15%. In case of default, the lenders were to charge interest @ 2.1% over the maximum lending rate of the lenders prevailing at the time of default. Since the Company failed to make payments in accordance with the settlement arrangement, IFCI revoked the arrangement vide letter dated 28.2.2003 and restored all the terms and conditions of the original loan agreement. It is pointed out that as per the settlement arrangement before BIFR, the Company's liability towards IFCI is Rs. 15.16 crores and towards IDBI is Rs. 20.18 crores aggregating Rs. 35.34 crores as on 30.6.2010. It is pointed out that RBI's guidelines for One Time Settlement are not applicable to the Company as such guidelines were applicable only to Small Medium Enterprises (SME), whereas as per the Balance Sheet of the Company for the year 2004-05, the investment in the plant and machinery of the Company was more than Rs. 16 crore and the outstanding dues were more than Rs. 10 crore. The Company has not availed loan facility as SME and that RBI guidelines are not applicable to willful defaulters. No One Time Settlement proposal was ever made by the Company as per the RBI guidelines and by raising various contentions, the Company offered only Rs. 2.62 lacs to all the lenders put together. The said affidavit is accompanied by the calculations sheet of interest reflecting the interest chargeable and the amount received from the company from time to time.

24. The Alchemist has filed another counter affidavit, wherein reliance has been placed upon an order passed by the Hon'ble Supreme Court in United Bank of India Vs. Satyawati Tondon and Others, and Transcore Vs. Union of India (UOI) and Another, , in support of the plea that the Company is not entitled to any indulgence from this Court. It is stated in the affidavit that the writ petition is not maintainable, in view of the availability of efficacious and statutory remedies under the DRT Act and SARFAESI Act. It is also pleaded that the present writ

petition is liable to be dismissed as the Company has filed writ petition No. 17151 of 2009, which was withdrawn with liberty to avail other remedy. In pursuance of such liberty, IA No. 708 of 2009 in OA No. 57 of 2008, was filed by it against the Company and amongst others for recovery of its due. The learned DRT has declined to pass any interim order in the said miscellaneous application. It is also alleged that the Company has agitated the same issues by concealing the fact. The following cases are stated to have been filed by the Company:

Sr. No.

Particulars

Nature of proceeding

Status & date

1.

Suit No. 1569 of 2006 filed before Delhi High Court

Suit for declaration against ICICI, IFI, IDBI & KMBL declaring that Company is liable to pay Rs.2,62,126/-to the consortium (based on alleged claim of amount due as per RBI Guidelines)

Dismissed as withdrawn on 17.8.2006

2.

Suit No. 243/2007 filed before District Court Delhi

Suit for inter-pleader for directing lenders to interplead together concerning their claim to amount of Rs.1,62,126/-(based on alleged claim of amount due as per RBI Guidelines).

Dismissed on 17.5.2008

3.

CWP No. 4719/2007 filed before Punjab and Haryana High Court

Writ Petition seeking direction to the lenders to settle the dues as per RBI circulars

Dismissed as withdrawn on 29.9.2007

4.

CWP No. 4732/2007 filed before the Punjab and Haryana High Court

Writ Petition seeking direction to the lenders to settle the dues as per RBI circulars

Withdrawn on 28.7.2010

5.

CA No. 526/2008 filed before Punjab & Haryana High Court

Company Application filed in Company Petition No. 129/2004 restraining respondent No. 2 from taking over possession of assets the Company.

Dismissed on 3.12.2009

6.

MA No. 262/2009 filed by Guarantor (Coventry Springs & Engineering Co. Ltd.) of the Company before BIFR.

Application filed by the Guarantor seeking direction to the lenders of the Company to adjudicate on the unfulfilled obligations of secured creditors of the Company

Dismissed on 3.12.2009

7.

Appeal No. 101/2010 filed by Guarantor (Coventry Springs Co.. Ltd.) of the Company before AAIFR

Seeking setting aside of order dated 3.12.2009 passed by BIFR

Dismissed on 3.6.2009

8.

WP (C) No. 4938/2010 by Guarantor (Coventry Springs & Engineering Co. Ltd.) of the Company before Delhi High Court.

Seeking setting aside of orders dated 3.12.2009 passed by BIFR and 3.6.2010.

Dismissed on 27.7.2009.

9.

WP No. 17151/09 by the Company before Punjab and Haryana High Court

Writ Petition seeking direction to the lenders to calculate the dues as per RBI OTS guidelines.

Dismissed as withdrawn on 27.11.2009.

10.

I.A. No. 708 filed by the Company before DRT-I, Delhi

(Seeking computation of dues as per RBI Guidelines). I.A. seeking stay of SARFAESI proceedings initiated by respondent No.2.

Dismissed by the DRT-I, Delhi on 23.12.2009.

25. It is also pointed out that as per the proposal filed by the Company before BIFR u/s 17(2) of the SICA, the dues of the Company towards the three financial

institutions were Rs. 35.65 crores as on 31.3.1999. The detail of exposure as on 31.3.1999 is stated to be as under:

(Rs. In Million)

Name of the Institution

Principal

Simple Interest

Other charges

Total

ICICI

35.5

44.0

42.3

121.8

IDBI

32.8

47.7

54.7

135.2

IFCI

24.3

34.1

41.1

99.5

Total

92.6

125.8

138.1

356.5

It is also pleaded that even if the dues of IDBI and IFCI are calculated as per the settlement arrangement filed by the Company u/s 17(2) of the SICA before BIFR, the amount works out to be Rs. 35.31 crores as on 31.6.2010 and that the

Company has not made any repayment since the year 2006. It is also pointed out that the amount settled before the BIFR is Rs. 11.78 crores, which is more than Rs. 10 crores. The RBI guidelines contemplate that the minimum amount that shall be recovered under the revised guidelines in respect of one-time settlement of NP As classified as doubtful or loss as on March 31, 2004 will be 100% of the outstanding balance in the account as on the date on which the account was categorized as doubtful NP As. Therefore, the amount settled before the BIFR was the minimum amount which was required to be paid by the Company. It is further stated that the ICICI was not appointed as the operating agency by the BIFR. It is also pleaded that BIFR loses its jurisdiction over the case, once it has passed an order of deregistering the Company from the purview of SICA. Therefore, the question of taking any prior permission of BIFR before revoking the settlement arrangement does not arise. It is further pleaded that the Company was making the payment to ICICI and IDBI even as early as 1993 and the payments made to the ICICI were in higher ratio as compared to IFCI and IDBI.

26. It is admitted fact that two secured creditors i.e. IDBI and IFCI have initiated proceedings for recovery of debt in terms of Section 19 of the Recovery of Debts to Banks and the Financial Institutions Act, 1993 (for short the DRT Act) by filing an appropriate application before the DRT, Delhi. The ICICI has initiated proceedings for winding up of the Company (CP No. 129 of 2004) before this Court, whereas the assignees of secured creditors i.e. IFCI and IDBI have initiated proceedings under SARFAESI Act which is subject matter of challenge in CWP No. 12067 of 2010. The ICICI has also initiated proceedings for winding up of the promoter Company of the Respondent Company and also filed a civil suit against the said promoter Company. Such petition for winding up and/or suit is pending before the Calcutta High Court.

27. From the above, it can be culled down that the total amount due to the three financial institutions as on 31.3.1999 was Rs. 35.65 crores as per the proposal submitted by the Company u/s 17(2) of the SICA. The arrangement arrived at before the BIFR was to pay a sum of Rs. 11.78 crores as on 31.3.1999. The company was to pay quarterly installments along with interest @ 15% upto 31.3.2002 and in case of default, further penal interest was payable. The said amount is the principal sum advanced and 20% of the interest amount. It may be noticed that amount of over Nine Crores Rupees was advanced to the Company in the year 1990-92, whereas the settlement arrived was in the year 1999 with 20% interest for the entire period. As against the said amount, the Company has paid a sum of Rs. 11,01,88,705/- between November, 1997 to October, 2005. As per the financial institutions, the amount due and payable by the Company as on 31.3.2004 is Rs. 35.34 crores in terms of settlement submitted before BIFR by the Company.

28. Firstly, it is required to be examined "Whether, the Company is liable to be wound up for its inability to discharge its admitted liabilities or that the defence

of the Company that the amount claimed to be due and payable is disputed is bona-fide or not".

29. Shri R.C. Setia, learned Senior Counsel, appearing for the Company has vehemently argued that the amount claimed by the ICICI in the petition for winding up is bona-fide disputed, in as much as in the communication Annexure P.27/B, the ICICI Bank has communicated the receipt of various amount, the total of which comes to Rs. 5,43,87,660/- from the period 23.10.1992 till 23.3.2004. On the basis of the aforesaid letter, it is sought to be argued that the ICICI Bank or its assignee Kotak Mahindra, has not communicated the total amount received from the Company and the payments due from it. The Company has also filed CA No. 732 of 2009, wherein the Company has sought production of the detail of the accounts including interest charged, reversal of income as per para 3.5 of the RBI guidelines, but the institutions did not provide the requisite details. Thus, the stand of the secured creditor is not fair and reasonable.

30. It is further contended that Kotak Mahindra is not the assignee of the debt, in as much as, the appropriate stamp duty on the deed of assignment has not been affixed. It is also argued that the other secured creditors i.e. IDBI and IFCI have assigned their debts to the Alchemist but the deed of assignment is not properly stamped. It is also argued that though the debt has been assigned for a sum of Rs. 3.04 crores in March, 2008 by IFCI and for Rs. 4.1 crores in August, 2008 by IDBI i.e. total Rs. 7.14 crores, the amount claimed is Rs. 133 crores in respect of the loan availed from IFCI. It is, thus, alleged that debt assigned for Rs. 3.04 crores cannot become Rs. 133 crores. It shows that the claim of the secured creditor is not tenable and is highly inflated, unjust and unreasonable.

30-A. Shri Setia has further argued that it is not just and equitable to wind up the Company for the reason that it is a running Company employing 250 persons and has contributed Rs. 23.18 crores as wages during the last 10 years; paid about Rs. 40 crores as taxes to the State and has the production worth of Rs. 48.40 crores. Therefore, relying upon a judgment reported as *Canara Bank and Ors. v. Arihant Industries Ltd.* 2001(2) PLR 547, it is contended that it is not in the interest of the workmen or the State to wind up such Company, which is contributing enormously to the State Exchequer and also providing employment to large number of people. Such argument is supported by Shri Arun Jain, learned Senior Counsel, appearing for the workmen in CA No. 514 of 2009.

31. Shri Setia, has further argued that the amount of debt is not determined, which fact is evident from the fact that all the three financial institutions have initiated proceedings for determination of the amount due by invoking the jurisdiction of the DRT. Therefore, till such time, the amount is adjudicated upon and determined to be payable by the Company, the process of winding up is not available to the Petitioner. It is contended that the winding up proceedings are not the proceedings for recovery of the amount due, therefore, the process of winding up cannot be used to arm-twist the Company to succumb to the pressure of the financial institutions to make the payment of the amount, which

is yet to be determined. It is also argued that the Company has filed CA No. 732 of 2009 to which the Bank has not even filed reply. In the said application, the Company has sought a direction to the Bank to produce the statement of accounts. Thus, it is contended that having failed to communicate even statement of account reflecting the payments made by the Company in the books of account of the financial institutions, the process of winding up is untenable.

32. On the other hand, the learned Counsel for the financial institutions has vehemently argued that the Company cannot be permitted to raise an argument that the amount is bona-fide disputed after the petition was ordered to be admitted. The order of admission and of publication of the petition was challenged by the Company by way of Company Appeal No. 13 & 15 of 2008. Both the appeals stands dismissed. The order dated 10.2.2009 by the Division Bench of this Court is detailed and speaking order considering and rejecting all the contentions now being raised by the Company. It is contended that all the arguments now raised by the Counsel for the Company have been dealt with by the Division Bench in its order dated 10.2.2009 including the issue of CA No. 732 of 2009, therefore, the same issues cannot be permitted to be raised again before the Company Judge.

33. It is contended that the Company has also filed an application to recall of the order of admission, which has been dismissed vide order dated 29.5.2009. The Company Appeal No. 33 of 2009 against the said order was also dismissed. It is argued that the Company had the opportunity to raise a defence that the amount claimed in the petition for winding up is frivolous or lacks bona-fide before the petition is admitted. But in view of the admission notice and the decision of application for recall of the admission order, the Company cannot be permitted to raise the issue regarding bona-fide dispute of debt again. It is contended that after publication is effected, it is open to the Company to show to the Company Court that the winding up order should not be passed, because it is not in the interest of the Company for one or the other reason, but not for the reason that the debt is disputed.

34. As mentioned above, the Company has not responded to the pre-admission notice. The Company failed to file its written statement within time granted, which led to passing of an order of admission. Such order of admission was challenged in the Company Appeal, which was dismissed. Subsequently, even the order of publication was challenged in appeal, which was dismissed. An application for recall of admission was filed which was also dismissed. Company appeal filed against the said order also stands dismissed.

35. Rule 96 of the Companies (Court) Rules deals with admission of petition and direction to advertisement. As per the said provision, the Court has the discretion to issue pre admission notice to the Company before admitting the petition and giving direction as to advertisement. The Court can also admit the petition and fix a date for hearing thereof without pre admission notice. After admission, the

petition is to be advertised in terms of Rule 99. An advertisement of petition in form 48 calls upon any creditor or contributory or other persons desirous of supporting or opposing the making of an order on the said petition. Rules 96, 99 and Form 48 of the Companies (Court) Rules, read as under:

96. Upon the filing of the petition, it shall be posted before the Judge in Chambers for admission of the petition and fixing a date for hearing thereof and for directions as to the advertisements to be published and the persons, if any, upon whom copies of the petition are to be served. The Judge may, if he thinks fit, direct notice to be given to the company before giving directions as to the advertisement of the petition.

xx xx xx Advertisement of petition.

99. Subject to any directions of the Court, the petition shall be advertised within the time and in the manner provided by Rule 24 of these Rules. The advertisement shall be in Form No. 48."

xx xx xx Form 48

Advertisement of petition

Notice is hereby given that a petition for the winding-up of the above-named company by the High Court at...(or the District Court of...) was on the...day of...19..., presented to the said Court by the said Company [or, where the petition was not presented by the company, state that the name and address of the Petitioner and the capacity in which he presents the petition e.g., creditor, contributory etc.) and that the said petition is directed to be heard before the Court on the...day of...19....

Any creditor, contributory or other person desirous of supporting or opposing the making of an order on the said petition should send to the Petitioner or his advocate notice of his intention signed by him or his advocate with his name and address, so as to reach the Petitioner or his advocate not later than 5 days before the date fixed for the hearing of the petition, and appear at the hearing for the purpose in person or by his advocate. A copy of the petition will be furnished by the undersigned to any creditor or contributory on payment of the prescribed charges for the same.

36. Learned Counsel for the parties could not refer to any precedent as to whether the Company can be permitted to raise dispute in respect of bona-fide claim of the creditor after the dismissal of the Company Appeal challenging the order of admission. In my view, it is not open to the Company at this stage to assert that the claim of the creditors is mala-fide, vexatious and is not bona-fide keeping in view the judicial propriety and the principle that there should not be multiple proceedings in respect of the same question. Though it is open to the Company to resist the order of winding up on other grounds such as that it will not be fair to wind up the Company for the reason that it is a running concern or that the interest of the workmen is involved, but the plea that the debt of the

creditor is disputed, cannot be permitted to be raised again.

37. Alternatively, I have also considered the argument that the debt is bona-fide disputed. The Company has availed a loan of over Rs 9.26 crores in the year 1990-92. The said loan amount was repayable along with interest ranging from interest @ 13.5% to 21 % per annum with quarterly rests. The Company had paid a sum of Rs. 1,53,24,404/- up to 24.9.1993. Even the simple interest @ 13.5 % per annum for a period of one year alone on the amount of loan advanced to Company would be more than Rs. One Crore and Twenty Five thousand per annum. Therefore, the payment of approximately Rs. One Crore Fifty thousand up till 24.4.1993 i.e. almost for a period of three years, is in fact part payment of interest amount only. It cannot be said that the Company had paid any part of the principal amount up to 24.4.1993.

38. The Company's Rehabilitation Package u/s 17(2) of the SICA Act was accepted by BIFR on 24.12.1999. As per the calculations submitted by the Company, it was to pay the principal amount i.e. Rs. 9.26 crores and the interest of Rs. 2.52 crores as on 31.3.1999, total amounting to Rs. 11.78 crores. Such amount was to carry interest @ 15% from 1.4.1999. Admittedly, the Company has not paid Rs. 11.78 crores up to March, 2002. An amount of Rs11.01 Crores was paid after the package submitted by the Company was accepted. The amount paid is not in terms of the settlement arrived at before the BIFR.

39. The Company has come out with a plea that a sum of Rs. 2,62,126/- is payable. The said amount is arrived at by taking into consideration only the payments made without taking into consideration any interest payable on the amount advanced. The Company has easily and conveniently overlooked the fact that the public money advanced to it was to carry interest @ 15% p.a. from 1.4.1999 in terms of the settlement produced before BIFR. Therefore, the stand of the Company that the amount of Rs. 2,62,162/- alone is payable is preposterous and is an attempt not to pay the dues of the financial institutions on patently false pretext. The financial institutions carry important public functions to finance the industry. The cycle of financing industry can be maintained only on regular repayments by the borrowers. In fact, it is borrowers like the Company in question, which led to enactment of the stringent provisions for the recovery of the debt from the defaulters such as DRT and the SARFAESI Acts.

40. Hon'ble Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., , held that the banks and the financial institutions have heavily financed the industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Liquidity of finances and flow of money

is essential for any healthy and growth-oriented economy.

41. In *Transcore Vs. Union of India (UOI) and Another*, , Supreme Court said that the SARFAESI Act enables the banks and Financial Institutes to realize long-term assets, manage problems of liquidity, asset-liability mismatch and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets by adopting measures for recovery and reconstruction. Non-performing assets (NPA) are a cost to the economy. Basically, NPA is an account which becomes non-viable and non-performing in terms of the guidelines given by RBI. Keeping in mind the above circumstances, the SARFAESI Act is enacted for quick enforcement of the security. The said Act deals with enforcement of the rights vested in the bank/FI and that the Act proceeds on the basis that security interest vests in the bank/FI.

42. In *United Bank of India Vs. Satyawati Tondon and Others*, , the Court held that with a view to give impetus to the industrial development of the country, the Central and State Governments encouraged the banks and other financial institutions to formulate liberal policies for grant of loans and other financial facilities to those who wanted to set up new industrial units or expand the existing units. Many hundred thousand took advantage of easy financing by the banks and other financial institutions but a large number of them did not repay the amount of loan, etc. Not only this, they instituted frivolous cases and succeeded in persuading the civil courts to pass orders of injunction against the steps taken by banks and financial institutions to recover their dues. Due to lack of adequate infrastructure and non-availability of manpower, the regular courts could not accomplish the task of expeditiously adjudicating the cases instituted by banks and other financial institutions for recovery of their dues. As a result, several hundred crores of public money got blocked in unproductive ventures. Thus the purpose of the SARFAESI Act is to empower Banks and the financial Institutes to recover their dues expeditiously and by non adjudicatory process.

43. The argument that the Bank has not filed any reply to CA No. 732 of 2006 and that the ICICI Bank has been paid more than Rs. 5 crores as per Annexure P 27-B , is not tenable. The payments by the Company by itself are not indicative of the fact that the liability of the Company towards the financial institutions stands discharged. The liability of the Company includes interest for almost two decades, which the Company wishes to ignore. Therefore, the payments reflected to have been shown in Annexure P 27-B is of no inference that the entire amount due towards the ICICI stands discharged.

44. In fact, filing of CA No. 732 of 2006 is another attempt to divert the attention of the Court to the non-issues. Even the annual reports submitted by the Company show the amount due and payable. Therefore, to seek a counter from the Bank is only delaying tactics successfully used by the company for the last many years. It is the stand of the Company that it is not liable to pay anything over and above an amount of Rs. 2,62,162/- The company in its Balance Sheets year after year is reflecting the amount due to the Financial Institutions. The

amount due in the Balance Sheets is sought to be explained by inserting a Note, which is based upon wholly untenable and false pretexts. The note contains arguments as are raised in present proceedings. Thus, the stand of the Company is of an unreliable, untrustworthy and a dishonest borrower. Therefore, the said application does not warrant any other consideration. In fact, the Division Bench has also considered an argument based on such application pending before the Company Court. It was held to the following effect:

6. The argument of Mr. R.C. Setia has failed to impress whereby he has submitted that an order on the CA No. 732 of 2006 should have been passed granting the prayer of the Appellant by issuing direction to the Respondents to disclose the details of their dues so as to settle the accounts with them because such a course is not available in view of the provisions of Section 447 of the Act. It follows that the claim of the Appellant alone is not to be considered. According to Section 447 of the Act an order for winding up of a company is to operate in favour of all the creditors and of all the contributories of the company as if it had been made on the joint petition by the creditors and all the contributors. The Bombay High Court in the case of S.P. Capital Financing Ltd. V. Bagade (India) Engineering Ltd. 2002 (10) Comp Cas 657, rejected the application of one of the creditors who had filed a winding up petition holding that the prayer made by such creditors is not acceptable. It has been observed that Section 447 of the Act in its plain language provides that as soon as the order of winding up is passed the nature of the winding up petition undergoes transformation from an individual petition to a petition on behalf of all the creditors and all the contributors. Therefore, the Petitioner was not permitted to withdraw the petition without the consent of all the creditors or contributories. Therefore, it is not surprising that the learned Company Judge did not feel the necessity of passing any order on the application filed by the Appellant.

45. The argument that the proper stamp duty has not been affixed on the assignment deed of debt by ICICI Bank in favour of Kotak Mahindra, is again not tenable. The assignment has been registered by the competent authority. The registration of document is prima-facie a proof of affixation of proper stamp duty on it. It is for the competent authority to examine whether the stamp duty has been properly affixed and if not so, to recover the deficient amount of stamp duty, but for deficient stamp duty, the document of assignment cannot be ignored from consideration.

46. Supreme Court in recent judgment in the case of ICICI Bank v. Official Liquidator of APS Star Industries Ltd. (Civil Appeal No 8393 of 2010 decided on September 30, 2010) has held that the guidelines issued by Reserve Bank of India on 13th July 2005 are to improve quality of assets of the banks. Such guidelines of RBI are not to eliminate NP As but to restructure. The Section 21 of the Banking Regulation Act, 1949 empowers RBI in the interest of the Banking Policy to lay down guidelines in relation to advances to be followed by banking companies. These guidelines have been issued as "a restructuring measure" in

order to avoid setbacks in the banking system. NP As do not generate interest. 85% of the Indian Banks' income comes from interest. Thus, NP As adversely impact profits of the banks and hence, as a matter of Banking Policy, RBI as Regulator seeks through its guidelines u/s 21 read with Section 35A to manage these NP As and not to eliminate. The said guidelines deal with restructuring of the banking system which is one of the objects behind giving authority to RBI to frame "banking policy". Therefore, the assignment of NPS is permissible and legal.

47. The argument that the amount of debt is not determined as the financial institutions have instituted the proceedings for determining the amount of debt by invoking the jurisdiction of DRT, is again misconceived. After the commencement of the DRT Act, the financial institutions have no option but to initiate the proceedings under the said Act for recovery of the amount due to them and for recovery certificates. Though subsequently the SARFAESI Act has conferred on the financial institutions the power to recover the secured assets, but the proceedings of SARFAESI Act are in addition to the process of recovery under the DRT Act. The provisions of the SARFAESI Act are not in derogation of the aforesaid Act. It is well settled that the financial institutions can recover the amount only either in pursuance of recovery certificate pursuant to an order passed by the DRT or by relying upon the security under the SARFAESI Act. Since the Company has failed to pay huge amount of the money to the financial institutions, such act of the Company is against the public interests. Supreme Court in Transcore (Supra) held that there is one more reason for enacting the SARFAESI Act, 2002. The Parliament enacted the DRT Act as the civil courts failed to expeditiously decide suits filed by the banks/Financial Institutions. However, DRT did not provide for assignment of debts to securitization companies. The secured assets also could not be liquidated in time. In order to empower banks/ Financial Institutions to liquidate the assets and the secured interest, the SARFAESI Act was enacted in 2002. The enactment of such Act is, therefore, not in derogation of the DRT Act. The SARFAESI Act removes the fetters which were in existence on the rights of the secured creditOrs.

48. The argument raised by the counsel for the workmen and Shri Setia that the Company is employing 250 persons and is contributing to the State Exchequer, is again not tenable. It is not in dispute that the interests of the workmen has to be kept in view, but it is the Company which has to ensure the payment of wages to the workmen as also repayment of the loans availed from the financial institutions. The Company has not paid any amount to any of the financial institutions since October, 2005. Thus, the huge amount of loan availed by the Company in the year 1990 remains unpaid, which may reflect profit in the balance sheets of the Company but that is only playing with figures by the Company. By usurping the public money, the projection of the Company that it is profit making Company is not tenable. The profitability of the Company is dependent upon nonpayment of dues of the financial institutions. The court has to draw a balance between the interests of the workmen and the public interest.

Though the Company is said to be employing 250 persons, but only 48 employees have filed an application opposing the winding up. All these applicants are not workmen but also include the persons engaged for managerial and supervisory work. Out of the said these 48 employees, 7 have filed CA No. 698 of 2010 asserting that they are interested in running of the Company. Such CA was dismissed on 19.11.2010 inter-alia for the reason that the application is absolutely vague and without any provision to meet out the financial obligations. Therefore, it is the management of the Company, which has failed to maintain the financial discipline and to maintain payment schedule of the financial institutions. Thus the act of the failure to pay public money should not be treated to be a bona-fide dispute or that the winding up of the Company would not be just and equitable. The workers cannot provide shield to the Company against winding up in these circumstances. Such defence cannot be accepted. In Arihant's case, the interest of the large number of workmen numbering 1456 was kept in view. But in the present case, the public money of the secured creditors cannot be permitted to be sunk in the name of workmen's right.

49. It may be noticed that the Company has filed appeals against the order of admission, against the order of publication and then against the order of dismissing an application for recall of the order of admission. All the appeals have been dismissed. The Company cannot be permitted to raise similar arguments again. It is not only impressible but against the judicial propriety as well.

50. Thus, the defence of the Company is not bona-fide. The amount is due and payable by the company. The Balance Sheets of the Company also reflects large sum of money as due and payable to the secured creditors. Therefore, it would be just and equitable to order winding up of the Company, which has failed to discharge its admitted liabilities. Accordingly, the Company is ordered to be wound up. The Official Liquidator attached to this Court is appointed as Liquidator of the Company, who shall take over all the assets and liabilities, actionable claims of the Company and act in accordance with law. CP No. 129 of 2004 and other applications stand disposed of accordingly.

51. Coming the writ petition filed by the company, the same was filed on 6.7.2010 challenging the notice dated 12.12.2008 u/s 13(2) and notice u/s 13(4) of the SARFAESI Act. Before filing of the petition, the financial institutions have communicated the reasons declining objections filed by the Company. A notice u/s 13(4) of the SARFAESI Act was issued on 17.8.2009 and published in newspapers on 19.8.2009. Once, a notice u/s 13(4) of the SARFAESI Act has been issued, the remedy of the Company is before the DRT alone, as has been held in Mardia Chemicals and reiterated in Transcore's case. In Mardia Chemical's case (supra), it was held to the following effect:

...The next safeguard available to a secured borrower within the framework of the Act is to approach the Debts Recovery Tribunal u/s 17 of the Act. Such a right accrues only after measures are taken under Sub-section (4) of Section 13 of the

Act.

xxx xxx 59. We may like to observe that proceedings u/s 17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings u/s 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar u/s 34 of the Act in the present case.

xxx xxx 80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures u/s 13(4) of the Act have been taken, a mechanism has been provided u/s 17 of the Act to approach the Debts Recovery Tribunal. The above noted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

1. Under Sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days" notice before proceeding to take any of the measures as provided under Sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal u/s 17 of the Act, at that stage.
2. As already discussed earlier, on measures having been taken under Sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) u/s 17 of the Act before the Debts Recovery Tribunal.
3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.
4. In view of the discussion already held in this behalf, we find that the requirement of deposit of 75% of the amount claimed before entertaining an appeal (petition) u/s 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

Reiterating the said judgment in Transcore"s case (supra), the Court held to the following effect:

On reading Section 13(2) it is clear that the said Sub-section proceeds on the basis that the borrower is already under a liability and further that, his account in the books of the bank or FI is classified as substandard, doubtful or a loss. The NPA Act comes into force only when both these conditions are satisfied. Section 13(2) proceeds on the basis that the debt has become due. It proceeds on the basis that the account of the borrower in the books of bank/FI, which is an asset of the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual of liability, determination of liability and liquidation of liability. Section 13(2) deals with liquidation of liability. Section 13 deals with enforcement of security interest, therefore, the remedies of enforcement of security interest under the NPA Act and the DRT Act are complementary to each other. There is no inherent or implied inconsistency between these two remedies under the two different Acts.

34. In our view, Section 17(4) shows that the secured creditor is free to take recourse to any of the measures u/s 13(4) notwithstanding anything contained in any other law for the time being in force e.g. for the sake of argument, if in the given case the measures undertaken by the secured creditor u/s 13(4) come in conflict with, let us say the provision under the State land revenue law, then notwithstanding such conflict, the provision of Section 13(4) shall override the local law. This position also stands clarified by Section 35 of the NPA Act which states that the provisions of the NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 is also important from another angle. As stated above, the NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for enforcement of securities. Section 35 gives an overriding effect to the NPA Act with all other laws if such other laws are inconsistent with the NPA Act. As far as the present case is concerned, the remedies are complementary to each other and, therefore, the doctrine of election has no application to the present case.

52. It is not a case where the Company has approached this Court after the notice u/s 13(2) was issued. The Company challenged the action u/s 13(2) only after the notice u/s 13(4) was issued and that too after reasons for raising demand were communicated. The Company cannot be permitted to challenge part of the action when the financial institutions have proceeded ahead to recover possession of the secured assets in terms of Section 13(4) of the SARFAESI Act. In terms of the judgments aforesaid, the remedy of the Company is to approach DRT in terms of Section 17 of the SARFAESI Act.

53. The Company has filed miscellaneous application in a petition for winding up for restraining the financial institutions from proceedings under the SARFAESI Act. The said application has been withdrawn. However, it may be noticed that the petition for winding up was filed by the ICICI Bank, whereas the proceedings under the SARFAESI Act, are being taken by the assignee of IFCI and IDBI Banks. Both of the said secured creditors were not parties to the petition for winding up when the said application was filed nor has winding up order been

passed by this Court on that date. Therefore, in a petition for winding up, such application was not maintainable and has been rightly withdrawn on 28.7.2010. It may be noticed that such application was filed after notice u/s 13(4) of the SARFASI Act was published. Instead of invoking the jurisdiction of the DRT, the Company invoked the jurisdiction of the Company Court through a miscellaneous application, in which the secured creditors were not even party. Apart from the said application, the numerous litigations initiated by the Company before the different Forums claiming identical or similar relief are nothing, but an abuse of the process of the Law. The Company files the application and then withdraws the same at ease, which only shows that the proceedings are initiated by the Company not for any bona-fide settlement of the dispute, but for collateral purposes of finding ways to delay the payments and action initiated by the secured creditors against it.

54. It may be noticed that the Company has earlier filed a petition for directing the secured creditors to calculate the dues in exercise of One Time Settlement guidelines of RBI. Such writ petition was filed on 9.11.2009. The writ petition was withdrawn on 27.11.2009 i.e. on the first date of hearing itself when the Petitioner sought liberty to approach the DRT. The Company has not challenged the proceedings either u/s 13(2) or 13(4) of the SARFAESI Act, in the said writ petition, though the Company could raise all the pleas which are now raised in the present writ petition. By not raising pleas in the aforesaid writ petition, the Company is estopped to challenge the same in the present writ petition on the analogy of the provisions of Order 23 Rule 1 read with Order 2 Rule 2 of the Code of Civil Procedure. A suitor cannot be permitted to split the cause of actions to seek relief in respect of part of cause of action leading to multiplicity of the proceedings. Since the Company has the opportunity to include all the cause of actions in the aforesaid writ petition but failed to do so, therefore, the present writ petition is an abuse of process of law.

55. The argument that the secured creditors i.e. IFCI and IDBI have assigned their debts to the Alchemist in the sum of Rs. 7.1 crores but the amount claimed from the Company exceeds Rs. 143 crores i.e. Rs. 133 crores from IFCI and Rs. 10.77 Crores from IDBI, is again not tenable. The transaction between the secured creditors of the Company and that of the assignee is an independent transaction. It is not in the nature of One Time Settlement arrived at by a secured creditor with a debtor. The assignee has stepped into the shoes of the secured creditors on the basis of the assignment deed and thus all the rights and obligations arising in terms of the loan agreement executed by the borrower with the secured creditors can be enforced by the assignee against the borrower. Therefore, the amount of assignment cannot be claimed to be an amount on the basis of which the Company can claim to settle the account of the secured creditOrs.

56. The IFCI has claimed Rs. 133,77,25,581/- as the amount due in terms of the agreements executed by the Company, whereas the claim of the IDBI is Rs.

10,76,34,691 as per settlement produced by the Company before BIFR as on 15.9.2008. It is the stand of M/S Alchemist in short affidavit, that the amount payable to IFCI is Rs. 15.16 Crores and to IDBI Rs. 20.18 Crores as on 30.6.2010 as per the settlement package produced by the Company before BIFR. Though IFCI has claimed amount on the basis of original agreement entered upon by the Company with the secured creditors, but the said claim of the secured creditor cannot be said to be unjustified for the reason that the Company has failed to honour the Rehabilitation Package submitted before the BIFR.

57. The argument raised by Shri Setia that the Company has a right to avail One Time Settlement is again not tenable. The argument is that the financial institutions were bound to declare the assets of the Company as Non Performing Assets in December, 1993 itself, since the Company has failed to make the payment within 30 days in terms of the Master Circular of July 2004. Therefore, in terms of the One Time Settlement Scheme notified by the RBI in the year 1995, the financial institutions are bound to give effect to the Scheme of the RBI for One Time Settlement.

The said master circular was issued on 17.7.2004 after the commencement of the SARFAESI Act. The SARFAESI Act defines Non Performing Asset as under:

Section 2(o) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,-

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank;

Since the financial institutions in the present case are governed by the classifications issued by the RBI, therefore, the said circular is indeed applicable to the financial institutions such as the Banks in the present case. In terms of the said circular, the Non Performing Asset has been defined as under:

2.1 Non-performing assets 2.1.1 An asset, including a leased asset, becomes nonperforming when it ceases to generate income for the bank. A "non-performing asset" (NPA) was defined as a credit facility in respect of which the interest and/ or instalment of principal has remained "past due" for a specified period of time. The specified period was reduced in a phased manner as under:

Year ending March 31 Specified period 1993 four quarters 1994 three quarters 1995 onwards two quarters

2.1.2 An amount due under any credit facility is treated as "past due" when it

has not been paid within 30 days from the due date. Due to the improvements in the payment and settlement systems, recovery climate, upgradation of technology in the banking system, etc., it was decided to dispense with "past due" concept, with effect from March 31, 2001. Accordingly, as from that date, a Non-performing Asset (NPA) shall be an advance where

- i) interest and/or instalment of principal remain overdue for a period of more than 180 days in respect of a Term Loan,
- ii) the account remains "out of order" as indicated at paragraph 2.2 below, in respect of an Overdraft/Cash Credit (OD/CC),
- iii) the bill remains overdue for a period of more than 180 days in the case of bills purchased and discounted,
- iv) interest and/or instalment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes, and v) any amount to be received remains overdue for a period of more than 180 days in respect of other accounts.

2.1.3 With a view to moving towards international best practices and to ensure greater transparency, the "90 days" overdue" norm for identification of NP As has been adopted, from the year ending March 31, 2004. Accordingly, with effect from March 31, 2004, a non-performing asset (NPA) shall be a loan or an advance where;

- i) interest and/ or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan,
- ii) the account remains "out of order" as indicated at paragraph 2.2 below, in respect of an Overdraft/Cash Credit (OD/CC),
- iii) the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted,
- iv) interest and/or instalment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes
- v) any amount to be received remains overdue for a period of more than 90 days in respect of other accounts.

2.1.4 With effect from September 30, 2004, a loan granted for short duration crops will be treated as NPA, if the instalment of principal or interest thereon remains overdue for two crop seasons. With effect from September 30, 2004, a loan granted for long duration crops will be treated as NPA, if the instalment of principal or interest thereon remains overdue for one crop season.

2.1.5 As a facilitating measure for smooth transition to 90 days norm, banks have been advised to move over to charging of interest at monthly rests, by April 1, 2002. However, the date of classification of an advance as NPA should not be

changed on account of charging of interest at monthly rests. Banks should, therefore, continue to classify an account as NPA only if the interest charged during any quarter is not serviced fully within 180 days from the end of the quarter with effect from April 1, 2002 and 90 days from the end of the quarter with effect from March 31, 2004.

2.2 "Out of Order" status

An account should be treated as "out of order" if the outstanding balance remains continuously in excess of the sanctioned limit/drawing power. In cases where the outstanding balance in the principal operating account is less than the sanctioned limit/drawing power, but there are no credits continuously for 90 days as on the date of Balance Sheet or credits are not enough to cover the interest debited during the same period, these accounts should be treated as "out of order".

2.3 "Overdue"

Any amount due to the bank under any credit facility is "overdue" if it is not paid on the due date fixed by the bank.

58. From the above said circular of the RBI, it is apparent that default of four quarters was relevant for declaring the Non Performing Assets in the year 1993, which was reduced to three quarters in 1994 and two quarters in 1995. It was 180 days with effect from 31.3.2001; 90 days with effect from 31.3.2004 and 30 days with effect from 30.9.2004. Therefore, in the year 1993, the period from which the Company claims that its assets should have been declared as Non Performing Assets, the default period was four quarters and not 30 days. Therefore, the argument that the assets of the Company should have been declared as Non Performing Assets in December, 1993 is not borne out from the circular issued by the RBI relied upon by the Company.

59. A perusal of the circular dated 3.9.2005 issued by the RBI appended with the writ petition as Annexure P.5 shows that such circular is in respect of Non Performing Assets below Rs. 10 crores. It contemplates as under:

Guidelines on One-Time Settlement Scheme for SME Accounts

Please refer to Paragraph No. 8 of our circular RPCD. PLNFS.BC. No. 31/06.02.31/2005-06 dated August 19, 2005 and accordingly, a one-time settlement scheme for recovery of NP As below Rs. 10 crore is proposed hereunder which is required to be implemented by all public sector banks. These guidelines will provide a simplified, non-discretionary and non-discriminatory mechanism for one-time settlement of chronic NP As in the SME sector. All public sector banks shall uniformly implement these guidelines.

2. The guidelines will not, however, cover cases of wilful default, fraud and malfeasance. Banks shall identify cases of wilful default, fraud and malfeasance and initiate prompt action. Accordingly, guidelines for one-time settlement of

dues relating to NP As of public sector banks in SME sector are given below:

(A) Guidelines for one-time settlement of chronic NP As up to Rs. 10 crore.

[i] Coverage

a) The revised guidelines will cover all NP As in SME sector which have become doubtful or loss as on March 31, 2004 with outstanding balance of Rs. 10 crore and below on the date on which the account was classified as doubtful.

b) The guidelines will also cover NP As classified as sub-standard as on 31st March, 2004, which have subsequently become doubtful or loss where the outstanding balance was Rs. 10 crore and below on the date on which the account was classified as doubtful.

60. The Government of India has enacted "The Micro, Small and Medium Enterprises Development (MSMED) Act, 2006" on June 16, 2006 which was notified on October 2, 2006. The MSMED Act, 2006 has modified the definition of micro, small and medium enterprises engaged in manufacturing or production and providing or rendering of services. As per the said Act, A small enterprise is an enterprise where the investment in plant and machinery is more than Rs. 25 lacs but does not exceed Rs. 5 crore; and a medium enterprise is an enterprise where the investment in plant and machinery is more than Rs. 5 crore but does not exceed Rs. 10 crore. In fact, such was the conditions even prior to the enactment of the said Act.

61. As per the 14th Annual Report produced by the Company as Annexure R-3, the total cost of fixed assets of the Company as on 31.3.2001 was Rs. 17,69,05,793, which was Rs. 18,55,599,46/- as on 31.3.2002. The details of such fixed assets are given in Schedule-N of the Balance Sheet. Thus, the Company is not a small or medium enterprise to which the One Time Settlement guidelines issued by the RBI are applicable, as the investment in plant and machinery was more than Rs. 10 Crores. The company has not produced any document to show that its investment in plant and machinery was less than Rs. 10 Crores at the time of starting industry. It is asserted by the secured creditor that one time settlement guidelines are not applicable to the Company. Such stand of the secured creditors that the Company is not small and medium enterprise has not been controverted. There is no explanation as to how such guidelines are applicable to it. Therefore, the company can not avail the benefit of One Time Settlement Scheme notified and circulated on 3.9.2005 and November 22, 2005.

62. In view of the above discussion, the invocation of jurisdiction of this Court is misconceived. The action of the Company in approaching this Court not only suffers from lack of bona-fide, but is an attempt to frustrate the claim of the secured creditors on false and made up grounds without any legal justification.

Consequently, the writ petition is dismissed.