

(2009) 01 GUJ CK 0017
In the Gujarat High Court

Case No : O.J. Appeal No's. 156, 157, 164, 167 and 190 of 2007, Company Application No's. 489 and 539 of 2006, Civil Application No's. 165 of 2005 and 226 of 2006 and Miscellaneous Civil Application No. 213 of 2006

Kotak Mahindra Bank Ltd.

APPELLANT

Vs

O.L. of Aps Star Ind. Ltd.

RESPONDENT

Date of Decision : 12-01-2009

Acts Referred:

Banking Regulation Act, 1949 — Section 2, 35A, 5, 6, 6(1)
Bombay Stamp Act, 1958 — Section 5
Civil Procedure Code, 1908 (CPC) — Order 22 Rule 10
Companies Act, 1956 — Section 125, 134, 135, 529, 529A
Contract Act, 1872 — Section 23
Income Tax Act, 1961 — Section 80P, 80P(2)
Registration Act, 1908 — Section 21, 28, 60, 65
Reserve Bank of India Act, 1934 — Section 45Q
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(3A), 2
Transfer of Property Act, 1882 — Section 130, 54

Citation : (2009) 3 CompLJ 417 : (2009) 2 GLR 1158

Hon'ble Judges : H.N. Devani, J; D.A. Mehta, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

D.A. Mehta, J.

1 This group of appeals has been preferred challenging the judgment and order dated 09.07.2007 of the learned Single Judge (hereinafter referred to as "the Company Court") dismissing Company Application No. 489 of 2006 filed by the appellant of Appeal No. 156 of 2007, and similar other matters.

2. It is an accepted position that the facts stated in Appeal No. 156 of 2007 are similar to those involved in other appeals and the learned advocates appearing for the respective parties have treated O.J. Appeal No. 156 of 2007 as the

principal appeal. Hence, hereinafter reference to the facts shall be from the record of O.J. Appeal No. 156 of 2007, unless specifically mentioned otherwise. The appellant has formulated the following 19 questions of law, stated to be arising out of the judgment of the Company Court:

Questions of Law: (i) Whether the Company Court has erred in adopting a completely erroneous procedure in the conduct of this application, particularly in impleading the Chief Controlling Revenue Authority vide order dated 20.09.2006, completely giving a go by to the provisions of the Bombay Stamp Act, 1958 (hereinafter referred as "the Stamp Act")?

(ii) Whether the Company Court erred in relying upon the opinion expressed by the Chief Controlling Revenue Authority vide his affidavit dated 04.10.2006?

(iii) Whether the Company Court was entitled in concluding prima facie relying upon the opinion expressed by the Chief Controlling Authority that the document produced in support of the application for substitution is not properly stamped?

(iv) Whether the Company Court was right in expressing opinion that separate stamp duty is required to be paid for each loan transaction, in spite of the fact that the Appellant was not called upon to address the said issue at the time of hearing as that was an issue for the stamp authorities to decide the same?

(v) Whether the Company Court has erred in coming to the conclusion that separate stamp duty is required to be paid on each loan transaction?

(vi) Whether the Company Court could have come to the conclusion that for each loan transaction with underlying security assigned by the Deed of Assignment separate stamp duty is required to be paid without adjudicating as to whether each loan transaction is a distinct matter within the meaning of Section 5 of the Stamp Act?

(vii) Whether the Company Court was justified in opining/remarking that it is on account of enforcement of Securitisation Act and the Scheme for purchasing of financial assets by the Securitisation Company or Reconstruction Company that the State Government has with a view to give encouragement come out with the Notification of putting upper limit of stamp duty of Rs. 1 lac?

(viii) Whether the Company Court was justified in holding that a separate documentation of assignment of each loan transaction is required in view of the provisions of the Transfer of Property Act and the Registration Act, if the document is assigning the rights as a creditor with security interest?

(ix) Whether the Company Court was justified in holding that for assignment of each loan transaction with underlying security the document is required to be registered where one of the immovable properties of the concerned loan transaction is located?

(x) Whether the Company Court was justified in rejecting the contention raised by the Appellant relying upon Section 28 of the Registration Act, 1908 read with

Section 65 thereof that the registration of document at one place, where one of the properties in any of the loan transactions is situated is sufficient to fulfill the requirements of the Registration Act, 1908?

(xi) Whether the Company Court was justified in rejecting the contention raised in Question (x) above, inter alia, on the ground that details of properties with separate identification, etc. as required u/s. 21 of the Registration Act, 1908 have not been met by the Deed of Assignment and the Appellant cannot be heard to say relying upon Section 65 that it is the duty of Sub-Registrar to forward the document at various places for registration where the property is situated?

(xii) Whether the Company Court has erred in not calling upon the Appellant to place before the Court the original document and examine the same particularly before opining that the details in respect of immovable properties are not sufficient to comply with the requirement of Section 21 of the Registration Act, 1908 ?

(xiii) Whether the Company Court was justified in opining that it cannot give any directions for registration of the document in other districts in absence of document not providing for identity of various immovable properties, particularly when the registration does not become invalid, if any, by reason of any defect in the procedure of registration?

(xiv) Whether the Company Court was justified in concluding that the document is not registered as per the provisions of Section 60 of the Registration Act, 1908 without calling upon the Appellant to place the original document for the Court's perusal?

(xv) Whether the Company Court was justified in rejecting the application for substitution in spite of the fact that in the proceedings filed by the Assignor Bank before the Debts Recovery Tribunal the Appellant in some of the proceedings have already been substituted in place of the Assignor Bank?

(xvi) Whether the Company Court was justified in rejecting the application for substitution pursuant to the Deed of Assignment executed by the Assignor Bank in favour of the Appellant, particularly when the Courts interpreting provisions of Order 22 Rule 10 of the Code of Civil Procedure, 1908 have held that the decision regarding substitution in pending proceedings is prima facie solely with a view to see that the proceedings continue and do not culminate for lack of substitution?

(xvii) Whether the Company Court is entitled in law to express a prima facie opinion and reject the application for substitution?

(xviii) When the secured creditors are not participating in winding up proceedings and are standing outside the winding up and are before the Court only for limited purpose of protecting their proprietary interest, whether the Court was justified in rejecting the application for substitution on the basis of a prima facie view taken by the Court?

(xix) Whether the Company Court was justified in not considering any of the judgments cited at the bar by the Appellant?

3. The appellant, a Banking Company, approached the Company Court with Company Application No. 489 of 2006 seeking to be substituted in place of respondent No. 9-Bank. The basis for the application is stated to be a Deed of Assignment executed on 31.03.2006 by ICICI Bank Limited (the Assignor/Transferor) to Kotak Mahindra Bank Limited (the Assignee/Transferee) by which a basket of debts of the Assignor Bank along with underlying security interest (if any) have been assigned/transferred on "as is where is" and "as is what is" basis to the Assignee Bank at the defined purchase price. On behalf of the Company (in liquidation), the Official Liquidator and the workmen of the Company (in liquidation), a preliminary objection was raised resisting the application for substitution made by the Assignee Bank.

4. The Company Court has found that the Deed of Assignment is not a valid piece of document for various reasons set out in the judgment and thus held that the request for substitution cannot be granted. The operative part of the impugned judgment reads as under:

39. In view of the aforesaid observations and discussion, as the rights are not acquired by the assignee through the process known to law, the applicants cannot be permitted to be substituted in place of secured creditors of the company in liquidation (assignor) However, in view of the aforesaid, the situation has arisen, resulting into abandonment of the rights by the assignor and non-acquiring of the rights by the assignee. It may be that in a given case on account of ultimate establishing of the right before the appropriate forum, the Official Liquidator In-charge of the company in liquidation may be required to pay the dues of the secured creditor(s), may be pro rata or otherwise, at a later stage and, therefore, with a view to see that further complications may not arise or the situation may not become irreversible, appropriate directions deserve to be issued to Official Liquidator, who otherwise is to function under the supervision of this Court as per the provisions of the Companies Act.

40. Hence, the following order:

(a) All applications are dismissed with the directions to the Official Liquidator to bring this order to the notice of the Court(s) at the time when disbursement of the amount is to be made or to be permitted by this Court amongst secured creditors and the dues of the workmen, so as to enable this Court to order appropriate provisions of the secured creditors of the Company concerned.

41. Before parting with, it deserves to be recorded that the observations made by this Court are prima facie and shall not be read as conclusive if the legality and validity of the deed of assignment is challenged before the appropriate forum or if the rights are asserted or the defence is raised as permissible in law, by the respective parties before the appropriate forum, which is to finally adjudicate the rights. Such observations would also apply in the event any proceedings are

initiated under the provisions of the Stamp Act or the Bombay Stamp Act, as the case may be, for non-payment of the requisite stamp duty. Suffice it to say that all rights and contentions before the appropriate forum of the parties concerned shall not get concluded by the observations made by this Court and shall be treated as concluded only for substitution in the present proceedings.

5. The learned Counsel for the appellants i.e. the Assignee Banks and the learned Counsel for the Assignor Banks, who are supporting the appellants, have raised various contentions. At the time of hearing the Court had called upon the learned Counsel for the Assignee and the Assignor Banks to point out and explain as to whether it is open - (i) to the Assignor Banks to transfer the Non-performing Assets (NPAs/Debts); And (ii) to the Assignee Banks to purchase such NPAs/Debts, as a business or a part of the business of the banks in light of the provisions of the Banking Regulation Act, 1949 (the B.R. Act).

6. Initially it was submitted that the said aspect of the matter could not be raised and considered in the appeal because the Company Court had raised the said issue, joined Reserve Bank of India (RBI) as a necessary party in the Company Application, RBI had filed two detailed affidavits along with the guidelines issued for purchase/sale of Non-performing Financial Assets, and thereafter RBI was deleted from the array of the respondents. Thus in fact, the said issue had been considered by the Company Court and it can be presumed to have been held by the Company Court that such an exercise viz. sale and purchase of NPAs, was permissible under the provisions of the B.R. Act. Therefore, neither the Assignees nor the Assignors could be called upon to once again submit as regards an issue which was concluded in their favour by the Company Court, in appeals filed by the Assignee Banks. However, subsequently the learned Counsel accepted that it was open to the Appellate Court to go into the said legal issue and various submissions have been made on the basis of the provisions of the B.R. Act.

7. It was submitted that the provisions of the Transfer of Property Act, 1882 (the T.P. Act) permitted sale and purchase of debts and there was no prohibition in the B.R. Act and, therefore, the entire transaction was in accordance with the law of the land. For this purpose reliance was placed on provisions of Section 130 of the T.P. Act contending that a debt was freely assignable both at law and in equity without the consent of the debtor, the debt being only an actionable claim. That the only safeguard that was necessary was protection to the debtor, in case of the debtor dealing with the original creditor after the transfer. That there was a distinction between "privity of contract" and "privity of estate". But from this, it was pleaded that, no prior notice to the debtor could be implied as a prerequisite for a valid assignment. That there was no express bar in law prohibiting such assignment of debt.

7.1 Referring to provisions of Section 5(b) of the B.R. Act it was submitted that the exercise of assignment formed part of "banking" as defined by the said provision which permitted lending of monies. Therefore, once monies are lent, with or without security, the bank is entitled to recover the outstanding loan and

the assignment was only one of the modes of recovery so far as the Assignor Bank was concerned. Referring to provisions of Section 6(1)(a) of the B.R. Act it was submitted that the said provision also permitted lending with or without security and the lender would have all the rights of a secured creditor/mortgagee which would include - (i) right to enforce the security to recover debt; (ii) right to sub-mortgage the interest acquired under the mortgage; (iii) right to sell the interest acquired by the mortgagee under the mortgage, AND (iv) right to redeem any prior mortgage by discharging the debt of the prior mortgagee. That the fourth right having been exercised by the Assignee Bank and the third right having been exercised by the Assignor Bank, the transaction of assignment was valid in eyes of law. That it was permissible to transfer rights under a contract without consent of the other party to the contract although it was not possible to transfer the obligations under the contract. Reliance was also placed on provisions of Section 6(1)(f), 6(1)(g), 6(1)(l), 6(1)(m), 6(1)(n) and 6(1)(o), of the B.R. Act in support of the submissions made. Analyzing the aforesaid provisions it was contended that it was open to the Assignor Bank to deal with any property or any right in any such property which may form the security or part of the security for the purposes of satisfaction of any of its claims, and correspondingly it was permissible to the Assignee to acquire and hold and generally deal with any such property which is dealt with as aforesaid by the Assignor Bank. That once it was accepted that lending of monies and recovery thereof was a permissible form of business under the B.R. Act, acquiring and undertaking the whole or part of any such business was a permissible activity forming part of the same business. That it was open to do all such other things as are incidental or conducive to the promotion or advancement of the business of the banking company; meaning thereby, the Assignor Bank was entitled to sell away its NPAs as an incidental activity, or it was conducive to the promotion or advancement of the business of the Assignor Bank to get rid of its debts so as to ensure a better financial position. That the assignment of debt was only one of the modes of recovery. In summary it was submitted that the Assignee of an NPA got substituted as the lender and the account of the borrower was transferred from the books of the Assignor to the books of the Assignee Bank entitling the borrower to be treated in the like manner as the borrower was entitled vis-a-vis the Assignor Bank and, therefore, such a transfer was banking business as contemplated by Section 6(1)(a) of the B.R. Act.

7.2 It was submitted that provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the Securitisation Act) did not prohibit an Assignor Bank from assigning the debt to the Assignee Bank because this was only one of the modes of recovery effected by the Assignor Bank. That the object of enacting Securitisation Act was primarily to facilitate Securitisation of Financial Assets of Banks and Financial Institutions in India, to take possession of securities and sell them without intervention of the Court, but that did not mean that the banks were not entitled to effect recovery by any other mode. That provisions of the Securitisation Act

which provide for registration of a Securitisation Company or a Reconstruction Company did not bar a bank from exercising the option of disposing of its NPAs nor did it make compulsory for a bank to seek registration.

7.3 That even if the assignment was for a consideration less than the value of the full claim, to which the Assignor Bank was entitled, the said aspect would not make either the transaction invalid, or would not prevent the Assignee Bank from recovering the whole amount of debt from the underlying security or otherwise. That the customer or the borrower being a third party to the contract between the Assignor and the Assignee is not entitled to question the said agreement on any ground whatsoever including adequacy of consideration. That provisions of Section 134 and 135 of the Companies Act, 1956 cannot be read to mean a requirement of notice of assignment to the customer Company as being necessary for the validity of the assignment and it was only out of abundant caution that such a notice was stipulated.

7.4 Assailing the impugned judgment of the Company Court it was submitted that a separate document for assignment of each loan transaction was not prescribed in law and it was always open to an owner of an asset to transfer more than one asset by one document to another person. That all loan accounts in the books of the Assignor Bank and the Assignee Bank would be treated as debts and it was open to transfer the same as a single portfolio. In support of the submissions, by way of illustration, it was submitted that it was always possible to gift immovable or movable property by one document, or mortgage various immovable properties situated in different parts of the country by one document, etc.

7.5 Similarly, it was submitted that the findings of the Company Court on the issue of registration are not correct. That registration of a document was permissible at a place where one of the properties was situated as provided u/s 28 of the Registration Act, 1908 (the Registration Act) and u/s 65 of the Registration Act the registering authority was under an obligation to inform other registering authority under whose jurisdiction the other properties were located. Similarly, in so far as provisions of the Bombay Stamp Act, 1958 (the Stamp Act) are concerned, it was submitted that the document was adequately stamped and the entire procedure adopted by the Company Court of calling upon the Chief Controlling Revenue Authority, Gujarat State, seriously prejudiced the rights of the Assignee Banks as the said authority was an appellate authority under the Stamp Act after adjudication by the Collector. Thus in fact, the statutory right of appeal under the Stamp Act was taken away once the Chief Controlling Revenue Authority had gone on record by filing an affidavit and expressing an opinion on the document. That even if the Deed of Assignment was deficient or defective in any manner whatsoever the value of the debt and the underlying security would not undergo any change and the same remain intact vis-a-vis the borrower entitling the Assignee to full amount of debt having stepped into the shoes of the secured creditor.

7.6 Lastly, it was submitted that the object of an application for substitution was only to enable the Assignee Bank to participate in the Court proceedings, more particularly the proceedings for sale of assets and to obtain a share from the proceeds at the time of distribution. That the Company Court having accepted in principle that substitution was permissible in law, and that all other questions could be gone into in appropriate proceedings before appropriate forum, it was not open to the Company Court to prima facie hold that the appellants were not entitled to be substituted in place of the Assignor Banks. The scope of the proceedings had not been appreciated by the Company Court.

8. On behalf respondents the appeals have been resisted by the customers of the assignor banks viz. the Company (in liquidation), the Official Liquidator, the representative of the union of the workmen, to contend that the transaction in question cannot be held to be justified in law because both the assignor and the assignee banks are bodies corporate, who derive powers under the relevant provisions of the B.R. Act. That the question of prohibition of such an assignment/transfer would arise only if the statute permits such transfer in the first instance. That the B.R. Act does not permit trading in debts. That the act of assignment of the debt was not a mode of recovery but essentially amounted to trading in debts. Referring to the Deed of Assignment (Page Nos.11 and 12) it was submitted that 56 debts are shown to be for an amount of Rs. 52.45 crores indicated in the statement and assigned for a paltry amount of Rs. 12 crores, giving a misleading picture, because the sum of Rs. 52.45 crores is only the principal amount outstanding; whereas the debts actually run into hundreds of crores of rupees. That under the Securitisation Act such an activity was not permissible unless and until a securitisation company or a reconstruction company had been constituted in accordance with the provisions of the Securitisation Act. The assignee bank was thus acting as a Securitisation Company without following the required procedure under the provisions of the Securitisation Act.

8.1) Referring to provisions of Section 23 of the Indian Contract Act, 1872 it was submitted that object of an agreement or consideration of an agreement is lawful, unless forbidden by law, or if permitted, would defeat the provisions of any law, etc. and, therefore, permitting the assignee bank to go ahead with the assignment would defeat the provisions of the Securitisation Act. The transaction in question was also opposed to public policy, as the assignee bank would show in its balance-sheet an NPA of the assignor bank as if it was not an NPA considering the fact that the assignor bank had transferred the NPA at throw away price. That when the provisions of the Securitisation Act only envisage either the original lender, or the Securitisation Company or the Reconstruction Company, as a deemed lender, to exercise powers available under the Securitisation Act, the Deed of Assignment cannot create a new class of lenders by permitting the assignee bank to purchase a basket of debts in violation of the provisions of the Securitisation Act.

8.2) That the transaction in question, though titled as a Deed of Assignment, actually encompasses two concepts viz.--(i) assignment; AND (ii) novation. That the customer of the assignor bank is made liable to the assignee bank without there being a contract between the assignee and the customer, more particularly in light of Clause No. 2.2.3, thus resulting in a novatio but without any contract. That though it was accepted by the counsel of the assignee bank that obligations could not be transferred under such an assignment by virtue of Clause No. 7.1.3 of the Deed of Assignment even the obligations stand transferred.

8.3) Reference was made to provisions of Sections 125 and 135 of the Companies Act, 1956 to submit that registration of a charge was compulsory and in absence of any charge being registered the same would be void against the liquidator and any other creditor. That by virtue of the Deed of Assignment, the assignee becomes de jure charge holder and is therefore, required to have the modification of charge registered.

That after such modification of charge being registered the modification is required to be communicated to the borrower company and in absence of the same the assignee bank cannot be treated as a secured creditor.

8.4) Submissions were also made on the provisions of the Bombay Stamp Act and the Registration Act to submit that remission of duty claimed under the Government Notification was only applicable in case of a document executed under the Securitisation Act and not otherwise. That the document does not fulfill the requirement of Section 54 of the T.P. Act.

8.5) On behalf of the Textile Labour Association it was submitted that the scheme of Sections 529 and 529A of the Companies Act permitted the secured creditor and the workmen to have a pari passu charge because both of them had contributed to building up of the assets of the company (in liquidation). The lender by way of advancement of loan and the workmen by input of labour. That the assignee bank not having contributed in any manner was not entitled to the pari passu charge over the assets of the company (in liquidation).

9. Learned Advocate General appearing on behalf of the Chief Revenue Controlling authority submitted that the said authority had placed on record only its opinion in so far as calculation of the stamp duty is concerned without expressing any final view of the matter because the said authority had been called upon by the Company Court to assist the Court. The views expressed in the affidavit-in-reply were only prima facie views and not an expression of opinion after adjudication of an issue. Therefore, the said expression cannot be permitted to be concluding the issue in so far as the assignor or the assignee banks are concerned.

10. In rejoinder, apart from reiterating what was stated in the principal address it was submitted that though vide Clause No. 2.2.3 and 7.1.3 the Deed of Assignment talked of obligations being transferred, a reasonable construction of

the Deed would show that the obligation vis-a-vis the debtor remained with the assignor and the agreement between the assignor and the assignee does not bind the customer.

10.1) That in so far as the modification of the charge and registration thereof was concerned, under provisions of the Companies Act, the assignee banks had taken steps by making the application, but in all cases as the companies are in the process of being wound up, no action has been taken. Responding to the submission regarding provisions of Section 529A of the Companies Act, it was submitted that the assignee bank having stepped into the shoes of the assignor bank was equally entitled to what the assignor bank was entitled to.

10.2) In so far as the prohibition under the Securitisation Act is concerned, it was submitted that even before the Securitisation Act assignment of debt with underlying securities was permissible and hence, there was no violation of provisions of the Securitisation Act. That the bar under the Securitisation Act was only in relation to a non-banking company and not to a banking company.

11. Though initially the submission on behalf of the Assignor and the Assignee banks was to the effect, as noted hereinabove, that - firstly, the Court should not undertake the exercise of finally determining as to whether the transaction was valid in law or not, and secondly, alternatively, the Court should finally decide the issue without restoring the matter back to the company Court, at the time of rejoinder, Mr. Saurabh N. Soparkar, learned Senior Advocate, striking a discordant note, submitted that if the Court comes to the conclusion that the transaction is no nest in law, the transferor bank will retain all rights, and then other issues need not be gone into.

12. The relevant provisions of the B.R. Act as are material for the present may be reproduced:

5. Interpretation. -- In this Act, unless there is anything repugnant in the subject or context, (b) "banking" means the accepting, for the purposes of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise;

(ca) "banking policy" means any policy which is specified from time to time by the Reserve Bank in the interest of the banking system or in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, the volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources;

6. Forms of business in which banking companies may engage. -- (1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely:- (a) the borrowing, raising, or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and

dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures certificates, scrips and other instruments and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller's cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise; the providing of safe deposit vaults; the collecting and transmitting of money and securities;

(c) contracting for public and private loans and negotiating and issuing the same;

(f) managing, selling and realising any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;

(g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;

(1) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;

(m) acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in this sub-section;

(n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;

(o) any other form of business which the Central Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage.

(2) No banking company shall engage in any form of business other than those referred to in Sub-section (1)."

8. Prohibition of trading.-- Notwithstanding anything contained in Section 6 or in any

contract, no banking company shall directly or indirectly deal in the buying or selling or bartering of goods, except in connection with the realisation of security given to or held by it, or engage in any trade, or buy, sell, or barter goods for others otherwise than in connection with bills of exchange received for collection or negotiation or with such of its business as is referred to in Clause (i) of Sub-

section (1) of section 6: [Provided that this section shall not apply to any such business as is specified in pursuance of Clause (o) of Sub-section (1) of section 6.]

Explanation:--For the purpose of this section, "goods" means every kind of movable property, other than actionable claims, stocks, shares, money, bullion and specie, and all instruments referred to in Clause (a) of Sub-section (1) of Section 6.

13. The definition of the term "banking" would primarily denote that the same means accepting of deposits of money from the public which is repayable on demand or otherwise, and permitting withdrawal of such deposits by cheque, draft, etc.; the purpose of accepting such deposits of money is for lending or investment. Thus, the core business of any bank is to accept money deposited by a customer and utilise the same for lending to another customer or for the purposes of an investment. In other words, the deposits of money are accepted at certain rates of interest and such monies are invested or lent out at a rate of interest which is normally, marginally higher than the rate at which the deposits have been accepted entitling the bank to record profits by such differential rate of interest. The activity of lending would definitely include the right to recover the amount lent just as an investment carries with it a right to recover the amount invested after earning interest therefrom. In the simplest form of this business, "banking" as defined by Section 5(b) of the B.R. Act does not envisage any right to deal in the securities which have been acquired at the time of lending. The securities are only to ensure the recovery of the outstandings. On failure of the borrower to honour the commitment, it is open to the bank to realise the security. The plain language of the said provision does not permit any other view of the matter.

14. The concept of "banking policy" as defined by Section 5(ca) of the B.R. Act means any policy specified periodically by RBI in the interest of-(a) banking system; (b) monetary stability; (c) sound economic growth, but such policy has to be framed having due regard to the interests of the depositors, the volume of deposits and other resources of the bank, the need for equitable allocation and the efficient use of such deposits and resources. Therefore, on a plain reading a policy such as this cannot be formulated even in the interest of the banking system, namely to permit trading in debts between the banks because the debts are not acquired as a part of "banking activity", but are "a necessary concomitant" to the activity of lending. Such an activity cannot also be part of any policy of sound economic growth because it only means, if one may use the expression, clearing the debris from one balance-sheet and dumping the same in another balance-sheet. The activity undertaken by the Assignor and the Assignee Banks is nothing else but a form of window-dressing as understood in commercial parlance. Thus, such an activity cannot be part of any policy, more particularly when before the policy is framed due regard has to be had to the interests of the depositors, volume of deposits and other resources of the bank,

and need for equitable allocation and efficient use of the deposits and the resources. Therefore, the B.R. Act itself does not envisage framing of any such policy by RBI. In the circumstances, any guidelines formulated by RBI cannot be a part of banking policy. Reference to Section 35A of the B.R. Act in this context is thus misplaced. The said provision grants powers to RBI to issue directions after recording satisfaction that it is necessary to issue directions to banking companies generally, or to any banking company in particular, having regard to- (a) public interest; (b) in the interest of banking policy; (c) to prevent affairs of any banking company from being conducted in a manner detrimental to the interests of the depositors or prejudicial to the interests of the banking company; AND (d) to secure proper management of any banking company generally. Thus, the present transaction viz. assignment in question, cannot fall within any of the four prescribed requirements so as to enable RBI to record its satisfaction for the purposes of issuing directions. In fact, no directions are issued and guidelines cannot be equated with directions. If at all any directions have been issued they have not been placed on record and attention of the Court is not invited to any such directions.

15. At this stage, a contention based on a decision of this Court in the case of Barkha Investmnt and Trading Co. Vs. Commissioner of Income Tax, , may be considered. It was submitted that the aforesaid decision has laid down that a decision by the RBI would be final in so far as the financial system is concerned. The reliance is misplaced. The Court was concerned with efficacy of directions issued by RBI under the provisions of the Reserve Bank of India Act, 1934, namely, Reserve Bank of India's Non-banking Financial Companies (Directions), 1977. In the present, as noted, no directions are issued. There is no provision under the B.R. Act similar to Section 45Q of the Reserve Bank of India Act. Hence, the said decision is not applicable, even by analogy, to the facts of the case.

16. Section 6(1) of the B.R. Act specifies forms of business in which a banking company may engage. The said section occurs in Part-II under the heading "BUSINESS OF BANKING COMPANIES". Sub-section (1) of Section 6 of the B.R. Act specifies that a banking company may engage in any one or more of the forms of business specified in clauses (a) to (o). The use of the phrase "In addition to the business of banking" in the said provision thus makes it apparent that Section 6(1) of the B.R. Act is an enabling provision. Before analyzing the various clauses of Sub-section (1) of Section 6 of the B.R. Act it is necessary to bear in mind that Section 6(2) of the B.R. Act provides that no banking company shall engage in any form of business other than those referred to in Section 6(1) of the B.R. Act.

17 Section 6(1)(a) of the B.R. Act takes within its sweep a wide variety of activities. The said clause provides that in addition to the business of banking, a banking company may engage in-

(i) the borrowing, raising, or taking up of money;

- (ii) the lending or advancing of money either upon or without security;
- (iii) the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures certificates, scrips and other instruments and securities whether transferable or negotiable or not;
- (iv) the granting and issuing of letters of credit, traveller's cheques and circular notes;
- (v) the buying, selling and dealing in bullion and specie;
- (vi) the buying and selling of foreign exchange including foreign bank notes;
- (vii) the acquiring, holding issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds;
- (viii) the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances;
- (ix) the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise;
- (x) the providing of safe deposit vaults;
- (xi) the collecting and transmitting of money and securities;

18. On a close reading of the aforesaid activities it becomes clear that the concept of buying and selling is available as part of the additional business only for the purposes of certain categories of activities, for instance, in case of bills of exchange, hoondees, promissory notes, etc; or in case of dealing in bullion and specie; or foreign exchange, including foreign bank notes; dealing in stock, funds, shares, debentures, etc.; bonds, scrips or other forms of securities on behalf of constituents or others. The activity of purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances is one form of business, but the kind of transaction that is under consideration in the present case cannot fall within such an activity. The activity under contemplation in the clause is negotiating of loans, etc. for the constituents, namely, for whom bonds, scrips, etc. are purchased or sold.

19. Similarly, the second of the activities relating to lending or advancing of money either upon or without security only permits such an activity, meaning thereby, when read in juxtaposition with other activities the concept of buying and selling the debts with the underlying securities cannot be a part of the said activity. When certain activities specifically permit the activity of buying and selling the said exercise cannot be read into this activity of lending by taking recourse to the provisions of the general law, more particularly the T.P. Act. If the B.R. Act, a special enactment, was not in existence, may be the Assignors and

the Assignees might have been in a position to make out a case under the provisions of the T.P. Act. But any reference to the general law cannot be permitted when a special law is in place. More so, in light of Sub-section (2) of Section 6 of the B.R. Act, which prohibits any other forms of business, other than those specified in Section 6(1) of the B.R. Act.

20. Clause (c) of Sub-section (1) of Section 6 of the B.R. Act stipulates contracting for public and private loans and negotiating and issuing the same. On a plain reading the said clause cannot assist the case of the Assignee. It talks of making a contract for negotiating and issuing a public or a private loan. In other words, the customer is a necessary party for negotiating and issuing a loan either in public or in private. The said clause cannot be read to mean that after a loan is negotiated and issued the same can be contracted to be transferred without recourse to the borrower.

21. The next clause, Section 6(1)(f) of the B.R. Act relates to managing, selling and realising any property which comes into possession of the banking company in satisfaction or part satisfaction of any of its claims. It is not possible to agree with the appellant or the assignor bank that this will permit the activity of trading in debts. The debt is not the kind of property envisaged by the said clause which can be managed, sold or realised in satisfaction or part satisfaction of the claim, because the debt has to come into possession of the banking company in the course of such satisfaction of the claim. In other words, a debt which has come into existence by virtue of a transaction of advancing of funds cannot be said to have come into possession of the banking company in satisfaction of its claim. If the debt cannot be treated to be a property of such a kind the underlying security guaranteeing repayment of the debt cannot be treated to be an independently tradable property. Such a property, namely, the underlying security, would come into possession of the banking company in satisfaction of the claim and not during subsistence of the claim. The stage at which the property comes into possession has to be understood and considered so as to correctly read the provision. An illustration of application of this clause would be where a suit for recovery is filed and the debtor offers some property, movable or immovable, in satisfaction of the claim; or, in a case where, when the suit is decreed in favour of the creditor, the Court or the Tribunal orders handing over possession of certain properties, may be of the guarantor also and not only of the borrower, towards satisfaction of the outstanding dues. Therefore, the activity of purchasing and selling debts cannot fall within Clause (f) of Sub-section (1) of Section 6 of the B.R. Act.

22. A great deal of emphasis was laid on behalf of the assignor and the assignee banks on provisions of Section 6(1)(g) of the B.R. Act to submit that this was one clause which permits dealing in any property or any right, title and interest in any such property which may form the security or part of the security for any loans or advances, or which may be connected with any such security. Once again the entire contention proceeds on a fallacy. The error occurs because one

tends to read the clause divested of the opening portion of the sub-section which talks of permitting a banking company to engage in any one or more of the specified forms of business in addition to the business of banking. Therefore, one has to bear in mind that the term "banking" relates to accepting deposits of money from the public for the purposes of lending or investment. The activity envisaged by Section 6 of the B.R. Act is supplemental or additional form of business, namely, a business in addition to the business of banking. It is not an activity which can be termed as a part of business of banking. A banking company cannot state that it is in the business of acquiring and holding and generally dealing with any property, etc. which forms the security for any loan or property which may be connected with any such security. In other words, a property or any right, title and interest in a property which forms the security for advancement of a loan can be acquired, held and generally dealt with. If one accepts the basic contention raised on behalf of the assignor and assignee banks that under the general law trading in debts with underlying securities is a permissible activity, and Clause (g) of Sub-section (1) of Section 6 of the B.R. Act also refers to the said aspect, namely, a permissible mode of activity, that would amount to ascribing the legislature with tautology.

23. Section 2 of the B.R. Act stipulates that application of other laws is not barred by stating that the provisions of the B.R. Act shall be in addition to, and not, save as expressly provided in the B.R. Act, in derogation of the Companies Act, 1956, and any other law for the time being in force. Therefore, the plain meaning that emerges is that the provisions of the B.R. Act are in addition to the provisions of the T.P. Act, on which great emphasis and reliance has been placed. Thus, it cannot be stated that Section 6(1)(g) of the B.R. Act provides for the same form of permissible mode of business which is envisaged by the general law. One has to read the provisions in the context in which the provisions are framed and appear. The assignor and the assignee banks thus cannot successfully contend that Clause (g) permits them to trade in debts.

24. In fact the concept of trading in debts is, by its very nature, abhorrent to the concept of banking in any form, either the form of primary business of banking or the additional activities, namely, forms of business envisaged by provisions of Section 6 of the B.R. Act. The reason for this is not far to seek. A bank is normally not expected to function to the detriment of its financial well being. When a debt is purchased at a price fixed, may be after ascertaining the worth of the borrower by the seller, it is not possible for the assignee bank to say with certainty that the assignee bank shall earn therefrom, namely, recover more than what was paid for the debt to the assignor bank. This fact was accepted by the learned Counsel appearing for both the assignor and the assignee banks, namely, the likelihood of incurring of loss in a transaction. More so when the transaction consists of a basket of debts wherein even the assignor bank is not in a position to specify the amount for which a particular debt falling within the basket is sold. To put it differently, the entire activity is based on a speculative form of transaction: where a profit may accrue in future or a loss may be

incurred in future. That can never be a permissible mode of activity as part of, or in addition to, or incidental to, or conducive to the promotion or advancement of the business of the banking company. The words "incidental to, conducive, etc." form part of Clause (n) of Sub-section (1) of Section 6 of the B.R. Act. Therefore, the activity of selling and purchasing debts cannot be treated to be a form of business of a banking company in addition to the business of banking, because the addition has to be of an act, a business which is incidental or conducive to the promotion or advancement to the business of banking. The entire premise, on which the contention of the assignor and the assignee banks rests, is that the debt and/or the underlying security are property of a kind which can be acquired, held and generally dealt with. It is not in dispute that there are debts in the basket which are not covered by any security, either movable or immovable, or any interest in any such property. Therefore, to state that: treat the debt as a property and hold that the same falls within the form of business contemplated by Clause (g) is basically against the provisions itself. The property referred to in the said clause is one which forms the security for any loan or which is connected with such security. Therefore, in case of a debt incurred by the borrower without any security the earlier part of the clause cannot be made applicable. Similarly, the latter part also refers to any property which may be connected with any such security, namely, the security for any loan or advances. A debt simpliciter cannot form part of security for any loan or advance. The debt is itself an outstanding loan and not the kind of property which forms part of security for any loan. Hence, neither Clause (g) nor Clause (n) can carry the case of the assignor and the assignee banks any further.

25 Clause (1) of Sub-section (1) of Section 6 of the B.R. Act refers to activities which cannot be said to include the transaction, or covered in transaction which is under consideration. The said provision permits a banking company to sell, improve, manage, etc. any part of the property and rights of the Company. That is to say it should be a property and/or rights in the property of the company which the company can exchange, lease, mortgage, sell, improve, etc. A debt per se cannot be leased or mortgaged. First of all such a debt has to be property and right of the Company. The right that a company has is the right to recover its outstanding dues. An outstanding loan cannot be improved, developed, etc. therefore, all the activities envisaged by Clause (1) take their meaning from the context. The said clause refers to the movable or immovable property which a bank may acquire or hold as a person, like a building in which the bank is housed, the furniture, fixtures, etc. which the bank acquires and holds, which can be sold, improved, managed, developed, exchanged, leased out, mortgaged, disposed of or turned into account or otherwise dealt with. Therefore, even this clause cannot permit any trading in debts.

26. The next clause, i.e. Clause (m) of Sub-section (1) of Section 6 of the B.R. Act relates to acquiring and undertaking the whole or any part of the business of any person or company, when such business is of a nature enumerated or described in the sub-section. In other words, the entire business of another bank

or a part of the business of another bank can be acquired and then undertaken as a business, the caveat being it has to be business of a nature set out or described in Sub-section (1) of Section 6 of the B.R. Act. To put it differently, any of the activities falling within clauses (a) to (l) can be acquired or undertaken, as whole or any part of the business of any person or any banking company, but such a person or the banking company must, in the first instance, be carrying on such a business. It is not the case of the assignor banks that the assignor banks are carrying on a business of purchasing and selling debts. Nor is it an activity envisaged by any of the clauses of Sub-section (1) of Section 6 of the B.R. Act. If the assignor bank is not carrying on any such business of purchasing and selling debts, there is no question of the assignee bank acquiring such a business. In fact, the deed of assignment only relates to assignment of debts and not assignment of any business. Thus there is no transfer of any business as envisaged by Clause (m) of Section 6(1) of the B.R. Act. Therefore, Clause (m) also cannot be of any help.

27. Similarly, Clause (n) of Sub-section (1) of Section 6 of the B.R. Act is an inherent pointer to the interpretation one is required to place on Section 6(1) of the B.R. Act. The said clause permits a bank "doing of all such other things as are incidental or conducive to the promotion or advancement of the business of the banking company". Thus there is a live link, and nexus between clauses (a) to (o) of Section 6(1) of the B.R. Act and business of "banking" u/s 5(b) of the B.R. Act. The contention that selling of the NPAs, namely, outstanding loan, would be conducive to the business of the assignor bank sounds attractive at first blush but on a closer scrutiny does not merit acceptance. Such an activity has to be an additional form of business, namely, selling of debts and purchasing of debts. As already noted hereinbefore, the activity cannot be stated to be either incidental or conducive to the promotion or advancement of the business of banking. The activity is speculative in nature and cannot be considered to be conducive to the promotion or advancement of the business of the banking company. Therefore, none of the clauses, on which reliance has been placed by the assignor and the assignee banks, really permit the banking company to trade in debts as a form of business which is incidental to the business of banking. In fact the prohibition laid down by Sub-section (2) of Section 6 of the B.R. Act would operate and no banking company would be entitled to engage in any form of business other than those forms of business referred to in Sub-section (1) of Section 6 of the B.R. Act.

28. It is not the case of either the assignor or the assignee banks that this is a form of business which the Central Government has, by notification in the official gazette, specified to be a form of business in which it would be lawful for a banking company to engage as stipulated by Clause (o) of Sub-section (1) of Section 6 of the B.R. Act.

29. The issue may be considered from a slightly different dimension. Section 6(2) of the B.R. Act provides that no banking company shall engage in any form of

business other than those referred to in Section 6(1) of the B.R. Act. u/s 8 of the B.R. Act a banking company is prohibited from trading in goods, either by way of buying or selling or bartering of goods, except in connection with the realisation of security given to or held by the banking company. The Proviso to Section 8 of the B.R. Act carves out an exception laying down that any such business as specified in pursuance of Clause (o) of Sub-section (1) of Section 6 of the B.R. Act shall not be prohibited by Section 8. As already noticed the activity does not form part of Clause (o). The Explanation in Section 8 specifies that "goods" means every kind of movable property, other than those referred to in Clause (a) of Sub-section (1) of Section 6 of the B.R. Act. Therefore, on a conjoint reading of Section 8 of the B.R. Act, which opens with a non-obstante clause, and Section 6 of the B.R. Act the contention of the appellants and the assignor banks cannot be accepted. In fact the prohibition envisaged by Section 8 of the B.R. Act is absolute in terms and also takes within its sweep the activities covered by Section 6 of the B.R. Act. Therefore, even if for the sake of argument, one proceeds on the footing that any one of the clauses of Sub-section (1) of Section 6 of the B.R. Act permits the activity of trading in debts with underlying security yet Section 8 of the B.R. Act prohibits such trading and, therefore, unless and until the activity is one which either falls in Clause (o) of Sub-section (1) of Section 6 of the B.R. Act, or is covered by the exception carved out by the Explanation falling within Clause (a) of Sub-section (1) of Section 6 of the B.R. Act, such an activity of trading in debts cannot be stated to be a permissible form of business. Section 8 of the B.R. Act also contains an inherent indicator when the latter part of the provision permits trading in relation to the goods in connection with the business as is referred to in Clause (i) of Sub-section (1) of Section 6 of the B.R. Act, namely, in the process of administration of estates as executor, trustee, etc. In other words, when the banking company acts as an executor of an estate or functions as a trustee of a trust and in course of administration of such an estate buys or sells goods, it will be a permissible activity not covered by the prohibition imposed by Section 8 of the B.R. Act.

30. In nutshell it can be stated that a banking company is entitled to carry on business of banking stipulated by Section 5(b) of the B.R. Act; it is also entitled to carry on, over and above the business of banking, any business from amongst the forms of business enumerated in clauses (a) to (l) of Sub-section (1) of Section 6 of the B.R. Act, but the same is subject to the caveat laid down by Section 8 of the B.R. Act. The activity of trading, i.e. buying and selling, has been provided by the B.R. Act only in certain cases as noted hereinbefore, by only certain clauses of Sub-section (1) of Section 6 of the B.R. Act. The legislative scheme envisaged by Section 5(b)), Section 6(1), Section 6(2) and Section 8 of the B.R. Act indicates that a banking company is not entitled to engage in any form of business other than those specified by Sections 5(b), 6(1) and the exception stipulated by Section 8 of the B.R. Act. The prohibition is absolute in terms when one reads Sections 6(2) and 8 together. Therefore, the recourse to provisions of general law cannot be had either by the assignor or the assignee

bank, and the transaction in question cannot be said to be a transaction within the meaning of the provisions of the B.R. Act as a business and cannot be permitted.

31. During course of hearing the learned Counsel for the assignor and the assignee banks placed heavy reliance on the following observations of this Court in the case of Commissioner of Income Tax-III Vs. The Baroda Peoples Co-op. Bank Ltd.,

However, the business of banking is primarily a business in trust, a business of putting trust in a banker. How does a bank ensure that the customer places trust. It has to offer not only good returns but also safety and liquidity. In other words, the depositor must be ensured that the depositor will get good returns on its deposit, the deposits would be safe and deposits would be available for withdrawal as and when required, subject to the terms of the contract between the parties. It is in this context that the requirement of investment being in easily realisable securities or money being readily available for meeting the demand made by the depositor is taken as touch stone of the business of banking.

The depositor is not aware of the definition of the term "Banking" as provided under the B.R. Act nor is he concerned with the same. His only concern is to place his funds with a "Bank", which in common parlance is defined as a financial establishment which uses money deposited by the customer for investment, pays it out when required, makes loans at interest, exchanges currency, etc. When the term "Bank" is used as a verb in its transitive form it would take within its sweep deposit of money or valuables in a bank. The phrase "Bank on" indicates to rely on. Thus, a depositor banks on a particular bank or a banker while making deposit in the bank. The only way the depositor gains confidence, places reliance on, or banks upon a particular establishment, is by looking at the total of the assets of the bank concerned. The assets would include all investments net of liabilities. In other words a balance-sheet which reflects sound financial health of a bank would get preference over an establishment whose balance-sheet reflects weak finances. It is for this purpose that a prudent banker is required to invest in various modes, including in securities of different kinds to carry on the business of banking. It is in this context that the concept of easily realisable securities, investments wherefrom moneys are readily available, comes into sphere of banking. The business is not only to be transacted by banker alone. The customer is an equally vital component of such a business and it is the trust that he has in a particular establishment which ultimately permits the establishment to carry on the business of banking. Thus all investments, even if one accepts Revenue's artificial distinction, surplus or not, are essential and conducive to the promotion or advancement of the business of banking.

to submit that when the assignor bank divested itself of NPAs the balance-sheet of the assignor bank would reflect sound financial health of the assignor bank and would thus be in the interest of the customers viz. the depositors.

32. The aforesaid observations have to be first of all understood in the context of the controversy brought before the High Court in the said case i.e.:

Whether, on the facts and circumstances of the case, the Income Tax Appellate Tribunal was right in allowing deduction u/s 80P(2)(a)(i) of the Income Tax Act, 1961, on interest income as being attributable to the business of banking?

The basic contention of the revenue therein was that the profits and gains envisaged by Section 80P of the Income Tax Act, 1961 must be profits and gains of business attributable to any one or more of the specified activities and the interest income earned on investments can be said to be attributable to investments which are only statutorily required and investment of any surplus funds cannot be termed to be investment attributable to the specified activity. It was in this context that the aforesaid observations have been made by the Court. Secondly, the contention that when NPAs are removed from the books of the assignor banks such assignor banks would reflect a better balance-sheet is a myopic or ostrich like attitude. The contention fails to consider that the other side of the same transaction would reflect a poor balance-sheet in so far as the assignee banks are concerned, may be at a lesser figure, because the assignee banks pay a nominal amount for a basket of large outstandings. Nonetheless, the fact remains that NPAs are shifted from books of one bank to books of another bank. The activity therefore, cannot be termed to be either in the interest of bank or in the interest of the customer or in the interest of banking industry in general. At this stage the incidental submission may be considered: that certain banks have developed expertise and niche for certain kinds of activities while other banks might be more proficient in a different kind of activity; this is a submission which glosses over the real issue. As already stated such an activity, such a transaction, is not permissible in law, namely, the B.R. Act.

33. Furthermore, considering the matter from the perspective of the customer, a person approaches a bank for loan after bearing in mind the terms offered by a particular bank for a particular loan, the treatment available in a particular bank to the customer; but, when both the assignor and the assignee banks are advancing loans of the same kind, if the customer initially preferred the assignor bank at the relevant time, the factors which weighed with the customer for preferring the assignor bank to the assignee bank cannot be said to be not relevant by forcing the customer to then transact with the assignee bank post the assignment of the outstanding loan. In other words, the act of assignment not only does not consider the interest of the customer but in fact would amount to not caring for the customer. The contention that it is because the customer has not discharged his duties that the position has come about requires to be stated only to be rejected. A customer normally would not like to be branded a "defaulter". There could be various diverse reasons which would vary from customer-to-customer, which might have forced the customer to default. To lump all such outstanding loans and as a consequence the respective borrowers, in one basket by categorizing each one of them under one label or category would be

doing injustice to the basic fabric of the trust reposed by the customer in the bank, in the banker.

34. More so, when the customer is not even intimated before the transaction, before the assignment is undertaken. Post assignment, mere intimation cannot be a substitute for a notice prior to the transaction being undertaken by the assignor bank.

35. The legislature has in the past, while framing laws relating to taking over/acquiring properties of citizens, not provided for an opportunity of hearing, but when such legislations have been challenged, the Apex Court has consistently laid down that a notice granting an opportunity of hearing is a must, even in absence of a provision. The case of C.B. Gautam Vs. Union of India and Others, relates to compulsory acquisition of property under provisions of Chapter XX-C of the Income Tax Act, 1961 wherein the Court has read in the requirement of a reasonable opportunity being given to the concerned parties in the provisions of Chapter XX-C. Similarly, as recently as in 2004 when the provisions of the Securitisation Act were challenged, as originally framed, in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., the Apex Court has read in the requirement of a duty of meaningfully considering the objections raised by the borrower which includes a right to know the reasons for non-acceptance of the objections. Subsequently the legislature has therefore inserted provisions of Section 13(3A) in the Securitisation Act in compliance with the ratio of the Apex Court decision. This gives an indication that when a property of a person is required to be taken over/acquired, a meaningful and reasonable opportunity of hearing has to be granted. Therefore, even if one assumes that transfer of debts is permissible, the assignment cannot be undertaken without granting a meaningful and reasonable opportunity to the borrower. At the cost of repetition, it is required to be stated that a mere intimation, after assignment is complete, cannot be treated as sufficient compliance of this requirement in law.

36. The law is well settled that mere making of entries or absence of entries cannot be determinative of the respective rights of the parties. Therefore, just as by writing off the account of the debtor and taking the outstanding balance to the NPA account by the assignor bank cannot discharge the debtor from his obligation, similarly, by merely transferring NPA from books of one bank to books of another bank the corresponding obligation of the assignor, corresponding to the rights of the debtor, cannot disappear and the assignor bank cannot be permitted to state that the borrower is no longer its customer. Therefore, even on this count, the transaction of assignment is bad in law.

37. There is one more aspect of the matter. Admittedly, number of outstanding debts relating to the same or different borrowers have been transferred by clubbing of the debts together in favour of the assignee bank. Under the provisions of the Companies Act the pari passu charge envisaged by a conjoint reading of Sections 529 and 529A of the Companies Act is available only in relation to the first charge holder and the second charge holder cannot be

equated with the first charge holder. There can be instances where the same creditor bank may have first charge and second charge over same or different properties of the same borrower. If the creditor bank cannot seek priority qua the debt relatable to the second charge in the winding up proceedings, then by merely clubbing such debts relatable to the first charge and the debts relatable to the second charge in one basket the assignee bank cannot claim that the assignee should be substituted in place of the first charge holder-assignor bank. Considering the nature of the basket it would become well nigh impossible for any one to locate the debt relatable to the second charge, and thus, the entire purpose of enacting Section 529A of the Companies Act would get frustrated. Hence, the exercise undertaken by the assignors and the assignees cannot be permitted in law.

38. The Scheme of the Securitisation Act can be broadly divided into two parts. The first part being under Chapter II of the Securitisation Act dealing with Regulation of Securitisation and Reconstruction of Financial Assets of Banks and Financial Institutions; while the second part forming Chapter III relating to Enforcement of Security Interest. Thus as stated in the Statement of Objects and Reasons the Securitisation Act enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mismatch and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The Securitisation Act further provides for setting up of asset reconstruction Companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured assets and take over the management of the business of the borrower. This would indicate that as stated in the OBJECTS AND REASONS till the Securitisation Act was enacted there was no legal provision for facilitating securitisation of financial assets of banks and financial institutions. The Securitisation Act has been enacted in light of the banking sector reforms suggested by Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government. If this object is borne in mind it becomes clear that a Banking Company cannot function as a Securitisation Company or a Reconstruction Company. In fact the bank and financial institutions have been separately granted powers for enforcing their security interest under Chapter III of the Securitisation Act. The contention on behalf of the assignee bank that the provisions of registration of securitisation or reconstruction company are applicable only in case of a non-banking Company is thus not correct. The provisions do not state that such registration is applicable only to a non-banking company. "Securitisation Company" as defined u/s 2 of the Securitisation Act only means any company formed or registered under the Companies Act for the purpose of securitisation.

39. The objection raised on behalf of the respondents therefore, to the transaction in question is justified. What is not directly permitted by the Securitisation Act cannot be undertaken indirectly by referring to the provisions

of the T.P. Act. In fact, if the General Law permits such course of action, such as the present assignment, in so far as a Banking Company is concerned, there was no need to enact Securitisation Act and the Statement of Objects and Reasons makes this clear. The Securitisation Act in Chapter III, provides for empowering the banks and financial institutions to take possession of the securities and to sell such securities without the intervention of the Court. Thus, indicating that the concept of securitisation was, even otherwise, not available to a Banking Company who is a lender. If the lender cannot directly undertake securitisation, the law cannot be twisted and read to mean that the activity of securitisation can be undertaken by assignment of debts.

40. The assignors are not entitled to transfer the debts, with or without security, under the provisions of the B.R. Act, which lay down the kinds of business which the assignor or the assignee bank can, as banking companies, undertake. Therefore, unless and until the provisions of the B.R. Act permit transfer by way of the transaction in question, there is no question of undertaking an exercise to find out a prohibition and then, say that in absence of a specific prohibition treat the activity to be a permissible activity. To the contrary the position in law is, that only certain defined, specified activities laid down in the B.R. Act, and subsequently in the Securitisation Act, are permissible. Otherwise, as noted hereinbefore, the B.R. Act has specifically prohibited any form of business, except those permitted, by virtue of Section 6(2) and Section 8 of the B.R. Act. Therefore, recovery also is permissible only in the prescribed mode.

41. The assignor Bank is not in fact effecting recovery of its outstandings. The deed of assignment itself indicates that a debt is assigned for a lump-sum after the lumping of a debt in the basket with all other debts covered by the deed of assignment. Recovery of a loan presupposes simultaneous discharge of liability vis-a-vis the borrower. In the present case, so far as the borrower is concerned, the loan is stated to remain outstanding and payable to the assignee bank. The Court is not examining the issue in the context of General Law, because as discussed hereinbefore, if the business of "banking" as laid down in section 5(b) and section 6 of the B.R. Act does not envisage such an activity, the transaction in question cannot be treated to be a recovery of outstanding loan in the hands of the assignor bank. The recovery can only be from the borrower while in the present case, the assignment in question essentially amounts to trading in debts. When debts of different nature, different kind, with or without security, are transferred under one deed of assignment for a lump-sum consideration, it is impossible to predicate and specify the consideration qua each of the debts in question. Though the assignor bank in its Books of Account, might have classified all the debts in one category, viz. Non Performing Assets (NPAs), that by itself cannot permit the assignor bank to claim that by virtue of the deed of assignment the outstanding debts are recovered. In fact, it is transfer of NPAs, and thus the consideration received for transfer of assets cannot be termed to be towards recovery of outstanding loan. Therefore, merely because from the Books of Account of the assignor bank either some NPAs, or all NPAs, are removed by

virtue of the assignment, the transaction cannot be termed to be recovery from the respective borrowers whose loans have been classified as NPAS. The transaction is thus hit by provisions of section 23 of the Contract Act.

42. The transaction in question results in terminating the contract of the customer with the assignor bank and the assignee bank has not entered into any contract with the customer. The transaction in question therefore not only involves assignment but also the concept of novation. If, as claimed by the assignor bank, the assignee bank has been substituted in the contract in place of the assignor bank, the entire contract containing respective rights and obligations would stand transferred, and as accepted by the Counsel for the assignee bank, the law does not permit transfer of obligations. Thus, if the obligations are not transferred, which obviously cannot be transferred, the original contract has undergone change, the terms have varied to the said extent, and thus there is a novatio. In such an eventuality the customer, unless and until a party to a contract with the assignee bank, would have no liability. The submission on this count, that the deed of assignment should be reasonably construed and that any such clause transferring obligation would not bind the customer, but would be binding only the parties to the agreement, requires to be noted only to be rejected. The agreement has to be read as a whole: it cannot be read to mean that one part binds the parties to the agreement and also the customer; while the other part is binding only to the parties entering the contract and not the customer. If the customer is a third party to the deed of assignment, he is a third party for all intents and purposes, and is not bound by such a deed, is not liable in any manner to the assignee bank. However, for the present, it is not necessary to deal with the said aspect any further. Suffice it to state that the transaction in question is not a valid transaction in eyes of law.

43. A further contention was that Company Court had failed to appreciate the true scope of the application and the only inquiry that was required to be made was as to whether the assignee bank was required to be substituted in place of the assignor bank. That the Company Court had failed to appreciate that this was not a stage to consider as to whether the assignor bank had a right or not to transfer the security interest. That the controversy was premature. In support of the submissions, the following judgments were cited explaining the provisions of Order XXII Rule 10 of the Code of Civil Procedure, 1908:

(i) Jawasharlas Vs. Saraswatibai Babulal Joshi and Others,

(ii) Ebrahim Mulla Rasulji v. Chhatrasinhji Samatsinhji and Anr. AIR 1954 Sau 403; And

(iii) Amit Kumar Shaw and Another Vs. Farida Khatoon and Another,

44. The entire contention proceeds on a fallacy. If the assignment in question is found to be beyond the purview of permissible business of the assignor bank the assignee bank cannot seek substitution. The observations made by the Company Court of prima facie agreeing with the aforesaid contention of the appellant and

yet recording findings on the validity of the document simultaneously cannot be accepted to the extent the Company Court states that the matter has to be decided prima facie. In fact the import of provisions of Section 529A of the Companies Act has been lost sight of. The proceedings before the Company Court cannot be equated with proceedings of a civil suit before a civil Court and the application for substitution cannot be considered and dealt with as if the dispute was between two private litigants. In the case of State Bank of India v. Official Liquidator of Commercial Ahmedabad Mills Co. and Ors. in O.J. Appeal No. 142 of 2008 and cognate appeals this Court has, in judgment rendered on 26.09.2008, laid down the scope and the importance of provisions of Section 529A of the Companies Act in the following words:

13. Section 529-A of the Act opens with a non-obstante clause and stipulates that notwithstanding anything contained in any other provisions of the Act or any other law for the time being in force in the winding up of a Company, workers' dues and debts due to secured creditors, shall rank pari passu and shall be paid in priority to all other debts. Therefore, the said provision has an overriding effect not only qua the provisions of the Act but also any other law for the time being in force. Section 529-A of the Act was inserted on the statute book vide Act No. 35 of 1985 with effect from 24.5.1985 and, therefore, would override all other provisions of the Act as well as any other law in force on the said date.

14. Therefore, prima facie, provisions of Section 42 of ULC Act cannot claim primacy over provisions of Section 529-A of the Act considering the fact that ULC Act was brought on statute in 1976 while Section 529-A of the Act is a subsequent legislation brought on statute book in 1985. Possibly this aspect of the matter, may not have been brought to the notice of the Company Court. However, the jurisdiction vested in a Company Court is a special jurisdiction and considering the true scope and object of the provisions of Section 529-A of the Act, Official Liquidator functions under the directions of the Company Court and acts for and on behalf of the Company Court, primarily to ensure that the interest of workmen of a Company (in liquidation) do not go unrepresented and are taken care of. This salutary feature of functioning of Company Court could not have been overlooked by the Company Court while determining the issue in question.

15. In fact, when Section 529-A of the Act was proposed to be introduced vide Companies (Amendment) Bill, 1985, the statement of object and reasons provided as under:

Another announcement made by the Finance Minister in his Budget speech relates to the decision of the Government to introduce necessary legislation so that legitimate dues of workers rank pari passu with secured creditors in the event of closure of the company and above even the dues to Government. The resources of the companies constitute a major segment of the material resources of the community and common good demands that the ownership and control of the resources of every company are so distributed that in the unfortunate event

of its liquidation, workers, whose labour and effort constitute an invisible but easily perceivable part of the capital of the company are not deprived of their legitimate right to participate in the product of their labour and effort. It is accordingly proposed to amend Sections 529 and 530 of the Companies Act and also to incorporate a new Section in the Act, namely Section 529A vide clauses 4, 5 and 6 of the Bill).

16. In case of *T.L.A. v. Official Liquidator* 2004 3 GLH 416, the Apex Court was called upon to decide the true scope of provisions of Section 529-A of the Act in light of the priority claimed by Oil and Natural Gas Commission on the basis of an order made by the Apex Court in favour of ONGC. The Supreme Court has laid down as under:

8. The effect of Sections 529 and 529-A is that the workmen of the Company become secured creditors by operation of law to the extent of the workmen's dues provided there exists secured creditor by contract. If there is no secured creditor then the workmen of the company become unsecured preferential creditors u/s 529-A to the extent of the workmen's dues. The purpose of Section 529-A is to ensure that the workmen should not be deprived of their legitimate claims in the event of the liquidation of the Company and the assets of the Company would remain charged for the payment of the workers' dues and such charge will be *pari passu* with the charge of the secured creditors. There is no other statutory provision overriding the claim of the secured creditors except Section 529-A. This Section overrides preferential claims u/s 530 also. u/s 529-A the dues of the workers and debts due to the secured creditors are to be treated *pari passu* and have to be treated as prior to all other dues.

9. Therefore, the law is clear on the matter as held in *UCO Bank's* case that Section 529-A will override all other claims of other creditors even where a decree has been passed by a Court.

10. Therefore, claims, if any, of O.N.G.C. will have to be worked out in accordance with Sections 529 and 529-A of the Companies Act as well. The contention advanced on behalf of O.N.G.C. by Shri Raju Ramchandran that if a mandamus had been issued, it will prevail over any law is not tenable and is rejected.

45. The same ratio would be applicable in the facts of the present case. Even if one assumes for the sake of argument, that the provisions of the T.P. Act are available to the assignor and the assignee banks, the provisions of the T.P. Act cannot claim primacy over provisions of the B.R. Act and the Companies Act, more particularly Section 529A of the said Act. In fact there have been cases before the Company Court when the dues of all the creditors stand satisfied upon disbursement being ordered by the Company Court, not leaving anything to be urged, agitated or adjudicated before any other forum. Hence, the proceedings before the Company Court cannot be treated to be proceedings in the interregnum. Therefore, the case law cited in this regard would have no

application. Thus, considering the matter from any point, it is not possible to accept the case of the assignor and the assignee banks. During course of hearing it was pleaded that the assignee banks have parted with large sums of money in favour of different assignor banks and also taken certain steps pursuant to the assignment in question. That in certain cases the Company Court and/or the Debts Recovery Tribunal had also granted the prayer for substitution. Hence, taking any other view of the matter would create difficulties both for the assignors and the assignees.

46. In this regard suffice it to state that merely because some applications for substitution were granted, the Court cannot be precluded from determining an issue once the same is raised. It is not as if the earlier applications were granted after they were resisted and the Court made a considered order. Hence, those orders cannot be termed to be precedents and are not binding.

47. In the view that the Court has adopted it is not necessary to enter into any discussion on merits as regards the applicability of the provisions of the Registration Act, the Stamp Act, etc. Once the transaction in question, namely, the assignment, is held to be impermissible in law, it is not necessary to record any findings in relation to the violation of other laws. However, suffice it to state that, prima facie, the views expressed by the Company Court in relation to these issues merit consideration and acceptance. However, it is not necessary to deal with the said aspect in detail as the transaction itself is held to be bad in law being in violation of the provisions of the B.R. Act, which is the statute governing the business conduct of the assignor and the assignee banks. Hence, various decisions cited at the Bar in relation to the provisions of T.P. Act, Registration Act, Stamp Act, etc. are not referred and dealt with.

48. To summarise:

(a) neither the definition of the term "banking" as appearing in Section 5(b) of the B.R. Act, nor the extended meaning available in terms of provisions of Section 6 of the B.R. Act can take within its sweep the transaction in question;

(b) the provisions of the B.R. Act do not give any right to deal in securities acquired at the time of lending;

(c) the right to realize a security to ensure recovery of outstanding debt cannot be stretched to mean a right to deal in securities;

(d) the definition of "banking policy" u/s 5(ca) of the B.R. Act cannot permit framing of such a policy which permits trading in debts as the debts are not acquired as a part of banking activity but come into existence upon advancement of a loan. The requirements of Section 5(ca) of the B.R. Act cannot be said to have been met with by such an assignment;

(e) any guidelines formulated by RBI cannot be part of banking policy because u/s 35A of the B.R. Act RBI has powers to issue directions after recording satisfaction that it is necessary to issue directions to banking companies having

regard to the factors stated in Section 35A of the B.R. Act. The present transaction cannot fall within any of the four prescribed requirements so as to enable RBI to record satisfaction for the purposes of issuing directions. No directions are in fact issued and guidelines cannot be equated with directions;

(f) none of the clauses (a), (c), (f), (g), (l), (m), (n) and (o) of Section 6(1) of the B.R. Act cover the transaction in question;

(g) the activities envisaged by Section 6(1)(a) of the B.R. Act make it clear that concept of buying and selling is available as part of additional business only for certain specified categories of activities;

(h) the activities relating to lending with or without security only permits such an activity when read in juxtaposition with other activities and the concept of buying and selling the debts with the underlying securities cannot be part of the activity of lending;

(i) when certain specified activities specifically permit the activity of buying and selling the said concept cannot be read into the activity of lending by resorting to provisions of general law. Once a special enactment is in existence reliance on provisions of the T.P. Act cannot be permitted, more so in light of provisions of Section 6(2) of the B.R. Act which prohibits any other form of business, other than those specified in Section 6(1) of the B.R. Act;

(j) the activity envisaged by Section 6(1)(g) of the B.R. Act is not an activity which can be termed to be a part of business of a banking;

(k) the activities envisaged by Section 6 of the B.R. Act are supplemental or additional forms of business, in addition to the business of banking and not independent thereof;

(l) Section 2 of the B.R. Act stipulates that the provisions of the B.R. Act are in addition to the provisions of other laws for the time being in force, save as expressly provided in the B.R. Act and, therefore, it cannot be stated that Section 6(1)(g) of the B.R. Act provides for the same form of permissible mode of business which is envisaged by general law;

(m) the concept of trading in debts is, by its very nature, abhorrent to the concept of banking in any form, either the form of primary business of banking or the additional activities envisaged by Section 6 of the B.R. Act;

(n) the entire transaction is based on a speculative form of activity which can never be a permissible mode of activities as part of, or in addition to, or incidental to or conducive to the promotion for advancement of the business of a banking company;

(o) the transaction in question is not a form of business which the Central Government has specified to be a form of business in which it would be lawful for a banking company to engage in, as notified in the official gazette;

(p) Section 6(2) of the B.R. Act read with Section 8 of the B.R. Act and the Explanation u/s 8 of the B.R. Act make it clear that the kind of activity reflected by the present transaction cannot be permitted under the provisions of the B.R. Act. From this it cannot be inferred that because of the prohibition in the B.R. Act recourse can be had to general law;

(q) the activity undertaken in the form of the transaction in question cannot be termed to be either in the interest of the bank or in the interest of the customer or in the interest of banking industry in general;

(r) to lump all outstanding loans and as a consequence the respective borrowers, in one basket by treating each one of them as one category would be doing injustice to the basic fabric of the trust reposed by the customer in the bank or the banker;

(s) when a property of a person is required to be taken over/acquired a meaningful and reasonable opportunity of hearing has to be granted and mere intimation, after the assignment is complete, cannot be treated as sufficient compliance of this requirement in law. The transaction in question cannot be equated with recovery of outstanding loan, even in the hands of the assignor bank and mere making of entries cannot be determinative of the respective rights of the parties;

(t) the pari passu charge envisaged by a conjoint reading of Sections 529 and 529A of the Companies Act is available only in relation to first charge holder and the second charge holder cannot be equated with the first charge holder. Therefore, clubbing of debts where the charges might be different does not give a right to the assignee to seek substitution in place of the first charge holder assignor bank;

(u) provisions of the Securitisation Act read with objects and reasons make it clear that if the transaction in question is upheld it would mean permitting an act, which is not directly permitted by the Securitisation Act, by referring to provisions of the T.P. Act;

(v) recovery of a loan can only be from the borrower while the transaction in question essentially amounts to trading in debts;

(w) the transaction in essence is transfer of NPAs and thus the consideration received for transfer of assets cannot be termed to be towards recovery of outstanding loan;

(x) the transaction in question terminates the contract of the customer with the assignor bank and the assignee bank has not entered into any contract with the customer and thus involves the concept of novation;

(y) the proceedings before a Company Court cannot be equated with proceedings of a civil suit before a civil Court and the application for substitution cannot be considered and dealt with as if the dispute was between two private litigants;

(z) the provisions of the T.P. Act, even if available to the assignor and the assignee banks, cannot claim primacy over provisions of B.R. Act and the Companies Act.

49. Thus, the judgment and order of the Company Court does not merit intervention in so far as the rejection of the application for substitution in principle is concerned. However, the directions issued by the Company Court, and the observations made, permitting the parties to raise the issue at the time of disbursement cannot be upheld considering the fact that the transaction in question, namely, assignment is itself held to be bad in law as not being permissible in law, in light of what is stated hereinbefore. In fact as per directions made in order dated 17.10.2007 in Civil Application Nos.376 of 2007 and 377 of 2007 the Official Liquidator has been directed to disburse the amount payable, the amount which were otherwise payable to the assignor prior to the deed of assignment, only to the assignor subject to the conditions that the assignor shall file an undertaking as directed. Therefore, no further directions are required to be made as the assignee banks have not been substituted in effect.

50. All the appeals are accordingly dismissed. There shall be no order as to costs.

D.A. Mehta, J.

51. At this stage, learned advocate for the appellants and the assignor banks makes a request to continue the interim arrangement as per directions made in order dated 09.08.2007 and 17.10.2007. The request cannot be granted firstly because the order dated 09.08.2007 made in various Civil Applications has thereafter merged in the final order dated 17.10.2007 wherein all the Civil Applications have been disposed of by the Court in light of the directions made in order dated 17.10.2007 in Civil Application Nos.376 of 2007 and 377 of 2007. In so far as the direction to disburse the amount payable, namely, the amount which was otherwise payable to the assignor prior to the Deed of Assignment, only to the assignor, the said direction attains finality as the assignment itself has been held to be bad in law.

52. Hence, there is no question of continuing any interim arrangement any further.