

(2009) 08 GUJ CK 0020

In the Gujarat High Court

Case No : Company Application No. 1 of 2009 in Company Application No. 648 of 2008

Mafatlal Denim Limited

APPELLANT

Vs

Sicom Limited and Others

RESPONDENT

Date of Decision : 31-08-2009

Acts Referred:

Companies (Court) Rules, 1959 — Rule 71
Companies Act, 1956 — Section 391(1), 391(6), 392, 393, 394
Constitution of India, 1950 — Article 226, 227
Defence of India Act, 1962 — Section 43
Defence of India Rules, 1962 — Rule 131(2)
Public Premises (Eviction of Unauthorised Occupants) Act, 1971 — Section 2
State Financial Corporations Act, 1951 — Section 29, 29, 29, 31, 46(B)

Citation : (2011) 1 GLH 122

Hon'ble Judges : K. M. Thaker, J

Bench : Single Bench

Advocate : Mihir Thakore and Mr. A. S. Vakil, for the Appellant; Saurabh Soparkar and Mr. Sanjay A. Mehta, Advocate for Respondent 1, Mr. Mihir Joshi and Mr. Sandeep Singhi, Advocate for Respondent 3 and Mr. Ashwin L. Shah, Advocate for Respondent 2, for the Respondent

Final Decision : Dismissed

Judgement

Mr. K.M. Thaker, J.—By this application u/s 391(6) of the Companies Act, 1956 (hereinafter referred to as "the 1956 Act"), the applicant Company has prayed for below-mentioned relief:-

(A) That pending the outcome of the meeting of the secured creditors of the Applicant Company, ordered to be convened on 4th February 2009 at 11.30 AM at Mumbai and pending the hearing and final disposal of the proceedings for sanction of the said scheme of compromise, SICOM Limited, one of the secured creditors of the Applicant Company be restrained from taking any legal proceedings against the Applicant Company, including, acting in any manner whatsoever u/S. 29 of the State Financial Corporations Act, 1951 including its

notice dated 18th July 2008....

Re:- FACTS

2. The relevant facts leading to this application are as follows:-

2.1. The applicant is a Limited Company (hereinafter referred to as the Company) incorporated and registered as such under the 1956 Act. The Company is engaged, inter alia, in the business of manufacturing and sale of high quality denim fabrics.

2.2. The Company appears to have availed diverse types of loans from different Banks/Financial Institutions [FIs for short] which include Axis Bank, EXIM Bank and SICOM Ltd. The said Banks/Financial Institutions are banking Company or Financial Institution or Financial Corporation under Recovery of Debts Due to Banks and Financial Institution Act, 1993 [hereinafter referred to as "RDB Act"] and/or under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [hereinafter referred to as SARFAESI Act or 2002 Act] and/or under State Financial Corporations Act, 1951 [hereinafter referred to as SFC Act or 1951 Act]. For sake of convenience, the Banks or the Financial Institutions or Corporation are hereinafter referred to as Banks or FIs.

2.3 The Company, for the purpose of availing the facility of loans, created charge over various movable/immovable assets by way of mortgage and/or hypothecation in favour of FIs. It is claimed that earlier mentioned 3 FIs have pari passu charge over the assets of the Company. After some time the Company faltered in repayment of dues to the said FIs.

2.4 It emerges from the record that one of the FIs, viz. SICOM issued a demand notice dated 18.7.2008 calling upon the Company to pay Rs. 1,61,74,750/- on or before 25.7.2008 failing which it would be compelled to take actions as may be available in law, including action u/S. 29 of SFC Act.

2.5 About 5 months after the notice, the Company moved an application being Company Application No. 648/2008 u/s 391(1) of 1956 Act. It is declared in the pleadings that the said application was filed on or around 24.12.2008 with following prayer(s):-

(A) that a meeting of the secured creditors be convened at Mumbai (where all the secured creditors of the Applicant Company are situated) or at the registered office of Company or at such other place as this Hon''ble Court directs, for the purpose of considering and if thought fit, approving, with or without modification, a scheme of compromise proposed to be made between the Applicant Company and its secured creditors as stated in the Scheme.

(B) that directions may be given as to the method of convening, holding and conducting the said meeting and as to the notices and advertisements to be issued in that behalf.

2.6 It emerges that in the background of defaults in making repayments and maintaining the payment of schedule, the Company had contrived a scheme of restructuring debts [hereinafter referred to as the Scheme] and on that ground it preferred the aforesaid application with a prayer for direction to convene the meeting of secured creditors

2.7 An order dated 26.12.2008 was passed in the said Application No. 648 of 2008 directing to convene and hold a meeting of Secured Creditors on 4.2.2009 for considering the proposed arrangement/Scheme.

2.8 After the said order dated 26.12.2008, the Company, on or around 31.12.2008 took out present application, with Judges summons, filed u/S. 391(6) which came to be registered as Company Application No. 1 of 2009.

2.9 The present application has been preferred mainly on the apprehension that though the meeting (as per the order dated 26.12.2008) was to be held on 4.2.2009, SICOM was likely to take action in pursuance of its notice dated 18.7.2008 against the mortgaged or hypothecated assets. The Court issued notice and made it returnable on 19.1.2009 with the following ad-interim order passed on 2.1.2009;

Present application is filed u/s 391(6) of the Companies Act, 1956 read with Rule 71 of the Companies (Courts) Rules, 1959 seeking injunction and/or stay against Sicom Limited....

This Court (Coram: Hon"ble Mr. Justice K.A. Puj) has by order dated 26.12.2008 passed in Company Application No. 648 of 2008 ordered the meeting to be convened of three Secured Creditors (including Sicom Limited) of the applicant....

It is accordingly ordered that let notice be issued to said Sicom Limited (at the address to be provided by applicant) returnable on 19.01.2009 and pending the hearing and final disposal of this application and the proceedings for sanction of the said scheme of compromise, Sicom Limited, one of the secured creditors of the applicant, is restrained from taking possession of any property or assets of the applicant Company in exercise of authority u/s 29 of the SFC Act on condition that the applicant shall not create any interest or encumbrance or charge, in any manner, over the assets and property until finalization of Scheme u/s 391 of the Act and status quo of all assets and property shall be maintained.

2.10 The Company claims that on 4.2.2009 the meeting was held as per the order dated 26.12.2008 and in the said meeting the scheme proposing reconstruction of debts was approved, with certain modifications (as compared to draft scheme), by the statutory majority, with the sole dissenting voice of SICOM Ltd. (hereinafter referred to as "SICOM" or "objector") who raised objection against the Scheme and declared that the scheme was not acceptable to it and that it would oppose the scheme., if and when presented for sanction.

2.11 In the meanwhile, the application came up for further hearing on the returnable date, however, the opponent No. 1 SICOM did not attend the hearing

on 19.1.2009 hence, it was adjourned to 23.1.2009.

2.12 In the interregnum, on 16.1.2009, SICOM issued another Notice to the applicant recalling the entire principal amount together with interest.

2.13 On 23.1.2009, the said objector opposed the application by putting on record its affidavit-in-reply submitting inter alia that the application under Sec. 391(6) was not maintainable and that it was not in favour of the Scheme.

2.14 Before the next date for hearing i.e. 30.1.2009 the objector issued another notice dated 29.1.2009 stating, inter alia, therein:-

1.....

2.....

3.....Under the circumstances, we have decided to take over possession of the assets mortgaged-hypothecated by you to our favour and to sell the same for recovery of our dues as mentioned in our recall notice dated 16th January, 2009....

4.....

2.15 During the proceeding and hearing of this application, the Court has been informed that on 29.1.2009 the objector has filed application u/S. 19 r/w. S. 17 of the RDB Act and has put the proceedings in motion before the Tribunal [hereinafter referred to as DRT] at Mumbai.

2.16 The applicant has claimed that during the meeting on 4.2.2009 the statutory majority accepted/approved the scheme. After the acceptance of the Scheme by the statutory majority, as prescribed u/S. 391 of 1956 Act, the Company has presented a Company petition No. 34 of 2009 in Company Application No. 648 of 2008 and it has, thereby, submitted the scheme for sanction by the Court which is pending, after admission.

2.17 In the backdrop of the aforesaid facts, the objector is opposing this application u/s 391(6) and the applicant is praying for the reliefs, pending the consideration of the scheme by the Court.

2.18 Before advertng to the rival contentions, it is necessary to record certain other facts-details which have been urged during the, hearing;

(a) The position of outstanding/dues qua all the 3 Secured Creditors (as on the cut-off date i.e. 31.7.2008 (as per the scheme) and as on the date of meeting (i.e., as on 4.2.2009) is thus:-

Amounts owed to Secured Creditors

As On 31.7.2008 The Cut-Off Date (Rupees in Lacs)

Institution

Principal Amt.

Amounts Due and Outstanding Interest

Principal Amt. Not Yet Due Total

Total Amount Outstanding

SICOM LIMITED

132

64

195

2644

2839

AXIS BANK LTD.

0

9

9

6650

6659

EXPORT-IMPORT BANK OF INDIA

0

0

0

2440

2440

TOTAL

132

73

204

11734

11938

Amounts owed to Secured Creditors

As On 4.2.2009 Date of Meeting of Secured Creditors (Rupees in Lacs)

Institution

Principal Amt.

Amounts Due and Outstanding Interest

Principal Amt. Not Yet Due Total

Total Amount Outstanding

SICOM LIMITED

762

282

1044

2014

3057

AXIS BANK LTD.

950

272

1222

5700

6922

EXPORT-IMPORT BANK OF INDIA

979

147

1126

1500

2626

TOTAL

2691

701

3391

9214

12605

(b) The total value of the credit, on percentage basis, of SICOM Ltd is 23.78% of

EXIM Bank is 20.44% and of AXIS BANK is 55.78%.

(c) At present the Company is a going concern.

3. Mr. M. J. Thakore, learned Senior Counsel with Mr. A. S. Vakil has appeared for the Company and Mr. S. Soparkar, learned Senior Counsel with Mr. S. A. Mehta has appeared for SICOM Ltd. Mr. M. H. Joshi, learned Senior Counsel with Mr. S. M. Singhi has appeared for EXIM Bank and Mr. A. L. Shah, Advocate, has appeared for AXIS Bank.

Re: SUBMISSION

4. Mr. Thakore, learned Counsel submitted that while the Scheme proposed by the Company is under consideration, it is necessary that any prejudice may not be caused which may frustrate the scheme and that if the proceedings before the Tribunal are allowed to continue, serious prejudice will be caused to the applicant and the Scheme would be rendered only academic or it will be totally frustrated. He also submitted that the provisions under Sections 391 to 394 of 1956 Act confer a right in favour of the Company and the creditors to consider and accept a Scheme, inter alia, for restructuring its debt and such a scheme would be binding on all the Creditors/Members/Official Liquidator as the case may be, if after its acceptance by the statutory majority creditors or members, the Court also sanctions it and that therefore it is but essential that any action by solitary or minority objector may not be allowed to nullify the Scheme. Mr. Thakore, urged that the objector may, therefore, be restrained from proceeding further with the application u/s 19 of RDB Act pending before the DRT and/or with the action pursuant to the notice under SFC Act.

4.1 Opposing the said submissions and the prayer of the applicant, Mr. Soparkar, learned Counsel for the objector submitted that SICOM has a statutory right u/s 29 of SFC Act to take steps to recover its dues and/or it also has a right to prefer application u/s 19 of RDB Act, therefore, its action u/s 29 of SFC Act and/or the proceedings before the DRT under RDB Act cannot and need not be stayed.

4.2 Mr. Soparkar, learned senior Counsel further submitted that the RDB Act and/or the SFC Act override the 1956 Act, hence once an action under SFC Act is initiated and/or the proceedings under RDB Act are instituted, then an application under Sections 391 of 1956 Act would not be maintainable and the Company Court will not have jurisdiction to entertain such application and that therefore as a corollary the application under sub-Section (6) of Section 391 of 1956 Act also would not be maintainable.

4.3 He also submitted that the Company Court does not have power u/S. 391 (6) to injunct the FIs from taking action u/S. 29 of SFC Act and/or to restrain the DRT from adjudicating the application u/S. 19 of RDB Act. He submitted that assuming that application u/s 391 is maintainable despite the pendency of S. 19 application before the DRT and/or despite the proposed action u/S. 29 of SFC Act and that the Company Court has power to stay either the proposed action or the

proceedings then in that event also such discretionary power should be exercised judiciously and only after very close scrutiny of the facts of each case. In his submission, facts of present case do not warrant exercise of such power and the Court is not bound to mechanically stay the proceedings of application u/s 19 of RDB Act or the action u/s 29 of SFC Act. He also submitted that Sections 17 to 19 of RDB Act and 29 of SFC Act would prevail over Section 391(6) and the statutory right under said provisions cannot be nullified by application u/S. 391 (1) and 391(6) of 1956 Act. He also submitted that the role and jurisdiction of the Company Court u/s 391 of 1956 Act is only peripheral and supervisory and that therefore the Court cannot decide about justifiability or otherwise of Objector's action.

4.4 Mr. Soparkar also advanced alternative submission and urged that if the Court holds that the application is maintainable and also decides to stay the proceedings or the proposed action, then appropriate conditions may be prescribed, i.e. unconditional stay may not be granted. He relied on the below mentioned judgments in the case between;

1. U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others, ;
2. U.P. Financial Corporation and Others Vs. Naini Oxygen and Acetylene Gas Ltd. and Another,
3. Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another,
4. Hindustan Lever and Another Vs. State of Maharashtra and Another, ;
5. M/s. Bakemans Industries Pvt. Ltd. v. M/s. New Cawnpore Flour-Mills and Ors. reported in 2008 (6) ALL M.R. 463
6. Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd. and Another, ;
7. In respondent: IMP Powers Ltd. reported in 2008 (142) CC 481.
8. Judgment of the Hon''ble Apex Court in Civil Appeal No. 7128 of 2008 between Union of India and Ors. v. SICOM Ltd. and Anr.
9. An order in Company Application No. 35 of 2005 passed by High Court of Judicature at Bombay in the matter between Meta Strips Limited v. Economic Development Corporation.

4.5 Per contra, Mr. Thakore, learned senior Counsel for the applicant in rejoinder submitted that the family of Section 391 to Section 394 of 1956 Act operate in a field different from the field of operation of S. 19 of RDB Act and Section 29 of SFC Act and the scope of 1956 Act is entirely different, hence there is no scope of conflict or any occasion for one statute prevailing over the other. In reply to a query, it was submitted that it will not be feasible for the applicant to offer any further security. He, however, submitted that in view of the provisions u/s 391 to 394 of 1956 Act, one of the secured creditors should not be allowed, at the cost of other secured creditors, to steal a march over other secured creditors more

particularly when Objector does not have exclusive charge over the assets.

4.6 Mr Thakore submitted that application u/s 391 is maintainable despite the action under SFC Act and/or the pendency of application before DRT, and consequently the application u/S. 391(6) for interim relief would also be maintainable and the Company Court can stay the action under SFC Act and/or the proceedings launched by objector before the Tribunal under RDB Act and that the provision u/s 391(6) of 1956 Act cannot be viewed independently since it is an enabling provision in aid of S. 391(1) of 1956 Act.

4.7 Lastly, he submitted that the Objector has tried to over reach the process made available u/s 391 to 394 of 1956 Act by legislature. So as to support his submissions, he relied upon the judgments in the following cases; 1. Municipal Council Palai Vs. T.J. Joseph and Others, .

2. Municipal Corporation of Delhi Vs. Shiv Shanker, .

3. Harish Kapoor and Ors. v. Zafarbhai Mohmadbhai Chhatpar reported in (1989) 65 CC 163.

4. Maharashtra Tubes Ltd. Vs. State Industrial and Investment Corporation of Maharashtra Ltd. and Another, .

5. Gujarat Kamdar Sahakari Mandal and Ors. v. Ramkrishna Mills Ltd. reported in 1998 (92) comp cases 692;

6. Allahabad Bank Vs. Canara Bank and Another, ;

7. Arvind Mills Ltd., In re. reported in [2002] 110 CC 539.

8. Arvind Mills Ltd., In re. reported in [2002] 111 CC 118.

9. Deepika Leasing and Finance Ltd. v. Deepika Chit Fund (P) Ltd. reported in (2005) 3 Comp L.J. 51.

10. Shree Rama Multitech Ltd. In re: reported in [2006] 131 CC 209.

11. Core Health Care Ltd. In re. [2007] 79 SCL 47.

12. ARCIL v. Ashok Organik and Ors. reported in (2008) 3 Comp.L.J. 61.

13. Chembra Orchard Produce Ltd. and Ors. v. Regional Director of Company Affairs and Anr. reported in (2009) 1 Comp LJ 1 (SC).

14. ICICI Ltd. v. State of Gujarat in SCA No. 6324 of 2000 (decided on 8th December, 2000).

15. he also placed reliance on various orders passed by this Court in various applications u/s 391(1) wherein, this Court has, ad interim relief granted stay of the proceedings by bank or financial institution.

16. He also referred to the judgments/orders passed by the High Court of Kerala in (a) Misc. Application No. 47 of 2000, (b) in the matter of B.P.L. Ltd. being

Company Petition No. 13 of 2005, (c) Misc. Application No. 84 of 2004 preferred by B.P.L. Ltd., (d) in Company Appeal No. 9 of 2005 against order in Misc. Civil Application No. 84 of 2004, (e) in Company Appeal No. 1 of 2006 against the order in Company Petition No. 13 of 2005, and (f) in Company Appeal No. 2 of 2006 against the judgment in Misc. Civil Application No. 84 of 2004.

4.8 Mr. Joshi, learned senior Counsel while adopting the submissions of Mr. Thakore, submitted that the Tribunal only adjudicates what is claimed to be due and the RDB Act in general or Section 19 of RDB Act in particular does not grant any right but it merely provides a mode of recovery and by virtue of RDB Act no contractual or statutory rights are granted. He also submitted that what SICOM claims, in effect, is exclusion from the provision of law and immutability of its contractual rights. He relied on the decisions reported in (i) Sayed Aqueel Arif v. University of Pune and Others reported in 2003 (12) SCC 724 , (ii) Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another, , and (iii) Harish Court. Raskapoor and Others v. Jaferbhai Mohmedbhai Chhatpar reported in 1989 (65) CC 163.

4.9 Mr. AL Shah for AXIS Bank submitted that after the scheme is sanctioned by the Court, a novatio occurs and a new debt is substituted for earlier one. He also adopted submissions made on behalf of the applicant-Company and submitted that the provisions u/s 391 should not be allowed to be frustrated. He also submitted that provision u/s 391 and Section 19 of RDB Act or Section 29 of SFC Act can exist together.

5. Before proceeding further it needs to be mentioned that in light of the elaborate submissions and rival contentions by both sides regarding RDB Act and Section 19 proceedings it was enquired by the Court about the absence of any specific reference or prayer about RDB Act or application u/S. 19, and in reply reliance was placed on the part of prayer which runs thus.... Company be restrained from taking any legal proceedings against the applicant Company including.... so as to urge that the prayer for said relief stands covered in any legal proceedings. Further, no objection on this ground is raised by SICOM and actually its Counsel has made elaborate submissions with reference to scope of Section 391(6) vis-a-vis Sections 17 to 19 and 34 of RDB Act. Hence, it is deemed necessary to deal with both i.e. SFC Act and RDB Act.

6. It also deserves to be mentioned that the limited nature and scope of this application u/S.391(6) of 1956 Act does not call for, at this stage, scrutiny of the merits of the proposed scheme. It would be, thus, not necessary to refer to the referred judgments dealing with the scope of application u/s 391(1).

Re: MAINTAINABILITY

7. This application u/s 391(6) has been opposed by the objector SICOM mainly on the ground that it has not accepted the scheme and it stands outside the proceedings under Sections 391 and 394, consequently its statutory right to proceed to recover its dues cannot be nullified by presenting a scheme proposing

to restructure the debt.

7.1 The objector has drawn support mainly from the provision under Sections 17 and 19 and 34 of the RDB Act and Sections 29 and 46-B of SFC Act, and has contended that Section 34 of RDB Act and Section 46-B of SFC Act give overriding effect to the provisions of RDB Act and the SFC Act. Reliance is also placed on the judgment of the Hon"ble Supreme Court in the case between Allahabad Bank Vs. Canara Bank and Another, and also on the judgment of the High Court of Bombay in the matter of Re: IMP Powers Ltd.

7.2 The contention regarding maintainability of application under Sections 391 and 394 may be cleared first. Actually, after having been confronted with the judgment of this Court (Coram: Hon"ble Mr. Justice R.S.Garg), Mr. Soparkar. Senior Counsel did not carry this contention further. This Court has, in the judgment in the case of Re. Core Health Care Limited [(2007) 79 SCL 47], after considering the judgment of Hon"ble Apex Court in the case of Allahabad Bank, already held that: -

One of the objections raised by the objectors is that the objectors have filed their case before the Debt Recovery Tribunal, therefore, this Court would have no jurisdiction to consider the Scheme and by grant of the Scheme as the objectors are to be non-suited by the Debt Recovery Tribunal, present proceedings are illegal. The petitioners have placed their reliance upon the judgment of the Supreme Court in the matter of Allahabad Bank Vs. Canara Bank and Another, . So far as the right of the objector to proceed with the case before the Debt Recovery Tribunal is concerned, it would certainly stand if the Scheme proceedings are not approved by the High Court. Core certainly would have a right to take out proceedings for compromise. If the proceedings ultimately fail and the Scheme is not approved by the High Court, then right to proceed with the proceedings before the Debt Recovery Tribunal would stand, but it cannot be said by any stretch of imagination that Scheme proceedings cannot be approved by the High Court in view of pendency of the proceedings before the Debt Recovery Tribunal. Judgment in the matter of Allahabad Bank [supra] was in altogether different context, there, the Supreme Court was not considering approval, sanction or rejection of the Scheme. It cannot be denied that in a pending litigation, a borrower can come forward for settlement and it would always be open to the lender to accept the terms of the settlement. If such authority is available to a borrower, then he can always come forward with a Scheme for compromise which is being offered to the creditors individually so also jointly. However, I would agree with the petitioner that if an individual lender can settle, then, there is no reason to hold that the lenders collectively cannot enter into the Scheme of compromise.(Emphasis supplied)

7.3 Further, similar view has also been taken by the High Court of Kerala in the matter of M/s. BPL Ltd. (MCA No. 84/2004 d/o 14.03.2005).

7.4 It has, thus, been held that the application under Sections 391 read with

Section 394 would be maintainable despite the presentation and pendency of an application u/s 19 of the RDB Act. The judgment in the case of Core Health (Supra) is binding on me, hence, I shall, for the purpose of considering this application, proceed on the premise that the application u/s 391/394 is maintainable although the application u/s 19 of the RDB Act is pending.

7.5 The question which next arises is about maintainability and scope of application u/s 391(6) of 1956 Act. The application u/S. 391(6) is meant for incidental and ancillary relief during the consideration of the application u/s 391(1) r/w Section 394. On reading of the said Sections, it emerges that the Company or any creditor or shareholder/member of the Company or the Official Liquidator (in case of Company under winding up) can present, by way of application u/s 391, diverse type of compromise or arrangement i.e. a scheme for sanction by the Court. Thus, in view of the wide scope of the provisions u/s 391, its arena is not restricted only to the Scheme for restructuring debt. Further, Section 391(6) confers incidental power on the Company Court to pass appropriate interim order after application u/S. 391(1) is presented. Hence, it cannot be denied that after an application u/s 391 of 1956 Act is submitted and in pursuance of such application, a Scheme is presented for sanction by the Court, an application u/s 391(6) would be, if circumstances so require, maintainable.

7.6 However, the matter concerning the scope of such application would be a separate issue and it stands on different footing because the question which arises is whether the said provision can halt the action of Financial Corporation u/ S. 29 of SFC Act or the proceedings u/S. 19 of RDB Act.

8. Before advertng to the said issue. it is pertinent to note that u/s 391(6) the relief of stay against the commencement and continuation of suit and proceedings is not available automatically or mechanically upon mere presentation of an application but it is left to the discretion of the Court and the Court has to decide each case judiciously and on its own facts and merits.

Re: The 1956 Act and the RDB Act

9. For the sake of convenience, the rival contentions regarding the RDB Act may be considered first.

9.1 It has been urged on behalf of the applicant that sub-Section (6) of Section 391 of the 1956 Act is in aid of Section 391(1), hence, during pendency of an application u/s 391/394, the stay of proceedings u/s 19 read with Section 17 before the DRT should be granted. In this context it is necessary to note at this stage that in view of the scope of Section 391(1), application(s) seeking sanction in respect of diverse type of Schemes e.g. for amalgamation/merger or for restructuring capital or by way of any other compromise or arrangement, can be made and the Scheme for reconstruction of debt would be only one out of the diverse type of Schemes which can be submitted u/s 391(1).

9.2 Section 391(6) empowers the Company Court to stay, in appropriate case(s), the commencement or continuation of any suit or proceedings against the Company, on such terms that the Court may think fit, until the Scheme is considered and the application is finally disposed of. In this backdrop the earlier mentioned issue, whether the power u/S. 391(6) would touch the proceedings before DRT and whether the same can be stayed by Company Court, would arise.

9.3 The intention and policy of the legislature with regard to Section 391(6) of the 1956 Act is to enable the Company Court to consider the scheme(s), and thereby the desire of the statutory majority, and to independently decide what is in the best interest of the Company and to empower the Company Court to stay, when it may be necessary and justified, the commencement and continuation of such suits and proceedings on such terms and conditions as may be necessary and appropriate, until the application is disposed of.

9.4 However, the Legislature, seems to have also found it necessary and appropriate to address the concern for the recovery of the dues of the FIs and consequently the legislature found it necessary to carve out an exception from the aforesaid position so as to take care of the situation involving Scheme concerning the dues of the FIs which may affect its recovery. Hence, upon considering and noticing the ineffectiveness and inadequacy of existing modes, avenues and procedure for recovery of the dues of FIs, the Legislature enacted the RDB Act and also provided the shield of Section 34 therein and made the statute more comprehensive in 2000 by amending it and including, by virtue of Section 19(19), the obligation to disburse the sale proceeds in accordance with the provisions of Section 529A of the 1956 Act.

9.5 The RDB Act provides, by virtue of Sections 17 to 19, a special Forum viz. DRT, with exclusive jurisdiction and mechanism, for the Banks/FIs to recover the debts expeditiously and without any hindrance or obstacles. This is reflected in the Statement of objects and reasons wherein, it is stated:-

Banks and Financial Institutions at present experience considerable difficulties in recovering loans and enforcement of securities charged with them. The existing procedure for recovery of debts due to the Banks and Financial Institutions has blocked a significant portion of their funds in unproductive assets, the value of which deteriorated with the passage of time..... An urgent need was, therefore, felt to work out a suitable mechanism: through which the dues to the banks and financial institutions could be realised without delay.

9.6 Thus, as a consequence of the provisions under Sections 391(1) and 391(6) of 1956 Act on one hand and Sections 17 to 19 of RDB Act on the other hand two parallel proceedings in two judicial fora may come face-to-face when a bank or FI may initiate any recovery proceedings against a debtor Company while a scheme (more particularly in case of Scheme for debt restructuring) is submitted u/s 391/394 and is under consideration before the Company Court or when FI's application before the DRT is pending against a debtor Company and such

Company submits a scheme (particularly scheme for restructuring debt) under Sections 391/394 for the consideration by the Court and also prefers an application u/s 391(6) of 1956 Act.

9.7 At such times competing situation and/or overlapping or conflict between the two proceedings under the two statutes arises, i.e. the question as to which one can have precedence over the other, arises. It would be so for the reason that the creditor FI would want its application before the DRT decided expeditiously and as per the Scheme and time frame provided u/s 19, whereas the debtor Company would urge that in exercise of the power u/s 391(6) the Company Court may stay the commencement of suit or proceedings while the application and thereby the Scheme, u/s 391 read with Section 394 can be examined by the Company Court.

9.8 The Legislature has, so as to make its intention clear and to emphasise the aforesaid object of the RDB Act, made provision by incorporating Section 34 in RDB Act which, ordinarily, would take care of such situation. By this non-obstante clause, the provisions of RDB Act, including Sections 17 to 19 have been granted overriding effect. The said provision reads thus:-

34. Act to have over-riding effect.____ (1) Save as provided under sub-Section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984) [, the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986).

9.9 The extent of the primacy that the legislature intended to confer on the RDB Act and particularly on Sections 17 to 20, 25 and 28 thereof is evident and becomes clear also from the conjoint reading of the provisions under Sections 18 and 17 which, by cumulative effect, mandate that the DRT shall have plenary and exclusive jurisdiction. The said Sections read thus:-

Section 18. Bar of Jurisdiction. -On and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority(except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution) in relation to the matters specified in Section 17.

Section 17. Jurisdiction, powers and authority of Tribunal. - (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the Banks and Financial Institutions for recovery of debts due to such Banks and Financial Institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

9.10 Thus, as per the Section 18 no Court or authority will, after enactment of RDB Act, have any power or any authority and any Court or authority will not be entitled to exercise any authority or power in the matters pertaining to and incidental and/or ancillary to the recovery of debts of FIs when any application u/s 19 r/w Section 17 is being considered by the DRT. Further, Section 19 prescribes, in detail, exhaustive procedure for deciding the application. The procedure required to be followed for this purpose has been exhaustively laid down in Sections 17 to 20 and Sections 25 to 28 which, conjointly and collectively constitute a complete code in itself. Therefore, a conjoint reading of Sections 17, 18 and 19 read with Sections 25 to 28 of RDB Act paints clear picture of the policy and intention of legislature which is highlighted by Section 34 of the RDB Act.

9.11 In light of the provisions u/s 34 read with Sections 18 and 17, the objector SICOM would submit that the RDB Act will have overriding effect over 1956 Act while the applicant counters claiming that the RDB Act can have overriding effect only in the event of inconsistency which could arise if the statutes operate in the same field. It is claimed that the questions which ought to be addressed to determine whether there is any inconsistency between the statutes, as held by the Hon''ble Apex Court in the case between Kishorebhai Khamanchand Goyal Vs. State of Gujarat and Another, , are: (a) whether there is a direct conflict between two provisions, (b) whether the Legislature intended to lay down any exhaustive mode in respect of the subject matter replacing the earlier law, and (c) whether the two laws occupy the same field. Reference is also made to the judgment of the Hon''ble Apex Court in the case between Municipal Council v. T. J. Joseph (supra) and the judgment in the case between Municipal Corporation of Delhi v. Shivshankar (supra).

9.12 It is, thus, appropriate at this stage to take into consideration the diverse situations with regard to the overriding effect of one statute over another and/or the effect of non- obstante clause in one of the two statutes or in both statutes, which have been examined by the Apex Court and other High Court.

9.13(a) In the judgment in the case between Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another, the Hon''ble Apex Court considered the situation between Sick Industrial Company''s Special Provisions Act, 1985 (SICA for short) and the Interest on Delayed Payments to Small Scale and Ancillary Industrial Undertaking Act, 1993. After comparing the provisions under the said two statutes, the Apex Court held that:-

24. Both the Acts operate in different fields. If the 1985 Act is attracted, the question of its giving way to the 1993 Act would not arise.

28. Both the Acts contain non-obstante clauses. Ordinary rule of construction is

that where there are two non-obstante clauses, the latter shall prevail. But it is equally well settled that ultimate conclusion thereupon would depend upon the limited context of the statute.

31. The endeavour of the Court would, however, always be to adopt a rule of harmonious construction.

(emphasis supplied).

9.13(b) In the said judgment, the Apex Court also referred to para 41 and 49 from the judgment in the case between NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another, , wherein it is held that:-

41. It is difficult to accept the submission of the learned Counsel appearing on behalf of the respondents that both the Company Court and BIFR exercise concurrent jurisdiction. If such a construction is upheld, there shall be chaos and confusion. A Company declared to be sick in terms of the provisions of SICA, continuous to be sick unless it is directed to be wound up. Till the Company remains a sick Company having regard to the provisions of sub-Section (4) of Section 20, BIFR alone shall have jurisdiction as regards sale of its assets till and order of winding up is passed by a Company Court.

49. Section 32 of SICA contains a non obstante clause stating that provisions thereof shall prevail notwithstanding anything inconsistent with the provisions of the said Act and of any rules or schemes made thereunder contained in any other law for the time being in force. It would bear repetition to state that in the ordinary course although the Company Judge may have the jurisdiction to pass an interim order, in exercise of its inherent jurisdiction or otherwise directing execution of a deed of sale in favour of an applicant by the Company sought to be wound up, but keeping in view the express provisions contained in sub-Section (4) of Section 20 of SICA such a power, in our opinion, in the Company Judge is not available.

(Emphasis supplied)

9.13(c) In M/s. Bakemans Industries Pvt. Ltd. v. M/s. New Cawnpore Flour Mills and Ors. 2008 (6) ALL Mr. 463 the Apex Court held that:-

39. The 1951 Act indisputably is a special statute. If a Financial Corporation intends to exercise a statutory power u/s 29 of the 1951 Act, the same will prevail over the general powers of the Company Judge under the Companies Act.

(Emphasis supplied)

9.13(d) In the judgment in the case between Ashok Organic Industries Ltd. v. ARCIL (supra) the High Court considered maintainability of an application seeking sanction for the scheme of arrangement when reference before BIFR was pending, and observed that:-

15. In any event Section 32 (the non obstante provision) of the SICA 1985 will

have the effect of SICA 1985 overriding Sections 391-394 of the companies Act, 1956.

18. Considering the above we have to hold that once the industrial Company makes a reference u/s 15 of the SICA, the Company Court would have no jurisdiction for sanctioning the scheme of arrangement of compromise with its creditors and shareholders and neither will it have jurisdiction to take cognisance of such an application during the pendency of the reference.

(Emphasis supplied).

9.13(e) In the case between Tata Motors Ltd. v. Pharmaceutical Products of India Ltd. and Anr., the Apex Court held that:-

19..... The provisions of a special Act will override the provisions of a general Act. A later of it will override an earlier Act. 1956 Act is a general Act. It consolidates and restates the law relating to companies and certain other associations. It is prior in point of time to SICA. (Emphasis supplied).

Whenever any inconsistency is seen in the provisions of the two Acts, SICA would prevail. SICA furthermore is a complete code. It contains a non-obstante clause in Section 32.

20. SICA is a special statute. It is a self contained Code. The jurisdiction of the Company Judge in a case where reference had been made to BIFR would be subject to the provisions of SICA.

22..... It is also not possible to harmonize the provisions of Sections 391 to 394 of the 1956 Act with the provisions of SICA.

9.13(f) The Apex Court considered the effect of non-obstante clause and overriding effect between Sick Industrial Companies (Special Provisions) Act, 1985 ("SICA" for short) and SFC Act in the case between Maharashtra Tubes Ltd. and State Industrial Investment Corporation of Maharashtra Ltd., (supra). The Hon"ble Apex Court considered the scope and effect of S. 29 and/or 31 of SFC Act and S. 22 of SICA in the backdrop of the issue whether in a case where an industrial concern makes any default in repayment of any loan or advance or any instalment thereof or otherwise fails to meet its obligations under the terms of any agreement with the Financial Corporation, such as the respondent herein, can the latter take recourse to Sections 29 and/or 31 of the State Financial Corporations Act, 1951 (hereinafter called the "1951 Act") notwithstanding the bar of Section 22 of the SICA. The Apex Court has observed that:-

5.....It is thus clear from the provisions of this law that its primary objective is to provide an impetus to industrialisation by providing through a statutory Corporation financial assistance to industrial concerns and incidental power to take over is given and summary procedures have been laid down by Sections 29 and 31 for the realisation of its dues from defaulting industrial concerns. The power conferred by Section 29 and the remedy provided in Section 31(1) is not

the underlying object and purpose of the statute, the real objective of the law is to create an instrumentality through which financial assistance can be extended to deserving entrepreneurs. This is the main purpose, scope and object of this special law.

6. On the other hand, the 1985 Act was enacted, as its preamble manifests, with a view to timely detection of sick or potentially sick companies owning industrial undertakings, the identification of the nature of sickness through experts in relevant fields with a view to devising suitable remedial measures through appropriate schemes and their expeditious implementation....

7. It will be seen from the above discussion that both the 1951 Act and the 1985 Act are special statutes, each having a different objective, the emphasis in the case of the former being on giving of financial assistance to entrepreneurs for setting up industries while in the case of the latter it being to revive or rehabilitate industries which have on account of economic or other related reasons gone sick. No doubt the latter Act also contemplates giving of financial assistance for revival or rehabilitation of a sick industrial undertaking but that is by way of a remedy or as a measure at revival of the sick unit.

(Emphasis supplied)

After considering the various aspects, and particularly the objectives and the field of operation of the two statutes and the concept of earlier and latter Statute and the non-obstante clause, the Hon"ble Apex Court held;

9. Having reached the conclusion that both the 1951 Act and the 1985 Act are special statutes dealing with different situations ---- the former providing for the grant of financial assistance to industrial concerns with a view to boost up industrialisation and the latter providing for revival and rehabilitation of sick industrial undertakings, if necessary, by grant of financial assistance, we cannot uphold the contention urged on behalf of the respondent that the 1985 Act is a general statute covering a larger number of industrial concerns than the 1951 Act and, therefore, the latter would prevail over the former in the event of conflict. Both the statutes have competing non obstante provisions. Section 46-B of the 1951 Act provides that the provision of that statute and of any rule or order made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force whereas Section 32(1) of the 1985 Act also provides that the provisions of the said Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law. Section 22(1) also carries a non obstante clause and says that the said provision shall apply notwithstanding anything contained in Companies Act, 1956 or any other law. The 1985 Act being a subsequent enactment, the non obstante clause therein would ordinarily prevail over the non obstante clause found in Section 46-B of the 1951 Act unless it is found that the 1985 Act is a general statute and the 1951 Act is a special one. In that event the maxim generalia specialibus non derogant would apply. But in the

present case on a consideration of the relevant provisions of the two statutes we have come to the conclusion that the 1951 Act deals with pre-sickness situation whereas the 1985 Act deals with the post-sickness situation. It is, therefore, not possible to agree that the 1951 Act is a special statute vis-a-vis the 1985 Act which is a general statute. Both are special statutes dealing with different situations notwithstanding a slight overlap here and there, for example, both of them provide for grant of financial assistance though in different situations. We must, therefore, hold that in cases of sick industrial undertakings the provisions contained in the 1985 Act would ordinarily prevail and govern. (Emphasis supplied)

It is pertinent that in this case after noticing that both special statutes dealt with different situations, the Apex Court held that 1985 being subsequent enactment would prevail over non-obstante clause of earlier statute i.e. of 1951 Act.

10. So far as the RDB Act is concerned, while considering the provisions u/s 446 and Section 537 of 1956 Act vis-a-vis the RDB Act in the case between Andhra Bank and Canara Bank, the Apex Court held that even if the 1956 Act is considered to be a special statute, it is the RDB Act which will prevail in the event of inconsistency.

10.1 Subsequently, the High Court of Bombay in Re: IMP Powers Ltd v. Respondent, in light of the judgment of the Hon"ble Apex Court in Allahabad Bank's case, has held that:-

8. The submission of learned Counsel for the petitioner is that the powers of the High Court under Sections 391 and 394 are untrammelled by the provisions of the RDB Act because Section 391 does not make a distinction between classes of creditors. Hence, it is urged that u/s 394, the High Court has the power to sanction a compromise or arrangement which has the effect of modifying any contract and once the contract with the secured creditors is so modified, the Debts Recovery Tribunal would necessarily be bound to enforce the terms of the modified arrangement. The submission cannot be accepted for more than one reasons. First and foremost, in the judgment in Allahabad Bank v. Canara Bank 2000 101 Comp Case 64 the Supreme Court affirmed the view taken by several High Courts which was to the effect that the Companies Act, 1956 is a general enactment which will give way to the special provisions contained in the RDB Act which is enacted to ensure speedy and expeditious adjudication and realisation of debts due to banks and Financial Institutions. Secondly, in the exercise of powers conferred by Section 17 of the RDB Act, the Debts to adjudication, execution and working out priorities. Thirdly, the process of adjudication into the debt due to IndusInd Bank has already been set in motion by the institution of the proceedings under the RDB Act. The sanctioning of the scheme under Sections 391 to 394 will unquestionably dilute the full and plenary powers conferred under the Tribunal under the RDB Act to adjudicate upon the claim of the bank as presented. Fourthly, the exercise of powers of the Company Court in matters which fall within the ambit of the jurisdiction of the Debts Recovery)" Tribunal,

would clearly amount to curtailing the jurisdiction of the Tribunal to adjudicate upon the claim of recovery submitted before the Tribunal.

(emphasis supplied)

11. Hence, in view of the fact that the RDB Act is a special statute as compared to 1956 Act and is also a latter statute as against the 1956 Act and is also conferred with non-obstante clause, the RDB Act would override the provisions of 1956 Act. However, in view of the applicant's contention that the 1956 Act operates in different field as against the SFC Act and/or RDB Act, occasion of RDB Act overriding the 1956 Act does not arise, the question, which comes out is whether overlapping or conflict may arise between statutes which may be operating in different fields.

11.1 The answer emerges from the observations of the Hon'ble Apex Court in the judgments where the rival contentions raised with reference to the two statutes which operate in different field and/or have different objective and/or have non-obstante clause, have been considered. The following observations from the decisions of the Apex Court help in appreciating such situation.

11.1(a) While considering the controversy which arose in light of the provisions of Public Premises (Eviction of Unauthorised Occupants) Act, 1971 and Delhi Rent Control Act. 1958 the Apex Court has, in the case between, Jain Ink Manufacturing Company Vs. Life Insurance Corporation of India and Another, , held that:-

7. It is true that in both the Acts there is a non-obstante clause but the question to be determined is whether the non-obstante clauses operate in the same field or have two different spheres though there may be some amount of overlapping.

8. In the light of the principles laid down in the aforesaid cases, we would test the position in the present case. So far as the Premises Act is concerned, it operates in a very limited field in that it applies only to a limited nature of premises belonging only to particular sets of individuals, a particular set of juristic persons like companies, corporations or the Central Government. Thus, the Premises Act has a very limited application. Secondly the object of the Premises Act is to provide for eviction of unauthorized occupants from public premises by a summary procedure so that the premises may be available to the authorities mentioned in the Premises Act which constitute a class by themselves.

9. Thus, it would appear that both the scope and the object of the Premises Act is quite different from that of the Rent Act. The Rent Act is of much wider application than the Premises Act inasmuch as it applies to all private premises which do not fall within the limited exceptions indicated in Section 2 of the Premises Act. The object of the Rent Act is to afford special protection to all the tenants or private landlords or landlords who are neither a Corporation nor Government or Corporate Bodies. It would be seen that even under the Rent Act, by virtue of an amendment a special category has been carved out under S.25B

which provides for special procedure for eviction to landlords who require premises for their personal necessity. Thus, S. 25B itself becomes a special law within the Rent Act. On a parity of reasoning, therefore, there can be no doubt that the Premises Act as compared to the Rent Act, which has a very broad spectrum is a special Act and override the provisions of the Rent Act.

(Emphasis supplied)

In the said judgment, although the Apex Court noticed that, both the scope and the object of the Premises Act is quite different from that of the Rent Act, the Apex Court held that the Premises Act being Special Act would override the provisions of the Rent Act.

11.1(b) Subsequently, in the judgment in the case between Ashoka Marketing Ltd. and another Vs. Punjab National Bank and others, it has been observed that,

This indicates that the object underlying the Rent Control Act is to make provisions for expeditious adjudication of dispute between the landlords and tenants, determination of standard rent payable by tenants and giving protection against eviction to tenants. The premises belonging to the Government are excluded from the ambit of the Rent Control Act which means that the Act has been enacted primarily to regulate the private relationship between landlords and tenants with a view to confer benefits on the tenants and at the same time to balance the interest of the landlords by providing for expeditious adjudication of proceedings between landlords and tenant.

The Apex Court further observed that,

This shows that the Public Premises Act has been enacted to deal with mischief of rampant unauthorised occupation of public premises by providing a speedy machinery for the eviction of persons in unauthorised occupation. In order to secure this object the said Act prescribed the time period for the various steps which are required to be taken for security eviction of the persons in unauthorised occupation. The object underlying the enactment is to safeguard public interest by making available for public use premises belonging to Central Government, Companies in which the Central Government has substantial interest, Corporations owned or controlled by the Central Government and certain autonomous bodies and to prevent misuse of such premises.

(Emphasis supplied)

Having, thus, noticed the objectives of the two statutes, the Apex Court held that,

In our opinion, therefore, keeping in view the object and purpose underlying both the enactments viz., the Rent Control Act and the Public Premises Act, the provisions of the Public Premises Act have to be construed as overriding the provisions contained in the Rent Control Act.

As regards the non-obstante clauses contained in Sections 14 and 22 and the provisions contained in Sections 50 and 54 of the Rent Control Act, it may be

stated that Parliament was aware of these provisions when it enacted the Public premises Act containing a specific provision in Section 14 barring jurisdiction of all Courts(which would include the Rent Controller under the Rent Control Act). This indicates that Parliament intended that the provisions of the Public Premises Act would prevail over the provisions of the Rent Control Act in spite of the above mentioned provisions contained in the Rent Control Act.

(emphasis supplied)

and after having noticed the differences between the two statutes, the Apex Court held that the Public Premises Act would prevail over the Rent Control Act.

11.1(c) The Hon"ble Apex Court also considered an earlier decision in the case between Kumaon Motor Owners" Union Ltd. and Another Vs. The State of Uttar Pradesh, wherein also, has recorded in para 58 that,

58..... there was conflict between the provisions contained in R. 131(2)(gg) and (i) of the Defence of India Rules, 1962 and Chapter IV-A of the Motor Vehicles Act, 1939. S. 68B gave overriding effect to the provisions of Chapter IV(A) of the Motor Vehicles Act whereas S. 43 of the Defence of India Act, 1962, gave overriding effect to the provisions contained in the Defence of India Rules. This Court held that the Defence of India Act was later than the Motor Vehicles Act and, therefore, if there was anything repugnant, the provisions of the later Act should prevail. This Court also looked into object behind the two statutes, namely, Defence of India Act and Motor Vehicles Act and on that basis also it was held that the provisions contained in the Defence of India Rules would have an overriding effect over the provisions of the Motor Vehicles Act.

(emphasis supplied)

Accordingly after comparing the situation arising in light of provisions of two statutes having different object viz. Defence of India Act and Motor Vehicles Act, the Apex Court held that provisions of Defence of India Act will have overriding effect. Here also the controversy was resolved by considering the object of the statute.

11.1(d) In the judgment in the case between Shri Ram Narain v. The Simla Banking and Industrial Company Ltd. 1956 SC 614, the Apex Court considered the provisions under Banking Companies Act, 1949 and Displaced Persons (Debt Adjustment) Act, 1951 and held that:-

On the other hand, if the rule as to the later Act overriding an earlier Act is to be applied to the present case, it is the Banking Companies (Amendment) Act, 1953, that must be treated as the later Act and held to override the provisions of the earlier Displaced Persons (Debt Adjustment) Act, 1951. It has been pointed out, however, that Section 13, Displaced Persons (Debt Adjustment) Act, uses the phrase "notwithstanding anything inconsistent therewith in any other law for the time being in force" and it was suggested that this phrase is wide enough to relate even to a future Act if in operation when the overriding effect has to be

determined.

But it is to be noted that Section 45-A, Banking Companies Act has also exactly the same phrase. What the connotation of the phrase, "for the time being" is and which is to prevail when there are two provisions like the above each containing the same phrase, are question which are not free from difficulty. It is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two Acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein. (Emphasis supplied)

The Hon"ble Apex Court has thus held that it is desirable to determine the overriding effect in light of the purpose and policy underlying the two Acts and the intention conveyed by the language.

11.1(e) In the judgment in the case between *Solidaire India Ltd. Vs. Fairgrowth Financial Services Ltd. and Others*, the Apex Court considered the provisions under Special Court (Trial of Offence Relating to Transactions and Securities) Act, 1992 vis-a-vis the Sick Industrial Companies (Special Provisions) Act, 1986, and held that:-

9. It is clear that both these Acts are Special Acts. This Court has laid down in no uncertain terms that in such an event it is the later Act which must prevail.

In the judgment, the Hon"ble Supreme Court considered the scope of the provisions of the two statutes and observed that:-

The whole aim of these provisions is to ensure that monies which are siphoned off from Banks and Financial Institutions into private pockets are returned to the banks and financial institutions. The time and manner of distribution is to be decided by the Special Court only. u/s 22 of the 1985 Act, recovery proceedings can only be with the consent of the Board for Industrial and Financial Reconstruction or the Appellate Authority under that Act. The Legislature being aware of the provisions of Section 22 under the 1985 Act still empowered only the Special Court under the 1992 Act to give directions to recovery and to distribute the assets of the notified persons in the manner set out u/s 11(2) of the 1992 Act. This can only mean that the Legislature wanted the provisions of Section 11(2) of the 1992 Act to prevail over the provisions of any other law including those of the Sick Industrial Companies (Special Provisions) Act, 1985.

(emphasis supplied)

Having noticed the provisions under the two statutes, the Apex Court further observed that:--

It is clear that the Legislature intended that public monies should be recovered first even from sick companies. Provided the sick Company was in a position to first pay back the public money, there would be no difficulty in reconstruction. The Board for Industrial and Financial Reconstruction whilst considering the

scheme for reconstruction has to keep in mind the fact that it is to be paid off or directed by the Special Court. The Special Court can, if it is convinced, grant time or installments. There can, therefore, be no stay of any proceedings for recovery against a sick Company so far as the Special Court under the 1992 Act is concerned.

(Emphasis supplied)

In the said judgment, it is further observed that,

The Special Court (Trial of Offences Relation to Transactions in Securities) Act, 1992, provides in Section 13, that its provisions are to prevail over any other Act. Being a later enactment, it would prevail over the Sick Industrial Companies (Special Provisions) Act, 1985. Had the Legislature wanted to exclude the provisions of the Sick Companies act from the ambit of the said Act. the Legislature would have specifically so provided. The fact that the Legislature did not specifically so provide necessarily means that the Legislature intended that the provisions of the said Act were to prevail even over the provisions of the Sick Companies Act.

11.1(f) In the case between Ashoka Marketing Ltd. (supra) the Apex Court referred to the judgment in the case between The J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh and Others, and observed in paragraph 51 of the judgment that,

The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of man and the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only Some of them his intention is that these latter directions should prevail as regards thesewhile as regards all the rest the earlier directions should have effect.

11.2 In the above referred judgments the Apex Court noticed that the object and/or the legislative policy of the respective statutes (which were under consideration in the cases on hand) were different, however, in view of the non-obstante clause obtaining either in both or in one of the two statutes, the Apex Court held, in light of the recognised principles, that one (i.e. the special statute or the later statute) will override the other (i.e. the general statute or earlier statute).

12. As held by the Hon''ble Apex Court in the case of M/s. Jain Ink Manufacturing Company (supra) as well as in Ashoka Marketing Ltd. (supra) and Kamaon Motor Owners'' Union Ltd. (supra), where the scope, the legislative policy and object of the respective statutes are different, the question of one statute overriding the other may arise more so when both or one of the two statutes are/is conferred with non-obstante clause and in such circumstances, it is, as held in Shri Ram Narain v. The Simla Banking and Industrial Company Ltd. (supra) desirable to

decide the overriding effect of one or the other on much broader consideration of purpose, object and policy underlying the statutes and the intendment of the relevant provisions. Hence, in the facts of present case, it is necessary and desirable to decide the position between the 1956 Act on one hand and the SFC Act and the RDB Act on the other hand and the overriding effect of one or the other in the light of the above referred judicial pronouncement and on the touchstone of the purpose and policy underlying the statutes and the intendment of the relevant provisions.

13. When considered from the said perspective, it can be seen that the object of Section 391(6) is, as aforesaid, to enable the Court to consider the scheme(s), and thereby the desire of the statutory majority and to independently decide the interest of the Company and also to empower the Company Court to stay the commencement and continuation of such suits and proceedings when it may be necessary and justified and on such terms and conditions as may be necessary and appropriate, until the application is decided.

13.1 Whereas, the legislative policy and object of the RDB Act is, as spelt out from its preamble, expeditious adjudication of all matters which are incidental or ancillary to and connected with the adjudication and recovery of the dues of FIs and of working out the priorities. The legislature has created special forum viz DRT for such purpose who shall exercise plenary jurisdiction in the matter of and in the process of adjudication, working out priorities and execution of recovery.

13.2 Thus, on one hand the sub-Section 6 of Section 391 empowers the Company Court to stay the commencement or continuation of any suit or proceedings when an application, and thereby any scheme, is pending consideration before the Company Court, whereas on the other hand the legislative policy and object of the RDB Act is to ensure quick and unhindered adjudication as well as recovery of the FI's claims for more than Rs. 10 Lacs, and by virtue of Section 34 it is emphasised that the provisions will have overriding effect. 13.3 It is at such juncture and in such situation that competing situation or overlapping between the two proceedings under two statutes arise and thereby the two legislative policies and the objects of the two statutes viz. one in respect of the scheme under Sections 391/394 read with Section 391(6) of the 1956 Act and the other one engrafted in Sections 17 to 19 of RDB Act, come face to face, overlap and get crossed and at such stage and in such situation the question as to which one should give way and which one should prevail, arise. It is situations like this which, as held by the Apex Court, need to be decided by considering the purpose, policy and object underlying the statutes and also the intendment of relevant provisions.

13.4 In view of the observations of the Hon'ble Supreme Court in the judgment in the case of Andhra Bank that.... on questions of adjudication, execution and working out the priorities, the special provisions made in RDB Act have to be applied and that no dual jurisdictions at different stages are contemplated, it follows that anything i.e. any procedure or any action or order concerning any

stage of the proceeding, which fall in between the said three terminal points, would also be within the plenary and exclusive jurisdiction of the Tribunal.

13.5 Thus, in light of the purpose and policy of the statutes and the intendment of the provisions under Sections 17 to 19 of RDB Act and Section 391(6) r/w Section 391(1) of 1956 Act, the legislative intention is that the proceedings u/s 19 r/w Section 17 before the Tribunal can not be delayed or obstructed or regulated by any Court (excluding the Supreme Court and the High Court under Article 226).

13.6 On this count, the below mentioned features, besides the earlier mentioned object and legislative policy of the RDB Act acquire relevance and prominence.

13.6(a) The RDB Act is a special and also a latter statute vis-a-vis the 1956 Act.

13.6(b) Besides the aforesaid two crucial aspects the RDB Act is also conferred with non-obstante clause which even otherwise, gives overriding effect to the provisions whereas the 1956 Act is a general and earlier statute.

13.6(c) It is also pertinent that by virtue of the provision in Section 1(4) the Legislature has set pecuniary jurisdiction for the Tribunal which provides that the Tribunal will exercise jurisdiction in those matters where the claim is of more than Rs. 10 Lacs. The legislature has, thus, placed such claims/dues of FIs in a different league and thereby conferred extra priority to all direct and incidental or ancillary matters connected with the adjudication and the recovery of the dues of FIs.

13.6(d) By enacting the RDB Act and inserting Section 18 and the non-obstante clause (Section 34) even while the Section 391(6) existed, the legislature has created an exception qua the exercise of power u/s 391(6) by the Company Court or placed the matters of the dues of FIs outside the reach of Company Court's power u/s 391(6).

13.6(e) Section 391(6) is not framed in the same manner or with similar scope and effect i.e. is not as wide and sharp as Section 22 of SICA or even Section 446 or Section 537 of the 1956 Act.

13.6(f) The RDB Act came to be enacted and brought in force w.e.f. 27.8.1993 i.e. after the 1956 Act which contains, by virtue of sub-Section (6) of Section 391, the power to stay the commencement or continuation of any suit or proceedings against the Company and yet the provisions under Sections 18 and 19 and Section 34 came to be incorporated in the RDB Act in 1993 and the RDB Act came to be further amended in 1995 (by Act 28 of 1995) and then in 2000 (by Act 1 of 2000) when sub-Section (19) of Section 19 also came to be added and still the said provision i.e. sub-Section (6) of Section 391 of the 1956 is not included in the purview of subSection (2) of Section 34 of RDB Act.

Differently put, despite the fact that the provision u/s 391(6) was in existence at the time of enactment of Sections 18, 19 and 34 of RDB Act, the Section 391(6)

is not taken under the protective umbrella of Section 34 (2) and it is not saved, like the other six statutes which have found place in Sub-Section(2), from the effect of the provisions of RDB Act and its overriding effect.

13.6(g) From the non-inclusion Section 391(6) of the 1956 Act in the list of the statutes included in sub-Section 2 of Section 34 coupled with the exclusion of the entire family of Sections 391 to 394, particularly Section 391(6) from Section 19 (though Section 529A has been included in the fold of Section 19(19) of the Act) and/or sub-Section 2 of Section 34 it is clear that though the legislature was aware about Section 391(6) it still conferred plenary powers on DRT and also provided Sections 17 to 19 and 34 therein. This also discloses that the legislature wanted the said provisions of RDB Act to prevail and if the legislature did not want the said provisions to prevail, it would have so provided in the RDB Act. In *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. and Ors.* (supra) the Apex Court has observed:-

Where there are two special statutes which contain non obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non obstante clause. If the Legislature still confers the later enactment with a non obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply (emphasis supplied)

13.6(h) The later enactment of the RDB Act and provision in the nature of Section 18 and Section 34 (r/w the statement of objects and reasons) are the clear pointers of the legislature's intention to ensure elimination of the mischief it felt acute viz. the delays (including procedural) in adjudication, working out of priorities and recovery of dues of Banks/FIs.

14. In view of this Court, the aforesaid features are sufficient indication of the policy and intention of Legislature that the plenary power of DRT is not to be curtailed and/or regulated by the Company Court's power u/s 391(6). The provisions under Sections 17 to 19 read with Section 34 of RDB Act clearly indicate the legislative intent that DRT shall exercise exclusive jurisdiction in the matters of adjudication and working out of priorities and recovery of the dues of Banks/FIs as well as in all incidental and ancillary matters.

15. At this stage, it is appropriate and necessary to refer to what the Hon'ble Apex Court has held, in the *Andhra Bank* case with regard to the RDB Act and its overriding effect with reference to the 1956 Act. It has been held:-

In our opinion the jurisdiction of the Tribunal in regard to adjudication is exclusive. The RDB Act requires the Tribunal alone to decide applications for recovery of debts due to banks or financial institutions.

....Under Section 18 the jurisdiction of any other Court or authority which would

otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to adjudicate upon the liability is exclusively vested in the Tribunal.

Then in para 23 of the judgment it has been further held that:-

Even in regard to execution the jurisdiction of the recovery officer is exclusive and it is not the intendment of the Act that while the basic liability of the defendant is to be decided by the Tribunal u/s 17, the Banks/Financial Institution should go to the Civil Court or the Company Court or to some other authority outside the act for the actual realization of the amount and and. It is further held - "No dual jurisdictions at different stages are contemplated. Further, Section 34 of the act gives overriding effect to the provisions of the RDB Act.

thus. the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of the Tribunal and the recovery officer and no other Court or authority much less the civil Court of Company Court can go into the said questions relating to the liability and the recovery except as provided in the Act.

While considering the issue whether the Company Court can u/s 442 stay the proceedings before the Tribunal or the recovery officer and whether the Company Court can u/s 537 stay proceedings, the Honble Apex Court held that:-

If the jurisdiction of the Tribunal is exclusive the Company Court cannot also use its powers u/s 442 against the Tribunal/recovery officer. Thus Sections 442 446 and 537 cannot be applied against the Tribunal.

In para 34 of the judgment it is also held that:-

...It was intended that there should be speedy and summary remedy for recovery of thousands of crores which will due to the banks and to financial institutions so that the other delays occurring in winding up proceedings could be avoided.

In para 37 of the judgment it is held that:-

...Thus, on questions of adjudication, execution and working out priorities the special provisions made in RDB Act have to be applied

15.1 It emerges from the respective provisions and as a cumulative effect of the aforesaid features and the judicial pronouncements that the proceedings before the DRT cannot be obstructed or interfered with or regulated or eclipsed by Company Court in exercise of power u/s 391(6) and the DRT alone can decide and regulate its procedure and proceedings otherwise the legislative policy and the objective of RDB Act would be frustrated.

This view is fortified by the earlier referred judgment in Re: IMP Powers Ltd. (supra) and also by the judgment in Company Appeal No. 9 of 2005 in MCA No. 84 of 2004 rendered by the Division Bench of High Court of Kerala. It is observed and held in the said judgment that:-

12. It is not necessary to quote similar contentions in the other counter-affidavits and reply affidavits of the parties since the question to be considered is one of jurisdiction to stay the proceedings before the various Tribunals in India as well as in Criminal Courts u/s 138 of the Negotiable Instruments Act. The Supreme Court in *Allahabad Bank V. Canara Bank* (2000) 4 SCC 408 has held that a Company Court has no jurisdiction over the Debt Recovery Tribunals and Recovery Officers even in cases where winding up petitions are pending or winding up order has been made. This Court has only to follow the same. Though the learned senior Counsel for the appellant has argued that in this case we are concerned with an application filed u/s 391(6) of the Companies Act and that question was not under the consideration of the Supreme Court, we do not think that we will be justified in accepting that contention as according to us, the position is not better for the Company when even in winding up proceedings the Company Court has no jurisdiction to stay the proceedings before the Debt Recovery Tribunals.

(emphasis supplied)

15.2 The applicant would also urge that such a construction would frustrate the provisions under the Sections 391(1) and 391(6) of the 1956 Act. Undoubtedly the provisions should be interpreted harmoniously and not in a manner which may render any provision nugatory. However, it is necessary to recall that Section 391 contemplates submission of diverse type of schemes and the scheme for reconstruction of debt is not the only subject or type of scheme which could be submitted u/s 391. By conferring exclusive jurisdiction, by virtue of a later and Special Statute, on the DRT in respect of dues of FIs, the Legislature's intention is to take out from the reach of Sections 391(6) atleast those cases which relate to the dues of FIs, while still continuing the Company Court's jurisdiction to stay the proceedings in respect of other type of suits and/or proceedings, and other type of Schemes i.e. the Schemes which are not relating to the dues of FIs and that therefore the powers of Company Court u/s 391(6) and/or the said provision will not be rendered wholly nugatory as claimed and it is only one particular type of scheme which would remain out of the reach of said provision of 1956 Act.

15.3 Further, it is also pertinent that the platform or the premise of the scheme and particularly its success is an agreement/a contract and the scheme of Sections 391/394 runs on readiness of both sides to alter the contract. Hence, it would be still open to the FI. which is the applicant before the DRT, to join the scheme even during the pendency of the proceedings before the Tribunal and/or even during the pendency of recovery proceedings by the recovery officer if it so intends. The DRT is, by virtue of Section 27 of the RDB Act conferred with jurisdiction to put on hold the proceedings pending before the recovery officer and grant time for the payment of amount. Therefore also it does not appear that the aforesaid construction would frustrate or render the provisions u/s 391(1) and/or Section 391(6) completely nugatory or redundant as claimed more

particularly when it is in respect of only one of the diverse type of Schemes covered u/s 391(1) that this position emerges.

15.4 It also deserves to be mentioned that before the enactment of the RDB Act, the Banks or financial institutions were required to approach Civil Court for recovery of their dues and it was under common law procedure that the proceedings for recovery of dues of banks and financial institutions were being carried out. However, it clearly appears that considering the delay and elaborate procedural requirements, the Legislature thought it necessary and appropriate to take out the subject of recovery of dues of FIs from the fold of civil Court and constituted special Tribunal and clothed it with exclusive jurisdiction to adjudicate the claims of the FIs and to carry out the recovery. This is evident from the statement of objects. So as to ensure smooth, unhindered and quick proceedings, the Legislature also incorporated Section 34.

15.5 It is pertinent that while the matter was within the fold of civil Court and while the civil Court exercised the jurisdiction in such matter i.e. recovery of dues of FIs any provision akin to the provision u/s 34 was not available in the code, thus, it was amendable to the jurisdiction of 391 (6) of 1956 Act but the provisions under Sections 17 to 19 of RDB Act have the aid and power of Section 34 which gives them overriding effect. Hence, the contention that the only change in the position which prevailed prior to enactment of RDB Act is that instead of civil Court, now it is the Tribunal which undertakes the adjudication process in respect of dues of banks and financial institutions and that therefore, the provisions u/s 391(6) of the 1956 Act should be applied with the same vigor and in the same manner as would have been done earlier in respect of civil Court, is not a persuasive and acceptable contention. So far as the other secured creditors are concerned, the legislature has, provided a safety valve by introduction of sub-Section 2 of Section 19 whereby, the Legislature has provided that any other bank or financial institutions which may have any claim against the same debtor against whom one bank/financial institution has already filed an application, then such other bank/financial institution can join the applicant/application at any stage of the proceedings.

15.6 To my mind when the legislature enacts, with a specific object and policy, a statute and creates a special forum thereunder and confers exclusivity to the forum, then the Courts have to not only give effect but also precedence to such special intention and policy of the legislature and the objective of the statute. Hence, the exclusivity of the DRT's jurisdiction in the matters relating to adjudication, working out of priorities and execution of recovery and all incidental and ancillary matters and its plenary power to prescribe and regulate its procedure has to be given precedence over the general principle. Section 391(6) cannot cast its shadow on the proceedings before the DRT and cannot stay the proceedings otherwise it would result into Company Court truncating the powers of DRT and regulating DRT's proceedings.

Re: The 1956 Act and the SFC Act:-

16. Now, coming to the submissions with reference to the SFC Act, the rival contentions have been already taken note of hereinabove, thus, no need to repeat them.

16.1 So far as the relief prayed for in the application against the action u/s 29 of SFC Act and the rival contentions are concerned, it is necessary to mention at the outset that the applicant made payment of Rs. 6,00,000/- to the objector- on 16.6.2008 and that after the said date no payment has been made by the applicant to the objector. It was in view of the applicant's default in keeping the schedule of payment that the objector issued and served the earlier mentioned notice dated 18.7.2008 stating, inter alia, that as on 30th June, 2008 total outstanding was to the tune of Rs. 1,61,74,750/-. Despite the said notice, the applicant did not make any payment.

16.2 Then, almost 5 months after the said notice, the applicant, on or around 24.12.2008, came out with an application u/s 391(1) of the 1956 Act, being Company Application No. 648 of 2008. It deserves to be mentioned that at that stage also (i.e. after 16.6.2008 and until the date of application i.e. 24.12.2008), no payment was made by the applicant since the payment of Rs. 6,00,000 only, made on 16.6.2008.

Thus, the applicant Company filed this application u/s 391(6) and submitted the scheme only after it was served with the notice dated 18.7.2008 under the SFC Act, by the objector.

16.3 Such action [of coming out with applications u/s 391(1) and 391(6) after committing default and upon being served with Section 29 notice] of the applicant would make the Court mindful of the fact that certain ill intending borrowers, who turn defaulter, can very easily take disadvantage of and misuse the provision of Section 391(6) and frustrate the actions of the Financial Corporation to recover its dues by exercising its statutory right u/s 29 of the SFC Act. The provision can be misused by scheming defaulters inasmuch as all those industrial concerns, who avail financial assistance from the Financial Corporation, will, immediately upon initiation of any action by Section 29 of the SFC Act, take recourse u/s 391(1) and after moving an application under that provision also come out with an application u/s 391(6) and seek injunction against the proceedings taken out by the Financial Corporation under the SFC Act. So as to guard against such misuse great caution and restrain in exercise of power u/s 391(6) would be necessary. In present case, the applicant has not paid any amount after 16.6.2008. At the cost of repetition, it needs to be recalled that the applicant presented the scheme in the meeting only on 4.2.2009, however, in the interregnum i.e. after 16.6.2008 and until 4.2.2009, the applicant did not make any payment. Even if one takes a liberal view and instead of marking the date on which the meeting was called for submitting the scheme, takes into account the date on which the first Company Application No. 648 of 2008 was filed i.e. 24.12.2008, then also, the fact emerges that for the period of almost 5 months, the applicant did not make any payment towards its dues to the objector. These

facts are sufficiently eloquent.

16.4 The SFC Act is a special statute and the Financial Corporation created thereunder is empowered, by virtue of Section 29 of the SFC Act, to take such actions against its defaulter as are specified under the said provision. The specified actions include the right to takeover the management or possession or both of the industrial concern as well as the right to transfer by way of lease or sale and to realize the mortgaged or hypothecated property of the industry which turns defaulter and that too without having recourse to the Court. Besides this, the Financial Corporation is also granted an option to take out, u/s 31 of the SFC Act proceedings without prejudice to its right u/s 29 of the SFC Act and Transfer of Properties Act by applying to the District Judge for an order for sale of property or for transferring the management or for an interim injunction against the industry restraining it from transferring or removing its property. The option to decide the course of action which it would want to follow in the given facts of the case is, however, left to the discretion and decision of the Financial Corporation. So far as present case is concerned the objector has opted to resort to its right u/s 29 of the SFC Act and has also filed, on or around 29.1.2009, (as submitted by the applicant) an application u/s 17 read with Section 19 of RDB Act. before DRT.

16.5 In present case the amount outstanding, as on 30.6.2008, was to the tune of Rs. 1,61,74,750/- It is not in dispute that there are at least other two secured creditors who also have large amounts recoverable from the applicant. The total outstanding amount in respect of the objector which was to the tune of Rs. 2839 lacs as on 31.7.2008 mounted to Rs. 3057 lacs as on 4.2.2009 whereas the total outstanding amount in respect of all the three secured creditors which was to the tune of Rs. 11,938 lacs mounted to Rs. 12,605 lacs as on 4.2.2009.

16.6 The dues of the applicant payable to the objector are public money. The applicant is requesting, by this application u/s 391(6) of 1956 Act, for stay against the exercise of statutory right by the Financial Corporation to recover its dues, on the premise that its application/scheme u/s 391(1) read with Section 394 of 1956 Act is pending and that the loan amount has been secured by the charge created at the time when the financial assistance was availed. There are serious differences between the applicant and the objector regarding the proposed scheme, although the scheme is said to have been accepted by the requisite majority of secured creditors in the meeting held on 4th February 2009. In this context it needs to be kept in focus that since the payment last made by the applicant, the interest component over the outstanding amounts mentioned by the Financial Corporation in its notice dated 18.7.2008 must have mounted and in all probability such amounts remain unsecured.

16.7 In this context reference deserves to be made, at this stage, to what the Apex Court has observed with regard to loans by FIs and the need for regular repayment and/or recovery. In U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others, , the Apex Court has observed in para 10 that:-

10. It is true that the appellant Corporation is an instrumentality of the State created under the State Financial Corporations Act, 1951. The said Act was made by the Parliament with a view to promote industrialisation of the States by encouraging small and medium industries by giving financial assistance in the shape of loans and advances, repayable within a period not exceeding 20 years from the date of loan. We agree that the corporation is not like an ordinary moneylender or a Bank which lends money. It is a lender with a purpose - the purpose being promoting the small and medium industries. At the same time, it is necessary to keep certain basic facts in view. The relationship between the Corporation and the borrower is that of creditor and debtor. The corporation is not supposed to give loans once and go out of business. It has also to recover them so that it can give fresh loans to others. The Corporation no doubt has to act within the four corners of the Act and in furtherance of the object underlying the Act. But this factor cannot be carried to the extent of obligating the Corporation to revive and resurrect every sick industry irrespective of the cost involved. Promoting industrialisation at the cost of public funds does not serve the public interest; it merely amounts to transferring public money to private - account. The fairness required of the Corporation cannot be carried to the extent of disabling it from recovering what is due to it. While not insisting upon the borrower to honour the commitments undertaken by him, the Corporation alone cannot be shackled hand and foot in the name of fairness. Fairness is not a one way street, more particularly in matters like the present one. The above narration of facts shows that the respondents have no intention of repaying any part of the debt. They are merely putting forward one or other ploy to keep the Corporation at bay. Approaching the Courts through successive writ petitions is but a part of this game. Another circumstance. These Corporations are not sitting on King Solomon's mines. They too borrow monies from Government or other Financial Corporations. They too have to pay interest thereon. The fairness required of it must be tempered - nay, determined, in the light of all these circumstances. Indeed, in a matter between the Corporation and its debtor, a writ Court has no say except in two situations: (1) there is a statutory violation on the part of the Corporation or (2) where, the Corporation acts unfairly i.e., unreasonably. While the former does not present any difficulty, the latter needs a little reiteration of its precise meaning. What does acting unfairly or unreasonably mean? Does it mean that the High Court exercising its jurisdiction under Art. 226 of the Constitution can sit, as an Appellate Authority over the acts and deeds of the corporation and seek to correct them? Surely, it cannot be. That is not the function of the High Court under Art. 226. Doctrine of fairness, evolved in administrative law was not supposed to convert the writ Courts into appellate authorities over administrative authorities. The constraints - self-imposed undoubtedly - of writ jurisdiction still remain. Ignoring them would lead to confusion" and uncertainty. The jurisdiction may become rudderless.

Then, in the State Financial Corporation and Another v. M/s. Jagdamba Oil Mills and Another (supra) and Haryana Financial Corporation and Another Vs.

Jagdamba Oil Mills and Another, the Apex Court has observed that:-

6. The Corporation as an instrumentality of the State deals with public money. There can be no doubt that the approach has to be public oriented. It can operate effectively if there is regular realization of the instalments. While the Corporation is expected to act fairly in the matter of disbursement of the loans, there is corresponding duty cast upon the borrowers to repay the instalments in time, unless prevented by unsurmountable difficulties. Regular payment is the rule and non-payment due to extenuating circumstances is the exception. If the repayments are not received as per the scheduled time frame, it will disturb the equilibrium of the financial arrangements of the Corporations. They do not have at their disposal unlimited funds. They have to cater to the needs of the intended borrowers with the available finance. Non-payment of the instalment by a defaulter may stand on the way of a deserving borrower getting financial assistance.

16. Section 29 gives a right to the Financial Corporation inter alia to sell the assets of the industrial concern and realize the property pledged mortgaged, hypothecated or assigned to the Financial Corporation. This right accrues when the industrial concern which is under a liability to the Financial Corporation under an agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations as envisaged in Section 29 of the Act. Section 29 (1) gives the Financial Corporation in the event of default the right to take over the management or possession or both and thereafter deal with the property.

and in the case of U.P. Financial Corporation and Others Vs. Naini Oxygen and Acetylene Gas Ltd. and Another, the Apex Court has observed that:

21. However, we cannot lose sight of the fact that the Corporation is an independent autonomous statutory body having its own constitution and rules to abide by, and functions and obligations to discharge. As such, in the discharge of its functions, it is free to act according to its own light. The views it forms and the decisions it takes are on the basis of the information in its possession and the advice it receives and according to its own perspective and calculations. Unless its action is mala fide, even a wrong decision taken by it is not open to challenge. It is not for the Courts or a third party to substitute its decision, however more prudent, commercial or businesslike it may be, for the decision of the Corporation. Hence, whatever the wisdom (or the lack of it) of the conduct of the Corporation, the same cannot be assailed for making the Corporation liable.

16.8 The above observations by the Apex Court are the beacon and are the guidelines which guide in examining the request for stay against FI's action for recovery of its dues, including the action u/S. 29 of SFC Act. Of course, the important distinction in present case is that the relief is prayed for on the strength of provision u/S. 391(1) of 1956 Act and in view of the power u/S. 391(6) of 1956 Act. The applicant's request has to be considered in light of this

position.

16.9 The provisions of SFC Act have been made in public interest and enables the Financial Corporation, by way of expeditious remedy, to take possession and sale the mortgaged assets. The intention of the legislature becomes clear from the nature and scope of the power conferred on the Financial Corporation which include the power to take possession and sale the properties of defaulter, without even recourse to the Court of law. It is pertinent that so as to make things clear, the legislature subsequently inserted the non-obstante clause i.e. Section 46-B in October 1956 which confers overriding effect.

16.10 Apart from conferring such overriding effect to the provisions of the SFC Act, the said Section 46-B also brings out and highlights the intention and policy of the Legislature inasmuch as when conjointly read, the provisions u/s 29, Section 31 and Section 46(B) of the SFC Act make it clear that the Legislature intended to confer special power, in form of statutory right, on the corporation to recover its dues directly and on its own in a manner akin to summary execution/recovery and without having recourse to the suit or such other proceedings in the Court and the legislature also wanted to arrest the abuse or misuse of Section 391(6) of 1956 Act and to ensure unhindered recovery of public money.

16.11 The very fact that such power is conferred on a lender-Corporation is in itself indicative of legislature's intention that such power should operate without obstruction unless so provided by any latter non-obstante clause or by any special provision in a statute, [illustratively speaking Section 529-A of the 1956 Act which came to be inserted in the 1956 Act w.e.f. 24.5.1985 by virtue of Act 35 of 1985 i.e. subsequent to the insertion of Section 46-B in the SFC Act] in which case such latter non-obstante clause or special provision may override the scope of Section 46-B and thereby of Section 29 of SFC Act.

16.12 In this context it is appropriate at this stage to borrow light from what the Apex Court has held with regard to the SFC Act, and more particularly Section 29. Upon taking into consideration the provision u/s 46(B) of the 1956 Act, in Union of India and other v. SICOM Limited and another Civil Appeal No. 7128/2008, the Apex Court, while considering the issue whether realization of central excise duty will have priority over the secured debts in terms of the SFC Act?, has, in light of the principle that secured debt will prevail over crown debt and that the right of the Financial Corporation is a statutory right, held that:-

The non obstante shall not only prevail over the contract but also other laws. See Periyar and Pareekanni Rubbers Ltd. Vs. State of Kerala,

16.13 In this context, the observations of the Apex Court in the case of Bakemans Industries Pvt. Ltd (supra) also are apposite wherein the Apex Court has observed that:

the 1951 Act indisputably is a special statute. If a Financial Corporation intends to exercise a statutory power u/s 29 of the 1951 Act the same will prevail over

the general powers of the Company judge under the companies Act.

16.14 It is pertinent that though Sections 391(1) and 391(6) of 1956 Act were in existence when the Section 46-B came to be included in SFC Act and yet the legislature did not provide for any protection or exclusion [as provided u/S.34(2) of the RDB Act in respect of the 6 statutes specified therein] qua Section 391(6) which means, as noticed earlier while examining the provision of RDB Act, that the legislature wanted the provision of SFC Act to prevail, otherwise the legislature would have made provision conferring protection i.e. saving clause in favour of the Company Court's power u/s 391(6). The conspicuous absence of such protection more particularly in light of the fact that Section 46-B came to be inserted subsequently and at that point of time Section 391(6) already existed, clarifies the legislative intent. It also emerges from this legislative action that the Section 46-B came to be inserted to protect and also aid the purpose and object of Section 29 and to place Section 29 of SFC Act out of the reach of Section 391(6) in like manner as Section 529-A in 1956 Act came to be inserted with inbuilt non-obstante clause so as to impose obligation on the Financial Corporations to share, in accordance with Section 529-A the recovered amounts with the workers while exercising the right u/s 29 of SFC Act. Hence, with and after the insertion of Section 46B (w.e.f. October, 1956), Section 29 of the SFC Act would constitute an exception to the Company Court's power u/s 391(6) to stay the commencement or continuation of any action thereunder.

16.15 The non-obstante clause of Section 46B of the SFC Act has to be given effect to which in turn lends overriding effect to Section 29 as against Section 391(6) of 1956 Act, for the following reasons:- (a) the SFC Act is special statute; whereas the 1956 Act is general statute; (b) the special statute is endowed with non-obstante provision giving the provisions of the SFC Act, overriding effect; (c) such non-obstante provision has been inserted in the special statute after the enactment of the said 1956 Act; (d) while subsequently inserting the non-obstante provision, the already/earlier or pre-existing provision [Section 391(6) of 1956 Act] is not protected or excluded or saved i.e. any exclusion or saving is not conferred or granted in favour of Section 391(6); (e) even otherwise the very wide and unhindered right granted to Financial Corporation to realise the security without even resorting to Court is indicative of the intention and policy that the FI's action u/S. 29 of the SFC Act should not be obstructed in exercise of power of Section 391(6);(f) conferment of such wide and unhindered power on corporation to enable it to effect recovery of its dues demonstrates and highlights the anxiety of the legislature for effective and quick or unobstructed recovery of dues otherwise legislature would not have conferred such wide power on Corporation, (g) and more importantly the legislature cannot be presumed to have granted, on one hand, such wide power and on other hand taken away its efficacy or the edge or made it blunt and dependent upon discretion of Company Court by way of Section 391(6), (h) so as to remove the doubt and curb any abuse, the legislature immediately after the effective date of 1956 Act (i.e. 1.4.1956) inserted-included Section 46-B in SFC Act.

16.16 Consequently, I am inclined to hold, in light of earlier discussion with regard to the scope and effect of non-obstante clause that when the legislature has, in the public interest conferred such special power on the corporation coupled with a provision having non-obstante clause, it would not be in consonance with the provisions or the legislative policy to hold that such exercise of the statutory right u/S. 29 can be interfered with by the Company Court in exercise of the power u/s 391(6).

17. On the overall consideration of the matter and in view of the above discussion and conclusions, I am of the view that in the facts and circumstances of the case, the reliefs prayed for do not deserve to be granted and I am not inclined to grant the relief either qua the Section 19 proceedings under RDB Act or qua the proposed action u/S. 29 of SFC Act. The application fails and deserves to be rejected. Consequently, the application is hereby rejected. Ad-interim relief granted earlier stands vacated.

18. It is necessary to mention that pursuant to the order passed by the Hon''ble the Chief Justice a day before the date on which the summer vacation was to commence this matter came to be placed before me (as it was earlier heard at length) and upon reopening of the Court, after the summer vacation, as per the changed roaster I was to sit in Division Bench. Therefore, I could undertake the hearing/dictation of the judgment only on the dates on which the Division Bench did not assemble and I could sit as Single Judge. Hence the dictation of judgment has spread over different dates.

19. At this stage, request for continuing the ad-interim relief granted earlier has been made on the ground that it has continued until now. Ms. J.M.Joshi for Mr. Sanjay A. Mehta has opposed the request. Considering the facts of the case, ad-interim relief granted earlier will continue until 25th September, 2009.