

(2010) 02 GUJ CK 0006

In the Gujarat High Court

Case No : O.J. Appeal No's. 67 and 109 of 2009

Mafatlal Denim Ltd.

APPELLANT

Vs

Sicom Ltd.

RESPONDENT

Date of Decision : 25-02-2010

Acts Referred:

Companies Act, 1956 — Section 391(6)

Constitution of India, 1950 — Article 226, 227

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 19, 34

State Financial Corporations Act, 1951 — Section 29

Citation : (2010) 2 GLH 167 : (2011) 107 SCL 443

Hon'ble Judges : Bhagwati Prasad, J; Bankim N. Mehta, J

Bench : Division Bench

Advocate : Mihir Thakore, S.N. Soparkar, Mihir Joshi and A.L. Shah, for the Appellant;

Judgement

Bhagwati Prasad, J.—These two appeals which are being decided by this common judgment, are filed against the decision in Company Application No. 1 of 2009 in Company Application No. 648 of 2008 rendered by learned Company Judge by oral judgment dated 7-8-2009, 26-8-2009, 28-8-2009 and 31-8-2009. One appeal, i.e., Appeal No. 67 of 2009 has been filed by Mafatlal Denim Ltd., which was the applicant before the Company Judge and another appeal, i.e., Appeal No. 109 of 2009 has been filed by SICOM Ltd., which was original Respondent No. 1 before learned Company Judge. The question which was raised before learned Single Judge was where there is an action under the State Financial Corporations, Act, 1951 ("SFC Act") and under Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDB Act"), can the company court exercise powers u/s 391(6) of the Companies Act, 1956 ("Act of 1956") pending application u/s 391 of the Act of 1956 and stay the proceedings initiated under RDB Act and SFC Act pending before the respective judicial forums?

2. The applicant before learned Single Judge Mafatlal Denim Ltd., availed various

loans from different banks and financial institutions which includes AXIS Bank, EXIM Bank and SICOM Ltd. The outstanding dues of all. these three institutions payable by the Appellant as on 4-2-2009, the date on which the meeting of the secured creditors was held pursuant to the orders of learned Company Judge, were as follows: (a) SICOM Ltd. Rs. 3,057 lakh, (4) AXIS Bank Ltd. Rs. 6,922 lakh, (c) EXIM Bank Rs. 2,626 lakh.

3. The Appellant-company having defaulted in making the payment to the banks and financial institutions, it felt that the loans are required to be restructured. For that purpose, a scheme was required to be framed u/s 391 of the Act of 1956. For that matter an application was contemplated before the company court. While the company court was being considered to be moved by company for getting the scheme sanctioned by the company court u/s 391 of the Act of 1956, SICOM Ltd., issued a demand notice dated 18-7-2008 calling upon the Appellant-company to pay the amounts due to it amounting to Rs. 1,61,74,750 on or before 25-7-2008 and vide this notice this was also informed to the Appellant-company that failing to make the payment, it would be compelled to take action which may be available in law including action u/s 29 of the SFC Act.

4. The company court, vide order dated 26-12-2008, ordered that a meeting of the secured creditors be held on 4-2-2009 for considering the proposed scheme. The Appellant-company also preferred an application on 31-12-2008 u/s 391(6) of the Act of 1956. This application was preferred apprehending that though the meeting as per the orders of the company court passed on 26-12-2008 will be held, SICOM Ltd. may take action in pursuance of its notice dated 18-7-2008 against the mortgaged and hypothecated assets. On this application, learned Company Judge issued notice and made it returnable on 19-1-2009. On 2-1-2009 learned Company Judge passed order that SICOM Ltd., one of the secured creditors of the Appellant-company, is restrained from taking possession of any property or assets of the Appellant-company in exercise of authority u/s 29 of the SFC Act. A further condition was put on the Appellant-company that it shall not create any interest or encumbrance or charge, in any manner, over the assets and property until finalisation of the scheme u/s 391 of the Act of 1956. It was further ordered that status quo in relation to all assets and property shall be maintained.

5. The meeting of the secured creditors of the Appellant-company is claimed to have been held on 4-2-2009 pursuant to the orders of learned Company Judge dated 26-12-2008. In the said meeting the scheme proposing reconstruction of debts was approved with certain modifications (as compared to the draft scheme) by the required statutory majority. The sole dissenter was SICOM Ltd., who had raised objections against the scheme stating that the scheme was not acceptable to it and it proposed to oppose the scheme, if and when presented for sanction.

6. While the application was pending before learned Company Judge, SICOM Ltd., ("the objector") issued a further notice on 16-1-2009 recalling the entire

principal amount together with interest which fell due against the Appellant-company. On 23-1-2009 the objector filed an affidavit in reply objecting to the prayer which was sought for u/s 391(6) of the Act of 1956 by stating that the application u/s 391(6) of the Act of 1956 was not maintainable and that the objector was not in favour of the scheme.

7. In the meanwhile, there came another notice issued by the objector on 29-1-2009 informing the Appellant-company that they have decided to take over possession of the assets mortgaged/hypothecated to it to recover the dues as mentioned in the recall notice dated 16-1-2009. The further development was that the objector during the proceeding and hearing of the application, informed the court that on 29-1-2009 the objector has filed an application u/s 19 read with Section 17 of the RDB Act and has put the proceedings in motion before the Debts Recovery Tribunal ("DRT") at Mumbai.

8. The Appellant-company has claimed that during the meeting on 4-2-2009 the proposed scheme having been accepted by statutory majority as prescribed u/s 391 of the Act of 1956, Company Petition No. 34 of 2009 in Company Application No. 648 of 2008 has been presented and it was prayed that the Hon'ble Court may be pleased to sanction the scheme and it was also prayed that proceedings for recovery initiated by the objector be stayed. This was opposed by the objector that the relief prayed for u/s 391(6) of the Act of 1956 be not granted to the Appellant-company.

9. Learned Company Judge, after hearing the rival submissions, decided the objection of the objector with regard to the application u/s 391 of Act of 1956 and held that such application would be maintainable. In this regard learned Company Judge has observed that a learned Single Judge of this Court had already taken a view in the matter of Core Health Care Ltd., In re [2007] 79 SCL 47 that application u/s 391 read with Section 394 would be maintainable. It was also observed that application u/s 391 of the Act of 1956 is not limited the scheme for restructuring debt. In that view of the matter, being bound by a coordinate Bench judgment, application u/s 391 of the Act of 1956 was held maintainable despite the objection raised by the objector. It was also held that an application u/s 391(6) of the Act of 1956 would also be maintainable as the application u/s 391(1) of the Act of 1956 is maintainable, if circumstances so required. Learned Company Judge has further held that scope of application is separate issue than its maintainability because there may arise a question that an order may not be feasible in view of the action of the objector u/s 29 of the SFC Act and proceedings u/s 19 of the RDB Act. Learned Company Judge further observed that a stay as prayed for is not available automatically or mechanically on presentation of an application but such order is left to the discretion of the court and the court has to decide each case judiciously and on its own facts and merits.

10. Learned Company Judge proceeded to decide the merits of the application u/s 391(6) of the Act of 1956 and observed at paragraph No. 9.3 of the judgment

as under:

That 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.

11. It was further held by learned Company Judge in paragraph Nos. 9.7, 9.8, 9.9, and 9.10 which are reproduced hereinafter:

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 far 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 proceeding 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 overriding 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 Finance 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:

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.

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 F Is when any application u/s 19 read with 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.

11.1 Learned Company Judge has further considered the following decisions in his judgment:

Kishorebhai Khamchand Goyal v. State of Gujarat 2004 AIR SC 1006.

Jay Engineering Works Ltd. Vs. Industry Facilitation Council and Another,

NGEF Ltd. Vs. Chandra Developers Pvt. Ltd. and Another,

Bakemans Industries (P.) Ltd. v. New Cawnpore Flour Milk [2008] 84 SCL 489 (SC).

Tata Motors Ltd. Vs. Pharmaceutical Products of India Ltd. and Another,

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

12. Learned Company Judge, after having considered in details, various judgments cited at the bar and the arguments, held in paragraph No. 11 which reads as under:

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.

13. Learned Company Judge has further proceeded to consider various decisions and held as under:

11 (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 unauthorised 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 u/s 25B which provides for special procedure for eviction to landlords who require premises for their personal necessity. Thus, Section 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.

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 securing 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."

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."

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 Owner''s Union Ltd. v. State of Uttar Pradesh AIR 1966 SC 785 wherein also, has recorded in para 58 that:

58.... There was conflict between the provisions contained in Rule 131(2)(gg) and (I) of the Defence of India Rules, 1962 and Chapter IVA of the Motor Vehicles Act, 1939. Section 68B gave overriding effect to the provisions of Chapter-IV(A) of the Motor Vehicles Act whereas Section 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 the 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 Vs. The Simla Banking and Industrial Co. Limited, 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 45A, 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 questions 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 intent 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 Act (Trial of Offences 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 instalments. 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

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 these while as regards all the rest the earlier directions should have effect" [Emphasis Supplied]

14. Having discussed the implications of the arguments and various decisions which were cited at the bar, learned Company Judge has delineated his findings as under:

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 lakh. The Legislature has, thus, placed such claims/dues of F Is 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 F Is.

13.6 (a) 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 F Is 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., it 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 with effect from 27th August, 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 Sub-section (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* case (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 would and would provide in the later enactment that the provisions of the earlier enactment continue to apply."

13.6 (h) The later enactment of the RDB Act and provision in the nature of Section 18 and Section 34 (read with 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/F Is.

15. In his ultimate conclusion, learned Company Judge has found as under:

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.

16. The aforesaid discussion summarised pertains to the implication of the RDB Act and in its later part of the judgment learned Company Judge considered the questions in relation to the proceedings u/s 29 of the SFC Act and relying on certain decisions of the Hon''ble Supreme Court came to the conclusion that while the proceeding u/s 29 of the SFC Act has not been considered appropriate to be stayed appropriate even u/s 226 of the Constitution of India, learned Company Judge has observed at paragraph No. 16.16, thus:

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. Learned Counsel for the Appellant-company has relied on various decisions of the Hon''ble Supreme Court to bring home the points canvassed by him.

18. The mainstay of the arguments of learned Counsel for the Appellant-company was: (a) that the court has to consider whether the provisions of Section 391 and the provisions of SFC Act and RDB Act operate and occupy the same field so as to determine the question of implied repeal of the former Act by the latter, (b) the court has to further consider whether there is conflict in the two Acts which will have to be resolved. The arguments were addressed at great length and written submissions have also been filed in which the Appellant-company has submitted that the following questions are required to be determined:

(i) The provisions of special Act will override the provisions of general Act.

(ii) The provisions of a later Act will override the provision of an earlier.

(iii) Whether later enactment having a non obstante (such as Section 34 of RDB Act and Section 46B of SFC Act) will override the provisions of prior enactments, the following questions need to be answered first:

(a) Whether there is a direct conflict between the provisions of the two enactments?

(b) Whether Legislature intended to lay down an exhaustive code in respect of the subject-matter replacing the earlier law?

(c) Whether the two laws occupy the same field?"

If there is a "direct conflict" between two provisions and they cannot stand together on harmonious construction, only then the court has to decide which

will prevail. If there is no direct conflict, the court will then have to see whether the later Act is enacted to lay down an exhaustive code as the subject-matter replacing the earlier Act or whether two Acts occupy the same field. For determining this, the court may consider the object and purpose of the Act. In any event, unless the court answers any of three questions in the affirmative, there is no question of considering whether later/special Act will prevail over the prior/general Act or there is no question of considering the effect of the overriding provision/ non obstante clause. This Court will, therefore, have to consider:

(i) Whether there is any direct conflict between the provisions of Sections 391 to 394 of the Act of 1956 on the one hand and the provisions of the RDB Act and SFC Act on the other hand.

(ii) Whether the provisions of the RDB Act and SFC Act (Section 29) lay down an exhaustive code in respect of the subject-matter of Section 391 to Section 394 of the Act of 1956.

(iii) Whether the provisions of Section 391 to 394 of the Act of 1956 on the one hand and the provisions of the RDB Act/SFC Act on the other hand occupy the same field.

The question is not whether the provisions of the RDB Act and SFC Act generally override all the provisions of the Act of 1956. To illustrate reliance is placed on the decision in the matter of Allahabad Bank v. Canara Bank [2000] 101 Comp. Cas. 64 (SC) wherein the Hon''ble Supreme Court held that RDB Act will override only Sections 442, 446 and 557 of the Act of 1956 and not the whole of the Act of 1956. There is no dispute that winding up petition under Sections 433 and 434 of the Act of 1956 for winding up of the company is certainly maintainable even when proceedings before the DRT are pending because there is no conflict between Sections 433 and 434 of the Act of 1956 and the provisions of RDB Act. The relevant judgments on which reliance is placed by the Appellant for the aforesaid propositions are: (i) Municipal Council Palai Vs. T.J. Joseph and Others, , (ii) Municipal Corporation of Delhi Vs. Shiv Shanker, (iii) Kishorebhai Khamanchand Goyal (supra) and (iv) Jay Engineering Works Ltd case (supra).

18.1 Learned Counsel for the Appellant submitted that the provisions of the Act of 1956 and the provisions of RDB Act and SFC Act do not occupy the same field and, therefore, it cannot be said that this would have the tendency of overlapping each other. The provisions of the RDB Act and the SFC Act are, in fact, to effect recovery by the substitution of the procedure provided in the Code of Civil Procedure, 1908 which was lengthy one and there is no provision in any of the Acts RDB Act and SFC Act covering the aspect dealt with Section 391 to 394 of the Act of 1956 for modification of the rights and contracts between the parties. RDB Act gives exclusive jurisdiction to the DRT only in respect of: (i) the adjudication of the claim of banks and financial institutions; (ii) the enforcement thereof, and (iii) to determine the priorities inter se between the banks, financial

institutions and workers (Sections 17, 18 and 19 of the RDB Act).

19. Learned Counsel for the Appellant submitted that RDB Act does not give any jurisdiction to the DRT to effect a compromise between the debtor bank/financial institution and the creditor as is conferred by Section 391 to Section 394 of the Act of 1956 upon the High Court. According to learned Counsel, the RDB Act or SFC Act does not in any manner lay down any exhaustive code in respect of the subject-matter u/s 391 to 394 of the Act of 1956. Thus, there is no question of considering any overriding effect of Sections 17, 18, 34 of the RDB Act or Section 29 and Section 46B of the SFC Act over Section 391 to 394 including Section 391(6) of the Act of 1956. Learned Counsel has tried to explain in his written submission the impact of certain decisions which have been considered by learned Company Judge in the following terms:

(i) Kumaon Motor Owners' Union Ltd. and Another Vs. The State of Uttar Pradesh, - The court has affirmatively held that there is an apparent conflict between Section 43 of the Defence of India Act and Section 68B of the Motor Vehicles Act, 1939, read with Section 6(4) thereof. It is thereafter that court considers that the Defence of India Act is special statute passed to meet an emergency arising out of Chinese invasion in 1962 and would, therefore, prevail, (paras 12, 14)

(ii) Jain Ink Manufacturing Company Vs. Life Insurance Corporation of India and Another, - It is evident from the facts that not only there is direct conflict between the Delhi Rent Control Act and the Public Premises (Eviction of Unauthorised Occupancy Act) but they occupy the same field qua public premises and the Public Premises Act is exhaustive Code qua their eviction. The court holds that there is direct conflict between Slums Areas (Improvement and Clearance) Act, 1956 and the Public Premises Act.

(iii) Shri Sarwan Singh and Another Vs. Shri Kasturi Lal, - The Supreme Court while considering the Delhi Rent Control Act, 1958 (as amended in 1975) and Slums Areas (Improvements and Clearance) Act, 1956, has in fact held when two or more laws operate in the same field and each contains a non obstante clause, the later Act will prevail, (paras 20,21 and 22)

(iv) Ashoka Marketing Ltd. v. Punjab National Bank AIR 1991 SC 855 - In this judgment again the provisions of Delhi Rent Control Act have been compared with Public Premises Act and it has been held that both occupy the same field and there is a conflict between the two procedure. Consequently later will prevail, (paras 40, 61)

(v) Solidaire India Ltd v. Pairgrowth Financial Services Ltd. [2001] 30 SCL 59 (SC). The Supreme Court has after considering in details the provisions of Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 enacted after the Harshad Mehta scam, gave a finding that there is a direct conflict between SICA and the Special Courts Act. It is in this context that the Special Courts Act has been considered to override SICA.

20. RDB Act vis-a-vis Sections 442, 446 and 537 of the Act of 1956 - The decision of the Hon''ble Supreme Court in the case of Allahabad Bank (supra) deals only with the conflict between Sections 442, 446 and 537 of the Act of 1956 vis-a-vis the provisions of the RDB Act. No other provisions, much less Sections 391 to 394 of the Act of 1956 have been even remotely considered by the Hon''ble Supreme Court. It is in this context of the above referred provisions (i.e., Sections 442, 446 and 537) of the Act of 1956 that the Hon''ble Supreme Court has taken the view that the provisions of the RDB Act will prevail over the said provisions only and not the entire Act of 1956. In doing so, the Hon''ble Supreme Court has categorically observed that the DRT has exclusive jurisdiction in respect of adjudication, execution and distribution of the sale proceeds and working out priorities as between banking and financial institutions and other creditors of the company so far as the money realised under the RDB Act. The Hon''ble Supreme Court has nowhere observed that under the RDB Act, DRT has exclusive jurisdiction on all issues - i.e., issues falling under Sections 391 to 394 of the Act of 1956. In fact, the RDB Act does not cover the issue of proposing the scheme (as contemplated under Sections 391 to 394 of the Act of 1956) and sanction thereof. In the circumstances, there is no conflict between the RDB Act and the Act of 1956 vis-a-vis Sections 391 to 394 thereof. In fact, in the recent judgment of the Hon''ble Supreme Court in Central Bank of India Vs. State of Kerala and Others, while considering the issue regarding conflict between the provisions of the Bombay Sales Tax Act and Kerala General Sales Tax Act vis-a-vis the overriding effect of RDB Act and the Securitisation Act in view of Sections 34 and 35 of the said Acts respectively, the Hon''ble Supreme Court has referred to the judgment of Allahabad Bank's case (supra) and explained that the provisions of RDB Act provide for exclusive jurisdiction only for adjudication, execution and determination of priority and are in no way conflicting with the provisions of the above referred Sales Tax Act. In the said judgment, the Hon''ble Supreme Court has laid down that where there is no conflict, there is no question of applying the overriding provisions of the RDB Act and the Securitisation Act. In the instant case also:

(1) There is no direct conflict between Sections 391 to 394 of the Act of 1956 on the one hand and the RDB Act or the SFC Act on the other.

(2) The RDB Act and the SFC Act do not lay down any exhaustive code which covers the subject-matter of Sections 391 to 394 of the Act of 1956. The RDB Act is exclusiveness is limited as stated above.

(3) The two laws, i.e., on one hand Sections 391 to 394 of the Act of 1956 and the RDB Act and SFC Act on the other, do not occupy the same field.

21. In the circumstances, the overriding provisions of the RDB Act and SFC Act would not override in any manner whatsoever the provisions of Sections 391 to 394 of the Act of 1956, which enable the company to propose a scheme of compromise/arrangement.

22. Learned Counsel has submitted that in comparing the provisions of Sections 391 to 394 of the Act of 1956 with the provisions of Sick Industrial Companies (Special Provisions) Act, 1985, ("SICA"), it is seen that both provide for a scheme of restructuring and would conflict with each other in case the company is sick as defined under SICA. It is in these circumstances that the Full Bench of the Bombay High Court in *Ashoka Organics v. ARCIL* [2008] 3 Comp. LJ 61 and the Hon'ble Supreme Court in *Tata Motors Ltd. case* (supra) have taken the view that since SICA is an exhaustive code in respect of sick undertakings and there is a direct conflict between SICA on one hand and Sections 391 to 394 of the Act of 1956 on the other in respect of the sick company, the provisions of SICA would override the provisions of the Act of 1956. In fact the judgment in the case of *Tata Motors Ltd. 's case* (supra) clearly establishes that Sections 391 to 394 are conflicting with SICA which provides for a scheme of restructuring. However, the said provisions of Sections 391 to 394 of the Act of 1956 would not have any conflict with RDB Act or SFC Act as the said RDB Act and SFC Act do not have any provisions of any nature whatsoever for restructuring the debt of the company vis-a-vis the banks and financial institutions.

23. Learned Counsel submitted that this Court in the matter of *Core Healthcare case* (supra) and a Division Bench of the Kerala High Court have taken the view that the scheme u/s 391 of the Act of 1956 is maintainable even if proceedings are pending before the DRT under the RDB Act and that there is no conflict. The objector when confronted with the judgment of *Core Healthcare Ltd. case* (supra) has conceded to this position as observed by learned Single Judge in paragraph No. 7.2 of the said judgment.

24. In view of the above, learned Counsel for the Appellant submitted that there is no conflict between Sections 391(1)/(2) to 394 of the Act of 1956 on the one hand and the provisions of the RDB Act and/or SFC Act on the other hand and/ therefore, the scheme proceedings under Sections 391 to 394 of the Act of 1956 are maintainable in spite of pendency of any proceedings before the DRT under the RDB Act.

25. Learned Counsel in his written submission has submitted that the very object of Section 391(1) and (2) would be frustrated, if the court is not able to restrain a bank or financial institution from taking any coercive action under RDB Act or SFC Act pending consideration of a (statutory) scheme, for by the time the scheme is considered and sanctioned by the court, if the mortgaged asset of the Appellant-company is taken possession of and disposed of by SICOM Ltd. and the very purpose of proposing/sanctioning the scheme would stand frustrated. Learned Counsel has drawn strength from the following decisions: (i) *Deepika Chit Fund (P.) Ltd., In re* [2004] 56 SCL 566 (AP) and (ii) Unreported judgment of this Court in *Core Healthcare Ltd case* (supra).

26. Learned Counsel has further submitted that provision of Section 391(6) being only enabling provision it can never be in conflict with any other provision. It only entitles the court to pass an order whose life would be till the final order is

passed u/s 391(1) of the Act of 1956. While urging so, the following has been submitted in the written submission in the following terms:

The alleged conflict would depend upon what order is passed. If such is the situation, it cannot be said that the enabling provision itself is in conflict with any provisions of the RDB Act/SFC Act. No enabling provision which enables the court to pass an order, can be said to be in conflict with the RDB Act or the SFC Act.

27. Learned Counsel has further submitted that there is an exception carved out in Section 14 of the RDB Act which is within the scope of RDB Act and if under this exception the company court can issue injunction u/s 391(6) then it would be a travesty of justice. Learned Counsel has further submitted that learned Company Judge has relied on the Hon"ble Supreme Court decisions which were decided in proceedings under Article 226 of the Constitution which is entirely a different domain than the exercise of powers u/s 391(6) of the Act of 1956 and, therefore, a wrong application of law has been made by learned Company Judge. The purpose and intent of the exercise of power u/s 391(6) of the Act of 1956 is to enable the court to pass adequate orders to see that the final order that the court may pass u/s 391(1) of the Act of 1956 remains implementable. Finally, learned Counsel has submitted the following in the written submission:

In the event the relief u/s 391(6) is refused, the company petition itself will not survive and the question of considering the scheme becomes academic, SICOM Ltd., by its aggressive conduct is trying to pressurise the Appellant to pay more/get better terms than the one offered in the scheme and thereby steal a march over the other two secured creditors who constitute more than 75 per cent and are supporting the scheme. The refusal of relief u/s 391(6) to the Appellant, in the facts of the present case, therefore, necessarily means prematurely dismissing the company petition itself and rejection of the scheme.

28. Mr. Mihir Joshi, learned senior counsel for Respondent Nos. 2 and 3 while supporting the arguments, submitted that even the provisions of the RDB Act are enabling provisions and, therefore, these enabling provisions cannot come to conflict of the Act of 1956. Therefore, the question of conflict being not there, the powers u/s 391(6) of the Act of 1956 are liable to be exercised.

29. Per contra Mr. S.N. Soparkar, learned senior counsel appearing for SICOM Ltd., submitted that learned Company Judge has no jurisdiction to grant relief as prayed for u/s 391(6) of the Act of 1956. He further submitted that the question of jurisdiction and whether to exercise the same are two distinct questions. The question of jurisdiction depends on the dominating positions of the law which governs the case and according to learned Counsel, u/s 17 read with Section 19 of the RDB Act has contained code for the recovery of the debts due to banks and financial institutions. So also the proceedings u/s 29 of the SFC Act has a purpose of realisation of the funds from the defaulting institutions. Learned Counsel has relied on the findings of learned Company Judge in paragraph Nos. 13, 15 and 16.15 of the judgment. Learned Counsel submitted that the

legislative scheme and intention of both the Acts convey that they have primacy over the Act of 1956, the reasons are:

(a) Both contains non obstante clause.

(b) Both are special Acts.

(c) Both serve larger, more important and predominant public interest of enabling FI/SFC to recover its dues as expeditiously as possible. In that sense the Act of 1956 is a general piece of legislation prescribing procedures or rights and obligations by or against the companies in general but these Acts have a larger public interest to subserve.

(d) Both acts are complete codes in themselves. Under the RDB Act, the DRT has complete power in relation to the recovery of the dues of FI including power to grant injunction, stay order, attachment before judgment, and/or appointment of receiver or Commissioner. Similarly, the SFC Act also makes complete provision for realising dues by taking over possession of the industrial unit, then by selling it or changing the management. These Acts are complete codes in themselves, the general law, namely, the Act of 1956 must give way to these Acts and any interpretation which prevents furtherance of achievement of special Acts must be avoided.

(e) The subsequent and/or special laws having non obstante clause have overridden the provisions of Act of 1956 to the extent of conflict. To examine whether there is any conflict, one must examine the legislative intent and purpose. It is not correct to state that there would be conflict between two laws only if observance of one law leads to breach of another law. There would be conflict between two laws if one law (which is general and earlier in point of time) comes in the way of fulfilment of the object and purpose of another special and subsequent law, brought in for larger public good. If the legislative desire of enactment of the latter law is likely to be frustrated by even the procedural operation of the earlier law, then for larger public good the earlier law is to be treated as inapplicable - Sarwan Singh's case (supra).

(f) In fact, even the requirement of a law to seek only permission and nothing more from the body/authority/court under a general law is regarded as repealed, the moment a special law is enacted covering the same issue on the short ground that once a special forum is created every other authority/ body/court would lose jurisdiction. In this connection strong reliance is placed on the following judgments: 1. Solidaire India Ltd. 's case (supra), Allahabad Bank's case (supra), NGEF Ltd.'s case (supra), Sarwan Singh case (supra), Jain Ink Manufacturing Co. 's case (supra) and Ashoka Marketing Ltd. 's case (supra).

(g) There is a direct conflict between RDB Act/SFC Act on one hand and Section 391 of the Act of 1956 on the other. At least in relation to Section 391(6) there is a direct conflict. It is for the DRT to decide whether to grant or not to grant interim order, including injunction or appointment of receiver. It is for the SFC to

decide whether to take over possession, sell or transfer possession of an industrial unit. These rights are not qualified under the respective special statutes. If it is assumed that u/s 391(6) of the Act of 1956, a company court would have the power to prevent FI/SFC from taking action under the Acts, their exclusive jurisdiction is made amenable to jurisdiction of a company court. The Hon''ble Supreme Court has in the above judgments repeatedly held that even seeking permission from other body/authority /court on enactment of a special Act would stand repealed, the natural corollary is that in relation to the proceedings before the DRT or the proceedings that a SFC may take, company court cannot exercise prohibitive power. Otherwise, the purpose of enacting these laws and giving them such powers is frustrated.

(h) Section 18 of the RDB Act bars every court other than the Supreme Court of India or this Court in its jurisdiction under Article 226 of the Constitution, from doing anything in relation to DRT proceedings. A company court would not come in this exception and would have no jurisdiction in relation to the DRT proceedings. So also in relation to the proceedings under the SFC Act.

30. Learned Counsel further submitted that the Appellant-company would not make itself liable to be favoured with an order in discretionary jurisdiction because except a paltry sum which has been paid by it, the Appellant-company has defaulted in great detail. Further the Hon''ble Supreme Court has held in various decisions which have been quoted by learned Company Judge that such discretion is not liable to be exercised even under Article 226 of the Constitution of India which has not been considered by the Hon''ble Supreme Court to be granted in wide and persuasive writ jurisdiction. Learned Counsel further submitted that the maintainability of application u/s 391(1) was questioned by his client before learned Company Judge but faced with difficulty that learned Single Judge of this Court has already taken a view which would be binding, the arguments were not stretched because of judicial propriety. However, the challenge to Section 391 has not been given up by his client as is understood by the Appellant.

31. In the appeal being OJ Appeal No. 109 of 2009, filed by SICOM Ltd., Mr. A.L. Shah, learned advocate with Mr. Sanjay A. Mehta for the Appellant submitted that it is not correct to assume that the maintainability of application u/s 391 has been given up by learned Counsel appearing on behalf of his client but the arguments were not carried further only because there is already a judgment of this Court in the matter of Core Healthcare Ltd. case (supra) and the same being binding on learned Single Judge, the arguments were not carried further and all these arguments are available before this Court and are being advanced and, thus, adopted the arguments advanced by Mr. S.N. Soparkar, learned senior counsel, that in view of various decisions of the Hon''ble Supreme Court which learned Single Judge has considered, the provisions of SFC Act and RDB Act are in conflict with Section 391 of the Act of 1956 and, therefore, they supersede.

32. Replying to this argument, Mr. Mihir Thakore, learned senior counsel for

Respondent No. 1, submitted that since the arguments were not carried further; it would be deemed that learned Counsel has given up the challenge otherwise he would have asked to refer the matter to a larger Bench and could have submitted that he seeks to argue the matter and it could not have been left to the discretion of the court.

33. We have heard learned Counsel for the parties, perused the records and have given our thoughtful consideration.

34. To start with, we would like to make a reference to what has been submitted on behalf of the Appellant in the written submissions which is quoted hereinbelow:

The very object of Section 391(1) and (2) would be frustrated, if the court is not able to restrain a bank or financial institution from taking any coercive action under RDB Act or SFC Act pending consideration of a (statutory) scheme, for by the time the scheme is considered and sanctioned by the court. if the mortgaged asset of the (Appellant) company is taken possession of and disposed of (by Sicom) and the very purpose of proposing/sanctioning the scheme would stand frustrated.

The alleged conflict would depend upon what order is passed. If such is the situation, it cannot be said that the (enabling) provision itself is in conflict with any provision of the RDB Act/SFC Act. No enabling provision which enables the court to pass an order, can be said to be in conflict with the RDB Act or SFC Act.

In the event the relief u/s 391(6) is refused, the company petition itself will not survive and the question of considering the scheme becomes academic. SICOM by its aggressive conduct is trying to pressurise the Appellant to pay more/get better terms than the one offered in the scheme and thereby steal a march over the other two secured creditors who constitute more than 75 per cent and are supporting the scheme. The refusal of relief u/s 391(6) to the Appellant, in the facts of the present case, therefore, necessarily means prematurely dismissing the company petition itself and rejection of the scheme.

The aforesaid submissions of the Appellant show that unless there is an exercise of jurisdiction u/s 391(6) of the Act of 1956 the question of consideration of the scheme itself u/s 391 of the Act of 1956 will become academic. Thus, according to the submissions of the Appellant itself, a conflict would depend on the order which is passed u/s 391(6) of the Act of 1956. According to the learned Counsel for the Appellant, the very purpose of proposing/sanctioning the scheme would stand frustrated. These submissions on behalf of the Appellant per se exhibit that there is a direct bearing of the exercise of the jurisdiction under the provisions of Section 391(6) of the Act of 1956 on the ultimate outcome. If the proceedings under RDB Act and SFC Act are continued the very purpose and object of the proposed scheme u/s 391 of the Act of 1956 would get frustrated. By pondering over these consequences it can safely be concluded that there can be a conflict in between the provisions of two set of Acts (i.e., Act of 1956 and RDB Act/SFC Act)

and that conflict may arise out of the negative nature of the order u/s 391(6) of the Act of 1956.

35. The question of conflict can be examined from different angle. As and when any order of sanction of a new scheme is passed u/s 391 of the Act of 1956 then the original contract in between the parties, i.e., the company and the financial institutions undergoes a radical change. The contracting parties cannot relegate on the original contract. Thus, there is a direct interference by exercise of jurisdiction u/s 391 of the Act of 1956 on the original contract entered into, in between the contracting parties. This directly means that the financial institutions cannot execute a contract entered into by them originally. The sanctioning of a scheme under the Act of 1956 has an inhibiting effect on exercise of the powers of the financial institutions, which otherwise can be exercised by them, taking recourse to RDB Act and SFC Act qua the original contract. Thus, there is a direct impediment as to the scope and operation of RDB Act and SFC Act, because once there is an exercise of jurisdiction u/s 391 of the Act of 1956 the original contract gets modified in terms of the orders of the company court.

36. The powers available to the financial institutions under Sections 17, 18 and 19 are very wide. Most specifically when it comes to safeguard its money by issuing attachment and appointing receivers. With the sanctioning of a new scheme such powers will get frustrated. Thus, there appears to be a direct conflict.

37. With regard to the aforesaid discussion, this may be kept in mind that the Hon''ble Supreme Court in the case of Sarwan Singh (supra) has categorically held that if the permission from the Slum Areas (Improvements and Clearance) Act, 1956 affects the rights of the Rent Control Act then there is a direct conflict in the provisions of two Acts and in these terms, the Hon''ble Supreme Court has held at paragraph No. 15 as under:

... The reason is that the relevant provisions of that Act devise an overriding procedure by reason of which no suit or proceeding can be instituted without the previous permission in writing of the competent authority. Sections 19 and 39 of the Slum Clearance Act are to that extent inconsistent with the procedure prescribed by Chapter IIIA of the Delhi Rent Act and have to be subordinated to it.

38. The financial institutions cannot execute the original contract as entered in between the company and the financial institutions if powers are exercised by the company court u/s 391 of the Act of 1956. Thus, to that extent the provisions of two set of Acts are inconsistent and in conflict with each other. Thus, the first question as has been canvassed by learned Counsel for the Appellant-company that whether there is a direct conflict in between the provisions of Section 391 of the Act of 1956 and RDB Act and SFC Act stands answered against the company.

39. Now what has to be seen is whether two Acts RDB Act and SFC Act lay down an exhaustive code in respect of the matters specified in Sections 391 to 394 of the Act of 1956. It can be seen that u/s 391 of the Act of 1956 the company court sanctions a fresh scheme, then the course as provided under RDB Act and SFC Act for immediate recovery is interfered. Recovery of money of the financial institutions become delayed. The object and purpose of RDB Act has a clear providence that the financial institutions at present are experiencing a considerable difficulty in recovering loan and enforcement of security charges. That purpose gets frustrated. Once the object and the purpose of RDB Act gets frustrated by providing a new scheme of repayment u/s 391 of the Act of 1956 by the company court, it interferes with the scheme of RDB Act and SFC Act where the recoveries are provided expeditiously. Thus, the object and purpose of RDB Act and SFC Act are frustrated, if any injunction is granted against the financial institutions u/s 391(6) of the Act of 1956. This would not be in conformity with the law laid down by the various decisions of the Hon''ble Supreme Court. For ready reference, a reference is made to paragraph No. 23 of the judgment in the case of Sarwan Singh (supra) which is reproduced as under:

The argument of implied repeal has also no substance in it because our reason for according priority to the provisions of the Delhi Rent Act is not that the Slum Clearance Act stands impliedly repealed pro tanto. Bearing in mind the language of the two laws, their object and purpose, and the fact that one of them is later in point of time and was enacted with the knowledge of the non obstante clauses in the earlier law, we have come to the conclusion that the provisions of Section 14A and Chapter III of the Rent Control Act must prevail over those contained in Sections 19 and 39 of the Slum Clearance Act.

40. May be that the RDB Act does not envisage a compromise between the parties but it enables the recoveries. The monies recovery is also field of the compromise which will make it a delayed payment. Thus, a sanctioned compromise will abrogate the right already accrued. If the sanctioning of the scheme is permitted, the existing right of the financial institutions to immediately recover monies will be gone. Thus, the two operating fields are not in consonance. Exhaustiveness of the Act, thus, will have to take a back stage when the very purpose of the RDB Act gets frustrated.

41. In view to ascertaining the meaning of the statute it is important to know what it does not mean. The RDB Act in operation does not mean that the recovery be deferred. It implies, therefore, that no effect be allowed to frustrate it as per the scheme of the Act. In this light also if the incidence of compromise is not there in the Act then it propounds the intention of the Legislature that recovery of the public monies is first priority.

42. The third question whether the provisions of Sections 391 to 394 of the Act of 1956 and the provisions of the RDB Act and SFC Act occupy the same field is dealt with as follows. It may be noticed that RDB Act and SFC Act provide for the recovery of money and Section 391 of the Act of 1956 provides deferment of that

recovery in accordance with the scheme to be formulated and sanctioned by it. Thus, to that extent that the two set of laws has a tendency of interference with the application of each other, they occupy the same field one delays the payment, another expedites it. Thus, to the extent that Act of 1956 provides for the deferment of the recovery and RDB Act and SFC Act are meant for speedy recovery will be holding the field. Once it is held that in the field of recovery RDB Act and SFC Act will hold the field the Act of 1956 will have to make way for their operations.

43. Law regarding the conflict of statutes has been summarised by learned Single Judge in great detail which has been quoted by us hereinabove. We are avoiding repetition of the same but we are of the considered opinion that in view of the mandate of Legislature in favour of RDB Act and SFC Act that there should be speedy recovery the same cannot be permitted to be frustrated by permitting the company court to frame a scheme u/s 391 of the Act of 1956 when recovery proceedings are pending. It may further be noticed that u/s 34 of the RDB Act the Legislature has omitted the Act of 1956 to be included and this omission is considered by us to be a conscious omission so as to give primacy to the RDB Act and SFC Act.

44. The argument of learned Counsel for the Appellant that in the case of Allahabad Bank (supra) the Hon''ble Supreme Court has not held that the provisions of RDB Act and SFC Act would have primacy over Section 391(6) of the Act of 1956 and it has only dealt with import of Sections 442, 446 and 557. It may be worthwhile to mention here that the Hon''ble Court in that case was not called upon to decide the question of the implication of Section 391 of the Act of 1956 and, therefore, if there is no finding to that effect in the judgment in the Allahabad Bank case (supra) it cannot be said that the Hon''ble Supreme Court has held that there is no conflict in between the provisions of Section 391 of the Act of 1956 and the provisions of RDB Act.

45. Finding of the Apex Court in the case of Allahabad Bank (supra) if carefully examined, throws a considerable light on the controversy involved in this case. The Hon''ble Supreme Court has held at paragraph No. 25 of the judgment as under:

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 or the company court can go into the said questions relating to the liability and the recovery except as provided in the Act. Point No. 1 is decided accordingly.

46. Here if we notice that the court has held exclusivity of DRT. In the matter of adjudication of liability then this liability in the instant case would mean the liability under the original contract. This was a contract wilfully agreed in between the parties and the objector has a right to enforce the same. The exercise of jurisdiction by company court will transform the contract without the

willingness of the objector. Thus, whatever protection Legislature intended to confer on it will be taken away. If right accrued under one Act is taken away by the operation of another Act then there is an obvious conflict in operation of these two Acts.

47. In Allahabad Bank's case (supra), the Hon''ble Supreme Court has further held as under:

While it is true that the principle of purposive interpretation has been applied by the Supreme Court in favour of jurisdiction and powers of the company court in Sudarsan Chits (I) Ltd. case [1984] 4 SCC 657, and other cases the said principle, in our view, cannot be invoked in the present case against the Debts Recovery Tribunal in view of the superior purpose of the RDB Act and the special provision contained therein. In our opinion, the very same principle mentioned above equally applies to the Tribunal/Recovery Officer under the RDB Act, 1993 because the purpose of the said Act is something more important than the purpose of Sections 442, 446 and 537 of the Companies Act. It was intended that there should be a speedy and summary remedy for recovery of thousands of crores which were due to the banks and to financial institutions, so that the delays occurring in winding up proceedings could be avoided.

48. The reasoning of the Apex Court quoted hereinabove applies with full force on the controversy involved in the present case. Purpose of permitting the company to pay under a new scheme would frustrate the very purpose of enacting the RDB Act. This will mean that the financial institutions will have to stop a speedy and summary remedy and wait for its money upto a time fixed in new scheme. A conflicting situation.

49. In the very same judgment, the Apex Court referring the judgment in the case of Maharashtra Tubes Ltd. (supra) has held as under:

Therefore in view of Section 34 of the RDB Act, the said Act overrides the Companies Act, to the extent there is anything inconsistent between the Acts.

50. This is a clear statement of law regarding the overriding effect of the RDB Act. We have noticed inconsistencies above, therefore, also the RDB Act will have primacy over Section 391 of the Act of 1956. In the very same judgment, the Hon''ble Supreme Court has observed that:

But the position under the RDB Act is different. Sections 442, 446 and 537 are not saved by the RDB Act. Even Section 34(2) of the RDB Act does not save the provisions of the Companies Act.

51. The aforesaid observation clearly enunciates that there being a conscious omission of Act of 1956 from Section 34 of the RDB Act. It has no savings from the RDB Act.

52. The non-inclusion of Act of 1956 in Section 34 of the RDB Act cannot be seen to be an omission without intention. As and when there is an omission of

mentioning an Act in the provision of another Act it should be construed to be a conscious omission. A reference in this regard be made to Craies on Statute Law, 7th edn., p. No. 71:

As a general rule, as Blackburn, J, pointed out in *it v. Cleworth* [1864] 4 B&S 927, if it appears that the class or thing which it is sought to bring within the Act (under consideration) was known to the Legislature at the time when the Act was passed, and that class is omitted. It must be supposed to have been omitted intentionally.

53. Thus, it would follow that the Companies Act was not intended to have been saved from the operation of RDB Act.

54. In the same judgment Allahabad Bank's case (*supra*) the Hon''ble Court has further observed at paragraph No. 50 as under:

For the aforesaid reasons, we hold that at the stage of adjudication u/s 17 and execution of the certificate u/s 25, etc., the provisions of the RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the company court u/s 442 read with Section 537 or u/s 446 of the Companies Act, 1956. In respect of the monies realised under the RDB Act, the question of priorities among the banks and financial institutions and other creditors can be decided only by the Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993, are to the above extent inconsistent with the provisions of the Companies Act, 1956 and the latter Act has to yield to the provisions of the former. This position holds good during the pendency of the winding up petition against the debtor company and also after a winding up order is passed. No leave of the company court is necessary for initiating or continuing the proceedings under the RDB Act, 1993. Points 2 and 3 are decided accordingly in favour of the Appellant and against the Respondents.

55. In addition to the adjudication, the RDB Act has exclusive jurisdiction for execution for the monies recoverable by the financial institutions. The order passed u/s 391 of the Act of 1956 will not permit such execution. This execution relates to the original contract in the instant case. Any modification in the contract is not envisaged in the scheme of the RDB Act. Thus, such exclusive jurisdiction is required to be given primacy resultantly an overriding effect of the RDB Act over Act of 1956. Argument of the Respondent that the provision of RDB Act are enabling provisions. Therefore, they cannot come in conflict is required to be noticed to be rejected in view of the discussions noted hereinabove.

56. In the matters of recovery by the financial institutions, non obstante clause is used in Section 34 of RDB Act. It would, thus, have primacy over the provisions of Section 391 of the Act of 1956 so far it relates to the recovery of the contracted amount in between the parties in terms of the original contract. To

that extent, the provisions of the RDB Act will eclipse provisions of Section 391 of the Act of 1956 and in that view of the matter as and when proceedings under RDB Act for recovery are instituted, the exercise of jurisdiction by company court u/s 391 of the Act of 1956 would be of no consequence because it would be futile to pass a scheme u/s 391 of the Act of 1956. Thus, the proceedings of RDB Act are not liable to be stayed u/s 391(6) of the Act of 1956. To that extent the findings of learned Single Judge that application u/s 391 of the Act can be maintained cannot be considered to be laying down a good law. This is held that as and when there are proceedings pending under the RDB Act exercise of jurisdiction u/s 391 of the Act of 1956 cannot be considered to be lawfully available.

57. As regards exercise of jurisdiction u/s 391(6) of the Act of 1956, it would not be available in view of overriding provisions of RDB Act/ SFC Act, it may be noticed here as well that the Hon''ble Supreme Court has decided in the cases noticed by learned Single Judge that as and when there is proceedings under SFC Act the same should not be interfered under Article 226 of the Constitution, a jurisdiction which is very wide and the jurisdiction u/s 391(6) is only limited that too circumscribed by terms which can be imposed. Therefore, also in view of the fact that the Appellant-company has not made any payment to the objector financial institutions over and above a paltry sum, may be around Rs. 60 lakh. That being the position, the conduct of the Appellant-company is also of the nature which does not call for exercise of discretionary jurisdiction in its favour.

58. In view of the aforesaid, the appeal of Appellant-company fails. The appeal filed by the objector succeeds to the extent indicated above.

59. Learned Counsel for the Appellant-company prays that the stay order which has been operating in the meanwhile may be extended till the parties approach the Hon''ble Supreme Court. Learned Counsel for the Respondents was not agreeable to such request. However, in the facts and circumstances of the case, the effect and operation of this judgment will remain in abeyance upto 29-3-2010.