

(2009) 03 P&H CK 0227
In the Punjab And Haryana At Chandigarh

Pegasus Asset Reconstruction P. Ltd.	Vs	APPELLANT
Haryana Concast Ltd.		RESPONDENT

Date of Decision : 20-03-2009

Acts Referred:

COMPANIES ACT, 1956 — Section 529, 529A
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 17, 35, 37, 5
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 32
State Financial Corporations Act, 1951 — Section 29, 31

Citation : (2009) 152 CompCas 215

Hon'ble Judges : K. Kannan, J

Bench : Single Bench

Judgement

K. Kannan, J.

(I) Applications with dissimilar reliefs, nature of:

1. Two batches of applications require to be considered in relation to a company which was ordered to be wound up by this Court. The official liquidator attached to this Court was permitted vide this Court's order dated May 28, 2004, passed in C.P. No. 133 of 2003 to sell the assets of the company-in-liquidation with assistance from the representatives of the secured creditors. There had been an offer of 29.12 crores by Radha Raman Builders and Developers P. Ltd., but the transaction failed, on the failure of the offeror to deposit 25 per cent, of the bid amount. Even this offer had been opposed by Haryana State Industrial and Infrastructure Development Corporation (HSIIDC) on the ground that the property was more valuable and that a fresh valuation should be undertaken. There had been a dispute with reference to the extent of the property itself and if a proper reckoning was to be undertaken and fresh advertisements were made for any increase in the area that could be found according to HSIIDC, there could be higher offers which would be beneficial to all.

2. Apart from this application seeking for revaluation. Pegasus Asset

Reconstruction P. Ltd., has moved Company Application No. 705 of 2008 in C.P. No. 133 of 2003 and 198 of 1999 seeking for direction for recalling of the order made already on March 20, 2008, directing sale of the property and for further direction to the official liquidator to hand over possession of the properties to the applicant in his capacity as an assignee of the debt of the secured creditor, namely, the Bank of India. The applicant-company had itself been substituted by order of this Court on December 5, 2008. The basis of the prayer for the reconstruction company was that by virtue of the assignment agreement dated August 27, 2008, with the Bank of India, the applicant had purchased all the rights, title and interest of the said bank in the credit documents and collateral security interest of the land in respect of such advance as envisaged u/s 5(1)(b) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act"). According to the applicant-reconstruction company, it had stepped into the shoes of the Bank of India and it had a right to seek to stand outside the winding up proceedings and bring to sale the properties which had been wholly secured in its favour.

(II) Option under RDB Act not exercised:

3. It is not in dispute that Bank of India was the only secured creditor in respect of the land where the company factory premises was situate. The plant and machinery alone had been the subject of hypothecation to HSIIDC at the time when the company was wound up. The Bank of India had approached the Debts Recovery Tribunal, Chandigarh, under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("RDB Act") for recovery of the outstanding amounts. The Debts Recovery Tribunal, Chandigarh passed an order on May 9, 2002 and issued a recovery certificate against the company in liquidation. The bank had opted not to take any action under the RDB Act but gave consent for sale of the immovable property of the company under the provisions of the Companies Act, 1956. It appears subsequently that the bank had withdrawn its consent on the ground that the sale was substantially delayed and in the meantime the property had considerably gone up in value.

(III) Option for sale through the official liquidator withdrawn to pursue remedy under SARFAESI Act:

4. For the sake of record, it should be noted that the company had been ordered to be wound up on October 22, 1999. The first order directing the sale of the property was made on May 28, 2004. A sale concluded by the official liquidator was set aside on March 20, 2008 under the circumstances set out when the purchaser had not deposited the 25 per cent, of the amount of the sale within the time stipulated in the sale notice. The plea of the applicant-reconstruction company was that it reserved its right to recover its dues in accordance with the provisions of the SARFAESI Act for sale of the property and it had already initiated action by notice to sell u/s 13(2) to the official liquidator. The official liquidator has not filed any objection to the notice. The applicant would contend that the only liability that it would undertake if it reserved to sell as provided

under the SARFAESI Act was of the claims of the workmen u/s 529A of the Companies Act, which the applicant-company considered to hold pari passu entitlement for distribution of the proceeds.

(IV) Objections for pursuing remedy under SARFAESI Act:

5. The parties filed the respective objections and the broad outlines of the objections are set out through the official liquidator and HSIIDC.

6. In the reply filed by the HSIIDC it is contended that during all the previous occasions when the official liquidator and the Corporation had been taking necessary steps to sell the assets of the company, the Bank of India did not raise any objection to the sale either initially when the order was passed on May 28, 2004 or on March 20, 2008, when the sale made by the official liquidator was ordered to be set aside and when a fresh order was passed by the court directing re-sale. The applicant who had stepped into the shoes of the Bank of India could have no better rights than its assignor the Bank of India itself and no application having been filed by the Bank of India at all times to remain outside the winding up, the present application by the assignee was totally misconceived. The company-in-liquidation was a Government company and the shares of the company had been held by the State Government and its undertakings. Under such circumstances it would only be appropriate that the assets of the company are sold by the official liquidator after informing the secured creditor that it would be in the interest of public that the property was sold under the supervision of the court by the official liquidator. It is further contended that the property sold through the official liquidator has the benefit of sale transaction being done subject to confirmation by this Court and this was a definite safeguard against any under-valuation of assets, protection for the general body of creditors and the workmen themselves. A reconstruction company has only profit motive and would actually be looking for interest being reckoned up to the date of sale and there was no public interest involved in the action of the applicant-reconstruction company. The HSIIDC settled the liabilities of the three banks, namely, the Bank of India, the Punjab National Bank and the Bank of Maharashtra to the tune of Rs. 581.15, 177.95 and 280.83, respectively, and in all Rs. 1,039.98 lakhs. Another amount of Rs. 30 lakhs advanced as principal due to the Bank of India alone remained to be settled and even in respect of the same the one-time settlement had been proposed and pending consideration. The HSIIDC had very strong objections for recalling the order for sale since it was not merely a majority shareholder but a secured creditor in respect of plant and machinery and institution that had discharged all the loans to the banks and had subrogated itself to their rights, apart from subsisting dues to it to the tune of Rs. 2 crores. Since the court had already permitted the sale in relation to the property, the applicant shall not be permitted to take over the assets from the official liquidator to the detriment of all concerned.

(V) The points for consideration:

7. The power of the secured creditor to stand outside the winding up process and for enforcement of the security for recovery of his dues cannot be doubted. The question however, is the time when it could be done and how the rights of several creditors including the workmen have to be addressed. The further point is whether the company court will completely lose its jurisdiction on an occasion when a secured creditor stakes the claim to the assets secured to it even after the official liquidator attached to the court is taking steps under the provisions of the Companies Act in the course of winding up and when the secured creditor had also participated for finalizing the sale and for conducting the sale.

(VI) Relevant provisions of SARFAESI Act analogous provisions of other enactments containing non obstante clauses:

8. The arguments on behalf of the reconstruction company through learned senior counsel Mr. M.L. Sarin have been with reference to the analogous provisions contained under the State Financial Corporations Act (SFC Act) and RDB Act which allow for sale of property under the relevant enactments even to the exclusion of the provisions of the Companies Act except in so far as they provide for treatment of the respective enactments as complementary to the provisions of the Companies Act for satisfaction of the claims of workmen. He also pointed to the effect of non obstante clauses contained in the enactments for their application and the way to reconcile with the complementary provisions under the Companies Act. According to him, the SARFAESI Act under which the present application of the company is filed, enables the applicant to pursue the remedy outside the provisions of the Companies Act and that the only area of congruence in the applicability of the SARFAESI Act and the Companies Act are what are provided u/s 13(9), proviso of the SARFAESI Act. It would, therefore, be relevant to bring out the provisions of Section 13(9), proviso and the relevant provisions of the RDB Act and the State Financial Corporations which provisions have been expressly cited in the decisions referred to by the counsel for both the sides.

9. Section 13(9) of the SARFAESI Act reads as follows:

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

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

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to

realise his security instead of relinquishing his security and proving his debt under proviso to Sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956) may retain the sale proceeds of the secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529A of that Act:

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

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

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

10. Section 35 of the SARFAESI Act reads as follows:

35. The provisions of this Act to override other laws.--The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

11. Section 37 of the Act reads as follows:

37. Application of other laws not barred.--The provisions of this Act or the Rules made thereunder shall be in addition to, and not in derogation of the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956). The Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

12. Section 34 of the RDB Act reads as follows:

34. Act to have overriding effect.--(1) Save as provided in subsection (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) and the Small Industries Development Bank of India Act, 1989 (39 of 1989).

13. Section 32 of Sick Industrial Companies (Special Provisions) Act, 1985, reads as follows (sic):

Some important case laws relating to pledge and mortgage.

Some important judgments and rulings will help throw light on the above two types of the securities which are offered to the bank for the purpose of raising moneys and advances.

These case laws are digested and the conclusions are given below:

(i) In pledge there is no transfer of property in the goods. In the case of mortgage the property in the goods is transferred.

(ii) In the case of the pledge of shares with the bank the same does not become the shareholder. It is only in the case of the pledge of the shares along with the blank transfer forms that the bank can become the shareholder and can exercise the rights of the same after the receipt of the directions in this regard from the Reserve Bank of India.

(iii) The bank who is pledgee has got the same rights as the borrower.

(iv) The bank is liable to return the goods on receiving the full payment from the borrower and will be liable for the damages if it fails to return the same as and when demanded by the pledgor after making the payment.

(v) The rights of the first pledgee cannot be extinguished by any other creditor.

(vi) In the case of the pledge of a railway receipt with the bank the bank will be in the possession of the goods till the repayment of the advance made by it is complete.

(vii) A surety is entitled to all the goods hypothecated or pledged to the bank once the borrower has paid all the moneys advanced to it. (viii) If the security is lost by the bank the surety will be discharged to the extent of the loss.

(ix) The bank is acting as a bailee of the goods and is supposed to take care of the goods as any prudent man will do in such cases. In case of any damage to the property in goods the bank will be liable to the loss due to the negligence of the bank.

14. There have been several decisions of the Supreme Court on the inter play of several enactments empowering the financial institutions to take actions for recovery of money through mechanisms other than through courts by reference to the non obstante clauses. While adverting to the effect of the non obstante clauses, the courts have always held that of the special enactments providing for specific procedure, the Act which is later in point of time alone will prevail over

the general enactment. The special enactment such as the RDB Act or State Financial Corporations Act or the SARFAESI Act will prevail over the Companies Act except in relation to the amendment brought through Section 529A of the Act with effect from May 3, 1995. It could be noticed that in all the special enactments, exceptions are made duly to the claims of the workmen and placed on pari passu entitlement of the claims along with the secured creditors. The decisions cited by the learned senior counsel with reference to the enforcement of the claim under the special enactments are first dealt with to spread the canvas wide for consideration.

(VII) In case of seeming conflict, the attempt must be to harmonize:

15. K. Chidambara Manickam v. Shakeena AIR 2008 Mad 108 : [2009] 152 Comp Cas 196, was dealt with by a Division Bench of the Madras High Court addressing the primacy of the claims of financial institutions under the SARFAESI Act. It also examined whether Section 35 of the SARFAESI Act which contained a non obstante clause over-rode Section 37 which stipulated that the provisions of the Act shall be in addition and not in derogation of the Companies Act. The Division Bench adopted the golden rule of construction that the attempt must always be to harmonize the provisions and not to see any conflict between the two sections under the same enactment. This decision did not actually address the issue of effect of any sale having already commenced after winding up of the company which the point of issue in the other case Rama Steel Industries and Others Vs. Union of India (UOI) and Another, , dealt with the case of interplay of the provisions of the SARFAESI Act and the RDB Act and other enactments. It found that the expression "any other law for the time being in force" u/s 37 of the Securitisation Act was missing from Section 34(2) of the RDB Act. This according to the Bench was crucial but it showed that the remedy was in addition to any other law for the time being in force and the availability of other mechanisms of recovery could not be a bar for providing remedy under the SARFAESI Act. The Division Bench of the Bombay High Court actually dispelled an attempt of the borrower to evade recovery of the amounts under the SARFAESI Act when action had already been initiated under the RDB Act and a resort to SARFAESI Act was taken subsequently. As a matter of fact the issue had been squarely covered by the Supreme Court in Greater Bombay Co-operative Bank Ltd. v. United Yarn Tex. P. Ltd. reported in AIR 2007 SCW 2325, Transcore Vs. Union of India (UOI) and Another, and Irene Isabella v. State Bank of India decided by the Madras High Court in Irene Isabella Vs. Authorised Officer, State Bank of India, Udagamandalam Branch and Another, that the bank which held a charge of the security and selling the property u/s 13(4) under the relevant Rules could not be thwarted except by resort to Section 17 which provided for an appeal to any person who is aggrieved by the action of the financial institutions.

16. It is contended by learned senior counsel for the reconstruction company that the action initiated u/s 13(2) could be objected to only by Section 17 by the HSIIDC or the official liquidator and they have no right to object in the manner

now sought to be done. These decisions also do not answer the specific question posed before us because the resort to Section 13(2) or (4) is not opposed either by the HSIIDC or the official liquidator. On the other hand, it is the reconstruction company which is before the court seeking for relief that it shall be permitted to stand outside the winding up process and that the sale order already passed by the company court shall not be proceeded with. In BPL Display Devices Ltd., In re decided by the High Court of Allahabad reported in [2009] 150 Comp Cas 280, the court considered a similar question as has arisen in this case, where a reconstruction company sought for a prayer to remain outside the proceedings for winding up and to let the applicant the sale of the movable and immovable property of the company-in-liquidation. The court, while granting such permission had observed that (page 291 of 150 Comp Cas): "The question of any possible conflict between the provisions of SARFAESI Act and the Companies Act was neither argued nor considered in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., ". Referring to the decision of the Supreme Court in ICICI Bank Ltd. Vs. Sidco Leathers Ltd. and Others, , where the Supreme Court had considered the issue of the option given to the secured creditor to stand outside the winding up process or relinquish the general benefit of the secured creditors and participate in the sale before the official liquidator the court ruled that the relinquishment shall be a conscious act where a person is aware of the right of requirement of the same as obtaining for the general benefit of the creditors and the action must lead to a conclusion that for some reason or other he intends to stand in the queue along with the creditors.

17. The Allahabad High Court identified the object of the SARFAESI Act as providing for enforcement of Securities Act without any intervention of the court or Tribunal and went on to hold on a point which it had earlier observed that was not a pointed controversy that "there was no apparent conflict between the SARFAESI Act and the Companies Act and therefore there does not appear to be any conflict between the sale of the security interest. The SARFAESI Act has to be harmonized in that the Act itself declares that is in addition and not in derogation of the Companies Act. It said at paragraph 41 (page 297 of 150 Comp Cas) : "that the object of speedier recovery of loan from non-performing assets would be defeated if the official liquidator would intervene to enforce the provisions of the Companies Act and to monitor each step of the securitisation and enforcement of the security interest. The company court therefore must allow the provisions of SARFAESI Act to be put into motion even if the proceedings of the winding up have been recommended or are pending or that company is under liquidation. The statutory duties of the company court for protecting the workmen's dues, and interest of the other stakeholder including the public interest will however, oblige the court to be informed with the process of sale."

18. Learned senior counsel refers to the above observation and states that the official liquidator shall not be justified in pursuing action under the Companies Act when the reconstruction company has initiated proceedings u/s 13 and the

relevant Rules under the SARFAESI Act. It must be remembered that the decision had been rendered in a circumstances where its specific finding was that the secured creditor had not relinquished its security and in respect of case where no more than winding up had been ordered on the recommendation of the BIFR. All the secured creditors had agreed in principle to take action under the SARFAESI Act notwithstanding the order for winding up and the reconstruction company had moved the court to inform, the High Court after development that had been specifically come about by the decision of the secured creditors to pursue remedy under the SARFAESI Act. It should be noticed that the company court itself had done no precipitative act to bring the property for sale at the time when the application had been moved by the reconstruction company.

19. Yet another decision relied on by the senior counsel for the applicant-reconstruction company was Asset Reconstruction Company (India) Limited Vs. The Official Liquidator, High Court as the liquidator of SIV Industries Ltd. (in liquidation), , where the High Court dealt with the issue of right of reconstruction company to be associated itself with the sale held by the official liquidator. It should be noticed that the reconstruction company did not seek to stand outside the winding up process but sought for permission in the manner provided in Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another, . Ruling official liquidator be associated with the reconstruction company for the sale of the assets of the company in Akola Oil Industries v. SBI reported in [2006] Bom CR 362, a Division Bench of the court considered the effect of non obstante clause and held that when actions were taken under the RDB Act, the financial institution had no necessity to seek the leave of the company court and the company court would also not stay the proceedings before the DRT. It said while dealing the primacy the applicability of the Securitisation Act, "we have no doubt in our mind" considering the provisions of the Securitisation Act the provisions of the Companies Act, the provisions of the Securitisation Act will prevail and no leave of the company court is required either before winding up or after winding up for selling the secured assets. The respondent, therefore, even if had preferred an application for leave or moved under the provisions of the Securitisation Act that really was not required". The observation of the Division Bench that the provisions of the Securitisation Act over ruled the provisions of the Companies Act find no similar echo in any of the pronouncements of the Supreme Court.

20. It would be the duty to harmonize and it was this approach that prevailed on the Supreme Court, while directing that the financial corporation shall assist the official liquidator for conduct of sale in Bakemans Industries Pvt. Ltd. Vs. New Cawnpore Flour Mills and Others, , that dealt with situation where the company court had ordered the sale of the company's property in auction under the provisions of Section 29 of the State Financial Corporations Act. The Supreme Court held that the company court would refer only to the terms of the Companies Act for exercise of its powers and shall do no act in terms of Section 29 of the State Financial Corporations Act. In that case, the Supreme Court

detailed the procedure to be adopted and did not rule out the jurisdiction of the company court for action for sale. In *Rajasthan Financial Corporation and Another Vs. The Official Liquidator and Another*, of the decisions of the Supreme Court including *Allahabad Bank Vs. Canara Bank and Another*, and *A.P. State Financial Corporation v. Official Liquidator* [2000] 102 Comp Cas 1 and summarised the legal position thus:

(i) A Debts Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institution Act, 1993, would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its recovery office but only after notice to the official liquidator or the liquidator appointed by the company court and after hearing him.

(ii) A district court entertaining an application u/s 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation, but only after notice to the official liquidator or the liquidator appointed by the company court.

21. Even while holding that the right of enforcement under the RDB Act should be resorted to even if the company was in liquidation it did not rule out the jurisdiction of the court in all matters. It found that the directions issued by the company court for joint action by the creditors was in the interest of all the creditors and was well within its jurisdiction. It directed the company court to order fresh valuation done by the panel of valuers by the High Court and directions issued by the company court were approved by the Supreme Court. The Supreme Court actually dealt with a similar situation when proceedings in liquidation of the debtor company were going on and two secured creditors who could have had recourse of the SFC Act to proceed against its assets, but who did not ever standing outside the winding up were claiming rights under the SFC Act by approaching the company court.

22. Learned Counsel appearing on behalf of the HSIIDC refers to the decision in *International Coach Builders Ltd. Vs. Karnataka State Financial Corpn.*, , where regular to the provisions of the State Financial Corporations Act, 1951 and their interplay with Sections 529 and 529A of the Companies Act was considered. The Supreme Court has held that there was no conflict, between the provisions of the Act. Even assuming that there was conflict, the amendment made to Sections 529 and 529A would override and control the rights u/s 29 of the SFC Act, between the provisions of the Act. We do not have a similar situation of any conflict between the secured creditors in relation to the same asset. It is an admitted case of the land that the Bank of India alone was the secured creditor in respect of the property and the issues involved here are different, namely, whether by the conduct of the bank in allowing the property to be sold through the official liquidator it had forsaken by its conduct right to proceed against its security and was placing itself in a queue for disbursement along with other classes of creditors. If lesson could be taken from this case for the benefit of HSIIDC, it is only that portion of the judgment where it directs that HFC must

take consent of the official liquidator, who as a representative of the workmen's prior charge under the proviso to Section 529 of the Companies Act would be in the position of a mortgagee. In case of refusal of consent by the official liquidator, the HFC must move the company court for appropriate directions. In this case, it has been argued that the reconstruction company must move only the company court for distribution of the proceeds of the assets in the manner provided under the Companies Act.

23. Learned Counsel appearing for the respondents and for the official liquidator placed reliance on *Bank of India Vs. Ketan Parekh and Others*, , while adverting to the conflict between the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 as amended in 1994 and the RDB Act of 1993 the court held that when both the enactments had non obstante clauses, then in that case the proper procedure would be that one has to see the intention as ascertained by looking to the object and reasons. The 1992 Act was found by the Supreme Court to contain special provisions relating to the transactions of securities during a particular period and RDB contained general provisions relating to recovery of debts by banks and financial institutions. On such a line of reasoning the former Act was found to override the provisions of the RDB Act to the extent where there was seemingly a conflict among the provisions in the respective enactments. The reliance of this judgment was to bring home the point that the object in scope of the Companies Act have to be borne in mind to exclude the portion of SARFAESI Act and give a primacy to the official liquidator and the company court to deal with the assets including the assets of a secured creditor who has decided to stay outside the winding up proceedings in so far as that it would take independent action under the special enactments such as SARFAESI Act.

24. The case cannot be parted without referring to a decision from the *Bank of Rajasthan Ltd. v. Official Liquidator* [2008] 146 Comp Cas 461 where a Division Bench of the Calcutta High Court had held that once winding up proceedings had commenced and the liquidator had been put in charge with the assistance of the company the sale of the assets of the company could be held at the instance of the financial institution coming under the RDB Act only with the assistance of the official liquidator and under the supervision of the company court. Learned Counsel appearing for the respondent would state that the adequacy of price and fairness of distribution of proceeds are assured under the Companies Act by the company court containing a supervisory control while no such safeguards exist under the SARFAESI Act. It must be pointed out that it would be wrong to assume that the SARFAESI Act itself does not contain adequate provisions for safeguarding the conduct of a fair proceeding for sale. It does contain provisions for any person aggrieved person to prefer an appeal to the DRT under SIT of SARFAESI Act. The Security Interest Enforcement Rules detail elaborate procedure for conduct of sale after due publicity. The apprehension expressed by the respondents is that the attempt of the reconstruction company to stay outside the winding up proceedings could give a serious disadvantage of the

secured creditors who already have over a period of several years exercised the time and expense for bringing the properties to sale.

25. If any attempt to harmonize the provisions of the SARFAESI Act and the Companies Act could be made, in the context of orders for sale having already been made by the company court and the participation of the assignor of the applicant at several step for the conduct of sale through the company court, it will be inexpedient to unyoke the proceeding that were put throughly the official liquidator. While upholding the claim that the procedure laid down under the SARFAESI Act would enable the provisions of the Security Interest Enforcement Rules to be applied for the conduct and confirmation of the sale, the dispensation in this case would be:

(a) to permit the applicant to stay outside the winding up proceedings and take action to bring to sale the secured assets u/s 13 of the SARFAESI Act read with rules 8 and 9 of the Security Interest Enforcement Rules, 2002.

(b) The applicant-reconstruction company shall keep all the steps taken under the SARFAESI Act and the relevant Rules transparent and submit all the proposals for sale to the official liquidator and the details of valuation obtained for the conduct of sale for the purpose of determining the used price.

(c) Sale shall be advertised with a specific clause that the winding up proceedings are pending before the company court, with details of case number and the court of adjudication.

(d) The expenses already incurred for the conduct of the sale by the official liquidator shall be deducted from out of the sale proceeds before any appropriation or disbursement and deposited with the official liquidator.

(e) The reconstruction company shall place before the company court the details of its claim and all expenses incurred before the company court, before making any appropriation to itself and disbursed.

(f) The surplus proceeds over what is lawfully due to it shall be deposited to the credit of the company (in liquidation) before the official liquidator.

26. The application filed by the reconstruction company and other connected application are disposed of in the above terms.