

(2014) 02 OHC CK 0037
In the Orissa High Court
Case No : W.P.(C) No. 9518 of 2005

Sarthak Builders Pvt. Ltd.

APPELLANT

Vs

Orissa Rural Development Corporation Limited

RESPONDENT

Date of Decision : 14-02-2014

Acts Referred:

Companies Act, 1956 — Section 4A
Criminal Procedure Code, 1973 (CrPC) — Section 428
Employees State Insurance Act, 1948 — Section 45B
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2
Reserve Bank of India Act, 1934 — Section 45I
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 14, 15
Transfer of Property Act, 1882 — Section 69, 69A

Citation : (2014) 3 AKR 298

Hon'ble Judges : A.K. Goel, C.J.;C.R. Dash, J;Akshaya Kumar Rath, J

Bench : Full Bench

Judgement

A.K. Goel, C.J.—The question referred for consideration of this Bench is whether provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 can be invoked with reference to the loan transaction entered into prior to coming into force of the said Act? A Division Bench of this Court in Subash Chandra Panda Vs. State of Orissa and Others, held in the negative while contra view has been taken by Uttaranchal High Court and Allahabad High Court in Unique Engineering Works Vs. Union of India (UOI) and Others, and Pradeep Kumar Gupta and Another Vs. State of U.P. and Others, respectively.

2. It may be necessary to advert to some basic facts giving rise to the question. The Orissa Rural Housing Development Corporation Limited (ORHDC) advanced loan to the petitioner-builder against mortgage of property in the year 1998. SARFAESI Act came into force on 17.12.2002 replacing the corresponding provisions of Ordinance which came into force from 21.6.2002. The Act inter alia provides for enforcing of Security Interest by a Secured Creditor without the

intervention of court. The term "Secured creditor" means a bank or "financial institution" and other entities as defined u/s 2(zd). The financial institution is defined u/s 2(m) of the Act to mean institutions specifically described therein and any other institution which may be so specified by a notification by the Central Government. The Central Government has notified several financial institutions under the said provision from time to time, including ORHDC. ORHDC was so notified on 10.11.2003. Thereafter, ORHDC invoked provisions of Section 13 of the SARFAESI Act and issued impugned notices dated 8.12.2004 and 18.4.2005 under Sections 13(2) and 13(4) of the Act, followed by sale notice dated 25.6.2005. The said notices have been impugned by the affected parties.

3. One of the contentions though raised belatedly was that the SARFAESI Act could not be invoked in respect of loan transaction entered into prior to 10.11.2003. This plea was supported by Division Bench of this Court in Subash Chandra Panda Vs. State of Orissa and Others,

4. However, financial institution sought reconsideration of the view expressed in Vanga Srinivas Vs. Public Prosecutor, High Court of A.P., and the Division Bench hearing the matter considered it appropriate to refer the matter to a larger Bench. Hence this reference.

5. We have heard learned counsel for the petitioner, learned counsel for the financial institution and learned Amicus Curiae.

6. It would be appropriate to refer to the background of the legislation in question.

The Act is aimed at speedy recovery of defaulted loans in the light of international experience highlighted by Expert Committees known as Andhyarujina Committee and Narasimham Committee, constituted by the Central Government for examining banking sector reforms. The said Committees suggested new law empowering financial institutions to take possession of the securities and sell the same without intervention of the court. Earlier, for speedy disposal of claims of the bank for recovery of loans, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (DRT) was enacted with a view to set up specialized Tribunals, excluding the jurisdiction of civil courts.

7. Section 13 of the Act confers power for enforcement of Security Interest of Secured Creditor. Relevant part of the said provision is as follows:

"13. Enforcement of security interest--(1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in re-payment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the

secured creditor as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4)."

8. In *Subash Chandra Panda Vs. State of Orissa and Others*, the question for consideration was as follows:

"8. Now the question is whether by virtue of the notification dated 10.11.2003 issued by the Central Government notifying it to be a financial institution, it can initiate such proceeding u/s 13 of the Securitization Act in respect of those two loan agreements of 2001 and 2002."

9. Dealing with the question, the Bench observed as follows:

"10. From a perusal of those provisions, it appears that in order to invoke them , the opposite party must show that, "security interest" has been created in favour of any "secured creditor". If it is so created it can be enforced without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of the said Act. In the said Act the expressions "secured creditor" and "security interest" have been defined. "Secured creditor" has been defined in Section 2(zd) which definition is as follows:

"(zd) "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes--

- (i) debenture trustee appointed by any bank or financial institution; or
- (ii) securitization company or reconstruction company, whether acting as such or managing a trust set up by such securitization company or reconstruction company for the securitization or reconstruction, as the case may be; or
- (iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due re-payment by any borrower of financial assistance.

"Security Interest" has been defined in Section 2(zf) which reads as follows:

"(zf) "security interest" means right, title and interest of any kind whatsoever upon property, effected in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31."

If we deal with those two definitions, it would be clear that "secured creditor" means a bank or financial institution or group of banks or financial institutions and "security interest" has been defined to mean right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge hypothecation etc.

11. Therefore, unless on the date the impugned agreement was entered into,

between the petitioner and the opposite party Nos. 6 and 7, the opposite party No. 6 has become a secured creditors within the meaning of Section 2(zd) of the said Act, no security interest can be created in its favour. So they cannot invoke the provisions of Section 13 of the said Act.

14. It is clear that prior to the notification dated 10.11.2003, the opposite party No. 6 was not a financial institution within the meaning of Section 2(m)(iv) of the Act. Since it was not a financial institution, it was not a secured creditor and it cannot invoke the provisions of the said Act in respect of a loan transaction of a prior date.

16. Opposite party No. 6 has been declared a financial institution only by the notification and the said notification takes effect from 10.11.2003 prospectively and not from a prior date. Therefore, the fact remains that by the time the alleged agreement was entered into between opposite party No. 6 and petitioner i.e. on 26.5.2001 and 6.5.2002, opposite party No. 6 Maharshi Housing Development Finance Corporation Ltd., was not a financial institution within the meaning of Section 2(m)(iv) of the said Act and not being a financial institution it was not a secured creditor and could not invoke the provisions of Section 13 of the Securitization Act. Nor the petitioner was a "borrower" under the definition of Section 2(f) on 26.5.2001 or on 6.5.2002 since a borrower means a person who has been granted financial assistance by a financial institution. Opposite party No. 6 not being a financial institution either on 26.5.2001 or on 6.5.2002 whatever loan it might have granted to the petitioner on that date was not any financial assistance given to the petitioner by a financial institution within the meaning of Section 2(m)(iv).

23. From the discussion which has been made hereinabove, it is clear that on the dates on which the alleged transactions were made between the petitioner and the opposite party No. 6, it was not a financial institution within the meaning of Securitization Act and it could not invoke Section 13. That being the position, the notice which is issued to the petitioner u/s 13(2) of the Securitization Act is without jurisdiction. It is highly doubtful whether any notice u/s 13(4) was given. Even if it is given for the same reason it is wholly without jurisdiction and the proceeding on the basis of which the petitioner has been dispossessed from his residential property is illegal and without any authority of law. Thus, the entire action of opposite party No. 6 is unauthorized, illegal and bad in law."

10. In Unique Engineering Works Vs. Union of India (UOI) and Others, the same issue was dealt with as follows:

"26. Thirdly, it was argued that the impugned NPA Act, 2002 cannot apply retrospectively.....There is a difference between retrospectivity and retroactivity. In the case of retroactivity the Parliament takes note of the existing conditions and it takes remedial measures to rectify the conditions. In the present case, if one looks at the various provisions of the impugned NPA Act, 2002 it is clear that the impugned NPA Act, 2002 is retroactive in nature. Firstly, the Act is enacted to

reduce the non-performing assets of banks and financial institutions which has accumulated. This is mentioned in Statement of Objects and Reasons. Secondly, even at present in case where Order 40, Civil procedural law (sic). Similarly, under the impugned NPA Act, 2002 we have the procedural law which enables the bank to take possession of the property for non-payment of dues. Therefore, Chapter III of impugned NPA Act, 2002 is procedural law under which remedy is provided for enforcement of security interest without intervention of the Court but at the same time appeal is provided to the Tribunal and in cases where possession is wrongly taken the Tribunal can correct the position. Thirdly, the various Sections of the Act indicate that the impugned NPA Act, 2002 is retrospective. In this connection, one has to look at Section 2(f) which defines the word borrower to mean any person who has been granted financial assistance by any bank or who is given guarantee. Section 2(f) shows intention of the Parliament to include all borrowers who are given financial assistance before the Act came into force. Section 2(j) defines the word default and the language used is "Account of such borrower which is classified as non-performing asset".

11. In Pradeep Kumar Gupta and Another Vs. State of U.P. and Others, the relevant discussion is as follows:

"21. The Act of 2002 was enacted with the purpose of reducing accumulated non-performing assets of the banks and financial institutions. The Act is a procedural law, which enables the banks to take possession of the property for non-payment of dues without intervention of the court, providing for an appeal to the Tribunal where possession is wrongly taken. The fact, whether the security was created prior to the enforcement of the Act or the notification by which the banking company is notified for applicability of the Act, will not make any difference. The Act may be divided in two parts, namely, the registration and regulation of securitization companies or reconstruction companies by the Reserve Bank of India and the facilitation of securitization of financial assets of banks and financial institutions with or without the benefit of underlying securities. The provisions relating to the registration of securitization companies or reconstructions companies must be read with a retrospective effect. The securitization, however, is only a procedure for which the rights may have created prior to the enforcement of the Act. It is only the enforcement of those rights that the Act comes into play. It does not create any fresh rights in the matter of procedures of securitization. Chapter III "Enforcement of Security Interest" is procedural in nature. A non-performing asset classified by the secured creditor, requires the secured creditor by notice in writing to discharge his liabilities to the secured creditors and thereafter under sub-section (4) to take possession or to take other management of the business of the borrower. Section 14 provides for assistance of the Chief Metropolitan Magistrate or the District Magistrate to assist secured creditor in taking possession of the secured interest. Section 15 provides for manner and effect of taking over possession. Section 16 provides that no compensation is to be paid to the directors for loss of

office and Section 17 provides for right to appeal to any person aggrieved by any measure referred to in sub-section (4) of Section 13 of filing an appeal in Debt Recovery Tribunal. In case of an appeal under sub-section (3) of Section 17 the Debt Recovery Tribunal has to examine whether any of the measures taken by the secured creditors u/s 13(4) are not in accordance with the provisions of the Act and the Rules made thereunder and require restoration of the management of the secured assets to the borrower."

12. From the above, it is clear that in Subash Chandra Panda Vs. State of Orissa and Others, the view taken is that the secured creditor could invoke Section 13 of the Act only if it was covered by the said definition on the date of loan transaction. The notification extended the Act to ORHDC with effect from 10.11.2003, by including ORHDC in the definition of "financial institution" u/s 2(m) and thus on the date of loan transaction it was not the "secured creditor" so as to invoke Section 13 of the SARFAESI Act. On the contrary, the view taken in Pradeep Kumar Gupta and Another Vs. State of U.P. and Others, is that the Statute is the remedy for enforcing security in the existing loan transactions which have become irregular. The Parliament had provided for remedial measures to rectify the existing conditions. The Statute is retroactive in nature, though it may operate in future by way of future action for enforcing existing security interest. The Act was intended to be retrospective to include all the borrowers who were given financial assistance before the Act came into force but whose accounts became non-performing. Reference has been made to definition "borrower" u/s 2(f), default u/s 2(j), hypothecation u/s 2(n) and secured asset u/s 2(zc) to highlight that the Act referred to transactions already entered into. It has also been observed that Section 13(2) used the expression "any person who makes default" which can refer to the transaction already entered into in respect of which default has been made and for which action was required to be taken under the Act. It has been further observed that the Act being a procedural law has to be taken to be retrospective. Securitization was only a procedure by which pre-existing rights are enforced. Section 2(f), (j), (m), (n), (zc) are as follows:

(f) "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;

(j) "default" means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor;

(m) "financial institution" means--

(i) a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956);

(ii) any institution specified by the Central Government under sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);

(iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958);

(iv) any other institution or non-banking financial company as defined in clause (f) of section 45I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central-Government may, by notification, specify as financial institution for the purposes of this Act;

(n) "Hypothecation" means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallisation of such charge into fixed charge on movable property;

(zc) "secured asset" means--the property on which security interest is created;

13. On due consideration of the issue, we are of the view that the view taken in *Subash Chandra Panda Vs. State of Orissa and Others*, is not sound law. The view taken in *Pradeep Kumar Gupta and Another Vs. State of U.P. and Others*, commends our acceptance.

14. The background and salient features of the legislation in question have been extensively analyzed by the Hon'ble Supreme Court of India inter alia in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, and *United Bank of India Vs. Satyawati Tondon and Others*, and it has been observed that the Act is intended to give impetus to industrial development in the country by providing speedy procedure of recovery. Regular courts were not able to cope with speed in adjudication of recovery cases on account of lack of infrastructure and man power. In the light of recommendations of the Tiwari Committee, Special Tribunals have been set up under the DRT Act for recovery of huge accumulated non-performing assets of the bank loans. In the light of the recommendations of the Narasimham Committee and Andhyarujina Committee, Securitisation Act was enacted to empower banks and financial institutions to take possession of the securities and to sell them, without the intervention of the Court. Reference may be made to observations in *Satyawati Tondon*:

"1.....With a view to give impetus to the industrial development of the country, the Central and State Governments encouraged the banks and other financial institutions to formulate liberal policies for grant of loans and other financial facilities to those who wanted to set up new industrial units or expand the existing units. Many hundred thousand took advantage of easy financing by the banks and other financial institutions but a large number of them did not re-pay

the amount of loan, etc. Not only this, they instituted frivolous cases and succeeded in persuading the civil courts to pass orders of injunction against the steps taken by banks and financial institutions to recover their dues. Due to lack of adequate infrastructure and non-availability of manpower, the regular courts could not accomplish the task of expeditiously adjudicating the cases instituted by banks and other financial institutions for recovery of their dues. As a result, several hundred crores of public money got blocked in unproductive ventures.

2. In order to redeem the situation, the Government of India constituted a Committee under the Chairmanship of Shri T. Tiwari to examine the legal and other difficulties faced by banks and financial institutions in the recovery of their dues and suggest remedial measures. The Tiwari Committee noted that the existing procedure for recovery was very cumbersome and suggested that Special Tribunals be set up for recovery of the dues of banks and financial institutions by following a summary procedure. The Tiwari Committee also prepared a draft of the proposed legislation which contained a provision for disposal of cases in three months and conferment of power upon the Recovery Officer for expeditious execution of orders made by adjudicating bodies.

3. The issue was further examined by the Committee on the Financial System headed by Shri M. Narasimham. In its First Report, the Narasimham Committee also suggested setting up of Special Tribunals with special powers for adjudication of cases involving the dues of banks and financial institutions.

4. After considering the reports of the two Committees and taking cognizance of the fact that as on 30-9-1990 more than 15 lakh cases filed by public sector banks and 304 cases filed by financial institutions were pending in various courts for recovery of debts, etc. amounting to Rs. 6000 crores, Parliament enacted the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the DRT Act"). The new legislation facilitated creation of specialised forums i.e. the Debts Recovery Tribunals and the Debts Recovery Appellate Tribunals for expeditious adjudication of disputes relating to recovery of the debts due to banks and financial institutions. Simultaneously, the jurisdiction of the civil courts was barred and all pending matters were transferred to the Tribunals from the date of their establishment.

5. An analysis of the provisions of the DRT Act shows that primary object of that Act was to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions. This is the reason why the DRT Act not only provides for establishment of the Tribunals and the Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of recovery of the amount determined by the Tribunal or the Appellate Tribunal but also bars the jurisdiction of all courts except the Supreme Court and the High Courts in relation to the matters specified in Section 17. The Tribunals and the Appellate Tribunals have also been freed from the shackles of procedure contained in the Code of Civil Procedure.

6. To put it differently, the DRT Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of banks and financial institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of the civil courts for frustrating the proceedings initiated by the banks and other financial institutions.

7. For few years, the new dispensation worked well and the officers appointed to man the Tribunals worked with great zeal for ensuring that cases involving recovery of the dues of banks and financial institutions are decided expeditiously. However, with the passage of time, the proceedings before the Tribunals became synonymous with those of the regular courts and the lawyers representing the borrowers and defaulters used every possible mechanism and dilatory tactics to impede the expeditious adjudication of such cases. The flawed appointment procedure adopted by the Government greatly contributed to the malaise of delay in disposal of the cases instituted before the Tribunals.

8. The survey conducted by the Ministry of Finance, Government of India revealed that as in 2001, a sum of more than Rs. 1,20,000 crores was due to the banks and financial institutions and this was adversely affecting the economy of the country. Therefore, the Government of India asked the Narasimham Committee to suggest measures for expediting the recovery of debts due to banks and financial institutions.

9. In its Second Report, the Narasimham Committee noted that the non-performing assets of most of the public sector banks were abnormally high and the existing mechanism for recovery of the same was wholly insufficient. In Chapter VIII of the Report, the Committee noted that the evaluation of legal framework has not kept pace with the changing commercial practice and financial sector reforms and as a result of that the economy could not reap full benefits of the reform process. The Committee made various suggestions for bringing about radical changes in the existing adjudicatory mechanism. By way of illustration, the Committee referred to the scheme of mortgage under the Transfer of Property Act, 1882 and suggested that the existing laws should be changed not only for facilitating speedy recovery of the dues of banks, etc. but also for quick resolution of disputes arising out of the action taken for recovery of such dues.

10. The Andhyarujina Committee constituted by the Central Government for examining banking sector reforms also considered the need for changes in the legal system. Both, the Narasimham and Andhyarujina Committees suggested enactment of new legislation for securitisation and empowering the banks and financial institutions to take possession of the securities and sell them without intervention of the court.

11. The Government of India accepted the recommendations of the two Committees and that led to enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act"), which can be termed as one of the most radical legislative

measures taken by Parliament for ensuring that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstruction. For the first time, the secured creditors have been empowered to take steps for recovery of their dues without intervention of the Courts or Tribunals."

15. Thus, the Act intends to provide remedy in respect of pre-existing loans. The interpretation that the Act will apply only to future debt transactions defeats the very purpose of law of reducing the non-performing assets. This object is clearly mentioned in the Statement of Objects and Reasons. As noted in the case of *United Bank of India Vs. Satyawati Tondon and Others*, amount of rupees one lakh twenty thousand crores was due to the banks in the year 2001 which had adversely affected the economy of the country. Obviously, the Act is intended to recover the said pre-existing loans by the machinery provided under the SARFAESI Act. The pre-existing loans are not excluded from the purview of the Act. Similarly, the object of notifying the financial institution in question is to enable such institution to avail the provisions of SARFAESI Act in respect of existing loans. This salient object of the Act does not appear to have been noticed in *Subash Chandra Panda Vs. State of Orissa and Others*,

16. Further, the settled principle of interpretation that while the statute affecting the substantive rights is presumed to be prospective, a statute changing the forum of remedy and the procedure is retrospective has also not been kept in mind. These principles are the basis of the view taken in the *Pradeep Kumar Gupta and Another Vs. State of U.P. and Others*, The said considerations are valid and legitimate, supported by ample authority of binding precedents of the Apex Court, to which reference may be made and relevant observations extracted:

1. *Rafiquennessa Vs. Lal Bahadur Chetri (Dead) through his Representatives and Others*,

"9.....Mr. Chatterjee has relied upon the well-known observations made by Wright, J. in (*Re, Athlumney ex parte or Wilson* (1898) 2 QBD 547) when the learned Judge said that it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. He added that there was one exception to that rule, namely that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights. In order to make the statement of the law relating to the relevant rule of construction which has to be adopted in dealing with the effect of statutory provisions in this connection, we ought to add that retrospective operation of a statutory provision can be inferred even in cases where such retroactive operation appears to be clearly implicit in the provision construed in the context where it occurs. In other words, a statutory provision is held to be retroactive either when it is so declared by express terms, or the intention to make it retroactive clearly follows from the relevant words and the context in which they occur."

(Emphasis added)

2. Memon Abdul Karim Haji Tayab Vs. Deputy Custodian General, New Delhi and Others,

"4.....It is well settled that procedural amendments to a law apply, in the absence of anything to the contrary, retrospectively in the sense that they apply to all actions after the date they come into force even though the actions may have begun earlier or the claim on which the action may be based may be of an anterior date...."

3. Boucher Pierre Andre Vs. Superintendent, Central Jail, Tihar, New Delhi and Another,

"2. The question which arises for determination in this petition is a narrow one and it rests on the true interpretation of Section 428. Is this section confined in its application only to cases where a person is convicted after the coming into force of the new Code of Criminal Procedure, or does it also embrace cases where a person has been convicted before but his sentence is still running at the date when the new Code of Criminal Procedure came into force? It is only if the latter interpretation is accepted that the petitioner would be entitled to claim the benefit of the section and hence it becomes necessary to arrive at its proper construction. Section 428 reads as follows:

"Where an accused person has, on conviction, been sentenced to imprisonment for a term, the period of detention, if any, undergone by him during the investigation, inquiry or trial of the same case and before the date of such conviction, shall be set-off against the term of imprisonment imposed on him on such conviction, and the liability of such person to undergo imprisonment on such conviction shall be restricted to the remainder, if any, of the term of imprisonment imposed on him."

This section, on a plain natural construction of its language, posits for its applicability a fact-situation which is described by the clause "where an accused person has, on conviction, been sentenced to imprisonment for a term". There is nothing in this clause which suggests, either expressly or by necessary implication that the conviction and sentence must be after the coming into force of the new Code of Criminal Procedure. The language of the clause is neutral. It does not refer to any particular point of time when the accused person should have been convicted and sentenced. It merely indicates a fact-situation which must exist in order to attract the applicability of the section and this fact-situation would be satisfied equally whether an accused person has been convicted and sentenced before or after the coming into force of the new Code of Criminal Procedure. Even where an accused person has been convicted prior to the coming into force of the new Code of Criminal Procedure but his sentence is still running, it would not be inappropriate to say that the "accused person has, on conviction, been sentenced to imprisonment for a term". Therefore, where an accused person has been convicted and he is still serving his sentence at the

date when the new Code of Criminal Procedure came into force. Section 428 would apply and he would be entitled to claim that the period of detention undergone by him during the investigation, inquiry or trial of the case should be set-off against the term of imprisonment imposed on him and he should be required to undergo only the remainder of the term. Of course, if the term of the sentence has already run out, no question of set-off can arise. It is only where the sentence is still running that the section can operate to restrict the term. This construction of the section does not offend against the principle which requires that unless the legislative intent is clear and compulsive, no retrospective operation should be given to a statute. On this interpretation, the section is not given any retrospective effect. It does not seek to set at naught the conviction already recorded against the accused person. The conviction remains intact and unaffected and so does the sentence already undergone. It is only the sentence, insofar as it yet remains to be undergone, that is, reduced. The section operates prospectively on the sentence which yet remains to be served and curtails it by setting off the period of detention undergone by the accused person during the investigation, inquiry or trial of the case. Any argument based on the objection against giving retrospective operation is, therefore, irrelevant."

4. New India Insurance Co. Ltd. Vs. Smt. Shanti Misra, Adult,

"5. On the plain language of Sections 110-A and 110-F there should be no difficulty in taking the view that the change in law was merely a change of forum i.e. a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective...."

5. Hitendra Vishnu Thakur and Others Vs. State of Maharashtra and Others,

"26.....From the law settled by this Court in various cases the illustrative though not exhaustive principles which emerge with regard to the ambit and scope of an Amending Act and its retrospective operation may be culled out as follows:

(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

6. K.S. Paripoornan Vs. State of Kerala and Others,

"64. A statute dealing with substantive rights differs from a statute which relates to procedure or evidence or is declaratory in nature inasmuch as while a statute dealing with substantive rights is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect, a statute concerned mainly with matters of procedure or evidence or which is declaratory in nature has to be construed as retrospective unless there is a clear indication that such was not the intention of the legislature.

7. Employee's State Insurance Corporation Vs. Dwarka Nath Bhargwa,

"The Employees" State Insurance Corporation has brought in challenge the order passed by the Allahabad High Court disposing of the first appeal from Order No. 362 of 1972. By the impugned judgment, the High Court has taken the view that provisions of Section 45B of the Employees' State Insurance Act, 1948 (hereinafter referred to as "the Act") enabling recovery of contribution payable under the Act as arrears of land revenue cannot be pressed into service by the appellant-Corporation in the present case. Reason given by the High Court for the said conclusion is to the effect that the recoveries pertain to the period prior to the date on which Section 45B was inserted in the statute-book. The said section was brought into force on 28-1-1968, while the amount sought to be recovered became payable on 27-1-1967 and 24-1-1968. It is of course true that these amounts were to be paid by the respondent-employer on these relevant dates, but these contributions were not made by the respondent in time. Therefore, they remained in arrears. After Section 45B was brought on the statute-book, notices were issued to the respondent on 24-4-1970 and 9-9-1970 for effecting recoveries of these unpaid amounts of contributions by resort to Section 45B. Question, therefore, is as to whether for the aforesaid contributions which remained unpaid resort to Section 45B could be effected on any day after the said section came on the statute-book? Now a mere look at the said section shows that it is of procedural nature. It provides that any contribution payable under this Act may be recovered as arrears of land revenue. Constantly, on the date on which the recovery by way of arrears of land revenue is to be effected, the contribution in question should have remained unpaid.

2. It is not in dispute and cannot be disputed that the contributions in question

had remained payable all throughout and were not paid by the respondent. The day on which recovery by way of land revenue was sought to be made, Section 45B had already come into force. As it was a procedural provision, it could obviously apply retrospectively to cover all contributions which had remained unpaid even prior to the date on which the section came into force. In support of this contention, learned counsel for the appellant rightly invited our attention to a decision of the Privy Council in AIR 1927 242 (Privy Council) wherein it has been laid down that--

"while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them, provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment"

3. As the aforesaid provision is purely procedural in nature, it cannot be gainsaid that it could have retrospective effect. Consequently, the contention of the learned counsel for the appellant in this connection is well made out and must be accepted. We, therefore, hold that Section 45B can be pressed into service to effect recovery of unpaid contributions when the contributions have remained unpaid since prior to the coming into force of Section 45B and have throughout also remained unpaid."

8. Shyam Sunder and Another Vs. Ram Kumar and Another,

"22. In Maxwell on the Interpretation of Statutes, 12th Edn., the statement of law in this regard is stated thus:

"Perhaps no rule of construction is more firmly established than this--"that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only". The rule has, in fact, two aspects, for, it "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have greater retrospective operation than its language renders necessary"."

23. In Francis Bennion's Statutory Interpretation, 2nd Edn., the statement of law is stated as follows:

"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex post facto law is enshrined in the United States

Constitution and in the Constitution of many American States, which forbid it. The true principle is that *lex prospicit non respicit* (law looks forward not back). As Willes, J. said retrospective legislation is "contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law".

24. In *Garikapatti Veeraya Vs. N. Subbiah Choudhury*, this Court observed as thus: (AIR p. 553, para 25)

"The golden rule of construction is that, in the absence of anything in the enactment to show that it is to have retrospective operation, it cannot be so construed as to have the effect of altering the law applicable to a claim in litigation at the time when the Act was passed."

25. In *Smt. Dayawati and Another Vs. Inderjit and Others*, it is held thus: (AIR p. 1426, para 10)

"10. Now as a general proposition, it may be admitted that ordinarily a court of appeal cannot take into account a new law, brought into existence after the judgment appealed from has been rendered, because the rights of the litigants in an appeal are determined under the law in force at the date of the suit. Even before the days of Coke, whose maxim--a new law ought to be prospective, not retrospective in its operation--is oft-quoted, courts have looked with disfavour upon laws which take away vested rights or affect pending cases. Matters of procedure are, however, different and the law affecting procedure is always retrospective. But it does not mean that there is an absolute rule of inviolability of substantive rights. If the new law speaks in language, which, expressly or by clear intendment, takes in even pending matters, the court of trial as well as the court of appeal must have regard to an intention so expressed, and the court of appeal may give effect to such a law even after the judgment of the court of first instance."

(Emphasis added)

9. *Dilip Vs. Mohd. Azizul Haq and Another*,

"9. The problem concerning retrospectivity concerning enactments depends on events occurring over a period. If the enactment comes into force during a period it only operates on those events occurring then. We must bear in mind that the presumption against retrospective legislation does not necessarily apply to an enactment merely because a part of the requisites for its action is drawn from time antecedent to its passing. The fact that as from a future date tax is charged on a source of income which has been arranged or provided for before the date of the imposition of the tax does not mean that a tax is retrospectively imposed as held in *Comms. of Customs and Excise v. Thorn Electrical Industries Ltd.*, (1975) 1 WLR 1661."

(Emphasis added)

10. Zile Singh Vs. State of Haryana and Others,

"13. It is a cardinal principle of construction that every statute is *prima facie* prospective unless it is expressly or by necessary implication made to have a retrospective operation. But the rule in general is applicable where the object of the statute is to affect vested rights or to impose new burdens or to impair existing obligations. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only--"*nova constitutio futuris formam imponere debet non praeteritis*"--a new law ought to regulate what is to follow, not the past. (See Principles of Statutory Interpretation by Justice G.R Singh, 9th Edn., 2004 at p. 438.) It is not necessary that an express provision be made to make a statute retrospective and the presumption against retrospectivity may be rebutted by necessary implication especially in a case where the new law is made to cure an acknowledged evil for the benefit of the community as a whole (*ibid.*, p. 440).

(Emphasis added)

15. Though retrospectivity is not to be presumed and rather there is presumption against retrospectivity, according to Craies (*Statute Law*, 7th Edn.), it is open for the legislature to enact laws having retrospective operation. This can be achieved by express enactment or by necessary implication from the language employed. If it is a necessary implication from the language employed that the legislature intended a particular section to have a retrospective operation, the courts will give it such an operation. In the absence of a retrospective operation having been expressly given, the courts may be called upon to construe the provisions and answer the question whether the legislature had sufficiently expressed that intention giving the statute retrospectivity. Four factors are suggested as relevant: (i) general scope and purview of the statute; (ii) the remedy sought to be applied; (iii) the former state of the law; and (iv) what it was the legislature contemplated, (p. 388) The rule against retrospectivity does not extend to protect from the effect of a repeal, a privilege which did not amount to accrued right. (p. 392)

17. Maxwell states in his work on Interpretation of Statutes (12th Edn.) that the rule against retrospective operation is a presumption only, and as such it "may be overcome, not only by express words in the Act but also by circumstances sufficiently strong to displace it" (p. 225). If the dominant intention of the legislature can be clearly and doubtlessly spelt out, the inhibition contained in the rule against perpetuity becomes of doubtful applicability as the "inhibition of the rule" is a matter of degree which would "vary *secundum materiam*" (p. 226). Sometimes, where the sense of the statute demands it or where there has been an obvious mistake in drafting, a court will be prepared to substitute another word or phrase for that which actually appears in the text of the Act (p. 231).

20. In The Bengal Immunity Company Limited Vs. The State of Bihar and Others,

Heydon case (1584) 76 ER 637, was cited with approval. Their Lordships have said: (SCR pp. 632-33)

"It is a sound rule of construction of a statute firmly established in England as far back as 1584 when Heydon case was decided that--

"... for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered--

1st. What was the common law before the making of the Act.

2nd. What was the mischief and defect for which the common law did not provide.

3rd. What remedy Parliament hath resolved and appointed to cure the disease of the Commonwealth, and

4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

11. Pratap Singh Vs. State of Jharkhand and Another,

"105. A remedial statute applied in a pending proceeding would not mean that thereby a retrospective effect and retroactive operation is being given thereto."

12. T. Kaliamurthi and Another Vs. Five Gori Thaikal Wakf and Others,

"40....It is well settled that no statute shall be construed to have a retrospective operation until its language is such that would require such conclusion. The exception to this rule is enactments dealing with procedure. This would mean that the law of limitation, being a procedural law, is retrospective in operation in the sense that it will also apply to proceedings pending at the time of the enactment as also to proceedings commenced thereafter, notwithstanding that the cause of action may have arisen before the new provisions came into force. However, it must be noted that there is an important exception to this rule also. Where the right of suit is barred under the law of limitation in force before the new provision came into operation and a vested right has accrued to another, the new provision cannot revive the barred right or take away the accrued vested right."

(Emphasis added)

13. Purbanchal Cables and Conductors Pvt. Ltd. Vs. Assam State Electricity Board and Another,

"45. In Govind Das and Others Vs. The Income Tax Officer and Another, this Court speaking through P.N. Bhagwati, J. (as he then was) held: (SCC p. 914, para 11) : (P. 558, Para 10 of AIR)

"11. Now it is a well-settled rule of interpretation hallowed by time and sanctified by judicial decisions that, unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general rule as stated by Halsbury in Vol. 36 of the Laws of England (3rd Edn.) and reiterated in several decisions of this Court as well as English Courts is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only."

14. Gurbachan Singh Vs. Satpal Singh and others,

"37. The provisions of the said section do not create any new offence and as such it does not create any substantial right but it is merely a matter of procedure of evidence and as such it is retrospective and will be applicable to this case. It is profitable to refer in this connection to Halsbury's Laws of England, Fourth Edition, Volume 44 page 570 wherein it has been stated that:

"The general rule is that all statutes, other than those which are merely declaratory or which relate only to matters of procedure or of evidence, are prima facie prospective, and retrospective effect is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature...."

38. It has also been stated in the said volume of Halsbury's Laws of England at page 574 that:

"The presumption against retrospection does not apply to legislation concerned merely with matters of procedure or of evidence; on the contrary, provisions of that nature are to be construed as retrospective unless there is a clear indication that such was not the intention of Parliament."

17. The above dicta clearly reveal:

(i) Presumption against retrospectivity is not applicable to enactments which merely affect procedure or change forum or are declaratory;

(ii) Retroactive/retrospective operation can be implicit in a provision construed in the context where it occurs;

(iii) Given the context, a provision can be held to apply to cause of action after such provision comes into force, even though the claim on which the action may be based may be of an anterior date; and

(iv) A remedial statute applies to pending proceedings and such application may

not be taken to be retrospective if application is to be in future with reference to a pending cause of action;

(v) SARFAESI Act is a remedial statute intended to deal with problem of pre-existing loan transactions which need speedy recovery.

18. We are of view that a notification u/s 2(m) in respect of a financial institution brings such institution at par with statutory institutions covered by Section 2(m) prior to such notifications. From the date such notification is issued, remedies under the Act become available even if loan was advanced earlier.

19. Applying the above established propositions to the present context, it is clear that the, statute intends to remedy a situation where recovery of loans of specified financial institutions were held up and are intended to be speedily recovered, without reference to procedure of the Court, by way of Securitization, by a substituted procedure and forum. Such statute applies to pre existing rights and may not be held to be retrospective so as to be hit by presumption of prospectivity. Moreover, presumption in respect of a procedural statute is that such statute is retrospective and can apply to existing cause of action even if it has reference to past transactions. Present context is very similar to the situation in Employee's State Insurance Corporation Vs. Dwarka Nath Bhargwa, and also covered by principles of law laid down in other judgments extracted above. Accordingly, we answer the question in the affirmative and hold that the provisions of the SARFAESI Act apply to existing debts even if loan was advanced earlier. Similarly, as soon as by a notification of Central Government, a financial institution is notified for purposes of Section 2(m), the machinery of the Act becomes available to recover any outstanding and legally recoverable debt even if such loan was advanced earlier. The view taken in Subash Chandra Panda Vs. State of Orissa and Others, is overruled. We express our agreement with the view taken in Unique Engineering Works and Pradeep Kumar Gupta.

The matter may now be listed before the Division Bench for being dealt with on merits.