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Court : Allahabad

Decided On : Aug-07-2009

Reported in : AIR2010All3; 2010(1)AWC51

Judge : Sunil Ambwani and ;Ran Vijai Singh, JJ.

Appellant : Pradeep Kumar Gupta and anr.;yogendra Kumar Jaiswal and ors. and Rakesh Kumar

Respondent : State of U.P. and ors.;cmm and ors.

Disposition : Petition dismissed

Judgement :

1. In all these writ petitions, the petitioners have raised question of applicability of the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short the Act of 2002) for securitising the mortgaged assets secured for recovery of the financial assistance given by Indiabulls Housing Finance Limited (in short, IHFL) prior to the notification dated 19.9.2007 by the Central Government issued declaring IHFL a 'financial institution' under sub Clause (iv) of Clause (m) of Sub-section (1) of Section 2 of the Act of 2002.

2. The Act of 2002 was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto, w.e.f. 17.12.2002 replacing the Ordinance notified

on 21.6.2002. A secured creditor under Section 2(zd) is defined to mean 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) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation 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 repayment by any borrower of any financial assistance.

3. The financial institution is defined under Section 2(m) of the Act to mean:

(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;

4. In Writ Petition No. 28054 of 2009 Pradeep Kumar Gupta and Anr. v. State of U.P. and Ors. the petitioners were sanctioned and disbursed Rs. 24.40 lacs by IHFL on 31.3.2007 under loan agreement No. 1, and Rs. 10 lacs under loan agreement No. 2. The petitioners defaulted in payment of instalments on which a notice under Section 13(2) of the Act of 2002 was sent by to the petitioners on 22.1.2008. The District Magistrate, Agra passed an order for possession of secured asset on a petition under Section 14 on 30.1.2009. The petitioners filed a

Writ Petition No. 16622 of 2009 in the High Court on the ground that the Additional District Magistrate has no power as per Division Bench judgment of Kerela High Court in the case of Ameena v. Sub Divisional Magistrate Palakkar and Ors. : AIR 2009 Ker 01. The Court was of the view that it was desirable that the District Magistrate, upon hearing the parties, will finalize the issue within two weeks and to take into consideration of the questions at the time of passing of the order. A correction application to change the description of the ''Additional District Magistrate' as ''Additional Collector/Additional District Magistrate (F&R;) Agra' instead of District Magistrate is pending. The District Magistrate has, by his order dated 4.5.2009, rejected the objections on the ground that under Section 14-A (3) of the U.P. Land Revenue Act, an Additional Collector can exercise such powers and discharge such duties of a Collector in such cases or class of cases as the Collector concern may direct. He has allowed the proceedings to continue in the Court of Additional District Magistrate (F/R).

5. In Writ Petition No. 34547 of 2009 Yogendra Kumar Jaiswal and Ors. v. Chief Metropolitan Magistrate, Kanpur Nagar the petitioner was given the housing loan against the mortgaged of immovable property for an amount of Rs. 9, 28, 674.00 for which a loan agreement was executed on 14.9.2006. Clause 10.2 of the loan agreement provided that, without prejudice to the provisions referred hereinabove upon the occurrence of any one events of default, shall, in addition to all rights conferred by the present agreement, also have right conferred to secured creditors under any law for the time being in force but not limited to Securities and Reconstructions of Financial Asset and Enforcement of Security Interest Act, amendment or re-enactment thereof. The petitioners committed defaults in repayment on which a notice under Section 13(2) of the Act of 2002 was sent, stating that had sanctioned and disbursed a loan amount of Rs. 9, 50, 000/-, payable along with interest @ 19.75 per annum. The principal amount and instalments have become overdue for more than 90 days on which the debt was classified as ''non-performing asset'. The notice gives 60 day's time to pay the entire amount with interest and penal interest failing which the creditor will take possession of the secured assets. The petitioner filed a Writ Petition No. 24341 of 2009 in the High Court against the ex-parte order of the Chief Metropolitan Magistrate under Section 14 of the Act of 2002, which was disposed of by the

Court on 8.5.2009 with directions to the Chief Metropolitan Magistrate, Kanpur Nagar to decide the recall application for recalling his order dated 28.4.2009 directing the police help in taking possession.

6. In Writ Petition No. 35158 of 2009 Rakesh Kumar v. Chief Metropolitan Magistrate, Kanpur Nagar the sanctioned and granted a financial assistance of Rs. 24 lacs on 29.3.2007 with interest @ 14.75 % per annum. The loan account became irregular on which a notice under Section 13(2) of the Act of 2002 was issued on 11.7.2008 giving 60 day's time to pay the defaulted amount and interest and penal interest failing which the possession of the secured assets shall be taken. An application under Section 14 of the Act of 2002 was filed in the Court of Chief Judicial Magistrate, Kanpur Nagar on 21.12.2008 for appointment of receiver and delivery of possession of the secured assets on which an order was passed by the Chief Metropolitan Magistrate, Kanpur Nagar on 28.4.2009 directing the police to help for taking possession. The Writ Petition No. 25074 of 2009 was disposed of on 13.5.2009 by this Court with directions to the Chief Judicial Magistrate Kanpur Nagar to decide the recall application. The application was rejected on 6.7.2009 on the ground that under Section 14 the enquiry is confined to the validity of the notice under Section 13(2) of the Act of 2002 to find out whether the asset is secured by the loan and is within the jurisdiction of the Court.

7. In Writ Petition No. 35160 of 2009 Rakesh Kumar v. Chief Judicial Magistrate, Kanpur Nagar a financial assistant of Rs. 21 lacs was given by to the petitioner @ 14.75% interest on 30.3.2007. A notice under Section 13(2) of the Act of 2002 was given to the petitioner by the on 19.9.2008 and an application under Section 14 was filed after expiry of 60 days on 15.12.2008 on which the Chief Metropolitan Magistrate, Kanpur Nagar issued directions on 28.4.2005 to provide police help. The petitioner filed a Writ Petition No. 25076 of 2009, which was disposed of on 13.5.2009 with observations that the Magistrate may decide the recall application. The recall application has been rejected by the Chief Metropolitan Magistrate on 6.7.2009 on the ground, that he has a limited jurisdiction in proceedings under Section 14 to find out whether the asset is secured under the loan agreement of financial assistance and is within the jurisdiction of the court.

8. Shri S.K. Shukla appears on behalf of petitioners in Writ Petition No. 28054 of 2009. Shri H.N. Singh has appeared for the petitioner in Writ Petition No. 34547 of 2009 and Shri J.K. Misra appears for petitioner in Writ Petition Nos. 35158 of 2009 and 35160 of 2009. Shri Shashi Nandan, Senior Advocate assisted by Shri V.D. Chauhan has appeared on behalf of I.H.F.L.

9. The Act of 2002 was notified on 17.12.2002. The loan agreements in these four Writ Petitions were executed after the Act of 2002 was notified. The IHFL was not a notified non-banking financial company under Section 2(1)(m) (iv) of the Act of 2002 at the time of grant of financial assistance and creation of security over the assets of the borrowers. The Department of Financial Services, Ministry of Finance, Government of India notified ''Indiabulls Housing Finance Limited' with its registered office F-60 Malhotra Building, IInd Floor, Connaught Place, New Delhi, as financial institution under Section 2(1)(m) (iv) vide Notification dated 19.9.2007. All the counsels appearing for the petitioners submit that the financial assistance sanctioned and granted prior to the notification dated 19.9.2007 cannot be subjected to the proceedings under the Act of 2002. They have relied upon the reasons given in Subhash Chandra Panda v. State of Orissa : AIR 2008 Orissa 88 (DB) decided on 29.2.2008. In this case Maharisi Housing Development Financial Corporation Limited, New Delhi-the creditor was notified as financial institution on or from 10.11.2003 after the loan was sanctioned and the security interest was created over the assets. The Orissa High Court held that the question whether by virtue of notification dated 10.11.2003, the financial institution can initiate proceedings under Section 13 of the Act of 2002 in respect of the loan agreements of the years 2001 and 2002, is answered in the statute itself. The loan agreements in this case were entered into between the Maharisi Housing Development Financial Corporation Limited New Delhi and the petitioners on 26.5.2001 and 13.2.2002, both prior to the enforcement of the Act of 2002, on 17.12.2002.

10. In paragraph-9 of the judgment, the Orissa High Court found that the statute itself answers the question. Section 13 (1) and (2) of the Act of 2002, provides that in order to invoke the provisions, the security interest must be created in favour of secured creditors. If it is so created, it can be enforced without the intervention of the courts or tribunals by such creditor in accordance with the provisions of the

Act. The expressions "secured creditor' & "borrower' are defined in the Act of 2002. After quoting these definitions the Orissa High Court held in paras 13 and 14 of the judgment as follows:

13. Therefore, on a conjoint reading of Section 2(f), 2(m)(iv), 2(zd) and 2(zf), it is clear that in order to invoke the provisions of Section 13 of the said Act on the date the alleged agreement was entered into, opposite party No. 6 must be a financial institution and a secured creditor within the meaning 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.

11. The Orissa High Court has given reasons, for drawing its conclusion in paragraph-21 in holding, that on the facts of the case, the proceedings under Section 13 of the Act against the petitioner is without jurisdiction, and that since the case is coming under the third principle of the judgment in Whirlpool Corporation's Case, AIR 1999 SC 22, namely that the orders or proceedings are wholly without jurisdiction or the vires of an Act is challenged, the writ petition is maintainable.

12. The petitioners have also relied upon Karnataka State Financial Corporation v. N. Narasimahaiah AIR 2008 SCW 2480, in submitting that interpretation of statute will not depend upon a contingency and if there is a doubt the courts should lean to protect the person, who is going to loose the property. In paras 32-34, the Supreme Court held:

32. Interpretation of a statute would not depend upon a contingency. It has to be interpreted on its own. It is a trite law that the court would ordinarily take recourse to the golden rule of literal interpretation. It is not a case where we are dealing with a defect in the legislative drafting. We cannot presume any. In a case where a court has to weigh between a right of recovery and protection of a right, it would also lean in favour of the person who is going to be deprived therefrom. It would not be the other way round. Only because a speedy remedy is provided for that

would itself lead to the conclusion that the provisions of the Act have to be extended although the statute does not say so. The object of the Act would be a relevant factor for interpretation only when the language is not clear and when two meanings are possible and not in a case where the plain language leads to only one conclusion.

33. Even if the legislation is beneficent, the same by itself would not be held to be extendable to a situation which the statute does not contemplate. S. Sundaram Pillai, etc. v. V.R. Pattabiraman : AIR 1985 SC 582.

In Attorney General v. Milne (1914) All ER 1061, Lord Dunedin states:

Now, prima facie one would expect that the scope of the two sets of provisions would be the same, i.e., in other words that the question must be answered as to those kinds of property which are swept in by Section 2, just as much as to those which fall under Section 1. Inasmuch, however, as this is a taxing statute, and the duty here is an additional duty, I consider that it must be shown that the words would clearly cover the individual case to which it is right to apply them. 34. It is now well-settled that when more than one remedy is provided for an option is given to a suiter to opt for one or the other remedy. Such a provision is not ultra vires as has been held by this Court in Maganlal Chhaganlal (P) Ltd. v. Municipal Corporation of Greater Bombay and Ors. (1974) 2 SCC 402; Director of Industries, U.P. and Ors. v. Deep Chand Agarwal : (1980) 2 SCC 332; Rajiv Anand (supra) : AIR 1974 SC 2009

13. Shri Shashi Nandan submits that the provisions of the Act for recovery of debts by securitisation of mortgaged assets are procedural in nature. They do not provide for any substantive right to the financial institutions and the banks. The security interest created on the assets for due performances of the agreement for repayment of loan can be enforced, without filing a suit for foreclosure of mortgage. He submits that in Unique Engineering Works v. Union of India and Ors. decided on 15.12.2003 the Uttaranchal High Court in Writ Petition No. 1002 (MB) and other connected writ petitions reported in : II (2004) BC 241 (DB) held in paragraph-26 that the Act is retroactive. There is a difference between retrospective and retroactive. In case of retroactive Acts the Parliament takes note

of the existing conditions and takes remedial measures to rectify the conditions. If one looks on various provisions of the Act of 2002, it is clear that the Act is retroactive in nature. The Court then gives reason as follows:

26. Thirdly, it was argued that the impugned NPA Act, 2002 cannot apply retrospectively. It was argued that the impugned NPA Act, 2002 cannot be applied to cases which are pending before the Debts Recovery Tribunal under the DRT Act, 1993. We do not find any merit in this argument. Firstly, as stated above the impugned NPA Act, 2002 is a special Act vis-a-vis the DRT Act, 1993. The impugned NPA Act, 2002 comes into picture only when the Account of the borrower becomes non-performing asset. It is in such circumstances that the Bank gets powers to sell the security, whereas the DRT Act, 1993 essentially deals with the adjudication of the liabilities. A suit for fore-closure/sale lies before Debts Recovery Tribunal under the DRT Act, 1993 but if pending that suit if an Account of the borrower becomes a non-performing asset for non payment of interest on the outstandings under the credit facility for specific period then the Banks were helpless in the past and they had to wait till the final decree is passed in the suit before the Debts Recovery Tribunal under the DRT Act, 1993. The cases before Debts Recovery Tribunal are mounting every day. Simultaneously, the non-performing assets were mounting the today they are at the figure of Rs. 90, 000 crores. It is for this reason that the Parliament thought it fit to by-pass Section 69/Section 69A of Transfer of Property Act. The Receiver under the DRT Act, 1993 or even the Receivers appointed by Civil Court in pending suits had no power to sell the property pending the suit for want of decree. Therefore, the Parliament has provided for enforcement of security interest immediately in cases where the Accounts become irregular so that the security interest could be immediately encashed and the proceeds could be handed over to Banks/financial institutions who is turn would provide credit to the borrower and make his Account regular to the extent possible. 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 Procedure Code applies, the Court can appoint a Receiver to take possession or custody of the property before or after the decree. Order 40, Rule 1 of Civil Procedure Code is a part of procedural law. 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'. This shows that the Act is retroactive. Similarly, Section 2(k) defines financial assistance to mean any 'loan or advance granted'. This also shows that the Act is retroactive. Similarly, Section 2(n) provides for definition of the word hypothecation to mean 'credit by a borrower' which also indicates that the Act is retroactive. So also Section 2(zc) defines secured asset to mean property on which 'security interest is created'. This also indicates that the Act is retoractive. Therefore, reading the various sections of the impugned NPA Act, 2002 it is clear that the Act is retroactive. Lastly, Section 13(2) uses the expression 'any person who makes default' which clearly shows that the Act is retroactive. In the circumstances, there is no merit in the argument that the impugned NPA Act, 2002 is prospective and it cannot be read as retoractive/retrospective. There is one more aspect which needs to be pointed out. A security interest is an interest in the personal property of the borrower which secures repayment or performance of an obligation by the borrwer. A security interest has no existence performance of an obligation by the borrower. A security interest has no existence independent of the obligation to repay and if the underlying obligation is unenforceable then the security interest is

invalid. A security interest is always given for an antecedent debt. This is clearly indicated by Section 13(2) of the impugned NPA Act, 2002, therefore, the Act is retrospective.

14. In Unique Engineering Works, the financial assistance was given and security interest was created prior to the enforcement of the Ordinance on 21.6.2002 and was classified as standard assets and was thereafter after the enforcement of the Act combined to constitute non-performing assets, the Court held after noticing the provisions of Sick Industrial Companies (Special Provisions) Act, 1985; the Debt Recovery Tribunal Act, 2003; and the objects and reasons of the Act of 2002 over the security interest defined under Section 2(z)(f) means right, title and interest of any kind whatsoever any property, created in favour of a secured creditor including mortgage, charge, hypothecation, assignment other than those specified in Section 31 of the Act of 2002. Section 31 of the Act of 2002 excludes a lien on goods, a pledge on immovable under Section 172 of the Contract; a conditional sale, hire purchase lease security interest in agricultural land and properties falling under Section 60 of Code of Civil Procedure from the provisions of the Act of 2002. The small value accounts for which security interests are created were exempted. The Act of 2002 provides adequate opportunities to the borrowers to repay. The drastic measures are contemplated by the Act only if the borrower including the guarantor refuses to repay and make his account regular despite opportunities. While upholding the validity of the Act, the Court specifically held for the reasons and reasoning provided in para-26, that the Act is retrospective.

15. The principle of ''stare decisis' (to stand by decided cases) is as old as the establishments of the Courts. It is derived from legal maxim 'stare decisis et non quieta movere'. It is best to adhere to decisions and not to disturb questions, which have been put at rest. When a point of law has been settled, it forms a precedent which is not to be ordinarily departed afterwards. A principle of law should not change from case to case. The judgments of the Supreme Court are binding on the High Courts and that the judgments of the same High Court of a larger strength are binding on the smaller strength of judges deciding the cases. The judgments of High Courts have not been given the binding effect in other High Courts. They have persuasive value on the other High Courts. The principle of

stare decisis is not strictly applicable when the High Court is considering the judgment of another High Court on the same issue. These judgments are treated with respect. The High Court is not obliged to follow them or should refer it to larger bench, if they want to take a different view. The law on the central of facts, however, must be laid down by different High Courts, which are also applicable to the High Court for which the case is decided, must be given greater respect. The administration of justice requires certainty in legal position in respect of same statutes, which are enforced by the different High Courts. The Supreme Court gives quietus to such issues, but then the High Court has interpret the provisions of the Act and decide the questions of law raised on the judgments of the High Court having greater persuasive value.

16. The judgment in Subhash Chandra Panda of Orissa High Court dated 29.2.2008, was given much later in point of time, to the judgment in Unique Engineering Works decided on 15.12.2003. The judgment in Unique Engineering Works by the Uttranchal High Court was not cited in Orissa High Court in Subhash Chandra Pandey's case.

17. In Subhash Chandra Panda's case the loan agreements are upto 26.5.2001 and 13.2.2002, much before the enforcement of the Ordinance on 21.6.2002, later enacted as the Act of 2002 on 17.12.2002. The Orissa High Court did not give persuasive reasoning except by relying upon the provisions of Section 13(1) and Section 13(2) and the definitions of secured creditors, security interest and borrowers in the Act. The Orissa High Court then said that on a conjoint reading of the section it is clear that in order to invoke the provisions of Section 13 of the Act of 2002, on the date of alleged agreement the financial institution must be a financial institution and is secured creditor within the meaning of the said Act. The Uttrakhand High Court in Unique Engineering Works has provided much better and persuasive reasoning in holding that the provisions of the Act are retrospective in nature. The reasons given in paragraph-26 of the judgment in Unique Engineering Works have persuaded us to follow the judgment. Prospective means looking forward having reference to a state of things existing before the Act in question. A retrospective statute contemplates the past and gives to a previous transaction some different legal effect from that which it had under the law when it

occurred or transpired. The Court shall not presume retrospectivity if any substantive right is created by the statute. Ordinarily the retrospectivity must be found from the provisions of the Act itself. In case of acts providing for procedure and machinery provisions, the statutes have always been given retrospective effect.

18. It was argued by Shri H.N. Singh that the securitization of the assets without recourse to the procedure of the court is a substantive right conferred upon the banks and financial institutions and that in the absence of such rights, the financial institutions cannot take recourse to the provisions of the Act.

19. Shri Shashi Nandan, Senior Advocate, on the other hand, submits that the Act of 2002 does not provide for rights, but the remedies available to the banks and financial institutions, which are in the nature of procedure. He submits that prior to the enforcement of the Act in case of realization of the dues from a secured asset, the secured creditor had to take recourse to procedure provided under the Code of Civil Procedure for foreclosure of mortgage, and for sale and realization of the amount due from the borrower. The Act of 2002 has provided the procedure for securitization of the secured assets, by firstly issuing notices giving opportunity to the borrower and thereafter taking possession of the assets and for its sale. A person aggrieved by the measures taken under the Act can file an appeal under Section 17 of the Act in Debt Recovery Tribunal. There are no fresh rights created or provided under the Act. Only a different procedure has been provided in the name of secutization of the secured assets.

20. In State of Punjab v. Bhajan Kaur AIR 2008 2276 it was held that a statute is presumed to be prospective unless held to be retrospective either expressly or by necessary indication after substantive law is presumed to be prospective, it is one of the facets of the rule of law. The rights of the parties are to be determined on the basis of the law as it then stood, before the new Act came into force. In Arvind Kumar v. State of Madhya Pradesh : AIR 2007 SC 2674 the Supreme Court held that presumption with respect to the procedural matters is normally to be construed as prospective. Relying upon Guru Bachan Singh v. Satpal Singh : AIR 1990 SC 209 it was held that if the section does not create any substantial rights, it

is merely a matter of procedure of evidence and as such it is retrospective then it will be applicable. Referring to Hulsbery's Laws of England (4th Edition) Vol. 44 page 570 in which it is stated that 'the general rule is that all statutes other than those which are merely declaratory or which relate only to matters or procedures or of evidence or prima facie prospective and retrospective effect are not to be given to them unless by expression words or necessary implication it appears that this was the intention of the legislature....'

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 securitisation companies or reconstruction companies by the Reserved Bank of India and the facilitation of securitisation of financial assets of banks and financial institutions with or without the benefit of underlying securities. The provisions relating to the registration of securitisation companies or reconstructions companies must be read with a retrospective effect. The securitisation, 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 securitisation. 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 under Section 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.

22. The constitutionality of the Act of 2002, was upheld in Mardia Chemicals Limited v. Union of India : AIR 2004 SC 2371. It was held that the Act provides for speedier legal methods to recover dues. The mounting non-performing assets posed a serious financial crises. The Narasimhan Committee recommended a legislation keeping in view the changing times and economic situation. Another expert committee was constituted, headed by Mr. Andhyarjuna and then the law was enacted to recover the amount from the non-performing assets secured with the banks. The RBI's Circular dated August 30, 2001, provides for guidelines to banks to declare the assets as NPA. The Act bars the jurisdiction of Civil Court under Section 34, and provides for sufficient safeguards for the borrower. In para 36, 44, 66, and 67 the Supreme Court considered the background and the objects for which the Act of 2002 was enacted:

36. In its Second Report, the Narasimham Committee observed that the NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report of Narasimham Committee deals about legal and legislative framework and observed:

8.1 A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries....One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the asset without intervention of the Court

and for reconstruction of the assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting the attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amount of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the report of the Narasimham Committee, yet another Committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps without the legal framework. We are, therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances the financial climate world over, if it was thought as a matter of policy, to have yet speedier legal method to recover the dues, such a policy-decision cannot be faulted with nor it is a matter to be gone into by the Courts to test the legitimacy of such a measure relating to financial policy.

44. As a matter of fact, the Narasimham Committee also advocates for a legal framework which may clearly define the rights and liabilities of the parties to the contract and provisions for speedy resolution of disputes, which is a sine qua non for efficient trade and commerce, especially for financial intermediation. Even the guidelines of the Reserve Bank of India in relation to classifying the NPA's while stressing the need of expeditious steps in taking a decision for classifying and identification of NPA's says, a system be evolved which should ensure that the doubts in asset classification are settled through specified internal channels within the time specified in the guidelines. It is thus clear that while recommending speedier steps for recovery of the debts it is envisaged by all concerned that within the legal framework, such provisions may be contained which may curtail the delays. Nonethelss dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty, or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be

expeditiously resolved.

66. On behalf of the petitioners one of the contentions which has been forcefully raised is that existing rights of private parties under a contract cannot be interfered with, more particularly putting one party to an advantageous position over the other. For example, in the present case, in a matter of private contract between the borrower and the financing bank or institution through impugned legislation rights of the borrowers have been curtailed and enforcement of secured assets has been provided for without intervention of the Court and above all depriving them the remedy available under the law by approaching to the Civil Court. Such a law, it is submitted, is not envisaged in any civilized society governed by rule of law. As discussed earlier as well, it may be observed that though the transaction may have a character of a private contract yet the question of great importance behind such transactions as a whole having far- reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions more particularly when financing is through banks and financial institutions utilizing the money of the people in general namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact in the socio-economic drive of the country. The two aspects are intertwined which are difficult to be separated. There have been many instances where existing rights of the individuals have been affected by legislative measures taken in public interest. Certain decisions which have been relied on behalf of the respondents, on the point are : 1951 SCR 292 Ramaswamy Aiyengar v. Kailasa Thevar . In that case by enacting the Madras Agriculturist's Relief Act, relief was given to the debtors who were agriculturists as a class, by scaling down their debts. The validity of the Act was upheld though it affected the individual interest of creditors. In Dahya Lala v. Rasul Mohd. Abdul Rahim : 1963 (3) SCR 1, the tenants under the provisions of the Bombay Tenancy Act, 1939 were given protection against eviction and they were granted the status of protected tenant, who had cultivated the land personally

six years prior to the prescribed date. It was found that the legislation was with the object of improving the economic condition of the @page-SC2397 peasants and for ensuring full and efficient use of land for agricultural purpose. By a statutory provision special benefit was conferred upon the tenants in Madras City where they had put up a building for residential or non-residential purposes and were saved from eviction, it did though affect the existing rights of the landlords. See also 1963 (Supp) 1 SCR 282, Swami Motor Transports Pvt. Ltd. v. Shri Sankraswamigal Mutt and Raval and Co. v. K.G. Ramachandran : 1974 (1) SCC 424. Similarly it is also to be found that in the case reported in : 2001 (5) SCC 546 Kanshi Ram v. Lachhman the law granting relief to the debtors protecting their property was upheld. Also see : 1978 (2) SCC 1; Pathumma v. State of Kerala : 1977 (2) SCC 670; Fatehchand Himmatlal v. State of Maharashtra : 1962 (1) SCR 852; Ramdhandas v. State of Punjab : AIR 1951 SC 189

67. It is well known that in different States, Rent Control legislations were enacted providing safeguards to the sitting tenants as against the existing rights of the landlords, which before coming into force of such law were governed by contract between the private parties. Therefore, it is clear that it has always been held to be lawful, whenever it was necessary in the public interest to legislate irrespective of the fact that it may affect some individuals enjoying certain rights. In the present we find that case the unrealized dues of banking companies and financial institutions utilizing public money for advances were mounting and it was considered imperative in view of recommendations of experts committees to have such law which may provide speedier remedy before any major fiscal set- back occurs and for improvement of general financial flow of money necessary for the economy of the country that the impugned Act was enacted. Undoubtedly such a legislation would be in the public interest and the individual interest shall be subservient to it. Even if a few borrowers are affected here and there, that would not impinge upon the validity of the Act which otherwise serves the larger interest.

23. In Transcore v. Union of India and Anr. : AIR 2007 SC 712 the Supreme Court held that the withdrawal of the application pending before Debt Recovery Tribunal is not a condition precedent to take recourse to the provisions of the Act of 2002. The Supreme Court also held that realization of secured assets under the Act of

2002 is an additional remedy to the Debt Recovery Tribunal Act, 1993. Both the Acts are complementary to each other and therefore the doctrine of election has no application to the case. These are co-existent remedies available and that there is no repugnance nor inconsistency between the two remedies. In substance it was held that the securitisation and reconstruction of financial assets and enforcement of security interest is a remedy provided to the banks and financial institutions. It is not a right, which may have only prospective effect.

24. There is another aspect to the matter. All the loan agreements and security interest were created in the cases at hand, after the Act came into force. The IHFL was not a notified financial institution on that date. It came to be notified after the loan transactions and creation of security interest, but before the assets became 'non-performing assets' and the procedure for enforcement of security interest was adopted. The right accrued to the lender to adopt the process under the Act, after it was notified as a financial institution.

25. We therefore hold that the security interest created at the time of grant of financial assistance, either before the enforcement of the Act or before the notification under Section 2(1)(m)(iv) of the Act of a financial institution by the Central Government, would not affect the remedies made available to the secured creditor for securitization of financial assets and enforcement of the security interest under the Act of 2002.

26. The petitioners can, if they are so advised, file appeal under Section 17 of the Act of 2002, on all other grounds, which are open to them in Debt Recovery Tribunal.

27. All the writ petitions are dismissed.

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