

*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**
AND
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

+ Writ Petition No.9275 of 2014

% 09.04.2015

M/s. SVPCL Limited,D. NO.11-13-173/11&12, Fathenagar, Hyderabad, Rep., by
its Managing Director, K. Mallikarjuna Reddy, S/o Subba Reddy.

... Petitioner

Vs.

\$ The State Bank of India and another.

... Respondents

! Counsel for the petitioner: Sri C.B. Rammohan Reddy

^ Counsel for the respondents: Sri B.S. Prasad

Sri B. Narayana Reddy, Asst.Solicitor General

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? Citations:

1. (1986) 1 SCC 100
2. (2015) 1 SCC 298
3. (2015) 1 SCC 166
4. AIR 2012 SC 1440
5. 2011 GLH (3) 712 : (2012) GLR 790
6. (2008 9 JT 381
7. (2009) 4 SCC 94
8. AIR 2011 Karnataka 183
9. LAWS (DLH)–2014-4-92
10. 2005 (9) SCC 129
11. AIR 1964 SC 207

12. 2005 (2) SCC 145
13. AIR 1952 SC 369
14. AIR 1957 SC 657
15. (1993) 2 SCC 144
16. (1997) 89 Comp Cas 547
17. AIR 2000 SC 1535 (2000) 4 SCC 406
18. AIR 2000 SC 2642
19. (2001) 3 SCC 71
20. (1977) 1 SCC 750
21. (1990) 4 SCC 406
22. (1966) 2 SCR 121
23. AIR 1956 SC 614
24. (2005) 2 SCC 638
25. (2004) 6 SCC 36
26. (2014) 5 SCC 610
27. Judgment of Madras High Court in W.P.No.10600 of 2007, dated 23.07.2009
28. AIR 2008 Delhi 192
29. (1921) 1 KB 64
30. 1945(2) ALL ER 499
31. 1948 (1) ALL ER 616
32. 1901 AC 102
33. 1990 (2) SCC 231
34. (1999) 4 SCC 197
35. (1990) 1 SCC 193
36. 2007 (5) SCC 211
- 37) AIR 1992 SC 111

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

-

WRIT PETITION NO.9275 OF 2014

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ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

This Writ Petition is filed questioning the action of the 1st respondent bank in

seeking to take possession of the immovable properties of the petitioner company pursuant to the notice issued under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Act 54 of 2002), (for short 'the SARFAESI Act'), and the notice of the Advocate Commissioner dated 21.03.2014 intimating that possession of the immovable properties of the petitioner at Vijayawada would be taken on 28.03.2014, as violative of the provisions of Sick Industrial Companies (Special Provisions) Act, 1985 (for short 'SICA').

The petitioner was initially constituted as a partnership firm in the year 1992. It was later converted into a public limited company in the year 1999. While the petitioner's manufacturing activities were initially confined to Vijayawada, a new unit was set up by them at Hyderabad in the year 1999-2000; and, thereafter, a third unit was set up by them in the Visakhapatnam SEZ area. The overseas branch of the 1st respondent Bank had sanctioned a term loan of Rs.12.44 crores to the petitioner in the year 2006. The sanctioned limits of the term loan was later enhanced to Rs.19.06 crores. As security for the said loan, the petitioner company created an equitable mortgage over their immovable properties. The loan amount of the petitioner became a non-performing asset ("NPA" for short). The 1st respondent bank initiated proceedings, and issued notice dated 27.08.2009 under Section 13(2) of the SARFAESI Act, demanding payment of Rs.19,07,21,161/-. A similar notice dated 03.11.2010 was issued through the Stressed Asset Management branch of the respondent bank demanding payment of Rs.22,38,78,147/-. As the said amount was not paid, the respondent bank instituted proceedings before the Debt Recovery Tribunal (for short the "DRT") under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short the "DRT Act") by filing O.A.No.252 of 2010 for recovery of Rs.21,96,37,830.53 ps. They also initiated action, under Section 13(4) of the SARFAESI Act, by issuing notices dated 18.02.2011 and 19.02.2011.

Aggrieved thereby the petitioner filed an application under Section 17 of the SARFAESI Act, in S.A.No.135 of 2011, before the DRT, Hyderabad. They filed I.A.No.349 of 2011 therein seeking an interim order to restrain the respondent-bank from proceeding further. The said I.A. was dismissed on 10.06.2011. Aggrieved thereby, the petitioner preferred an appeal to the Debts Recovery Appellate Tribunal, Chennai (DRAT), along with MA (SA) No.235 of 2011 seeking stay of

operation of the order of the DRT dated 10.06.2011, and a further order restraining the authorised officer of the respondent-bank from proceeding with recovery. The DRAT passed orders, in MA (SA) No.235 of 2011 dated 17.06.2011, staying the operation of the order passed by DRT in I.A.No.349 of 2011. The authorised officer was also restrained from proceeding further under the provisions of the SARFAESI Act.

Aggrieved thereby the first respondent-Bank filed W.P.No.24388 of 2011 before this Court contending that the order passed by the DRAT on 17.06.2011 contravened the first and second provisos to Section 18(1) of the SARFAESI Act. Three weeks, after granting absolute stay without any conditions, the DRAT, on 08.09.2011, *suo motu* modified its earlier order dated 17.06.2011 and directed the petitioner to deposit Rs.6.00 crores before it on or before 30.09.2011. The DRAT observed that, in the event the petitioner deposited the said amount on or before the stipulated time, the authorised officer stood restrained from proceeding further under the provisions of the SARFAESI Act. Aggrieved by the order of the DRAT dated 08.09.2011, the petitioner filed W.P.No.27357 of 2011 before this Court.

By a common order, in W.P.No.24388 of 2011 and W.P. No.27357 of 2011 dated 20.01.2012, a Division bench of this Court held that any person aggrieved by the order of the DRT, under Section 17 of the SARFAESI Act, had a right of appeal before the DRAT; this right of appeal was subject to the conditions stipulated under the three provisos to Section 18(1) of the SARFAESI Act; the second proviso required the appellant to deposit fifty per cent of the debt due from him as claimed by the Bank, or determined by the DRT, whichever was less; the third proviso conferred power on the DRAT to reduce the amount of fifty per cent, to be deposited, to an amount not less than twenty five per cent of the debt referred to in the second proviso; in view of the second and third provisos to Section 18(1), the order passed by the DRAT on 17.06.2011, granting a blanket stay, was *ex facie* illegal; the DRAT had, therefore, modified the said order by its order dated 08.09.2011, and had directed the petitioner to deposit Rs.6.00 crores on or before 30.09.2011; and the order of the DRAT dated 08.09.2011 was in accordance with the third proviso to Section 18 (1) of the SARFAESI Act. The Division bench further observed that, while issuing notice before admission on 29.09.2011, they had directed the petitioner to deposit Rs.3.00 crores within a period of six weeks, and another Rs.3.00 crores within a period of six weeks thereafter; this order had not been complied with; this

was also one reason why they were not inclined to exercise their discretion in favour of the petitioner; as the Legislature mandated the appellant to deposit fifty per cent of the debt due, to avail the remedy of an appeal, and had further conferred discretion on the DRAT to reduce the same to twenty five per cent, the order passed by the DRAT on 08.09.2011 must be held to be in accordance with law; and, as the subsequent order modified the earlier order, the order impugned in W.P.No.24388 of 2011 did not survive. While dismissing W.P.No.24388 of 2011 as infructuous, the Division bench, by its order dated 20.01.2012, dismissed W.P.No.27357 of 2011, filed by the petitioner, as devoid of merits.

A petition, in CrI.M.P. No.2559 of 2013, was filed by the 1st respondent bank, under Section 14 of the SARFAESI Act, before the Chief Metropolitan Magistrate, Nampally, Hyderabad. By order dated 22.07.2013, the Chief Metropolitan Magistrate directed the authorised person to take possession of the petitioner's assets by 27.09.2013. This was extended till 18.11.2013. On the ground that, for the financial year ending 2011-12, its accumulated losses were equivalent to its entire net worth, and it had become sick within the meaning of Section 3(o) of the SICA, the petitioner submitted an application to the BIFR, under Section 15(1) of the SICA, on 10.10.2013. Thereafter, they again invoked the jurisdiction of this Court by filing W.P. No.32980 OF 2013 to declare the action of the respondent bank, in trying to take possession of their immovable mortgaged properties pursuant to the possession notice issued under the SARFAESI Act while the matter was pending before the BIFR, as arbitrary and illegal. In the affidavit filed in support of W.P. No.32980 of 2013, the petitioner contended that it had become a sick industrial company within the meaning of Section 3(O) of SICA; it had submitted an application before the BIFR under Section 15(1) thereof; and the respondent-bank could not, therefore, take possession of the secured asset under the provisions of the SARFAESI Act, without obtaining necessary orders from the BIFR.

W.P. No.32980 of 2013 was disposed of by a Division Bench of this Court, by its order dated 19.11.2013, holding that the said Writ Petition was the second round of litigation; the proceedings initiated by the 1st respondent-bank, under the SARFAESI Act, had attained finality by virtue of the order passed in W.P.Nos.24388 and 27357 of 2011 dated 20.01.2012; the petitioner had been promising to pay the amounts due, the latest letter being 13.11.2013 by which the petitioner had informed the respondent-bank that they had identified a suitable buyer for the company, it was

in the final stage of negotiation, and they were about to sign the necessary documents; they had further stated, in the said letter, that the process would be completed by 22.11.2013, by which date the petitioner along with the potential buyer would visit the Bank; after the Bank's concurrence, the first payment would be directly made to the bank; though an Advocate Commissioner was appointed by the Chief Metropolitan Magistrate, Hyderabad by his order dated 22.07.2013 in CrI.M.P.No.2559 of 2013, on an application made under Section 14 of the SARFAESI Act to takeover physical possession of the secured assets, the respondent-bank had not proceeded further since the petitioner had come forward to settle the outstanding amount; the Writ Petition was not bonafide; though a legal issue was sought to be raised in the Writ Petition, contending that the first respondent Bank could not take any further steps under the SARFAESI Act since proceedings were pending before the BIFR, the Court was not inclined to go into the said issue in view of the conduct of the petitioner; apparently the petitioner had been promising, all the while, that the outstanding amounts would be settled, and had thus gained time for the past several months; and though the petitioner claimed to have made an application, under Section 15(1) of SICA on 10.10.2013, the said fact was not even mentioned in its latest letter dated 13.11.2013 wherein the respondent-bank was assured that the amounts overdue would be settled by 22.11.2013. The Division bench held that, in the totality of the facts and circumstances, they were not inclined to entertain the Writ Petition but, however, this did not preclude the petitioner from approaching the respondent-bank itself for grant of relief, if any. W.P. No.32980 of 2013 was, accordingly, disposed of by order dated 19.11.2013.

The BIFR, by its letter dated 11.11.2013, sought certain clarifications, and called upon the petitioner to furnish certain documents. In response thereto, the petitioner claims to have furnished all the details sought for. The BIFR informed the petitioner, by its letter dated 13.12.2013, that their application, under Section 15(1) of SICA dated 10.10.2013, was registered as Case No.89 of 2013; as per the decision of the BIFR, in regard to registration, the company was restrained from disposing of, or alienating in any manner, any of its fixed assets without the consent of the BIFR; as per Form A, there were several state government, central government, and other statutory dues outstanding against the company; however complete, correct and latest particulars of the dealing officers of the respective department/organisations

were not available on record; the petitioner should submit complete, correct and latest addresses of the offices dealing with their case; a copy of Form A, along with its enclosures, should be sent to the concerned state governments, banks and financial institutions immediately; and compliance report should be submitted within fifteen days.

In its hearing held on 21.01.2014, the BIFR recorded that Karur Vysya Bank Limited and Axis Bank Limited had assigned their debt, due from the petitioner, to IARC; and it was contended by the IARC that the reference was not maintainable under Section 15(1) of SICA as the assets of the company had been taken over in 2011. The BIFR, however, directed the petitioner to serve a copy of Form A on the IARC within a period of one week. All the concerned parties, including the IARC, were directed to file their objections on the sickness of the company, within a period of three weeks, with a copy to the company; and the petitioner was directed to file its reply to the objections on the sickness of the company, if received, within a further period of two weeks thereafter, with a copy to the respective parties. The next date of hearing was fixed as 02.04.2014. The fact, however, remains that, though more than one year has since elapsed, no orders have been passed till date by the BIFR on the maintainability of the reference made by the petitioner under Section 15(1) of SICA.

A counter-affidavit is filed, on behalf of the 1st respondent-bank, wherein it is stated that the petitioner invoked the jurisdiction of this Court by way of W.P. No.27357 of 2011 questioning the order of the DRAT dated 08.09.2011; the said Writ Petition was dismissed as devoid of merits; thereafter the petitioner filed W.P. No.32980 of 2013 which was disposed of by order dated 19.11.2013; the petitioner is estopped from filing the present Writ Petition on the very same ground, and the present Writ Petition is hit by the doctrine of resjudicata; the action of the respondent bank, in initiating proceedings under the SARFAESI Act, is not in violation of SICA; pursuant to the earlier possession notice, the 1st respondent-bank took possession of the registered office of the petitioner company situated at Ameerpet; the SARFAESI Act, which was enacted subsequent to SICA, provides for the speedy recovery of public money by realisation of the secured asset which has been classified as non-performing; the 1st respondent bank had sanctioned a term loan of Rs.12.44 crores in the year 2006 which was enhanced to Rs.19.06 crores; the petitioner had created an equitable mortgage of its immovable properties as security

for the term loan; Section 35 of the SARFAESI Act contains a non-obstante clause, and has overriding effect over other laws; the provisions of SICA must give way to the SARFAESI Act; the 1st respondent bank has not violated the provisions of SICA; it is incorrect to state that the petitioner is in possession and enjoyment of its assets, including its immovable properties; pursuant to the orders passed by this Court, in W.P. No.32980 of 2013 dated 19.11.2013, the petitioner submitted a letter dated 20.11.2013 seeking time for repayment; they submitted another letter dated 19.12.2013, requesting for grant of further time on the ground that the matter was pending before the BIFR; by Section 41 of the SARFAESI Act, and its Schedule, Section 15(1) of SICA was amended by insertion of the 2nd and 3rd proviso thereto; it is clear from the amended second proviso, that no reference shall be made to the BIFR, after commencement of the SARFAESI Act read with Section 5 thereof; and, even if a reference is sought, the same does not legally deprive the lender or the transferee securitisation/ reconstruction company from proceeding against the secured assets.

Sri C.B. Rammohan Reddy, Learned Counsel for the petitioner, would submit that SICA is a special enactment introduced for the purpose of dealing with sickness in industrial companies; the BIFR is entitled, after enquiry, to take effective measures to revive sick industries; proceedings before the 2nd respondent-BIFR are judicial proceedings; reference to the BIFR is to be made under Section 15 of SICA; the BIFR is required to conduct an enquiry under Section 16, and pass orders under Section 17 of SICA; after such enquiry, the BIFR is empowered to prepare a scheme, under Section 18 of SICA, for reconstruction of the sick industry; where any proceedings are pending before the BIFR, Section 22 of SICA requires consent of the BIFR to be obtained before other proceedings are initiated; any action taken by the 1st respondent-bank, for sale of the secured assets, would be in violation of the mandatory provisions of SICA; while the 1st respondent-bank is at liberty to approach the BIFR and obtain necessary orders, it cannot proceed independently when the matter is seized of by the BIFR; the petitioner is in possession and enjoyment of its assets, including immovable properties which were given as security to the loan transactions; pursuant to the orders in CrI.M.P. No.2559 of 2013 dated 22.07.2013 passed by the Chief Metropolitan Magistrate, Hyderabad, when the 1st respondent-bank tried to take possession of the petitioner's registered office,

they were constrained to approach this Court and file W.P. No.32980 of 2013 which was disposed of by order dated 19.11.2013; while disposing of the Writ Petition, this Court had directed the petitioner to approach the 1st respondent bank for grant of relief if any; pursuant thereto, the petitioner had submitted a letter dated 20.11.2013 seeking time; thereafter another letter dated 19.12.2013 was submitted by them requesting grant of time, as the matter was pending before the BIFR; it is only after W.P. No.32980 of 2013 was disposed of, that the BIFR by proceedings dated 21.01.2014, after hearing the parties, had admitted the reference, and had directed the parties to file their objections; after the SARFAESI Act was enacted, two provisos were inserted to Section 15(1) of SICA; under Section 5(1) of the SARFAESI Act, if any financial assets are acquired, reference to the BIFR cannot be made; no financial assets were acquired, belonging to the petitioner company, except the property in Ameerpet; hence the second proviso is not applicable to the facts of the present case; secured creditors, representing not less than 3/4th of the value of the amount disbursed to the borrowers, are required to take measures under Section 13(4) of the Act; no such measures have been taken, and the third proviso is not applicable; as Section 22 of SICA imposes a bar on proceedings against the petitioner company and its guarantors, the secured creditors are at liberty to approach the BIFR and obtain its consent; till consent is obtained, the 1st respondent-bank is prohibited, by operation of Section 22 of SICA, to proceed against the petitioner; and the action of the 1st respondent-bank, in seeking to take possession of the immovable properties of the petitioner-company, is illegal, arbitrary and contrary to the provisions of SICA.

A. IS THE PRESENT WRIT PETITION BARRED BY THE PRINCIPLES OF RES-JUDICATA?

In W.P.No.32980 of 2013 filed before this Court the petitioner questioned the action of the respondent-bank, in trying to take possession of their properties pursuant to the possession notice issued under the SARFAESI Act while the matter was pending before the BIFR, as arbitrary and illegal. Except for the subsequent act of the reference being registered by the BIFR, as Case No.89 of 2013, the contentions urged in this Writ Petition are similar to those raised earlier in W.P. No.32980 of 2013 to the effect that proceedings under the SARFAESI Act cannot be continued when the matter is pending with the BIFR, without the latter's consent.

The contention urged in this Writ Petition, regarding the effect of Section 22 of the SICA on proceedings pending under the SARFAESI Act, and that the second proviso to Section 15(1) of SICA is not attracted, could and ought to have been raised in W.P.No.32980 of 2013. An adjudication is conclusive and final not only as to the actual matter determined, but as to every other matter which the parties might and ought to have litigated and have had it decided as incidental to or essentially connected with the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action both in respect of the matters of claim or defence. The principle underlying Explanation IV to Section 11 CPC is that where the parties have had an opportunity of controverting a matter that should be taken to be the same thing as if the matter had been actually controverted and decided. **(Forward Construction Co. v. Prabhat Mandal (Regd.))**. As the Division bench of this Court, by its order in W.P. No.32980 of 2013 dated 19.11.2013, expressed its disinclination, in view of the petitioner's conduct, to examine the legal issue that the respondent-bank could not take further steps under the SARFAESI Act since proceedings were pending before the BIFR, the petitioner could only have had this legal issue examined by invoking the jurisdiction of the Supreme Court. Having failed to do so, and having let the order in W.P. No.32980 of 2013 dated 19.11.2013 attain finality, the petitioner is not entitled to agitate the very same issue in subsequent writ proceedings. The present Writ petition is, therefore, barred by the principles of res-judicata and is liable to be dismissed on this short ground.

B. THE PRESENT WRIT PETITION IS ALSO AN ABUSE OF PROCESS OF COURT:

This Writ Petition, as filed, is also an abuse of process of Court. As noted hereinabove the DRAT, by its order dated 08.09.2011, had directed the petitioner to deposit Rs.6.00 crores on or before 30.09.2011. Aggrieved thereby, the petitioner had filed W.P.No.27357 of 2011 and the Division Bench of this Court, while issuing notice before admission on 29.09.2011, had directed them to deposit Rs.3.00 crores within a period of six weeks, and another Rs.3.00 crores within a period of six weeks thereafter. The petitioner neither complied with the order of the DRAT dated 08.09.2011 nor the order of the Division Bench of this Court in W.P.No.27357 of 2011 dated 29.09.2011. Even thereafter, they have adopted one ruse or the other, and have avoided repayment of their debt, repeatedly assuring the 1st respondent-

bank that they would make payment shortly. As noted hereinabove the Division bench refused to entertain W.P.No.32980 of 2013 holding that the Writ Petition was not bonafide; they were not inclined to examine the legal issue in view of the petitioner's conduct; the petitioner had been promising all the while that the outstanding amount would be settled, and had thus gained time for the past several months; though they had made an application under Section 15(1) of SICA to the BIFR on 10.10.2013, they had assured the bank even thereafter by their letter dated 13.11.2013 that the amount overdue would be settled by 22.11.2013; and, in the totality of circumstances, they were not inclined to entertain the Writ Petition. Soon thereafter, the petitioner has again filed the present Writ Petition on the specious plea that the BIFR had, by letter dated 13.12.2013, informed them that their reference had been registered as Case No.89 of 2013. As a result of the interim order passed by this Court on 26.03.2014, they have continued to avoid making any payment to the 1st respondent-bank thereafter. They have not paid a single rupee to the 1st respondent-bank for the past more than three and half years, despite the directions of the DRAT and this Court to pay Rs.6.00 Crores as early as on 08.09.2011 and 30.09.2011 respectively. They have also, at the same time, used the legal process to prevent the 1st respondent-bank from taking possession of their secured assets, and putting them to sale. The present Writ Petition has been filed only to drag on proceedings, again prevent the respondent-bank from taking possession of their immoveable properties, and in realising even a part of the mounting debt by putting the secured assets to sale. The present Writ Petition is clearly an abuse of process of Court, and is liable to be dismissed as such.

Though the Writ Petition is liable to be dismissed on the aforesaid two grounds, we shall examine the contentions urged by Sri C.B.Rammohan Reddy, Learned Counsel for the petitioner, on the scope of the relevant provisions of SICA and the SARFAESI Act, as these issues would frequently arise.

C. SECTION 22 OF SICA HAS NO APPLICATION TO CASES WHERE THE SECOND PROVISOR TO SECTION 15(1) IS ATTRACTED

SICA, a complete code in itself, gives supervisory control to the BIFR over the affairs of a sick industrial company from the stage of registration of the reference. (**Ghanshyam Sarda v. Shiv Shankar Trading Co.**). Section 3(o) of SICA defines "sick industrial company" to mean an industrial company (being a company

registered for not less than five years) which has, at the end of any financial year, accumulated losses equal to or exceeding its entire net worth. Section 4(1) relates to establishment of a Board and, under sub-section (1) thereof, with effect from such date, as the Central Government may by notification appoint, there shall be established a Board to be known as the “Board for Industrial and Financial Reconstruction” (for short “BIFR”) to exercise the jurisdiction and powers, and discharge the functions and duties conferred or imposed on the Board by or under SICA.

Section 15 of SICA relates to the reference to the BIFR and, under sub-section (1) thereof, when an industrial company has become a sick industrial company, the board of directors of the company shall, within sixty days from the date of finalisation of the duly audited accounts of the company for the financial year as at the end of which the company has become a sick industrial company, make a reference to the BIFR for determination of the measures which shall be adopted with respect to the company. Under the first proviso thereto, if the board of directors have sufficient reason, even before such finalisation, to form the opinion that the company has become a sick industrial company, they shall, within sixty days after formation of such opinion, make a reference to the BIFR for the determination of the measures to be adopted with respect to the company. In the exercise of the powers conferred by Section 30 of SICA, the BIFR made the Board for Industrial and Financial Reconstruction Regulations 1987 (hereinafter called the “Regulations”). Chapter II thereof deals with the reference under Section 15 of SICA. Regulation 19(1)(a) requires every reference to the BIFR, under Section 15(1), to be made in Form A in respect of an industrial company other than a government company, and to be accompanied by five copies along with four copies each of all the enclosures. Regulation 19(4) stipulates that, on receipt of a reference, the Secretary or the Registrar of the BIFR shall cause to be endorsed, on each reference, the date on which it is filed or received in the office of the BIFR. Regulation 19(5) stipulates that, if on scrutiny, the reference is found to be in order, it shall be registered, assigned a serial number and submitted to the chairman for assigning it to a bench. Under Regulation 19(7), a reference declined to be registered shall be deemed not to have been made.

Section 16(1) of SICA enables the BIFR to make such inquiry, as it may deem fit, for determining whether any industrial company has become a sick industrial

company (a) upon receipt of a reference with respect to such company under Section 15; or (b) upon information received with respect to such company or upon its own knowledge as to the financial condition of the company. Section 16(2) enables the BIFR, if it deems it necessary or expedient so to do for the expeditious disposal of an inquiry under sub-section (1), to require, by order, any operating agency to enquire into and make a report with respect to such matters as may be specified in the order.

Section 22 of SICA relates to suspension of legal proceedings and, under sub-section (1) thereof, where, in respect of an industrial company, an inquiry under Section 16 is pending or any scheme referred to under Section 17 is under preparation or consideration or a sanctioned scheme is under implementation, then, notwithstanding anything contained in any other law, no proceedings for the winding up of the industrial company or for execution, distress or the like against any of the properties of the industrial company, and no suit for the recovery of money or for the enforcement of any security against the industrial company or of any guarantee in respect of any loans or advance granted to the industrial company, shall lie or be proceeded with further, except with the consent of the BIFR. Section 22 of SICA was enacted against the backdrop of the existing multitude of remedies which creditors may avail against an indebted company and its properties, bringing them to attachment, auction-sale, etc. making it difficult for the authorities, entrusted with its reconstruction under SICA, to evolve a scheme for reconstruction. Section 22, which is given primacy by way of a non-obstante clause in Section 32 of SICA, has been enacted to protect the properties of the sick industrial company and the company itself from being proceeded against by its creditors who may wish to seek the winding up of the company or institute execution or distress proceedings against its properties. (**KSL and Industries Ltd. v. Arihant Threads Ltd.**). Matters connected with the sanction and implementation of a scheme of rehabilitation, right from the date on which it is presented or the date from which the scheme is made effective, whichever is earlier, would fall within the ambit and scope of Section 22 of SICA. (**Raheja Universal Limited v. NRC Limited**). The immunity is, however, not absolute. Such proceeding, which a creditor may wish to institute, may be instituted or continued with the consent of the BIFR. (**KSL and Industries Ltd.**³).

Section 41 of the SARFAESI Act and its Schedule (Act 54 of 2002) provide for amendment of SICA, by insertion of the second and third provisos to Section

15(1) of SICA, with effect from 21.06.2002. The second proviso to Section 15(1) of SICA provides that no reference shall be made to the BIFR, after the commencement of the SARFAESI Act, where the financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of Section 5 thereof. The second proviso to Section 15(1) stipulates that, once a securitisation company or a reconstruction company acquires an asset under Section 5(1) of the SARFAESI Act, the board of directors of the sick industrial company cannot make a reference to the BIFR for determination of the measures which shall be adopted with respect to the company. In such a case, as the company cannot be declared sick, no advantage can be taken of Section 22 of SICA. (**Asset Reconstruction Company (India) Ltd. v. M.H.Mills & Industries Ltd.**).

Under the third proviso to Section 15(1) of SICA, on or after the commencement of the SARFAESI Act, where a reference is pending before the BIFR, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against the financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under Section 13(4) of the SARFAESI Act. The words “**on or after**”, in the third proviso, describe time in successive and continuous sequence of days, and fix the point from which the succeeding time area, it describes, begins. The words “on or after” fixes the date named as a point or period of time, on or after which the rule prescribed by the Act is to prevail. (**Words and Phrases – Permanent Edition – Volume 29A**). As the SARFAESI Act came into force on 21.06.2002 the starting point for the third proviso, to Section 15(1) of SICA, to be attracted is on or after 21.06.2002. If proceedings were pending before the BIFR on 21.06.2002, and on the conditions stipulated in the third proviso being satisfied, the reference stood abated. As the petitioners made a reference to the BIFR, under Section 15(1) of SICA, by their application dated 10.10.2013, the question of pendency of a reference before the BIFR, on or after the commencement of the SARFAESI Act, does not arise and the third proviso to Section 15(1) of SICA has no application.

D. THE PURPOSE FOR WHICH THE SARFAESI ACT AND SICA WERE ENACTED MUST BE BORNE IN MIND WHILE EXAMINING THE INTER-PLAY BETWEEN THE PROVISIONS OF BOTH THE ACTS:

The SARFAESI Act deals with mortgage type of securities under which the secured creditor, namely, the bank/ financial institution obtains interest in the property concerned and, for this reason, the intervention of courts/tribunals is ousted. The said Act provides for recovery of possession by a non-adjudicatory process, (**Transcore v. Union of India; Central Bank of India v. State of Kerala**), for the quick enforcement of the security, and the enforcement of the rights vested in the bank/financial institution. (**M/s. Bellary Steels and Alloys Ltd v. M/s. Man Takraf (India) Pvt. Ltd**).

Section 2(l) of the SARFAESI Act defines "financial asset" to mean debt or receivables and includes, among others, (i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or (ii) any debt or receivables secured by the mortgage of, or charge on, immovable property; or (iii) a mortgage, charge, hypothecation or pledge of movable property. Section 2 (v) defines "reconstruction company" to mean a company formed and registered under the Companies Act, 1956 for the purpose of asset reconstruction. Section 2(z) defines "securitisation" to mean acquisition of financial assets by any securitisation company or reconstruction company from any originator. Section 2 (za) defines "securitisation company" to mean any company formed and registered under the Companies Act, 1956 for the purpose of securitisation. Section 2 (zc) defines "secured asset" to mean the property on which security interest is created. Section 2 (zd) defines "secured creditor" to mean any bank or financial institution or any consortium or group of banks or financial institutions. Section 2 (ze) defines "secured debt" to mean a debt which is secured by any security interest. Section 2 (zf) defines "security interest" 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, assignment other than those specified in Section 31.

Section 5 of the SARFAESI Act relates to acquisition of rights or interest in financial assets and, under sub-section (1) thereof, notwithstanding anything contained in any agreement or any other law for the time being in force, any securitisation company or reconstruction company may acquire financial assets of any bank or financial institution by the methods prescribed in clause (a) and (b) thereof. The SARFAESI Act proceeds on the basis that the security interest vests in the bank/financial institution. Authority is given under the Act to the banks/financial

institutions to assign the secured interest to a securitisation company/asset reconstruction company. In cases where the borrower has bought an asset, with the finance of the bank/financial institution, the latter is treated as a lender and, on assignment, the securitisation company/asset reconstruction company steps into the shoes of the lender bank/financial institution and it can recover, the amount lent, from the borrower. (**Transcore⁶; Central Bank of India⁷**).

The SARFAESI Act is concerned mainly with the recovery of the debt, by banks and financial institutions, without recourse to any court or tribunal. It permits securitisation of the debt and aims at minimising non-performing assets. The SICA, a pre-existing legislation, provides for timely detection of sick and potentially sick companies owning industrial undertakings and the speedy determination by the BIFR of remedial and ameliorative measures, and enforcement of such measures. The different purposes of the two Acts must be kept in mind while examining the inter-play between the provisions of the two and eschew, if permissible, a readiness to hold that their provisions overlap or tread over each other. (**Global Infrastructure Technologies Ltd. v. Kotak Mahindra Bank Ltd**).

E. NON-OBSTANTE CLAUSE – ITS EFFECT:

Both SICA and the SARFAESI Act contain provisions which give the Act over-riding effect over other laws in force. Section 32 of SICA relates to the effect of SICA on other laws and, under sub-section (1) thereof, the provisions of SICA, and of any rules or schemes made thereunder, shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 (46 of 1973), and the Urban Land (Ceiling and Regulation) Act, 1976 (33 of 1976) for the time being in force. Section 35 of the SARFAESI Act makes the provisions of the said Act override other laws and, thereunder, the provisions of the SARFAESI Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

A non-obstante clause is generally appended to a Section with a view to give the enacting part of the Section, in case of conflict, an overriding effect over any other law in force as is mentioned in the non-obstante clause. It is equivalent to

saying that, inspite of the laws mentioned in the non-obstante clause, the provision following it will have full operation, or the laws embraced in the non-obstance clause will not be an impediment for the operation of the enactment or the provision in which the non-obstante clause occurs. (**State of Bihar v. Bihar Rajya M.S.E.S.K.K. Mahasangh; South India Corpn. (P) Ltd. v. Secretary, Board of Revenue, Trivandrum**). Normally the use of a phrase by the legislature in a statutory provision like “***not withstanding anything to the contrary contained in any other law for the time being in force***” is equivalent to saying that no other law in force shall be an impediment to the measure. Use of such an expression is another way of saying that the provision in which the non-obstante clause occurs would wholly prevail over any other law for the time being in force. Non-obstante clauses are to be regarded as clauses which remove all obstructions which might arise out of the provisions of any other law in the way of the operation of the principal enacting provision to which the non-obstante clause is attached. (**Bihar Rajya M.S.E.K.K., Mahasangam¹⁰; Iridium India Telecom Ltd. v. Motorola Inc**). While interpreting a provision containing a non-obstante clause it should first be ascertained what the enacting part of the Section provides, on a fair construction of the words used according to their natural and ordinary meaning, and the non-obstante clause is to be understood as operating to set aside as no longer valid anything contained in any other law which is inconsistent with the Section containing the non-obstante clause. (**Aswini Kumar v. Arabinda Bose; A.V.Fernandez v. State of Kerala**).

F. JUDGMENTS WHERE COMPETING NON-OBSTINATE CLAUSES, IN TWO DIFFERENT ENACTMENTS, WERE CONSIDERED:

It is useful to refer to certain judgments in which the effect of competing non-obstante clauses, in two different enactments, were considered. In **Maharashtra Tubes Ltd. v. State Industrial & Investment Corpn. of Maharashtra Ltd.**, the Supreme Court held that both the State Finance Corporation Act, 1951 and SICA were special statutes dealing with different situations — the former providing for the grant of financial assistance to industrial concerns with a view to boost up industrialisation and the latter providing for revival and rehabilitation of sick industrial undertakings, if necessary, by grant of financial assistance; they have competing non obstante provisions; SICA, being a subsequent enactment, the non obstante clause therein would, ordinarily, prevail over the non obstante clause found

in the State Finance Corporation Act, unless it was found that SICA was a general statute, and the State Finance Corporation Act was a special one; in that event, the maxim *generalia specialibus non derogant* would apply; the State Finance Corporation Act dealt with a pre-sickness situation whereas SICA dealt with the post-sickness situation; it was, therefore, not possible to agree that the State Finance Corporation Act was a special statute or that SICA was a general statute; both were special statutes dealing with different situations notwithstanding a slight overlap here and there, for example, both of them provided for grant of financial assistance though in different situations; and, therefore, in the case of sick industrial undertakings, the provisions contained in SICA would, ordinarily, prevail and govern.

In **Bhoruka Steel Ltd. v. Fairgrowth Financial Services Ltd.**, it was contended that recovery proceedings under the Special Courts Act should be stayed, in view of the provisions of SICA. The Special Court held that, where there are two special statutes which contain non-obstante clauses, the later statute must prevail; this is because, at the time of enactment of the later statute, the legislature was aware of the earlier legislation and its non obstante clause; if the legislature still

[image]

conferred the later enactment with a non obstante clause, it meant that the legislature wanted that enactment to prevail; and, if the legislature did not want the later enactment to prevail, it could and would then have provided in the later enactment that the provisions of the earlier enactment continue to apply.

In **Allahabad Bank v. Canara Bank** the Supreme Court held that, in view of Section 34 of the DRT Act, the provisions of the DRT Act overrides the provisions of the Companies Act to the extent there is anything inconsistent between both the Acts. In **A.P. State Financial Corpn. v. Official Liquidator** the Supreme Court held

that the proviso to sub-section (1) of Section 529 and Section 529-A of the Companies Act, having been subsequently enacted, the non obstante clause in Section 529-A of the Companies Act prevailed over Section 29 of the State Finance Corporation Act, 1951. In **Solidaire India Ltd.v. Fairgrowth Financial Services Ltd** the Supreme Court, after examining the scope of Section 13 of the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 and Section 32 of SICA, held that both these Acts were special Acts; and, in such an event, it was the later Act, namely, the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 which should prevail.

G. TEST TO BE APPLIED TO RESOLVE THE INTER-SE CONFLICT BETWEEN COMPETING NON-OBSTANTE CLAUSES IN TWO DIFFERENT ENACTMENTS:

When two or more laws operate in the same field, and each contains a non-obstante clause stating that its provisions will over ride those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the law. (**Sarwan Singh v. Kasturi Lal**). In the case of inconsistency between the provisions of two enactments, both of which can be regarded as special in nature, the ordinary principle that a special law over rides a general law does not afford any clear solution. It is, therefore, desirable to resolve the conflict by determining the overriding effect of one or the other of the relevant provisions in these two Acts on much broader considerations of the purpose and policy underlying the two Acts and the clear intendment conveyed by the language of the relevant provisions therein. (**Ashoka Marketing Ltd. v. Punjab National Bank; Sarwan Singh²⁰; Kumaon Motor Owners' Union Ltd. v. State of Uttar Pradesh; Shri Ram Narain v. Simla Banking and Industrial Co. Ltd.**).

The SARFAESI Act is an Act made to regulate securitisation and reconstruction of financial assets and enforcement of security interest, and for matters connected therewith or incidental thereto. The said Act provides a legal framework empowering banks and financial institutions to take possession of the securities, and sell them without the intervention of the Court; and enables banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery exercising the power to take

possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. Like SICA, the SARFAESI Act is also a special enactment and the conflict between the non-obstante clauses in both these Acts cannot be resolved applying the maxim generalia specialibus non-derogant. On a natural and ordinary meaning being accorded, and on a fair construction of the words used in the enacting part of Section 35 of the SARFAESI Act, it is clear that, if any other law for the time being in force (in this case “SICA”) is inconsistent with the provisions of the SARFAESI Act, it is the provisions of the SARFAESI Act which shall have effect, notwithstanding the inconsistency. (**Asset Reconstruction Company (India) Ltd.**⁵).

For resolving the inter-se conflict between competing non-obstante clauses in two different enactments, one other test may also be applied though the persuasive force of such a test is but one of the factors which combine to give a fair meaning to the language of the law. That test is that the later enactment must prevail over the earlier one. (**Sarwan Singh**²⁰). When both statutes, containing non-obstante clauses, are special statutes, an endeavour should be made to give effect to both of them. In case of conflict, the later shall prevail. (**Maruti Udyog Ltd. v. Ram Lal; Solidaire India Ltd.**¹⁹; **Maharashtra Tubes Ltd.**¹⁵; **Sarwan Singh**²⁰; **Allahabad Bank**¹⁷ and **Ram Narain**²³; **Engg. Kamgar Union v. Electro Steels Castings Ltd.**). In view of the non-obstante clause in Section 35 of the SARFAESI Act, which is a later Act, the SARFAESI Act shall, in case of conflict, have an overriding effect over the provisions of SICA. (**Asset Reconstruction Company (India) Ltd.**⁵). While Section 35 of the SARFAESI Act gives over-riding effect of that Act over other laws which are inconsistent therewith, the second and third provisos, which were inserted into the SICA in the year 2002, by the SARFAESI Act itself, cannot be construed as being inconsistent with the SARFAESI Act. (**Global Infrastructure Technologies Ltd.**⁹).

H. SECTION 37 OF THE SARFAESI ACT: ITS SCOPE:

While the provisions of the SARFAESI Act, being an Act later than SICA, may, in view of Section 35 thereof, prevail in case of inconsistency, it is necessary to examine whether any other consequence would ensue in view of Section 37 thereof.

Section 37 of the SARFAESI Act provides that the application of other laws are not barred and, thereunder, the provisions of the SARFAESI Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force. A secondary meaning of “*in addition to*” is “*also*”, which denotes that something is added to what preceded it. (**Words and Phrases – Permanent Edition – Volume 20A**). **Brown Legal Maxims**, 6th ed., p.166 defines “*derogation*” to mean the act of annulling or breaking a law, or some part of it. **P. Ramanatha Aiyer’s The Law Lexicon – 2nd Edition - Reprint 2002** defines “*derogation*” to mean, taking away, lessening or impairing the authority, position or dignity. **Black’s Law Dictionary – Sixth Edition** defines “*derogation*” to mean the partial repeal or abolishing of a law, as by a subsequent act which limits its scope or impairs its utility and force. **Oxford Dictionary** defines “*derogation*” to mean an exemption from, or relaxation of, a rule or law.

In view of Section 37, the provisions of any other law in force shall also apply along with the provisions of the SARFAESI Act, the scope of any other such law is not limited or restricted, and its application would not nullify or annul or impair the effect of the provisions of any other law in force. The heading of Section 37 makes it clear that the application of other laws are not barred. The effect of Section 37 would, therefore, be that, in addition to the provisions contained under the SARFAESI Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other Acts mentioned in Section 37, which includes any other law for the time being in force. (**Mathew Varghese v. M. Amritha Kumar**).

While Section 34(1) of the DRT Act contains a non-obstante clause, Section 34(2) stipulates that the provisions of the DRT Act shall be in addition to, and not in derogation of, the enactments mentioned therein which includes SICA. In **KSL and Industries Ltd.**³, the Supreme Court held that the purpose of the DRT Act and SICA are entirely different; where action under the two laws may seem to be in conflict, Parliament has wisely preserved the proceedings under SICA by specifically providing for, in Section 34(2) of the DRT Act, that the DRT Act shall be in addition to and not in derogation of SICA; the term “*not in derogation*” in Section 34(2) of the

DRT Act clearly expresses the intention of Parliament not to detract from or abrogate the provisions of SICA; Parliament intended the proceedings under SICA, for reconstruction of a sick company to go on; and, for that purpose, further intended that all other proceedings against the company and its properties should be stayed pending the process of reconstruction.

As Section 35 of the SARFAESI Act is similar to Section 34(1) of the DRT Act, and Section 37 of the SARFAESI Act similar to Section 34(2) of the DRT Act, does that mean that, in cases where proceedings are pending before the BIFR under the provisions of SICA, all proceedings under the SARFAESI Act should be stayed? The answer, for more reasons than one, must be in the negative. The DRT Act facilitated establishment of a two-tier system of Tribunals. The Tribunals established at the first level have been vested with the jurisdiction, powers and authority to summarily adjudicate the claims of banks and financial institutions in the matter of recovery of their dues without being bogged down by the technicalities of the Code of Civil Procedure. The SARFAESI Act drastically changed the scenario in as much as it enabled banks, financial institutions and other secured creditors to recover their dues without intervention of the Courts or Tribunals. The SARFAESI Act also made provision for registration and regulation of securitisation/reconstruction companies, securitisation of financial assets of banks and financial institutions and other related provisions. **(Central Bank of India⁷)**. It is with a view to achieve this object that, simultaneously, certain restrictions were placed in other enactments to further the objects for which the SARFAESI Act was made. Section 41 of the SARFAESI Act has the effect of amending certain other enactments specified in the Schedule in the manner specified therein. The Schedule refers to SICA, and envisages insertion of two provisos after the existing proviso in Section 15(1). **(M/s.Kanakadhara Spinning Mills v. The Registrar, BIFR, New Delhi)**.

It is a rule of legal policy that law should be altered deliberately rather than casually. Legislature does not make radical changes in the law 'by a side wind, but only by measured and considered provisions'. **(Francis Bennion's Statutory Interpretation, Butterworths, 1984, para 133; Byram Pestonji Gariwala's; Central Bank of India⁷)**. Insertion of the second and third provisos to Section 15(1) of SICA, as provided in Section 41 and the Schedule to the SARFAESI Act, makes it clear that Parliament intended to make a radical change to the law and, as against

the provisions of the DRT Act, to provide a legal frame work whereby banks and financial institutions could take possession of securities and sell them, to recover defaulting loans, without intervention of Courts/Tribunals; and to reduce their non-performing assets. The purpose of inserting the second proviso to Section 15(1) is to prohibit the defaulting company from invoking the jurisdiction of the BIFR, and claiming the protection of SICA, in cases where the conditions stipulated in the second proviso are satisfied. Parliament has, in enacting the SARFAESI Act, recognised the need for banks and financial institutions to improve recovery of debts, realise long-term assets, and reduce non-performing assets, to be of greater importance than revival and rehabilitation of sick industrial companies.

On a reading of Sections 35 and 37 of the SARFAESI Act together it is clear that, in the event of any of the provisions of the SICA not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, the SARFAESI Act and the SICA would complement each other. (**Mathew Varghese**²⁶). Since, however, the second proviso, divesting the jurisdiction of the BIFR, has been incorporated in Section 15(1) of SICA itself, in view of Section 41 of the SARFAESI Act and the Schedule thereto, a harmonious construction of the provisions of SICA and the SARFEASI Act, especially where the second proviso to Section 15(1) of SICA is attracted, does not arise. (**Punjab National Bank v. AAIFR**).

I. CONSENT OF THE BIFR IS NOT REQUIRED, TO CONTINUE PROCEEDINGS UNDER THE SARFAESI ACT, IN VIEW OF THE SECOND PROVISIO TO SECTION 15(1) OF SICA:

Let us now examine whether, in the facts of the present case, the petitioners can claim the protection of SICA, and prevent the first respondent-bank from taking possession of its immovable properties in accordance with the provisions of the SARFAESI Act. The obligation to make a reference to the BIFR is placed, by Section 15(1) of SICA and its first proviso, on the board of directors of the sick industrial company. Once a reference is made by the board of directors, the BIFR is required to make an enquiry under Section 16, and take remedial measures under Sections 17 to 19 of SICA, for the revival and rehabilitation of the sick industrial company. It is with a view to ensure that the BIFR exercises its jurisdiction, under Sections 16 and 17 without hindrance, that Section 22(1) of SICA provides for the suspension of legal proceedings where an enquiry under Section 16 is pending, or a

scheme under Section 17 is under preparation, and consideration, or a sanctioned scheme is under implementation.

From the proceedings of the BIFR dated 21.01.2014, it is evident that the assets of the petitioner, mortgaged to Karur Vysya Bank Ltd. and Axis Bank Ltd were acquired from them by IARC (a securitisation company). The requirement of Section 5(1) of the SARFAESI Act was, therefore, satisfied. Consequently the second proviso to Section 15(1) was attracted, and the petitioner was prohibited from making a reference to the BIFR by their letter dated 10.10.2013, more than a decade after the SARFAESI Act, 2002 came into force on 21.06.2002. The pre-condition for the BIFR to cause an enquiry under Section 16 is, a reference made to it, by the board of directors of a sick industrial company, under Section 15(1) of SICA and its first proviso. As no reference could have been made by the petitioner to the BIFR, in view of the embargo placed on it by the second proviso to Section 15(1) of SICA, the non-obstante clause under Section 22(1) of SICA has no application, and neither the securitisation company nor the first respondent-bank, are obligated to obtain the consent of BIFR to realise the security in accordance with the provisions of the SARFAESI Act and the Rules made thereunder.

J. SHOULD THE CONDITIONS STIPULATED UNDER THE THIRD PROVISOR BE READ INTO THE SECOND PROVISOR OF SECTION 15(1) OF SICA:

The next question which arises for consideration is whether the conditions prescribed in the third proviso must be read into the second proviso to Section 15(1) of SICA, and the second proviso held to apply only when the conditions in the third proviso are satisfied? In **Asset Reconstruction Co. India P. Ltd.**⁵, a Division bench of the Delhi High Court held that a literal interpretation of the second proviso to Section 15(1) which, unlike the third proviso thereto, does not require atleast 75% of the secured debt to be purchased by an asset reconstruction company or a securitization company, will defeat the object of SICA which is to prevent unemployment and loss of revenue to the state exchequer, and other ills which arise from the closure of an industry; if such an interpretation is adopted, a purchaser of a very minuscule amount of the debt of a sick company can frustrate its revival, which will result in an avoidable stalemate arising because of the ability of the secured creditor to prevent a reference for revival and rehabilitation of a sick company, but his inability to pursue his remedy under the SARFAESI Act because he would not have the cut off percentage of 75% as required by Section 13 (9) thereof; to the extent possible, different provisions of cognate and allied Acts must be interpreted

harmoniously with each other, and the object of the legislature will have to be understood by reading all the special statutes taken together; a literal interpretation, of the 2nd proviso to Section 15(1) of SICA, does not require any minimum percentage of the secured assets to be purchased by an asset reconstruction company, or a securitization company acting under the SARFAESI Act; the literal interpretation results in an absurdity and a stalemate which can and should be avoided; and, in the 2nd proviso to Section 15(1), the asset reconstruction company or the securitisation company must be required to purchase atleast 75% or more of the secured assets of a sick industrial company before it can claim to bring into effect the second proviso to Section 15(1).

We must express our inability to agree with the opinion of the Division bench of the Delhi High Court, in **Asset Reconstruction Co. India (P) Ltd**⁵, since the language of the 2nd proviso to Section 15(1) of SICA is plain and unambiguous, and must be enforced. It is, normally, not the concern of Courts to examine its reasonableness or consider its consequences. (**Cape Brandy Syndicate v. IRC**). If the meaning of the provision is reasonably clear, Courts have no jurisdiction to mitigate harshness. (**Canadian Eagle Oil Co. Ltd v. R; IRC v. Ross & Coulter (Bladnock Distillery Co. Ltd)**). Courts of law have nothing to do with the reasonableness or unreasonableness of a provision of a Statute except in so far as it may help it in interpreting what the legislature has said. If the language of a statute be plain, admitting of only one meaning, the legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. The language of the second proviso to Section 15(1) of SICA must, since its language is plain and unambiguous, be enforced and the Court, sitting judicially, is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous. (**Cooke v. Charles A. Vogeler Co**).

As long as there is no ambiguity in the statutory language resort to any interpretative process to unfold the legislative intent becomes impermissible. The supposed intention of the legislature cannot then be appealed to whittle down the statutory language which is otherwise unambiguous. If the intendment is not in the words used it is nowhere else. The need for interpretation arises when the words used in the statute are, on their own terms, ambivalent and do not manifest the

intention of the legislature. (**Keshavji Ravji & Co. v. CIT**) . Individual cases of hardship and injustice do not and cannot have any bearing for rejecting the natural construction by attributing normal meaning to the words used since “hard cases do not make bad laws”. The statute should be interpreted on the basis of the language used therein, and not dehors the same. No words ought to be added, and only the language used ought to be considered, so as to ascertain the proper meaning and intent of the legislation. The court is to ascribe a natural and ordinary meaning to the words used by the legislature and the court ought not, under any circumstances, to substitute its own impression and ideas in the place of the legislative intent as is available from a plain reading of the statutory provisions. (**Orissa State Warehousing Corporation v. CIT**). It is no function of the Court to add words to the second proviso to Section 15(1) of SICA on the premise that it would, otherwise, defeat the objects of SICA. Hardship if any, which may possibly result, is for the legislative branch of the State to consider.

K. DISTINCTION BETWEEN THE SECOND AND THIRD PROVISO TO SECTION 15(1) OF SICA:

The distinction between the second and third provisos to Section 15(1) of SICA is not without significance. Both these provisos are applicable in two different and distinct situations. While the second proviso prohibits even a reference being made to the BIFR, the third proviso brings to an end the proceedings pending before the BIFR. As noted herein above, the board of directors of the petitioner company made a reference to the BIFR by their letter dated 10.10.2013, long after the respondent-bank had initiated proceedings against them under Section 13(4) and 14 of the SARFAESI Act. The endorsement on the reference, by the Secretary of the BIFR under Regulation 19(4) of the Regulations, or registration of the reference under Regulation 19(5) thereof, are events posterior to the reference made to the BIFR, by the board of directors of the sick industrial company, under Regulation 19(1). In view of the bar under the second proviso to Section 15(1) of SICA, the very reference to the BIFR is without jurisdiction, and consequently the subsequent act of registration of the reference as Case No.89 of 2013, or commencement of the enquiry under Section 16(1) of SICA or for that matter remedial measures being taken under Section 17 to 19 of SICA, by the BIFR are also without jurisdiction and a nullity. Once the jurisdiction of the BIFR has been divested by the mandatory impact of the second proviso to Section 15(1), the BIFR cannot pass any orders under

SICA. (**Punjab National Bank**²⁸).

L. INVALIDITY OF AN ORDER, WHICH SUFFERS FROM INHERENT LACK OF JURISDICTION, CAN BE SET UP EVEN IN COLLATERAL PROCEEDINGS:

The petitioner seeks a direction to the first respondent-bank to refrain from continuing proceedings under the SARFAESI Act, as the reference made by them is pending enquiry before the BIFR. It is no doubt true that the validity of the proceedings before the BIFR are not under challenge in this Writ Petition. The fact, however, remains that an order passed by a Court/Tribunal without jurisdiction over the subject matter, or on other grounds which goes to the root of its exercise of jurisdiction, suffers from inherent lack of jurisdiction. It is *coram non judice*. An order passed by such a Court/Tribunal is a nullity, and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even in collateral proceedings. (**Sushil Kumar Mehta v. Gobind Ram Bohra**). True it is that no order can be ignored unless a finding is recorded that it is illegal, void or not in consonance with the law, and this principle is equally true even where the 'brand of invalidity' is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the Court/Tribunal. (**Pune Municipal Corporation v. State of Maharashtra**). As the invalidity of proceedings before a Court/Tribunal, which suffer from inherent lack of jurisdiction, can be set up even in collateral proceedings it would suffice for this Court to declare the reference made by the petitioner to the BIFR, by their letter dated 10.10.2013, and registration of the reference as Case No.89 of 2013, as a nullity. As these proceedings are void, it is enough for the Court to declare it so, and it collapses automatically. (**Pune Municipal Corporation**³⁶; and **State of Punjab v. Gurdev Singh**). Consequently, it must also be declared that the petitioner is not entitled to claim protection under SICA, and that the first respondent-bank is not disabled from continuing proceedings against the petitioner under the provisions of the SARFAESI Act.

M. CONCLUSION:

Viewed from any angle, the petitioner is not entitled to the relief sought for. The Writ Petition must be, and is accordingly, dismissed. As the Writ Petition is an abuse of the process of Court it is dismissed with exemplary costs of Rs.25,000/- which the petitioner shall pay the first respondent-bank within four weeks from today. The miscellaneous petitions pending, if any, shall also stand dismissed.

RAMESH RANGANATHAN, J

M.SATYANARAYANA MURTHY, J

Date: 09.04.2015

Note: L.R. copy to be marked

B/o

MRKR/CS