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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

COMPANY PETITION NO. 511 OF 2014

ICICI Bank Ltd. ...Petitioner
VS
S. Kumars Nationwide Ltd. ...Respondent

**WITH
COMPANY PETITION NO. 30 OF 2014**

Edelweiss Asset Reconstruction Co. Ltd. ...Petitioner
VS
S. Kumars Nationwide Ltd. ...Respondent

**WITH
COMPANY PETITION NO. 322 OF 2014**

L & T Finance Ltd. ...Petitioner
VS
S. Kumars Nationwide Ltd. ...Respondent

**WITH
COMPANY PETITION NO. 382 OF 2014**

Australia & New Zealand Banking Group Ltd. ...Petitioners
& Ors.
VS
S. Kumars Nationwide Ltd. ...Respondent

**WITH
COMPANY PETITION NO. 698 OF 2014**

Grey Worldwide India Pvt. Ltd. ...Petitioner
VS
S. Kumars Nationwide Ltd. ...Respondent

**WITH
COMPANY PETITION NO. 739 OF 2014**

Messrs Sathe & Sons Partnership firm ...Petitioner
VS

S. Kumars Nationwide Ltd. ...Respondent

WITH
COMPANY PETITION NO. 79 OF 2015

M/A Kabadi Shankarsa Clothing Co. ...Petitioner
VS
S. Kumars Nationwide Ltd. ...Respondent

WITH
COMPANY PETITION NO. 265 OF 2015

M/s Shiv Baba Enterprises through Sole
Proprietor Mrs Sushila Kumari ...Petitioner
VS
S. Kumars Nationwide Ltd. ...Respondent

WITH
COMPANY PETITION NO. 674 OF 2015

M/s Sunrise Media & Effects (P) Ltd. ...Petitioner
VS
S. Kumars Nationwide Ltd. ...Respondent

WITH
COMPANY PETITION NO. 964 OF 2015

IL and FS Financial Services Ltd. ...Petitioner
VS
S. Kumars Nationwide Ltd. ...Respondent

.....

Mr Nitin Thakkar, Sr. Advocate a/w Mr Shyam Kapadia a/w Ms Shreevardhini Parchure a/w Mr Yuvraj Singh i/b M/s Desai & Diwanji for the Petitioner in CP No.511 of 2014

Ms Priyanka Ladoia i/b Trilegal Advocates for the Petitioner in CP No.177 of 2014

Mr Nilesh Bamne i/b M/s V. Deshpande & Co for the Petitioner in CP No.30 of 2014

Mrs S.I.Joshi a/w Mr Anand Poojari a/w Nikita Pawar, Jalpa Pithadia & Vihar Paymode i/b S.I.Joshi & Co. for the Petitioner in CP No.322 of 2014

Ms J. P. Garasia i/b Consulta Juris for the Petitioner in CP No.382 of 2014

Ms Kavisha Shah i/b India Law Alliance for the Petitioner in CP No.698 of 2014

Mr Akhileshwar Sharma for the Petitioner in CP No.79 of 2015

Mr Reshant Shah i/b Lex Conseiller for the Petitioner in CP No. 265 of 2015

Ms Priyanka Rathi i/b Shamin & Co. for the Petitioner in CP No. 674 of 2015

Mr Ashutosh Kaushik a/w Mr Vijayendra Purohit i/b M.K.Ambalal & Co. for the Petitioner in CP No. 964 of 2015

Mr Ravi Kadam, Sr. Advocate a/w Mr Chirag Mody a/w Ms Samindara Surve a/w Mr Aditya Singh i/b Little & Co. for the Respondent Co. in all the Petitions.

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CORAM : B. P. COLABAWALLA J.

JULY 01, 2016

ORAL JUDGMENT :

1 This entire bunch of Petitions have been filed by different Petitioners seeking to wind up the Respondent Company on the ground that it is unable to pay its debts. I have been informed that out of this entire group, Company Petition Nos.698 of 2014, 739 of 2014, 79 of 2015, 265 of 2015, 674 of 2015 and 964 of 2015 have not yet been admitted.

2 Even though no affidavit in reply has been filed by the Respondent Company disputing the claim of many of the Petitioners on merits, one composite affidavit dated 22 June, 2016, has been filed *inter alia* contending that the Respondent Company has filed a reference before the Board for Industrial and Financial Reconstruction (“**BIFR**”) and which was registered on 10 December, 2015, and therefore, these Petitions cannot proceed in view of the bar contained in Section 22 of the *Sick Industrial Companies (Special*

Provisions) Act, 1985 (for short “**SICA, 1985**”).

3 In contrast, it is the contention of the Petitioners that by virtue of the 2nd proviso to Section 15(1) of SICA, 1985, the reference filed by the Respondent Company before the BIFR is non-est in the eyes of law and, therefore, there is no question of any protection being granted to the Respondent Company under Section 22 of SICA, 1985. According to the Petitioners, the protection under Section 22 can be availed of by the Respondent Company only once a valid reference is made before the BIFR. Since the filing of a reference before the BIFR was barred by virtue of the 2nd proviso to Section 15(1) of SICA, there was no valid reference filed by the Respondent Company and consequently, there is no impediment in these Company Petitions being heard and finally disposed of.

4 In the alternative, it was the contention of all the Petitioners that in any event, by virtue of the 3rd proviso to Section 15(1) of SICA, 1985 the reference filed by the Respondent Company before the BIFR has automatically abated because the conditions set out in the said proviso have been duly fulfilled. The reference having abated, the provisions of Section 22 of SICA, 1985 do not come into play and therefore, these Petitions can be heard on merits and

disposed of by this Court.

5 Before I deal with these legal contentions, it would be necessary to set out a few facts. Since I have heard Mr Thakkar, learned senior counsel on behalf of the Petitioner in Company Petition No.511 of 2014, I shall briefly advert to the facts in this Petition.

6 The facts of this Petition reveal that by a sanction letter dated 14 July, 2009, a Rupee Term Loan of Rs.275 Crores was sanctioned to the Respondent Company on the terms and conditions more particularly set out therein. Thereafter, pursuant to discussions between the Petitioners and the Respondent Company, the said sanction letter came to be amended on 28 August, 2009 as well as 14 September, 2009. In furtherance of the aforesaid sanction letters, the Respondent Company executed a Corporate Rupee Term Loan Facility Agreement along with the schedules thereto.

7 To secure the aforesaid Facility Agreement, the Respondent Company also executed (i) a Pledge Agreement dated 16 September, 2009 pledging its 26 % shareholding in its subsidiary Reid and Taylor (India) Ltd., (ii) a Deed of Hypothecation dated 16

September, 2009 creating a first paripassu charge over its fixed assets and second paripassu charge over its current assets in respect of movable properties of the Company and (iii) a memorandum of entry dated 18 September, 2009 creating a first paripassu charge in respect of all its immovable properties. To secure the Petitioner, the subsidiary of the Respondent, namely, Reid and Taylor (India) Ltd., also executed a corporate guarantee dated 16 September 2009, a declaration dated 17 September, 2009 and a memorandum of entry dated 18 September, 2009 to create a first paripassu charge over its immovable properties and a Deed of Hypothecation dated 16 September, 2009 creating a first paripassu charge over its fixed assets and second paripassu charge over its current assets in favour of the Petitioner.

8 Pursuant to all these documents, the Petitioner disbursed 240 Crores to the Respondent Company in a single tranche, which was received and availed of by the Respondent Company without any demur. In terms of the Facility Agreement, the Respondent Company was required to repay the principal amount in quarterly installments as per the repayment schedule set out in the Sanction Letter and the Corporate Rupee Term Loan Facility Agreement and to pay interest at the agreed rate on a monthly basis. It is the case of the Petitioner

that commencing from August 2012, the Company committed various defaults and breaches in respect of the facilities granted to it. Therefore, correspondence was exchanged between the parties whereby the Respondent Company was inter alia called upon to pay its outstanding dues. Finally, in view of the continued failure of the Respondent Company in repaying the dues of the Petitioner, the Petitioner issued a statutory notice dated 18 February, 2014 under Sections 433 and 434 of the Companies Act, 1956, calling upon the Company to pay a sum of Rs.95.32 Crores (outstanding as on 15 December, 2013), failing which winding up proceedings would be initiated. It is not in dispute that this statutory notice has been duly served upon the Respondent Company at its registered address and has been received by it. In reply to the said statutory notice, the Respondent Company, by its letter dated 5 March, 2014, did not dispute its liability in respect of the amounts outstanding to the Petitioner. In fact it reiterated the very same reasons for not making payment as was done by them in the earlier correspondence. It was further stated that it had tied up with a lender for infusion of funds to tide over its financial crisis, and that the administrative process for disbursement of the funds was in progress and sought further sixty days' time to pay the same. Despite this, no payment was made. It is, in these circumstances, that the present Petition was filed.

9 I must mention here that no affidavit in reply has been filed on behalf of the Respondent Company contesting the claim of the Petitioner on merits. When this Company Petition came up for admission, the parties entered into consent terms dated 19 June, 2014. These consent terms were filed in this Court on 12 August, 2014. The consent terms were taken on record and thereafter this Petition was placed on board for directions on 25 August, 2014. In these consent terms, the Respondent Company admitted its liability to the extent of Rs.95.32 Crores and agreed to pay a sum of Rs.86.60 Crores in full and final settlement of the Petitioner's claim. This payment was to be made in installments as more particularly set out in paragraph 3 of the consent terms. The consent terms further provided that in case of default, the Petitioner could approach this Court for admission of the Company Petition as well as other consequential directions. It is not in dispute before me that, admittedly there was a default in making payment of the very first installment that was due on 31 July, 2014 and therefore, this Court, after recording of all the facts admitted the Company Petition pursuant to the orders dated 25 August, 2014 read with the orders dated 28 August, 2014 and 15 September, 2014 and gave consequential directions for advertising the same in two local

newspapers which is the “**Free Press Journal**” (in English) and “**Navshakti**” (in Marathi) and also in the **Maharashtra Government Gazette**. Pursuant to these directions, the Company Petition was duly advertised and now the same has come up before me for hearing and final disposal.

10 Mr Ravi Kadam, learned senior counsel appearing on behalf of the Respondent Company, whilst not disputing the claim of the Petitioner on merits, submitted that since a reference of the Respondent Company was registered on 10 December, 2015 by the BIFR and the same is pending, this Petition cannot proceed. He submitted that by virtue of Section 22 of SICA, 1985 this Court was barred from proceeding further with this winding up Petition without the permission/ consent of BIFR. He submitted that admittedly no such consent or permission has been obtained from the BIFR to proceed with this Company Petition and therefore the same should be adjourned sine-die with liberty to the parties to apply after the proceedings before BIFR come to an end.

11 Mr. Kadam submitted that the contention of the Petitioner that the reference before the BIFR has abated, is canvassed on an incorrect interpretation of the 3rd proviso to Section

15(1) of SICA, 1985. He submitted that the 3rd proviso to Section 15(1) stipulates that after the commencement of the *Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002* (“**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 financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of Section 13 of that Act. Mr Kadam submitted that in the facts of the present case, only IDBI had taken measure under Section 13(4) of the said Act which constituted far less than 3/4th in value of the amount outstanding to the secured creditors from the borrower as required by the 3rd proviso to Section 15(1) of SICA, 1985. He submitted that merely by obtaining the consent of other secured creditors to take measures under Section 13(4) of the said Act would not be enough to fulfill the mandate of the 3rd proviso to Section 15(1) of SICA, 1985. According to Mr. Kadam, the secured creditors holding 3/4th in value of the financial assistance disbursed to the borrower, would have to take measures under Section 13(4) of the SARFAESI Act, before it could be held that the reference pending before the BIFR has abated. In this regard Mr. Kadam drew my attention to the possession notice

issued under section 13(4) of the SAEFAESI Act by IDBI Bank which, according to him states that they have taken measures under Section 13(4) of the Act only in relation to the debt due and payable to IDBI. He, therefore, submitted that admittedly the action taken by IDBI was not for and on behalf of all the secured creditors but only for their own benefit. This being the case, the conditions as required by the 3rd proviso to Section 15(1) of SICA, 1985 were not fulfilled for the reference to automatically abate. He, therefore, submitted that the Respondent Company continues to get protection under Section 22 of SICA, 1985 and this Petition, therefore, cannot proceed.

12 On the other hand Mr Thakkar, learned senior counsel appearing on behalf of the Petitioner submitted that it is an admitted fact that the debts owed by the Respondent Company to certain Banks were assigned in favour of certain Asset Reconstruction Companies (“**ARCs**”) as follows:-

Sr. No.	Date of Assignment to & Acquisition of Debts & Assets by the ARCs	Original Lender/ Creditor which assigned the debt	ARCs to which the Debt has been assigned
1	28.03.2014	EXIM Bank	Edelweiss ARC
2	29.03.2014	Bank of India	JM Financial ARC
3	30.06.2014	SBI	Edelweiss ARC
4	Prior to Oct 2014	Indian Overseas Bank	ARCIL

Mr. Thakkar submitted that it is also an admitted fact that the reference filed by the Respondent Company was registered by the BIFR only on 10 December, 2015. This being the factual position, Mr Thakkar placed reliance on the 2nd proviso to Section 15(1) of SICA, 1985 to contend that no reference could be made to the BIFR after the commencement of the SARFAESI Act, where financial assets were acquired by any securitisation company or reconstruction company under sub-section (1) of Section 5 of the SARFAESI Act. To put it simply, according to Mr. Thakkar, in the present factual scenario, the Respondent Company was barred from filing any reference before the BIFR and therefore, any reference filed by it would be in the teeth of the 2nd proviso to section 15(1) of SICA, 1985 rendering it non-est in the eyes of law. In support of this proposition, Mr. Thakkar relied upon a decision of a Division Bench of this Court in the case of **Paper Prints (India) Pvt. Ltd. Vs. Phoenix ARC Pvt. Ltd.**¹

13 In the alternative, Mr Thakkar submitted that in any event the reference before the BIFR has abated by virtue of the 3rd proviso to Section 15(1) of SICA, 1985 in view of the fact that the secured creditors holding approximately 85% in value of the financial assistance disbursed to the borrower, have taken measures under

1 (2012) 6 Mah LJ 427 : (2013) 2 Bom CR 371

Section 13(4) of the SARFAESI Act. In this regard, Mr Thakkar handed over across the bar a letter dated 11 February, 2016 addressed by IDBI Bank to the Registrar, BIFR, New Delhi, along with the annexures thereto. This letter clearly stipulates that IDBI Bank has taken measures under section 13(4) of the SARFAESI Act for and on behalf of all the secured creditors mentioned therein (which comes to approximately 85% in value). I must state over here that this letter has not been filed on record through any affidavit of the Petitioner and the same was only handed over across the bar. Be that as it may, it was therefore the submission of Mr Thakkar that, the reference filed by the Respondent Company before the BIFR automatically abated and therefore, the protection / bar of Section 22 of SICA, 1985 did not come into play. There was therefore no impediment in proceeding with the present Company Petition, was the submission of Mr. Thakkar.

14 I have heard the learned counsel for the parties at length and perused the papers and proceedings in the Company Petition as well as the affidavits filed by the respective parties. To understand this controversy it would be necessary to briefly advert to the objects and reasons for which SICA, 1985 as well as the SARFAESI Act were enacted.

15 The statement of objects and reasons for enacting SICA, 1985 reveal that the Government found the ill effects of sickness in industrial companies such as loss of production, loss of employment, loss of revenue to the Central and State Governments and locking up of investible funds of financial institutions as a serious concern to the Government and the society at large. There was also an increase in the incidences of sickness in industrial companies. In order to fully utilize the productive industrial assets, afford maximum protection of employment and optimize the use of the funds of banks and financial institutions, the Government felt that it would be imperative to revive and rehabilitate the potentially viable sick industrial companies as quickly as possible. The Government was also of the view that it would also be equally imperative to salvage the productive assets and realize the amounts due to the banks and financial institutions, to the extent possible, from the non-viable sick industrial companies through liquidation of those companies. In view of all these facts, the Government felt the need to enact in public interest, a legislation to provide for timely determination, by a body of experts, the preventive, ameliorative, remedial and other measures that would need to be adopted with respect to such companies and for enforcement of the measures considered

appropriate with utmost practicable dispatch. Keeping these objects in mind SICA, 1985 was enacted. In other words, SICA, 1985 was enacted with the avowed object of identifying sick and potentially sick companies and then try to revive and rehabilitate them. This Act created a two tier mechanism in the form of a BIFR and the Appellate Authority for Industrial and Financial Reconstruction (“**AAIFR**”). The Board was vested with the power to conduct an inquiry into the sickness of an industrial company, to prepare and sanction schemes for the reconstruction and for proper management of the company or for the winding up, if the sickness was found to be irreversible. Since the object of this Act was to turn sick industrial companies into healthy ones, perhaps by waving a magic wand, this Act also granted an immunity in terms of Section 22, against any kind of proceedings for the recovery of dues, during the pendency of an inquiry or the preparation or operation of a Scheme.

16 Since the Government felt that BIFR and AAIFR have not been able to fulfil the purpose and mandate as envisaged under SICA, 1985 of providing viable schemes for the revival of sick companies in a reasonable short time frame, in the year 1999, the Government constituted a Committee under the Chairmanship of Justice V. Balakrishna Eradi, (“**the Eradi Committee**”) a retired Judge of the

Supreme Court, to review the law relating to Insolvency and Winding up of Companies. The Committee presented a Report on 31.7.2000, under the caption "Report of The High Level Committee on Law Relating to Insolvency and Winding up of Companies". This Committee, after hearing all the parties and analysing the statistical data made available to it, opined that the facts and figures spoke for themselves and they placed a big question-mark on the utility of the institution of the BIFR and SICA, 1985. The problem of endemic delays inherent in SICA, 1985 procedures of revival and reconstruction was to a great extent exacerbated by the large scale abuse of the provisions relating to suspension of legal proceedings, suits and enforcement of contracts and other remedies contained in Section 22 of the Act. The Eradi Committee pointed out that the effectiveness of SICA had been severely undermined by reason of the enormous delays involved in the disposal of cases by BIFR. The Committee also observed that the success rate of revival of sick companies had fallen far too short of the expectations. Consequently, the Committee recommended that SICA, 1985 should be repealed and the provisions contained therein for revival and rehabilitation, should be telescoped into the structure of the Companies Act, 1956 itself. A detailed analysis of the Eradi Committee report can be found in a Full Bench decision of the Madras High Court in the case of **M/s.**

Salem Textiles Limited Vs. M/s. Phoenix ARC Private Ltd.

& Ors.² The reason why I have adverted to the report of the Eradi Committee is because it throws light on how SICA, 1985, despite its laudable objects, has, at least in spirit, failed to achieve the purpose for which it was enacted.

17 Be that as it may, in contrast, the statements of object and reasons of the SARFAESI Act indicate that the financial sector, being one of the key drivers in India's efforts to achieve success in rapidly developing its economy, did not have a level playing field as compared to other participants in the financial markets of the world. There was no legal provision for facilitating securitisation of financial assets of banks and financial institutions, and unlike international banks, the banks and financial institutions in India did not have the power to take possession of securities and sell them. The Legislature felt that our existing legal framework had not kept pace with the changing commercial practices and financial sector reforms, which resulted in delays in recovery of defaulting loans. This in turn had the effect of mounting levels of non-performing assets of banks and financial institutions. In order to bring the Indian Banking Sector on par with International Standards, the Government set up two Narasimhan Committees and the Andhyarujina Committee for the

2 2013 SCC OnLine Mad 1450 : (2013) 3 CTC 257 (FB) [Paras 25 to 29]

purposes of examining banking sector reforms. These Committees inter alia suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Accepting these recommendations, the SARFAESI Act was brought into force with w.r.e.f. 21-06-2002.

18 What is important to note is that the SARFAESI Act not only brought a fresh enactment providing for a special procedure for recovery of dues of banks and financial institutions, but also sought to amend three other enactments, namely, (i) **The Companies Act, 1956**, (ii) **The Securities Contracts (Regulation) Act, 1956**, and (iii) **SICA, 1985**. It is, by virtue of Section 41 of the SARFAESI Act read with the Schedule thereto, that two provisos were inserted under the already existing proviso to sub-section (1) of Section 15 of SICA, 1985. Section 15(1) of SICA, 1985 as amended by Section 41 of the SARFAESI Act, reads as under:-

“15. Reference to Board.—(1) Where 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 Board for determination of the measures which shall be adopted with respect to the company:

Provided that if the Board of Directors had sufficient reasons even before such finalisation to form the opinion that the company had become a sick industrial company, the Board of Directors shall,

within sixty days after it has formed such opinion, make a reference to the Board for the determination of the measures which shall be adopted with respect to the company:

Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under sub-section (1) of Section 5 of that Act:

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under sub-section (4) of Section 13 of that Act."

(emphasis supplied)

19 On a plain reading of the 2nd proviso, it is clear that no reference can be made to the BIFR after the commencement of the SARFAESI Act where the financial assets have been acquired by any securitisation or reconstruction company under Section 5(1) of the SARFAESI Act. In contrast, the 3rd proviso stipulates that, 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 3/4th 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. As can be seen from the aforesaid two provisos, they operate in two totally different fields. The 2nd proviso to Section 15(1) comes into operation where no reference has yet been filed by the sick company and the financial assets of that company have been acquired by a securitisation and reconstruction company under Section 5(1) of the SARFAESI Act. In other words, after the commencement of the SARFAESI Act, if a debt of a sick company is assigned to a securitisation company or a reconstruction company, then filing of a reference by the said sick company before the BIFR is wholly barred by virtue of the 2nd proviso to Section 15(1). In contrast, the 3rd proviso to Section 15(1) deals with a situation where on the commencement of the SARFAESI Act, a reference is already pending. In this scenario, the 3rd proviso stipulates that such a reference shall abate if the secured creditors representing not less than 3/4th 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 secure debt under Section 13(4) of the SARFAESI Act.

20 Having analyzed both the aforesaid provisions, I find considerable force in the arguments of Mr Thakkar that the Respondent Company was barred under the 2nd proviso to Section

15(1) from filing any reference before the BIFR. The facts in this case would reveal and which are really undisputed, is that the debts owed by the Respondent Company to certain banks and financial institutions, as set out above, were assigned to certain ARCs. This was done way back in the year 2014. The reference of the Respondent Company was filed before the BIFR and registered only on 10 December, 2015. In this factual scenario and on a plain reading of the 2nd proviso to Section 15(1), it is clear that no reference could have been filed by the Respondent Company before the BIFR, and if the same was filed, it was non-est in the eyes of law as it was in the teeth of the 2nd proviso to section 15(1) of SICA, 1985. In this regard, the reliance placed by Mr Thakkar on a decision of the Division Bench of this Court in the case of **Paper Prints (India) Pvt. Ltd.**¹ is well founded. The facts of this case would reveal that DBS Bank Ltd. had granted an overdraft facility in the amount of Rs.2.5 Crores to the Appellants, in terms of which, financial facilities were extended by the Bank. Since, there was default in making payment, the Bank issued a demand notice calling upon the Appellant to pay its dues. Since the Appellant failed to comply, the Bank moved Debt Recovery Tribunal for recovery of an amount of Rs.2.46 Crores due as on 31 January, 2009 together with interest. Thereafter, by a deed of assignment dated 9 December, 2009, DBS Bank Ltd. assigned

¹ (2012) 6 Mah LJ 427 : (2013) 2 Bom CR 371

its debts in favour of the Respondent (Phoenix ARC Pvt. Ltd.). The Respondent (Phoenix ARC Pvt. Ltd.) issued a notice dated 15 April, 2010 under Section 433, 434 of the Companies Act, 1956 and thereafter filed a winding up petition. When the petition came up for admission, the learned Company Judge directed the petition be admitted and advertised. It was urged on behalf of the Appellant that the Appellant had moved a reference before the BIFR under Section 15, and therefore, under the provisions of Section 22, the learned Company Judge could not have proceeded with the Company Petition. The Division Bench of this Court noted that DBS Bank had assigned its debts to the Respondent (which was an ARC) by a Deed of Assignment dated 9 December, 2009, whereas the reference to the BIFR was made on 26 November, 2010. The Division Bench, therefore, held that in view of the specific language of the 2nd proviso to Section 15(1) of SICA, 1985 the reference filed by the Appellant was not maintainable. The relevant portion of the said decision reads as under:-

“6. The submission of the Appellant is that the Respondent is an unsecured creditor and that consequently the reference under the SICA, 1985 will not abate unless secured creditors representing three-fourths in value of the amount outstanding have taken measures to recover their secured debt under section 13(4).

7. There is no merit in the submission. The first proviso to section 15(1) of the SICA, 1985 as introduced by the provisions of the Securitisation Act applies specifically to a situation where financial assets have been acquired by any securitisation company or by a

reconstruction company under sub-section (1) of section 5 of the Securitisation Act. The second proviso applies to a situation where a reference is pending before the BIFR after the commencement of the Securitisation Act. The second proviso provides the eventuality in which the reference would abate. That eventuality is where the secured creditors representing not less than three-fourth in value of the amount outstanding against the financial assistance disbursed to the borrowers have taken measures under section 13(4).

8. *The first and second proviso to sub-section (1) of section 15 of the SICA, 1985 operate in different fields. The first proviso is a specific provision made in relation to a securitisation company or reconstruction company, which has acquired financial assets after the commencement of the Securitisation Act, 2002 under section 5(1). The expression “financial asset” is defined in section 2(1) as follows:*

“(1) “financial asset” means debt or receivables and includes—

(i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or

(ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or

(iii) a mortgage, charge, hypothecation or pledge of movable property; or

(iv) any right or interest in the security, whether full or part underlying such debt or receivables; or

(v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or

(vi) any financial assistance.”

Sub-clause (i) of clause (1) includes a claim to any debt or receivables whether secured or unsecured. Therefore, the intent of Parliament when it introduced the two amendments to section 15(1) is clear. A special provision has been made in case of securitisation and reconstruction companies, where a financial asset within the meaning of section 2(1) has been acquired after the enactment of the Securitisation Act of 2002. In such a case, no reference can lie before the BIFR. The second proviso in contradistinction applies to a situation where a reference has been made validly. Such a reference can abate where measures under section 13(4) have been taken by the secured creditors representing not less than three-fourths in value of the amount outstanding against financial

assistance disbursed to the borrower. The first proviso does not contain any reference to a secured creditor at all. It refers to the acquisition of a financial asset by a securitisation or reconstruction company which as noted earlier includes among other things a debt or receivables whether secured or unsecured. As a matter of fact, it may be noted that an express provision has been made in sub-section (4) of section 5 of the Securitisation Act in respect of suits, appeals or other proceedings which are pending on the date of the acquisition of the financial asset. Section 5(4) reads as follows:

“(4) If, on the date of acquisition of financial asset under sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to sub-section (1) of section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be.”

9. *In the present case, the order of the learned Single Judge admitting the Company Petition for winding up was passed on 21 October, 2010. Prior thereto on 9 December, 2009 the Respondent had acquired the financial assets in question being the debts and receivables of DBS Bank Ltd. under section 5(1) of the Securitisation Act. The reference to the BIFR was made on 26 November, 2010. Clearly in view of the specific language of the first proviso to section 15(1) of the SICA, 1985, the reference was not maintainable.*

10. *For these reasons we do not find any merit in the contention of the Appellant based on the provisions of section 22 of the SICA, 1985.”*

I find that this judgment squarely covers the issue before me and supports the contentions as canvassed by Mr Thakkar. In the facts of the present case also the debts of certain Banks were assigned to ARCs long before the reference was filed by the Respondent Company

before the BIFR. This being the case and the clear and unambiguous language of the 2nd proviso to Section 15(1), the reference itself was not maintainable and non-est in the eyes of law. Consequently, there is no question of the Respondent Company contending that it gets the protection under Section 22 of SICA, 1985. I must mention here that the decision of this Court in **Paper Prints (India) Pvt. Ltd.**¹ was challenged in the Supreme Court by filing a Special Leave Petition which was dismissed on 9 January, 2013.

21 Faced with this situation, Mr Kadam learned senior Counsel appearing on behalf of the Respondent Company, placed reliance on a decision of a division bench of Delhi High Court in the case of **Asset Reconstruction Co. India P. Ltd. Vs. Shamken Spinners Ltd. & Ors.**³ Relying upon the aforesaid decision, Mr Kadam submitted that a literal interpretation of the 2nd proviso will defeat the objects of SICA, 1985 namely, to prevent unemployment and other loss that occurs from closure of the sick company. He submitted that, therefore, as done by the Delhi High Court, the condition of 75% as set out in the 3rd proviso to section 15(1), ought to be read also into the 2nd proviso. In other words, he submitted that the bar of filing a reference under the 2nd proviso would come into

1 (2012) 6 Mah LJ 427 : (2013) 2 Bom CR 371

3 AIR 2011 DELHI 17.

play only when 75% of the entire secured debt owed by the Respondent Company is acquired by a reconstruction company or a securitisation company.

22 I am unable to agree with this submission for more than one reason. Firstly, there is a direct decision on this point of this Court which is binding on me. Secondly, even otherwise I find that I am unable, with great respect, to subscribe to the view of the Delhi High Court in the case of **Asset Reconstruction Co. India P. Ltd.**³ To my mind the words of the statute are absolutely clear and unambiguous, and therefore, have to be construed accordingly. I cannot, under the guise of interpretation, supply words in the statute which are conspicuous by their absence. Whilst, interpreting a provision, it is not only important to pay attention to what is said in the statute but also to what is not said. When two provisions are inserted at the same time and a condition is imposed in one and conspicuously left out from the other, the Courts have to proceed on the basis that the Legislature deliberately intended to do so. The Court cannot proceed on the basis that looking to the so called intendment of the statute, the Legislature committed some mistake or inadvertent error. To my mind this would be against all the cannons and rules of interpretation. This view that I have taken is

supported by the decision of the Supreme Court in the case of **Mohd. Shahabuddin Vs State of Bihar and Ors.**⁴ Paragraphs 179 and 180 of this decision read thus:-

*“179. Even otherwise, it is a well-settled principle in law that the court cannot read anything into a statutory provision which is plain and unambiguous. The language employed in a statute is a determinative factor of the legislative intent. If the language of the enactment is clear and unambiguous, it would not be proper for the courts to add any words thereto and evolve some legislative intent, not found in the statute. Reference in this regard may be made to a recent decision of this Court in **Ansal Properties & Industries Ltd. v. State of Haryana [(2009) 3 SCC 553]***

180. Further, it is a well-established principle of statutory interpretation that the legislature is specially precise and careful in its choice of language. Thus, if a statutory provision is enacted by the legislature, which prescribes a condition at one place but not at some other place in the same provision, the only reasonable interpretation which can be resorted to by the courts is that such was the intention of the legislature and that the provision was consciously enacted in that manner. In such cases, it will be wrong to presume that such omission was inadvertent or that by incorporating the condition at one place in the provision the legislature also intended the condition to be applied at some other place in that provision.

(emphasis supplied)

23 In view of this clear enunciation of the law, with great respect, I am unable to agree with the view expressed by the Delhi High Court in the case of **Asset Reconstruction Co. India P. Ltd.**³

4 (2010) 4 SCC 653

3 AIR 2011 DELHI 17.

24 It would not be out of place to mention that the Judgment of Delhi High Court in the case of **Asset Reconstruction Co. India P. Ltd.**⁵ came up for consideration before a division bench of the Andhra Pradesh High Court in the case of **M/s SVPCL Ltd. Vs. State Bank of India and Anr.**⁵ Even the Andhra Pradesh High Court, after analyzing the provisions of the 2nd and 3rd proviso to Section 15(1) of SICA, 1985, was unable to agree with the view taken by Delhi High Court. The relevant portion of the Andhra Pradesh High Court decision reads thus:

“I. CONSENT OF THE BIFR IS NOT REQUIRED, TO CONTINUE PROCEEDINGS UNDER THE SARFAESI ACT, IN VIEW OF THE SECOND PROVISOR 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

5 2015 SCC OnLine Hyd 111 : (2015) 191 Comp Cas 214 (AP)

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.**, 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 Rayji & 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).”

(emphasis supplied)

25 I am in full agreement with the view expressed by the Andhra Pradesh High Court in the case of **M/s SVPCL Ltd.**⁵ as I, for one, am of the firm opinion that it lays down the correct law.

26 In these circumstances, I have no hesitation in holding

5 2015 SCC OnLine Hyd 111 : (2015) 191 Comp Cas 214 (AP)

that the reference filed by the Respondent Company before the BIFR and which was registered on 10 December, 2015, is not non-est in the eyes of law, and therefore, there is no question of the Respondent Company getting protection under Section 22 of SICA, 1985. I am, therefore, unable to accept the submission of Mr Kadam that this Petition cannot proceed and/or be heard and finally disposed of.

27 As far as the facts of Company Petition No.511 of 2014 are concerned, it is not in dispute that a huge amount is due and payable by the Respondent Company to the Petitioner. In fact, in the consent terms filed in this Court dated 19 June, 2014, the Respondent Company has expressly admitted its liability to the Petitioner in the sum of Rs.95.32 Crores. Admittedly, this amount has not been paid. In fact, Mr Kadam very fairly conceded before me that as far as merits of this Petition are concerned, the Respondent Company has no defence and the only point canvassed before me was the one dealt by me earlier. In this view of the matter, I find that the Respondent Company is indebted to the Petitioner for huge amounts and therefore commercially insolvent and unable to pay its debts. In this view of the matter, the Company Petition is allowed in terms of prayer clauses (a) and (b) which read as under:-

(a) that the Company viz. S. Kumars Nationwide

Limited, be wound up by and under the orders and directions of this Hon'ble Court under the provisions of the Companies Act, 1956, and the Official Liquidator attached to this Hon'ble Court be appointed as the Liquidator of the Company and all its assets, books of accounts, vouchers, files, documents etc. with all powers under the Companies Act, 1956;

- (b) that pending hearing and final disposal of this Petition, the Official Liquidator of this Hon'ble Court or some other fit and proper person be appointed Provisional Liquidator of the Company i.e. S. Kumars Nationwide Limited with all powers under the Companies Act, 1956, including power to take charge of all the assets, properties, stock-in-trade, books of accounts and Bank accounts of the Company.

28 In view of the fact that I have already ordered winding of the Respondent Company in Company Petition No.511 of 2014, nothing survives in other Company Petitions and the same are disposed of accordingly with liberty to the respective Petitioners to file their proof of claim / proof of debt before the Official Liquidator.

29 I must mention here that I have not opined on the contention of Mr. Thakkar that in any event the reference filed by the

Respondent Company before the BIFR has abated by virtue of the 3rd proviso to Section 15(1) of SICA, 1985. The reason why I haven't examined this contention is because I have already held that the reference filed by the Respondent Company is non-est in the eyes of law by virtue of the 2nd proviso to Section 15(1) of SICA, 1985.

30 At this stage, the learned counsel appearing on behalf of the Respondent Company, prays that the operation of this order be stayed for a period of four weeks from today. The said request is vehemently opposed by all the Petitioners. Considering that there are conflicting decisions on the point decided by me, I think it would be, in the interest of justice to stay the operation of this order for a period of four weeks from today to enable the Respondent Company to test this order in appeal. It is, however, clarified that the interim orders passed in the Company Petitions, namely, the orders dated 28 August, 2014 read with the order dated 15 September, 2014 shall continue to operate against the Respondent Company.

31 Learned counsel appearing on behalf of the Respondent Company states that if this order is challenged in appeal, the Respondent herein shall give notice to all the Petitioners before applying for any interim and/or ad-interim reliefs. The said

statement is accepted. All the Company Petitions are accordingly disposed of. There shall be no order as to costs.

(B. P. COLABAWALLA J.)