Before M.M. Kumar & Jaswant Singh, JJ.

HARYANA STATE INDUSTRIAL AND INFRASTRUCTURE DEVELOPMENT CORPORATION,—*Appellant*

versus

HARYANA CONCAST LIMITED HISAR AND ANOTHER,—*Respondents*

CAPP No. 23 of 2009

15th December, 2009

Companies Act, 1956—S. 483—Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002—Ss.5(1)(b) & 35—Recovery of Debts Due to Banks and Financial Institutions Act, 1993—High Court ordering winding up of Company—Company Judge permitting Securitization Company to stay outside winding up proceedings and take action to bring to sale secured assets—Company Judge issuing certain directions to HSIIDC and Securitization Company—Challenge thereto—Whether Company Court enjoys jurisdiction to issue supervisory direction to a securitization company/secured creditor in connection with a company in liquidation or under winding up in face of S. 13 of SARFAESI Act or securitization company opting to stand outside winding up is absolutely free to utilize sale proceeds of assets of company in liquidation—Held, yes—Appeals dismissed.

Held, that the Company Court enjoys the jurisdiction to issue directions to a securitization company or a secured creditor who might have opted to stay outside the winding up and has invoked its power under Section 13(4) of the SARFAESI Act. Therefore, we find that the learned Company Judge has correctly appreciated the issue.

(Para 34)

Further held, that we are in entire agreement with the view taken by the learned Company Judge because Section 35 of the SARFAESI Act provide for overriding effect of its provisions with a non-obstante clause

of anything inconsistent with the provisions of that Act. It is only the inconsistency which would bar the application of other laws and not otherwise. There is no inconsistency in issues of supervisory directions in order to achieve the avowed object of Section 529A of the Act as echoed by unnumbered five provisos of Section 13(9) of the SARFAESI Act because there is no provision in the SARFAESI Act giving any conflict with the claim of the workers due as contemplated by Section 529A of the Act.

Kamal Sehgal, Advocate, *for the appellant-HSIIDC.*

Ms. Punita Sethi, Advocate, *for the Official Liquidator.*

M.L. Sarin, Senior Advocate, with Harpreet Singh Giani, Advocate, *for respondent No. 2.*

M.M. KUMAR, J :

(1) This order shall dispose of two cross appeals bearing CAPP Nos. 23 and 28 of 2009, filed under Section 483 of the Companies Act, 1956 (for brevity, 'the Act') against the order dated 20th March, 2009, passed by the learned Company Judge. The Haryana State Industrial and Infrastructure Development Corporation (appellant in CAPP No. 23 of 2009) [for brevity, 'HSIIDC'] has principally claimed that the directions issued by the learned Company Judge by keeping Pegasus Asset Reconstruction Private Limited (for brevity, 'the Securitisation Company') without associating the HSIIDC, are wholly erroneous and it has right to be associated with the process of sale from beginning to end. However, the Securitisation Company (appellant in CAPP No. 28 of 2009) has even attacked the supervisory directions issued by the learned Company Judge in his order dated 20th March, 2009 by requiring it to submit all proposal for sale to the Official Liquidator and the details of valuation obtained from the conduct of the sale and that the sale notice should incorporate specifically a clause that winding up proceedings have been pending before the Company Court, with details of case number and the Court of adjudication. Further grievance of the Securitisation Company is that the learned Company Judge has required it to place before the Company Court the details of its claim and all expenses incurred prior to making any appropriation to itself and disbursing the amount.

(2) It would be necessary to notice few facts to put the controversy in its proper prospective. The Haryana Concast Limited, Hisar-respondent No. 1 is a Company incorporated on 20th November, 1973, which was promoted by the State of Haryana and its major shareholdings were held by the State Government and HSIIDC. The State Government acquired 40 acres of land to promote this company on 23rd January, 1974. It had taken a loan of Rs. 30 lacs from Bank of India, which was secured by tangible plant, machinery and building. Respondent No. 1---Company became sick and it was recommended to be wound up by the Board for Industrial and Financial Reconstruction (for brevity, 'BIFR'). On 28th October, 1999, this Court ordered winding up of respondent No. 1 Company and the Official Liquidator attached to this Court was directed to take over the assets of the company in liquidation.

(3) On 28th May, 2004, this Court allowed the Official Liquidator to sell immoveable assets of respondent No. 1 Company to satisfy claims of the creditors. The Official Liquidator sold the assets of respondent No. 1 Company accepting the highest bid of Rs. 21.10 crores and the sale was confirmed by this Court in favour of M/s Radha Raman Builders. The auction purchaser failed to deposit 15% of the bid amount, therefore, the earnest money deposited by it was forfeited. On 20th March, 2008, the sale concluded by the Official Liquidator was set aside by this Court. The amount of earnest money paid by M/s Radha Raman Builders was ordered to be refunded. He was directed to undertake the sale afresh. The auction purchaser M/s Radha Raman Builders filed company appeal and was awarded interest,—*vide* order dated 22nd January, 1999.

(4) It is pertinent to notice here that the Securitisation Company has claimed that the Bank of India was the sole secured creditor of respondent No. 1 Company. On 27th August, 2008, the Securitisation Company entered into an Assignment Agreement with the Bank of India. It purchased all its advances together with all other attendant rights, titles and interests of Bank of India in the credit documents including underlying collateral, security interest, pledges and/or guarantee in respect of such advances, as per the terms and conditions contained in the Assignment Agreement (A-1 attached with CAPP No. 28 of 2009) and as envisaged under Section 5(1)(b) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity, 'the

SARFAESI Act'). In this manner, the Securitisation Company stepped into the shoes of Bank of India to recover the assigned dues from respondent No. 1 Company. It is also pertinent to mention that the Bank of India at one point of time gave its consent for sale of immovable assets of respondent No. 1 Company under the provisions of the Act. The consent was subsequently withdrawn on the ground that a long span of time had passed since giving of consent but the sale process was substantially delayed. It has been claimed that in the meantime value of the properties has also increased considerably.

(5) The Bank of India had also approached the Debts Recovery Tribunal, Chandigarh (for brevity, 'the Tribunal'), under the Recovery of Debts Due to Banks and Financial Institution Act, 1993 (for brevity, 'the DRT Act') for recovery of outstanding amount from respondent No. 1 Company. The Tribunal acknowledging the rights of Bank of India over the mortgaged property and outstanding amount, had passed an order dated 9th May, 2002 and recovery certificates were issued against respondent No. 1 Company (Annexure A-2 attached with CAPP No. 28 of 2009).

(6) The Securitisation Company has also informed the Official Liquidator for substituting it in place of Bank of India. They also showed their intention to realise the dues by sale of property and opted to remain outside the liquidation process and to enforce its security as per the provisions of SARFAESI Act subject to the rights of the workers of respondent No. 1 Company as per Section 529A of the Act. In that regard, the Securitisation Company had sent a notice under Section 13(2) of the SARFAESI Act and a letter to the Official Liquidator on 8th September, 2008 and 9th September, 2008 respectively (Annexures A-3 & A-4 with CAPP No. 28 of 2009).

(7) The HSIIDC appeared before the Company Court and prayed for re-advertising the unit of respondent No. 1 Company for sale in view of the fact that value of the property has increased manifold. It has been claimed that the HSIIDC settled the liabilities of different banks and a sum of Rs. 10,39,98,000 was paid to three banks, namely, (i) Bank of Maharashtra ; (ii) Punjab National Bank ; and (iii) Bank of India. After clearance of the charge of above mentioned banks over the moveable assets of respondent No. 1 Company, this Court ordered substitution/subrogation of the HSIIDC in place of three banks,—*vide* order dated 22nd May, 2006.

(8) The Company Court has undertaken the bidding by itself. At the time of receipt of bid of Rs. 29.12 crores, there was a dispute regarding a part of the land measuring about 4 acres out of total land measuring 40 acres owned respondent No. 1 Company, which was under un-authorised possession of the DHBVN. During the proceedings before the Company Court, the secured creditor Bank of India as well as the HSIIDC agreed to sell the aforementioned disputed land measuring 4 acres to DHBVN at Collectorate rate. On 20th March, 2008, learned Company Judge claims to have passed an order permitting the Official Liquidator to sell the assets of the company in liquidation after associating the Bank of India and the HSIIDC. It was further directed that the reserve price of the property be fixed at Rs. 29.12 crores.

(9) The Official Liquidator by associating the HSIIDC started demarcation work of the land in question through the revenue authorities. It was found that after excluding the area measuring 27 Kanals 10 Marlas, which was in possession of the DHBVN, and common road area measuring 12 Kanals, 9 Marlas (total being 39 Kanals, 19 Marlas) the net area available for sale was 42.78 acres i.e. 286 Kanals, 17 Marlas. Since the Company Court,—*vide* order dated 20th March, 2008 had ordered for sale of 40 acres of land, therefore, an application bearing CA No. 590-591 of 2008 was filed for modification of order dated 20th March, 2008. Simultaneously, another application bearing CA No. 704-705 of 2008 was also filed by the Securitisation Company for recalling order dated 20th March, 2008 and directing the Official Liquidator not to proceed with sale of the property. It was further prayed that the Official Liquidator may be directed to hand over possession of the properties and to record the development including recovery certificate, notice under Section 13(2) issued by the Securitisation Company. The HSIIDC also appeared at the time of motion hearing of said applications and it was allowed to be impleaded as necessary party.

(10) After filing of replies by the respective parties, learned Company Judge allowed the applications filed by the Securitisation Company permitting it to stay outside the winding up proceedings and take action to bring to sale the secured assets under Section 13 of the SARFAESI Act read with Rule 8 and 9 of the Security Interest Enforcement Rules, 2002 (for brevity, 'the Rules'). The Securitisation Company in its appeal bearing

CAPP No. 28 of 2009 has averred that substantial relief has been granted to it but it is still aggrieved by the control asserted by the learned Company Judge by issuing directions to report the proposals to the Official Liquidator. They also feel aggrieved by the direction that sale notice must mention about the pendency of winding up proceedings. The learned Company Judge,— *vide* his order dated 20th March, 2009 further ordered the Securitisation Company to keep the Official Liquidator informed about the steps taken by them while conducting the sale and issued the following directions :—

"19. If any attempt to harmonize the provisions of the SARFAESI Act and the Companies Act could be made, in the context of orders for sale having already been made by the Company Court and the participation of the assignor of the applicant at several steps for the conduct of sale through the Company Court, it will be inexpedient unyoke the proceeding that were put through the O.L. While upholding the claim that the procedure laid down under the SARFAESI Act would enable the provisions of the Security Enforcement Rules to be applied for conduct and confirmation of the sale, the dispensation in this case would be

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

(b) The applicant-Reconstruction Company shall keep all the steps taken under the SARFAESI Act and the relevant rules transparent and submit all the proposals for sale to the O.L. and the details of valuation obtained for the conduct of sale for the purpose of determining the used price.

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

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

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

(f) The surplus proceeds over what is lawfully due to it shall be deposited to the credit of the Company (in liquidation) before the O.L."

(11) The aforementioned order dated 20th March, 2009 passed by the learned Company Judge is subject matter of challenge in these appeals by both the appellants HSIIDC and the Securitisation Company.

(12) Mr. M.L. Sarin, learned senior counsel for the Securitisation Company has argued that the directions issued by the learned Company Judge are patently against the object, letter and spirit of the SARFAESI Act and all such directions are liable to be set aside especially when the Securitisation Company has been kept out of the winding up being the sole secured creditor. Learned counsel has canvassed that the basic object of promulgating the SARFAESI Act was that there was huge non-performing assets and the pace of recovery of defulting loans was pathetically slow. He has drawn our attention to the following statement of objects and reasons and clause (h) & (i) of the statement made while presenting the Bill preceding the passing of the SARFAESI Act :—

"The Financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitization of financial assets of banks and financial institutions. Further, unlike international banks, the banks

and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, *inter alia*, have suggested enactment of a new legislation for securitization and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

2. It is now proposed to replace the Ordinance by a Bill, which *inter alia*, contains provisions of the Ordinance to provide for—

(a) to (g) xxx xxx xxx

(h) empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower's account as non-performing asset in accordance with the directions given or guidelines issued by the Reserve Bank of India from time to time ;

(i) the rights of secured creditor to be exercised by one or more of its officers authorised in this behalf in accordance with the rule made by the Central Government ;

(j) to (m) xxx xxx xxx

3. The Bill seeks to achieve the above objects."

(13) On the basis of the aforesaid statement of objects and reasons, the basic hypothesis propounded by Mr. Sarin is that Securitisation Company like respondent No. 2 are free from any fetters & shackles which ordinarily bind a Company Court under various provisions of the Act. He has maintained that the Securitisation Company has been registered under Section 3 with the Reserve Bank of India. According to the learned counsel there are very few Securitisation Companies, who could meet the strict financial control and thorough scrutiny of their antecedents, so as to be registered under Section 3 of the SARFAESI Act. It has been pointed out that there are following 12 companies all over the country which have been registered under Section 13 of the SARFAESI Act :—

Sr. No.	Name of the Registered Company	Address of the Company	Promoters
1	Asset Reconstruction Company (India) Ltd. (ARCIL)	Shreepati Arcade August Kranti Marg, Nana Chowk, Mumbai—40003	SBI, ICICI, IDBI
2	Assets Care Enterprise Ltd.	IFCI Tower, 61, Nehru Place New Delhi—110019	IFCI, PNB
3	ASREC (India) Ltd.	UTI Tower, Gn Block, Bandra Kurla, Complex, Bandra (East), Mumbai—400051	UTI, BoI, Alld.Bank, Indian Bank
4	Pegasus Assets Reconstruction Pvt. Ltd.	46, 4th floor, Free Press House Nariman Point, Mumbai—400021	

5	Dhir & Dhir Asset Reconstruction & Securitisation Company Ltd.	D-54 (FF), Defence Colony, New Delhi—110024	
6	International Asset Reconstruction Company Pvt. Ltd.	104, Ashoka Estate, Barakhamba Road, New Delhi—110 001	
7	Reliance Asset Reconstruction Company Ltd.	Reliance Centre 19, Walchand Hirachand Marg, Ballard Estate Mumbai—400 038	
8	Pridhvi Asset Reconstruction and Securitsation Company Ltd.	123/3 RT, First Floor, Sanjeeva Reddy Nagar, Hyderabad-500038	
9	Phoenix ARC Pvt. Ltd.	240, Navsari, Building, 1st Floor DN Road Mumbai—400001	Kotak Mahindra Bank
10	Invent Assets Securitisations & Reconstruction Private Limited	7, Raheja Centre, Ground Floor 214, Free Press Journal Marg, Mumbai—400021	
11	JM Financial Asset Reconstruction Company Limited	141, Maker, Chambers III, Nariman Point, Mumbai --400021	
12	India SME Asset Reconstruction Company Limited (ISARC)	SME Development Centre, Plot No. C-11, G-Block, Bandra Kurla Complex, Bandra (East), Mumbai—400051	SIDBI, United Bank of India, BoB

(14) According to the learned counsel a non-obstante provision has been made under Section 5(1)(b) of the SARFAESI Act, contemplating that a Securitisation Company may acquire financial assets of any bank or financial institution by entering into an agreement with them for the transfer of such financial assets to the Securitisation Company on such terms and conditions as may be agreed between them. Such an arrangement is permitted to operate notwithstanding anything contained in any agreement or any other law. The Securitisation Company has been permitted to provide for various measures for the purposes of asset reconstruction by keeping in view the guidelines framed by the Reserve Bank of India in that behalf as per the provisions of Section 9. Such a company is also entitled to enforcement of security interest in accordance with the provisions of the SARFAESI Act.

(15) Referring to the provisions of Section 12 of the SARFAESI Act, learned counsel has submitted that it is only Reserve Bank of India who could determine policy and issue directions to a securitisation company in matter relating to income, recognition, accounting standards, making provisions for bad and doubtful debts. Even the directions can be issued with regard to the type of financial asset of a bank or financial institution, which could be acquired and the procedure for acquisition of such assets. The directions could also be issued in respect of the aggregate value of financial assets which may be acquired by a securitisation company.

(16) Mr. Sarin has then referred to Chapter III from Sections 13 to 19 of the SARFAESI Act and contended that under Section 13(1) any security interest created in favour of any secured creditor could be enforced without the intervention of the Court in accordance with the provisions of the SARFAESI Act notwithstanding the provisions of Transfer of Property Act, 1882. Once a notice of 60 days is given for repayment of secured debt or instalment thereof to a defaulter and such a defaulter fails to pay the amount then the secured creditor is entitled to exercise its right under sub-section (4) of Section 13 of taking possession of the secured assets of the borrower including the right to jurisdiction by way of lease, assignment or sale for realising the secured assets. It has been pointed out that sub-section (3A) of Section 13 was added in the year 2004 and the representation in response to the notice issued under Section 13(2) by the borrower is required to be considered by the secured creditor and the reasons for not accepting the representation are required to be communicated

to such a borrower although reasons so communicated are not to confer any right upon the borrower to prefer an application before the Debt Recovery Tribunal under Section 17 or the Court of District Judge under Section 17A thereof. It has further been pointed out by referring to the provisions of Section 13(7) that any expenses properly incurred by a securitisation company/secured creditor or any expenses incidental thereto are liable to be recovered from the borrower in the process of initiating action under Section 13(4) involving taking of possession, the right to transfer by way of lease, assignment or sale for realising the secured assets etc..The money received by the secured creditor in the absence of any contract to the contrary is held by him in trust which is to be applied firstly in payment of such costs, charges and expenses. Secondly, in discharge of the duties of the secured creditor and the residue of the money so received is required to be paid to such persons who are entitled thereto in accordance with their rights and interests. He has then referred to the proviso of section 13(9) and submitted that in the case of a company in liquidation, the sale of secured asset is required to be distributed as per the provisions of Section 529A of the Act. With regard to the company which is being wound up after the commencement of the SARFAESI Act, different provisions have been made by second proviso to Section 13(9). Mr. Sarin has further pointed out that the distribution of assets as per the first proviso of Section 13(9) would not result into imposition of any shackles on a secured creditor or a Securitisation Company, to be imposed by the Company Judge because the 2nd, 3nd and 4th proviso clarifies that in case of company is being wound up after the commencement of the SARFAESI Act then a secured creditor who opts to realise his security, is entitled to retain the sale proceeds of his secured assets after depositing the workmen's dues with the Official Liquidator as per the provisions of Section 529A of the Act and the workmen's dues according to the third proviso are required to be intimated by the Official Liquidator to a secured creditor. If the workmen's dues could not be ascertained then the estimated amount of workmen's dues under Section 529A of the Act are required to be intimated and such a secured creditor could retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the Official Liquidator. There is further obligation imposed by the fourth proviso that a secured creditor is under obligation to pay the balance of the workmen's dues or it would be entitled to refund of the excess amount deposited by the secured creditor with the Official Liquidator.

(17) Mr. Sarin has then referred to the provisions of Section 35 which provides for overriding effect of the SARFAESI Act despite anything inconsistent contained in any other law. According to the learned counsel Section 37 which applies the provisions of other laws is not contradictory to Section 35, inasmuch as, the SARFAESI Act would have its effect to the extent it is in conflict with any other law and other laws would continue to operate in addition to the SARFAESI Act.

(18) On the basis of the aforesaid provisions of the SARFAESI Act, Mr. Sarin has concretised his argument that the provisions of the SARFAESI Act overrides those of the Companies Act because it is a special and specific legislation which enjoys a superior and overriding place. According to the learned counsel it is later in point of time and, therefore, learned Company Judge could not have imposed clogs on the rights of the Securitisation Company, which are alien to the letter and spirit of the SARFAESI Act. In support of his submission, learned counsel has placed reliance on paras 6 and 17 of the judgment of Hon'ble the Superme Court in the case of **Rajasthan Financial Corporation** *versus* **Official Liquidator (1),** and para 11 to 13 of another judgment of Madras High Court in the case of **Asset Reconstruction Co. India** *versus* **Official Liquidator, (2).** Reliance has also been placed on paras 39 and 40 of the judgment of Hon'ble the Supreme Court in **Bakemans Industries** *versus* **New Cawnpore, (3),** and para 47 of the judgment in the case of **Central Bank of India** *versus* **State of Kerala, (4).** Mr. Sarin has also placed reliance on an unreported judgment of Madras High Court in the case of **Subhash Kathuria** versus **Deve Sugars (C.A. Nos. 1811 of 2005, 854 of 2006 and 2740 to 2742 of 2007 in C.P. Nos. 170 of 1995 and 35 of 1997, decided on 3rd March, 2009).** He has drawn our attention to the legal principle formulated in para 41 of the judgment.

(19) Mr. Sarin has also argued that a conjoint interpretation of Sections 35 and 37, primacy has been conferred on the SARFAESI Act vis-a-vis the provisions of the Companies Act in various judgments. In that

(1) AIR 2006 S.C. 755
(2) (2006) 134 Company Cases 267 (Mad.)
(3) (2008) 144 Company Cases 71 (SC)
(4) (2009) 4 S.C.C. 94

regard reliance has been placed in the case of **Akola Oil Industries** versus **State Bank of India, (5), In Re: BPL Display Devices, (6)** and the observation made by Hon'ble the Supreme Court with regard to the objects of the SARFAESI Act in the case of **Central Bank of India** (*supra*).

(20) His second contention is that once the Securitisation Company has been held entitled to stay outside the winding up proceedings currently taking place under the supervision of the Company Court then such a company should have been kept out of the scrutiny and supervision of the Company Court by keeping in view the objects and intention of enforcing the SARFAESI Act. In that regard he has placed reliance on the observations made by Hon'ble the Supreme Court in the cases of **Transcore** *versus* **Union of India, (7)** and **Mardia Chemicals Ltd.** versus **Union of India, (8).** He has concluded by submitting that neither in the pleadings nor in the admitted documents placed on the record in the form of charge/search report obtained from the Registrar of Companies or the minutes of the meeting of the Official Liquidator etc., it could be clearly established that the plant and machinery of respondent No. 1 Company were also under the sole secured charge of the Securitisation Company/secured creditor. Likewise, there is no averment made that the plant and machinery of respondent No. 1 Company were under secured charge of any other bank or creditor much less that of HSIIDC. Therefore, he has submitted that the error committed by the learned Company Judge is patent in his order, dated 20th March, 2009 and the same is liable to be corrected.

(21) Mr. Kamal Sehgal, learned counsel for HSIIDC has argued that once respondent No. 1 Company has been wound up,—*vide* order, dated 28th October, 1999 by this Court then all the assets of the Company are in the custody of the Official Liquidator. According to the learned counsel a duty is cast on the Company Court to keep in view the interest of the secured as well as unsecured creditors by supervising the sale of assets through the Official Liquidator. Thereafter the sale proceedings are required to be distributed in accordance with the provisions of Section 529A and 530 of the Act. According to the learned counsel, the sacred duty of

(5) 2006 (1) Bom. C.R. 362
(6) (2009) 150 Company Cases 280 (All)
(7) (2008) 1 S.C.C. 125
(8) (2004) 4 S.C.C. 311

sale of assets and its distribution cannot be delegated to either a secured creditor or any person outside the process of winding up. Therefore, the order, dated 20th March, 2009 is liable to be set aside, inasmuch as, it permits the Securitisation Company to sell the remaining piece of land and building. According to the learned counsel, the only course open to the learned Company Judge was to permit the Official Liquidator to sell the assets in association with HSIIDC and the Securitisation Company. Learned counsel has referred to the provisions of Section 5(3) of the SARFAESI Act and argued that the only secured creditor i.e. Bank of India had given its consent to this Court for sale of assets through the Official Liquidator, which has never been withdrawn and, therefore, the rights of a securitisation company will remain subject to the consent given by its predecessor, namely, the Bank of India, as per the provisions of Section 5(3) of the SARFAESI Act. Therefore, once the consent has been given for sale of assets by the Bank of India through the Official Liquidator then the Securitisation Company being successor in interest would stand in the shoes of its predecessor and is deemed to have waived the legal right to invoke the SARFAESI Act. Another submission made by the learned counsel is that on true construction of Sections 35 and 37 of the SARFAESI Act, the provisions of the Act would apply. Thus, according to Section 529, 529A and 530 of the Act read with Rule 154, the Official Liquidator would be fully entitled to participate in fixation of sale price, auction and distribution of assets, especially when first proviso to Section 13(9) is kept in view.

(22) Mr. Sehgal has then argued that the learned Company Judge has committed grave error in law by refusing to fix any price which earlier was fixed at Rs. 29.12, crores and a free hand has been given to the Securitisation Company to realise as much price as may be possible in respect of huge chunk of land without association of the Official Liquidator as well as HSIIDC. He has attacked the order of the Learned Company Judge on another ground also, inasmuch as, no reference to the moveable assets over which HSIIDC has the charge has been made.

(23) In support of the aforesaid submissions, Mr. Sehgal has placed reliance on para 33/44 of the judgment of Hon'ble the Supreme Court in the case of **Allahabad Bank** *versus* **Canara Bank, (9)** and on various paras of the judgment in **Bakeman Industries Pvt. Ltd.** (*supra*). Reliance

(9) (2004) 4 S.C.C. 406

has also been placed on the observations made in paras 16 and 17 of the judgment in the case of **Rajasthan Financial Corporation** (*supra*). He has also placed reliance on paras 9 to 14 of the judgment rendered in **Unique Butile** *versus* **U.P. Financial Corporation, (10),** and paras 4 and 5 of **Asset Reconstruction Co. India** (*supra*). Qn the question of waiver, learned counsel has placed reliance on the judgments of Hon'ble the Supreme Court in the case of **Sita Ram Gupta** *versus* **Punjab National Bank, (11),** and **Bank of India** *versus* **Ketan Parek (12).**

(24) Ms. Punita Sethi, learned counsel appearing for the Official Liquidator has argued that the Securitisation Company by filing application bearing CA No. 705 of 2008 with a prayer for recalling order, dated 20th March, 2008 (A1), granting permission by the Company Court to sell the assets of the Company after setting aside the earlier sale, has itself surrendered to the jurisdiction of the Company Court. She has made a specific reference to the contents of para 11 of the application (A1), which seek permission of the Company Court to stay outside the process of winding up and enforce its security interest under the SARFAESI Act. According to the learned counsel Section 13 of the SARFAESI Act uses the expression 'may' which does not necessarily means that the secured creditor may invoke the SARFAESI Act or its secured interest could be recovered by the intervention of the Court. She has further argued that the proceedings of winding up in the instant case were at the final stage, when the sale notices have already been once issued and it was to be re-advertised after the express consent of the secured creditor i.e Bank of India.

(25) Another submission made by Ms. Sethi is that all the assets of respondent No. 1 Company are deemed to be in the custody of the Court from the date of winding up and under Rule 232 of the Company Courts Rules, 1959, the Official Liquidator is empowered to deal with the property subject to the direction issued by the Company Court. She has submitted that in such circumstances the provisions of the SARFAESI Act cannot be applied to respondent No. 1 Company. She has placed reliance on the judgment of **Rajasthan Financial Corporation's case** (*supra*) and argued that it has been rightly applied by the learned Company Judge by imposing

(10) (2003) 2 S.C.C. 455
(11) 2008 (2) I.S.J. Banking 182
(12) (2008) 143 Company Cases 711

certain conditions on the Securitisation Company while permitting it to stay outside the winding up. Moreover, by express provision made in Section 37 of the SARFAESI Act, the Companies Act has been made specifically applicable. She has also placed reliance on a Division Bench judgment of this Court in the case of **Dhir and Dhir Asset Reconstruction and Securitisation Company Ltd.** versus **M/s Air Liquide North India Private Limited, (13),** wherein the order of the Company Court imposing fetters on the Securitisation Company has been upheld in appeal. Learned counsel has then submitted that the second notice under Section 13(2) of the SARFAESI Act was issued on 26th March, 2009 purported to be in respect of the plant and machinery of respondent No. 1 Company and before expiry period of 60 days it has taken over the possession of the assets on 23rd May, 2009 and, therefore, there is no valid notice issued by the Securitisation Company as per the requirements of Section 13 of the SARFAESI Act.

(26) The aforesaid detailed arguments would lead us to the following two questions of law :—

(A) Whether the Company Court enjoys jurisdiction to issue supervisory direction to a securitisation company/secured creditor in connection with a company in liquidation or under winding up in the face of Section 13 of the SARFAESI Act or securitisation company opting to stand outside the winding up is absolutely free to utilise the sale proceeds of assets of the company in liquidation ?

(B) Whether the learned Company Judge committed a factual error by observing that the HSIIDC has hypothecation in respect of plant and machinery ?

RE : QUESTION (A) :

(27) In order to answer the aforesaid issue it would be necessary to ascertain the correct import of Section 13 of the SARFAESI Act. It provide that a secured creditor may enforce any security interest without the intervention of the Court or Tribunal irrespective of Section 69 or 69A of the Transfer of Property Act, 1882. Wherever a borrower is a defaulter

(13) 2009 (3) PLR 184

in repayment of the security debt or any instalment of repayment or the debt pending against him has been classified as non-performing asset by the secured creditor [See Reserve Bank of India's prudential norms on income recognition, asset classification and provisioning---pertaining to advances],— *vide* Circular, dated 30th August, 2001. The aforesaid circular has been set out in detail in the case of Mardia Chemicals Ltd. (*supra*) then before taking any step to realise its dues, the secured creditor is obliged to serve a notice in writing to such a borrower to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures provided by sub-section (4) of Section 13 the SARFAESI Act. Sub-section (3) of Section 13 further provides that a secured creditor is under an obligation to give details of the amount payable by such a borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment by him. In pursuance of the observations made in the case of **Mardia Chemicals Ltd.** (*supra*), sub-section (3A) was also added in Section 13 of the SARFAESI Act that if a borrower made any representation or raises any objection on the receipt of notice under Section 13(2), the secured creditor is under an obligation to consider such representation or objection. If he concludes that such a representation or objection was not acceptable or tenable, he must communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower, although the communication of such reasons was not to confer any right on borrower to prefer an application to the Tribunal under Section 17 or the Court of District Judge under Section 17A.

(28) Sub-section (4) of Section 13 of the SARFAESI Act postulate initiation of four measures by the secured creditor in case of non-compliance with the notice served upon the borrower. The secured creditor (a) may take possession of the secured assets which include the right to transfer the secured assets by way of lease, assignment or sale ; (b) may take over the management of the secured assets including right to transfer ; (c) may appoint a manager to manage the secured assets which have been taken possession of by the secured creditor ; and (d) may also require any person who has acquired any of the secured assets from the borrower or from whom any money is due to the borrower to pay the same to him as it may be sufficient to pay the secured debt. Section 13(8) of the SARFAESI Act,

however, provides that if all the dues of the secured creditor are tendered to him before the sale or transfer then no further steps are required to be taken in that direction.

(29) The most significant provision to decide the issue raised before us is Section 13(9) of the SARFAESI Act, which reads thus :—

> "13(9)In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors :
>
> Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) :
>
> Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of Section 529A of that Act :
>
> Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator :

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

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

Explanation : For the purposes of this sub-section,—

(a) "record date" means the date agreed upon by the secured creditors representating not less than three-fourth in value of the amount outstanding on such date ;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor."

(30) A perusal of sub-section (9) of Section 13 of the SARFAESI Act would show that in case of a company in liquidation the amount realised from the sale of secured assets must be distributed in accordance with the provisions of Section 529A of the Act. The second proviso also postulates that in case of a company being wound up after the commencement of the SARFAESI Act, a secured creditor or a securitisation company may retain the sale proceeds of his secured assets after depositing workmen's dues with the liquidator as per the requirements of Section 529A of the Act. Likewise, the liquidator is required to intimate the estimated amount of workmen's dues to the secured creditor and in such a case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated workmen's dues with the liquidator.

(31) The aforesaid provision came up for consideration before Hon'ble the Supreme Court in the case of **Rajasthan Financial Corporation** (*supra*). The issue which came up before their Lordships' was concerning the right of the State Financial Corporation under Section 29 of the State Financial Corporations Act, 1951, against the debtor company to sell assets of the company and to realise security when the company is under winding up. It has been held that in such a case the right under Section

29 could be exercise by the State Financial Corporation only after obtaining appropriate permission from the Company Court and acting in terms of direction issued by the Company Court in respect of process of sale and distribution of sale proceeds in terms of Section 529 and 529A of the Act. The views of their Lordships' are discernible from paras 17 and 18 of the judgment, which reads thus :—

> "17. Thus, on the authorities what emerges is that once a winding up proceeding has commenced and the liquidator is put in charge of the assets of the company being wound up, the distribution of the proceeds of the sale of the assets held at the instance of the financial institutions coming under the Recovery of Debts Act or of financial corporations coming under the SFC Act, can only be with the association of the Official Liquidator and under the supervision of the company court. The right of a financial institution or of the Recovery Tribunal or that of a financial Corporation or the Court which has been approached under Section 31 of the SFC Act to sell the assets may not be taken away, but the same stands restricted by the requirement of the Official Liquidator being associated with it, giving the company court the right to ensure that the distribution of the assets in terms of Section 529A of the Companies Act takes place. In the case on hand, admittledly, the appellants have not set in motion, any proceeding under the SFC Act. What we have is only a liquidation proceeding pending and the secured creditors, the financial corporations approaching the company court for permission to stand outside the winding up and to sell the properties of the company-in-liquidation. The company court has rightly directed that the sale be held in association with the Official Liquidator representing the workmen and that the proceeds will be held by the Official Liquidator until they are distributed in terms of Section 529A of the Companies Act under its supervision. The directions thus made, clearly are consistent with the provisions of the relevant Acts and the views expressed by this Court in the decisions referred to above. In this situation, we find no reason to interfere with the decision of the High Court. We clarify that there is no inconsistency between the decisions in **Allahabad Bank** *versus* **Canara Bank and**

Anr (*supra*) [AIR 2000 SC 1535] and in **International Coach Builders Limited** *versus* **Karnataka State Financial Corporation** (*supra*) [(2003) 10 SCC 482] in respect of the applicability of Section 529 and 529A of the Companies Act in the matter of distribution among the creditors. The right to sell under the SFC Act or under the Recovery of Debts Act by a creditor coming within those Acts and standing outside the winding up, is different from the distribution of the proceeds of the sale of the security and the distribution in a case where the debtor is a company in the process of being wound up, can only be in terms of Section 529-A read with Section 529 of the Companies Act. After all, the liquidator represents the entire body of creditors and also holds a right on behalf of the workers to have a distribution *pari passu* with the secured creditors and the duty for further distribution of the proceeds on the basis of the preferences contained in Section 530 of the Companies Act under the directions of the company court. In other words, the distribution of the sale proceeds under the direction of the company court is his responsibility. To ensure the proper working out of the scheme of distribution, it is necessary to associate the Official Liquidator with the process of sale so that he can ensure, in the light of the directions of the company court, that a proper price is fetched for the assets of the company in liquidation. It was in that context that the rights of the Official Liquidator were discussed in International Coach Builders Limited (*supra*). The Debt Recovery Tribunal and the District court entertaining an application under Section 31 of the SFC Act should issue notice to the liquidator and hear him before ordering a sale, as the representative of the creditors in general.

18. In the light of the discussion as above, we think it proper to sum up the legal position thus :—

(i) A Debt Recovery Tribunal acting under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would be entitled to order the sale and to sell the properties of the debtor, even if a company-in-liquidation, through its Recovery Officer but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.

(ii) A District Court entertaining an application under Section 31 of the SFC Act will have the power to order sale of the assets of a borrower company-in-liquidation but only after notice to the Official Liquidator or the liquidator appointed by the Company Court and after hearing him.

(iii) If a financial corporation acting under Section 29 of the SFC Act seeks to sell or otherwise transfer the assets of a debtor company-in-liquidation, the said power could be exercised by it only after obtaining the appropriate permission from the company court and acting in terms of the directions issued by that court as regards associating the Official Liquidator with the sale, the fixing of the upset price or the reserve price, confirmation of the sale, holding of the sale proceeds and the distribution thereof among the crditors in terms of Section 529A and Section 529 of the Companies Act.

(iv) In a case where proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or the SFC Act are not set in motion, the concerned creditor is to approach the company court for appropriate directions regarding the realization of its securities consistent with the relevant provisions of the Companies Act regarding distribution of the assets of the company-in-liquidation."

(32) Once the aforesaid legal position of the Company Court vis-a-vis the State Financial Corporation and Debt Recovery Tribunal is clear then by virtue of the same logic if the securitisation company seeks to sell or transfer the assets of a borrower company in liquidation opting the course under Section 13(4) of the SARFAESI Act then it follows that such a power could be exercised by a securitisation company only after obtaining permission from the Company Court and acting in terms of the directions issued by that Court. The aforesaid view has been followed and applied by Hon'ble the Supreme Court in para 40 of the judgment in the case of **Bakemans Industries Pvt. Ltd.** (*supra*) by following the reasoning given in the case of **Rajasthan State Financial Corporation** (*supra*) which has already been extracted in the preceding para.

(33) In Ram **Kripal Singh** *versus* **State of Uttar Pradesh, (14),** it has been categorically held that the State Financial Corporation could exercise its power under Section 29 unilaterally against a debtor as long as there is no order of winding up. After the order of winding up it cannot realise the mortgaged properties without the consent of the Official Liquidator, who cannot act without the directions from the Company Court. Likewise, in a latest judgment in the case of **Central Bank of India** (*supra*), their Lordships' of Hon'ble the Supreme Court has analysed the interplay of various provisions of the SARFAESI Act vis-a-vis the DRT Act. Referring to the unnumbered provisions to sub-section (9) of Section 13 of the SARFAESI Act, it has been observed as under :—

> "114. By enacting various provisions to sub-section (9), the legislature has ensured that priority given to the claim of workers of a company in liquidation under Section 529-A of the Companies Act, 1956 via-a-vis secured creditors like banks is duly respected. This is the reason why first of the five unnumbered proviso to Section 13(9) lays down that in the case of a company in liquidation, the amount realized from the sale of secured assests shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956. This and other provisos do not create first charge in favour of the worker of a company in liquidation for the first time but merely recognize the existing priority of their claim under the Companies Act. It is interesting to note that the provisos to sub-section (9) of Section 13 do not deal with the companies which fall in the category of borrower but which are not in liquidation or are not being wound up.
>
> 115. It is thus clear that provisons referred to above are only part of the distribution machanism evolved by the legislature and are intended to protect and preserve the right of the workers of a company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditor in accordance with Section 13 thereof."

(14) (2007) 11 S.C.C. 22

(34) Once the aforesaid legal position is clear then it has to be concluded that the Company Court enjoys the jurisdiction to issue directions to a securitisation company or a secured creditor who might have opted to stay outside the winding up and has invoked its power under Section 13(4) of the SARFAESI Act. Therefore, we find that the learned Company Judge has correctly appreciated the issue when it placed reliance on a judgment of Allahabad High Court in the case of **In Re : BPL Display Devices** (*supra*) and proceeded to observe in para 11 as under :—

> "11. The Allahabad High Court identified the objects of the SARFAESI Act as providing for enforcement of Securities Act without any intervention of Court or Tribunal and went on to hold on a point which it had earlier observed that was not a pointed controversy that "there was no apparent conflict between SARFAESI Act and the Companies Act and therefore does not appear to be any conflict between the sale of the security interest. The SARFAESI Act has to be harmonized in that the Act itself declares that is in addition and not in derogation of the Companies Act. It said at paragraph 41 that the objects of speedy recovery of loan from non-performing assets would be defeated if the O.L. would intervene to enforce the provisions of the Companies Act and to monitor each step of the securitization and enforcement of security interest. The Company Court therefore must allow the provisions of SARFAESI Act to be put into motion even if the proceedings of the winding up have been recommended or are pending of that Company is under liquidation. The statutory duties of the Company Court for protecting the workmen's due, and interest of the other stake holder including the public interest will however, oblige the Court to be informed with the process of sale"."

(35) We are in complete agreement with the aforesaid observation which in our humble conform to the view expressed by their Lordships' of Hon'ble the Supreme Court in various judgments, some of which have been referred above.

(36) The ancillary issue which emerge for determination concerns the true import of Sections 35 and 37 of the SARFAESI Act. Learned Company Judge has rightly taken the view that attempt must be made to adopt the golden rule of construction aimed at harmonising the provisions. He has observed as under :—

> "9. **K Chidambara Manickam and others** *versus* **Shakeena and others reported in AIR 2008 Madras 108** was dealt with by a Division Bench of the Madras High Court addressing the primacy of the claims of financial institutions under the SARFAESI Act. It also examined whether Section 35 of the SARFAESI Act which contained a non-obstante clause over-rode Section 37 which stipulated that the provisions of the Act shall be in addition and not in derogation of the Companises Act. The Division Bench adopted the golden rule of construction that the attempt must always be harmonize the provisions and not to see any conflict between two Sections under the same enactment. This decision did not actually address the issue of effect of any sale having already commenced after winding up of the Company which the point of issue in our case **Rama Steel Industries and others** *versus* **Union Of India (UOI)** and another reported in AIR 2008 Bombay 38 dealt with the case of interplay of the provisions of the SARFAESI Act and RDB Act and other enactments. It found that the expression "any other law for the time was in force" under Section 37 of the Securitisation Act was missing from Section 34(2) of the RDB Act. This according to the Bench was crucial but it showed that the remedy was in addition to any other law for the time being in force and the availability of other mechanisms of recovery could not be a bar for providing remedy under the SARFAESI Act. ....."

(37) We are in entire agreement with the view taken by the learned Company Judge because Section 35 of the SARFAESI Act provide for overriding effect of its provisions with a non-obstante clause of anything inconsistent with the provisions of that Act. It is only the inconsistency which would bar the application of other laws and not otherwise. There is no inconsistency in issues of supervisory directions in order to achieve the

avowed object of Section 529A of the Act as echoed by unnumbered five provisos of Section 13(9) of the SARFAESI Act because there is no provision in the SARFAESI Act giving any conflict with the claim of the workers due as contemplated by Section 529A of the Act. It is further pertinent to notice that a Division Bench of this Court has already upheld the order under challenge when its reasoning was adopted by the learned Company Judge in the case of **Dhir and Dhir Asset Reconstruction and Securitisation Company** (*supra*). The appeal against the order dated 26th March, 2009 passed by the learned Company Judge in the aforesaid case has been dismissed by a Division Bench of this Court (of which one of us, M.M. Kumar, J. was a member). In para 2 of the judgment in **Dhir and Dhir Asset Reconstruction and** (*supra*) a pointed reference has been made to the order under challenge and same reasoning adopted by the learned Company Judge, which reads as under :—

> "2. The Appellant Reconstruction Company moved an application being CA No. 151 of 2009 for modification of order dated 6th February, 2009 passed by the learned Company Judge directing that assets of the company were not to be sold by any party without leave of the Court and had issued notice. The learned Company Judge adopted the reasoning given by him in his decision dated 20th March, 2009 rendered in the case of **PEGASUS Asset Reconstructions Company Pvt. Ltd.** versus **Haryana Concast Ltd.** in CA Nos. 704 and 705 of 2008 in CP No. 133 of 2003 alongwith other Company Applications. In that judgment, the learned Company Judge made an attempt to harmonize the SARFAESI Act and the Companies Act. ....."

(38) Noticing the aforesaid order the Division Bench rejected the hypothesis of absolute freedom claimed by the securitisation company in the said case and proceeded to observe as under :—

> "6. .....A perusal of the directions issued in para 8 of the order, extracted above, shows that it is left open to the Appellant Reconstruction Company to move the Company Court for appropriate directions if the petition for winding up is considered favourably. The winding up petition is still pending. The situation

is fluid in the sense that at this stage it cannot be concluded as to whether there would be an order of winding up or not. If there is an order of winding up then the labour dues as contemplated by Section 529A of the Companies Act would require to be paid by Appellant Reconstruction Company as per the requirement of Section 13(9) of the SARFAESI Act. The directions issued by the learned Company Judge do not go to the extent of stopping the working of Appellant Reconstruction Company. The directions in fact are supervisory in nature and aims at ensuring that dues of every one as permissible by law gets paid. *The learned Company Judge has further issued supervisory directions by asking the Appellant Reconstruction Company to refrain from appropriation or disbursal of the sale proceeds without leave of the Court. It is not a case where it could be said that the learned Company Judge had interfered with the functioning of the reconstruction company because as and when any funds are required to be spent as per the provisions of Section 13(7) of the SARFAESI Act it could be done by the leave of the Court. The Appellant-Reconstruction Company has been granted liberty not only to take possession of the assets but to even proceed with the sale of those assets subject to a rider that no appropriation or disbursal of the sale proceeds is to be undertaken by the Appellant-Reconstruction company without leave of the Court. We are not persuaded to accept the these propounded by Mr. Ashok Aggarwal, learned senior counsel, that the appellant-reconstruction company is a completely 'free bird'. A perusal of Section 13(9) of the SARFAESI Act would show that labour dues as contemplated by Section 529A of the Companies Act have to be paid by the appellant reconstruction company. At this stage it would be the duty of the learned Company Judge to ensure that provisions of Section 13(9) are complied with. It is worthwhile to notice that the appellant-reconstruction company is already kept outside the winding up and is required to give information to the Official Liquidator with regard to the proposal of*

sale etc. The sale notice to the public has to contain clause that winding up proceeding are pending before the Company Court. These directions are merely supervisory in character and do not put such fetters so as to conclude that the Appellant Reconstruction Company cannot conduct its function properly. The appeal does not warrant admission and the same is dismissed." *(emphasis added)*

(39) We are not inclined to take any detailed discussion case wise as cited by Mr. M.L. Sarin and Mr. Kamal Sehgal. The judgment of Hon'ble the Supreme Court in **Transcore's case** (*supra*) does not deal with the question raised in the instant appeals. The question debated therein was whether withdrawal of original application in terms of first proviso to Section 19(1) of the DRT Act was a condition precedent to take recourse to the SARFAESI Act and the answer given was in the negative. Likewise, in the case of **Mardia Chemicals Ltd.** *(supra)* the constitutional validity of various provisions was debated and it has no bearing on the question raised in the instant appeals. Similar would be the position with regard to other judgments cited by the learned counsel. Therefore, no detailed survey would be necessary as the arguments have been noticed with regard to pivotal issue.

(40) In view of the above, question (A) is answered against both the appellants and their appeals are liable to be dismissed.

RE : QUESTION (B) :

(41) It appears to us that while recording facts in para 3 of the impugned judgment, learned Company Judge has committed a factual error when it observed as under :—

"3. It is not in dispute that Bank of India was the only secured creditor in respect of the land where the Company factory premises was situate. *The plant and machinery alone had been the subject of hypothecation to HSIIDC at the time when the Company was wound up.* ....." (emphasis added)

(42) We have examined the record and have also put it to the learned counsel for the HSIIDC as to whether there was any hypothecation of plant and machinery with it. The record does not show any such hypothecation nor Mr. Kamal Sehgal, learned counsel for the HSIIDC has been able to support the aforesaid averments. Therefore, there is factual error and to that extent the impugned order deserves to be modified. It is, thus, clear that the HSIIDC would be simply a secured creditor with regard to the raw material and, in fact, an unsecured creditor *qua* plant and machinery. It cannot claim any right of association with the process of sale or participation at par with the Securitisation Company.

(43) For the reasons aforementioned, these appeals are dismissed. However, the factual error is accepted and the following line, as it exists in para 3 of the impugned judgment, is ordered to be *deleted* :

> "The plant and machinery alone had been the subject of hypothecation to HSIIDC at the time when the Company was wound up."

R.N.R.

Before Permod Kohli, J.

RAJ RAJESHWARI COLLEGE OF EDUCATION, NACHRAUN AT RADAUR,—*Petitioner*

versus

KURUKSHETRA UNIVERSITY, KURUKSHETRA AND OTHERS,—*Respondents*

C.W.P. No. 15634 of 2009

2nd February, 2010

Constitution of India, 1950—Art. 226—NCTE granting recognition to a self-financed unaided institution to impart B.Ed course—University also granting provisional affiliation—University issuing notice to petitioner regarding location of building which was inspected and duly approved by University as also N.C.T.E.—College operating for last two academic sessions—Assuming there is some change of location University failing to point out any prejudice caused to it or any student with alleged change of