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(2018) 14 Supreme Court Cases 783

(BEFORE DR A.K. SIKRI AND ASHOK BHUSHAN, JJ.)

INDIABULLS HOUSING FINANCE LIMITED .. Appellant;

Versus

DECCAN CHRONICLE HOLDINGS LIMITED AND OTHERS .. Respondents.

Civil Appeal No. 18 of 2018† with Contempt Petitions (C) Nos. 756 and 1693 of 2017, decided on February 23, 2018

A. **Debt, Financial and Monetary Laws — Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Ss. 2(1)(d), (m), (f), (zb), (zf) & (zd) and Ss. 13(2) & (4) and Ss. 37 and 35 — Original financer not covered by SARFAESI Act transferring loans, securities etc., but transferee covered by SARFAESI Act — Retroactive applicability of SARFAESI Act — SARFAESI Act, reiterated, is applicable qua all debts owing and live when SARFAESI Act became applicable, and not only to debts created after coming into force of SARFAESI Act**

— Effect of amalgamation, whereby predecessor company (original financer not coming under SARFAESI Act) transferring its loans, recoveries, security, interest, financial documents, etc. to successor company (appellant herein, which did come under purview of SARFAESI Act) — Upon High Court sanctioning said arrangement of amalgamation under Ss. 391 to 394, Companies Act, 1956, successor company, held, became financial institution under Ss. 2(1)(d) and (m) in respect of respondent borrowers of predecessor company and actions of successor company (appellant herein) against said respondent borrowers under S. 13, SARFAESI Act, valid — Interference by High Court unwarranted, thus, set aside

— Retroactive applicability of SARFAESI Act — Consideration of rights of parties under Ss. 69 and 69-A, Transfer of Property Act, 1882 which weighed with High Court, is without any substance — SARFAESI Act is retroactive in nature — SARFAESI Act intended to give impetus to industrial development in country by providing speedy recovery procedure — Its object is to rectify earlier position by providing procedural remedy against security interest already created — SARFAESI Act is applicable qua all debts owing and live when Act became applicable

— While statute affecting substantive rights, prospective — Statute changing forum of remedy and procedure, retrospective — SARFAESI Act, is a procedural change in respect of forum for recovery of debt and no substantive rights are affected

— Effect of amalgamation — On sanctioning of scheme of amalgamation of IBFSL (original financer) with appellant company (though it was a reverse merger), respondent borrowers became borrower of appellant as if loan granted

† Arising from the Judgment and Order in *Deccan Chronicles Holdings Ltd.* v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78 (Andhra Pradesh High Court, Hyderabad Bench, WP No. 37381 of 2013, dt. 4-2-2014)

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by appellant — Thus even if IBFSL, was not notified under S. 2(1)(m) of SARFAESI Act, Respondent 1 would be treated as "borrower" under S. 2(1)(f) of SARFAESI Act — Arrangement classified as "security arrangement" under S. 2(1)(zb) — Agreements, created "security interest" under S. 2(1)(zf) — And appellant became "secured creditor" within meaning of S. 2(1)(zd) of SARFAESI Act — Thus High Court interfering with actions taken by appellant under SARFAESI Act, unsustainable, set aside — Allegation that just to realise debt, said amalgamation was effected, too far-fetched — Amalgamation was effected a per law under Ss. 391 to 394, Companies Act, 1956

— Transfer of Property Act, 1882 — Ss. 69 and 69-A — Companies Act, 1956, Ss. 391 to 394 (Paras 33 to 43 and 4 to 6)

M.D. Frozen Foods Exports (P) Ltd. v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741, *followed*

Saraswati Industrial Syndicate Ltd. v. *CIT*, 1990 Supp SCC 675; *Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311; *United Bank of India* v. *Satyawati Tondon*, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260, *relied on*

Sarthak Builders (P) Ltd. v. *Orissa Rural Development Corpn. Ltd.*, 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83; *Unique Engg. Works* v. *Union of India*, 2003 SCC OnLine Utt 107 : (2004) 2 BC 241, *approved*

ICICI Bank Ltd. v. *APS Star Industries Ltd.*, (2010) 10 SCC 1 : (2010) 4 SCC (Civ) 1; *Trimbak Damodhar Rajpurkar* v. *Assaram Hiraman Patil*, 1962 Supp (1) SCR 700 : AIR 1966 SC 1758; *Athlumney, In re, ex p Wilson*, (1898) 2 QB 547; *West* v. *Gwynne*, (1911) 2 Ch 1 (CA), *considered*

P.K. Unni v. *Nirmala Industries*, (1990) 2 SCC 378; *Union of India* v. *Elphinstone Spg. and Wvg. Co. Ltd.*, (2001) 4 SCC 139; *Delhi Financial Corpn.* v. *Rajiv Anand*, (2004) 11 SCC 625; *Rishabh Agro Industries Ltd.* v. *PNB Capital Services Ltd.*, (2000) 5 SCC 515; *Padma Sundara Rao* v. *State of T.N.*, (2002) 3 SCC 533, *distinguished*

Deccan Chronicles Holdings Ltd. v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78, *reversed*

Real Value Appliances Ltd. v. *Canara Bank*, (1998) 5 SCC 554; *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed 547 (2d Cir 1914); *Union of India* v. *Filip Tiago De Gama of Vedem Vasco De Gama*, (1990) 1 SCC 277; *D.R. Venkatachalam* v. *Transport Commr.*, (1977) 2 SCC 273; *N. Narasimhaiah* v. *State of Karnataka*, (1996) 3 SCC 88; *State of Karnataka* v. *D.C. Nanjudaiah*, (1996) 10 SCC 619; *Artemiou* v. *Procopiou*, (1966) 1 QB 878 : (1965) 3 WLR 1011 : (1965) 3 All ER 539 (CA); *Luke* v. *IRC*, 1963 AC 557 : (1963) 2 WLR 559 : (1963) 1 All ER 655 (HL); *Rafiquennessa* v. *Lal Bahadur Chetri*, AIR 1964 SC 1511, *cited*

B. **Debt, Financial and Monetary Laws — Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Ss. 37 and 35 and Ss. 13(2) & (4) — Maintainability of proceedings under SARFAESI Act — Fact that available remedies were not inconsistent with remedy under SARFAESI Act — Effect of S. 37 of SARFAESI Act — Inapplicability of Doctrine of Election in such a situation — Hence, held, proecceings under SARFAESI Act were maintainable despite the fact that appellant had taken steps under S. 9 of Arbitration and Conciliation Act, 1996/ existence of arbitration agreements**

— Doctrine of election — Applicability — There are 3 elements of the doctrine of election, namely, existence of two or more remedies, inconsistencies between such remedies and a choice of one of them — Since proceedings under A & C Act were not inconsistent with SARFAESI Act, doctrine of election not applicable

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— Effect of S. 37, SARFAESI Act — In addition proceedings initiated under SARFAESI Act parties can resort to provisions under other Acts

— Arbitration and Conciliation Act, 1996 — S. 9 — Statute Law — Generalia specialibus non derogant/Special Statute and General Statute — Doctrines and Maxims — Election (Paras 11 to 18)

M.D. Frozen Foods Exports (P) Ltd. v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741, *followed*

Transcore v. *Union of India*, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116; *Mathew Varghese* v. *M. Amritha Kumar*, (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254, *relied on*

Pradeep Kumar Gupta v. *State of U.P.*, 2009 SCC OnLine All 877 : AIR 2010 All 3; *Sarthak Builders (P) Ltd.* v. *Orissa Rural Development Corpn. Ltd.*, 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83; *HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566; *Unique Engg. Works* v. *Union of India*, 2003 SCC OnLine Utt 107 : (2004) 2 BC 241, *approved*

Subhash Chandra Panda v. *State of Orissa*, 2008 SCC OnLine Ori 10 : AIR 2008 Ori 88, *held, overruled*

Deccan Chronicles Holdings Ltd. v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78, *held, overruled* [in view of *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741] and *reversed herein*

Indiabulls Financial Services Ltd., In re, 2012 SCC OnLine Del 6187 : (2013) 177 Comp Cas 261, *referred to*

American Jurisprudence, 2d, Vol. 25, p. 652; *Snell's Principles of Equity* (31st Edn., p. 119), *referred to*

SS-D/60179/SV

Advocates who appeared in this case :

Dr A.M. Singhvi and Shyam Divan, Senior Advocates (Rishi Agrawala, Ankur Saigal, Rishabh Parikh, Nishant Rao and E.C. Agrawala, Advocates) for the Appellant;

M/s AP & J Chambers, Kuldeep S. Parihar, H.S. Parihar, C. Mukund, M.B. Elakkumanan, Bijoy Kr. Jain, Ms Pooja Dhar, Rahul Pratap, Jay Kr. Bhardwaj, Damyanti Juneja and Sudhansu P., Advocates, for the Respondents.

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17. (2000) 5 SCC 515, *Rishabh Agro Industries Ltd.* v. *PNB Capital Services Ltd.* 800*c-d*, 801*d-e*
18. (1998) 5 SCC 554, *Real Value Appliances Ltd.* v. *Canara Bank* 800*e*
19. (1996) 10 SCC 619, *State of Karnataka* v. *D.C. Nanjudaiah* 801*e*
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21. (1990) 2 SCC 378, *P.K. Unni* v. *Nirmala Industries* 798*c*
22. (1990) 1 SCC 277, *Union of India* v. *Filip Tiago De Gama of Vedem Vasco De Gama* 801*b-c*
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31. (1898) 2 QB 547, *Athlumney, In re, ex p Wilson* 797*d*, 805*d*, 808*a*

The Judgment of the Court was delivered by

DR A.K. SIKRI, J.— This appeal preferred by Indiabulls Housing Finance Ltd., in which the main contesting parties are M/s Deccan Chronicle Holdings Ltd. and its Directors (other respondents are the pro forma parties), questions the correctness and legality of the judgment and order dated 4-2-2014[1] passed by the High Court of Judicature of Andhra Pradesh at Hyderabad. The impugned judgment[1] is passed by the High Court in the writ petition which was filed by the contesting respondents questioning the validity of actions taken by the appellant against the contesting respondents under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") for recovery of the loan amounts, along with interest, which are payable by the contesting respondents to the appellant.

1 *Deccan Chronicles Holdings Ltd.* v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78

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2. The High Court has accepted the challenge laid by the contesting respondents holding that:

(*a*) loan agreements contained arbitration clauses which were invoked by the appellant with the filing of cases under Section 9 of the Arbitration and Conciliation Act, 1996. In view thereof, initiation of any other proceedings under the SARFAESI Act are impermissible in law; and

(*b*) the loan was initially given by M/s Indiabulls Financial Services Ltd. (for short "IBFSL") on 8-12-2011 and 5-1-2012 in the sum of Rs 50 crores each. IBFSL was not a banking company or financial institution within the meaning of Sections 2(1)(*d*) and (*m*) of the SARFAESI Act and, therefore, it had no jurisdiction to take any steps by invoking the provisions of this Act. However, IBFSL got merged with the appellant Company. No doubt, the appellant is a financial institution under the SARFAESI Act. However, since IBFSL had no right to initiate any action under the said Act, as a successor-in-interest, the appellant steps into the shoes of IBFSL and, therefore, it also cannot initiate any action under the SARFAESI Act. If that is allowed, held the High Court, substantive rights of the contesting respondents which accrued to them under Sections 69 and 69-A of the Transfer of Property Act, 1882 would be adversely affected, which cannot be countenanced.

3. Having given the glimpse of the transaction which was entered into between the parties and also that of the basis of the impugned judgment[1] of the High Court, we proceed to discuss the details on which the lis is founded.

4. We may start with the narration of brief facts of the case, which are as follows: on 18-4-2005, IBFSL was granted a certificate under Section 45-I(*a*) of the Reserve Bank of India Act, 1934 to operate as a non-banking financial company and, thus, act as a financial institution under the said Act. The appellant was incorporated on 10-5-2005. The appellant and IBFSL were sister concerns. The appellant was granted a registration certificate dated 28-12-2005 to commence the business of housing finance institution. The Central Government, vide Notification dated 19-9-2007, issued under Section 2(1)(*m*) of the SARFAESI Act, specified the petitioner as a "financial institution" for the purposes of the said Act. IBFSL disbursed a loan amount of Rs 50 crores to the respondent borrowers vide loan agreement dated 8-12-2011. The loan facility was secured by the respondent borrowers by creating equitable mortgage over various properties. IBFSL also disbursed a further amount of Rs 50 crores to the respondent borrowers vide loan agreement dated 5-1-2012. The loan facility was security by the respondent borrowers again by creating equitable mortgage over various properties.

5. Sometime in the year 2012, it was proposed that IBFSL gets merged with the appellant. After completing the formalities of informing the National Housing Bank as well as the Reserve Bank of India about the aforesaid proposal

1 *Deccan Chronicles Holdings Ltd.* v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78

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and furnishing them copies of the scheme of merger, the appellant filed a petition under Sections 391-394 of the Companies Act, 1956 in the High Court of Delhi for the merger of IBFSL with the appellant. The High Court, after taking various steps under the provisions of the Companies Act, ultimately sanctioned the scheme of arrangement between IBFSL and the appellant vide orders dated 12-12-2012[2]. With the sanction of the aforesaid merger, the assets and liabilities of IBFSL stood vested in the appellant, with IBFSL being dissolved without winding up on its amalgamation with the appellant. Pursuant to the said merger, the borrowers of IBFSL, including the respondent borrowers, became the borrowers of the appellant.

6. Insofar as the respondent borrowers are concerned, they had committed default in repaying the loans advanced to them by IBFSL and, therefore, even before the merger, IBFSL had issued loan recall notice dated 18-9-2012 to the respondent borrowers. On 4-3-2013, the loan accounts of the contesting respondents and other co-borrowers were classified as non-performing assets (NPA) by IBFSL. On 6-3-2013, IBFSL filed a petition under Section 9 of the Arbitration Act, being OPs Nos. 377 and 378 of 2013, before the IIIrd Addl. Chief Judge, City Civil Court, Hyderabad for securing the amount payable by the respondent borrowers. An ad interim injunction restraining the respondent borrowers and other co-borrowers therein from alienating the scheduled properties to third parties in any manner was passed. The scheme of arrangement as approved by the order dated 12-4-2013 was filed with the Registrar of Companies on 8-3-2013 making the same effective. The appellant, having stepped into the shoes of IBFSL in respect of the debts owed to IBFSL, issued notice dated 8-3-2013 under Section 13(2) of the SARFAESI Act to the respondent borrowers and other co-borrowers. This was followed by notice dated 29-5-2013 issued under Section 13(4) of the SARFAESI Act in respect of taking over symbolic possession of the mortgaged properties.

7. The respondents herein, on 17-7-2013, filed SA No. 182 of 2013 before the Debts Recovery Tribunal, Chandigarh under Section 17 of the SARFAESI Act challenging the action of the appellant invoking the measures under Section 13(4) of SARFAESI Act. Within few days thereafter i.e. on 30-7-2013, Respondent 1 also filed Writ Petition No. 22688 of 2013 challenging, inter alia, the declaration of the account as NPA and passing of orders by the Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act. Similar writ petitions, being Writ Petitions Nos. 22689 and 22934 of 2013 were filed by Respondent 1's employee union and Respondent 4 respectively. On 4-9-2013, the respondents herein unconditionally withdrew SA No. 182 of 2013 filed before the Debts Recovery Tribunal, Chandigarh. The appellant issued an auction notice dated 21-11-2013 informing the respondent borrowers that auction of the Banjara Hill properties of the respondent borrowers would be conducted on 24-12-2013. At this juncture, on 19-12-2013, Respondents 1 to 5 filed Writ Petition No. 37381 of 2013 before the High Court.

2 *Indiabulls Financial Services Ltd., In re*, 2012 SCC OnLine Del 6187 : (2013) 177 Comp Cas 261

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8. In the aforesaid writ petition, the High Court passed interim orders dated 20-12-2013, directing the parties to maintain status quo. Another interim order dated 23-12-2013 was passed directing the appellant not to finalise the auction though it was permitted to receive bids. However, the said auction could not fructify as, according to the appellant, some miscreants belonging to the contesting respondents came on the spot and threatened the intending purchasers and even tried to beat the representatives of the respondents and, therefore, the auction had to be cancelled. The appellant thereafter issued another auction notice dated 28-12-2013 fixing the auction dates as 3-2-2014 and 4-2-2014 in respect of Banjara Hills and Raj Bhavan Road properties respectively. Auction in respect of Banjara Hills properties took place on 3-2-2014 as per the date fixed. However, the sale was not finalised on account of the interim orders passed by the High Court. On 4-2-2014[1], when the next property was to be auctioned, the High Court gave the judgment in Writ Petition No. 37381 of 2013 filed by the contesting respondents allowing the said writ petition and setting aside the entire invocation of the SARFAESI Act by the appellant.

9. As already pointed out above, the High Court is swayed by the fact that after IBFSL had invoked the provisions of Section 9 of the Arbitration Act and filed petitions in this behalf, having regard to the arbitration agreement between the parties, it was not open to the appellant to take recourse to the provisions of SARFAESI Act. This aspect is concluded[1] in the following manner: (*Deccan Chronicles case*[1], SCC OnLine AP)

> "The two Ops nos. i.e. 377 and 378 of 2013 have already been filed in the name of IBFSL, under Section 9 of the Arbitration Act. The arbitration clause that existed in the agreements has been extracted in the preceding paragraphs. Section 8 of the Arbitration Act makes it amply clear that if the agreement between the parties contains an arbitration clause, institution of other proceedings is prohibited. When a suit cannot be instituted by a party to an agreement, which contains an arbitration clause, the initiation of proceedings before other fora becomes equally untenable. The proceedings under the SARFAESI Act cannot be placed on a higher pedestal. The borrower of a secured financial institution, as defined under Section 2(1)(*f*) of the SARFAESI Act cannot be treated as a super Court, to be kept on a higher pedestal in the context of Section 8 of the Arbitration Act. When arbitration proceedings have already been initiated, the 4th respondent cannot be permitted, ignore them and proceed against the security."

10. The High Court noted that the contesting respondents had not borrowed any amount from the appellant. The loan was taken from IBFSL, which was not under the purview of the SARFAESI Act. Therefore, at the time of taking the loan, the respondent borrowers knew that IBFSL would not be in a position to take recourse to the SARFAESI Act. With the merger of IBFSL with the appellant,

1 *Deccan Chronicles Holdings Ltd.* v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78

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ruled the High Court, the loan transaction which was outside the purview of the SARFAESI Act, could not be brought under its purview without the consent of the borrower. According to the High Court, SARFAESI Act prescribes a new legal regime and if the loan is allowed to be brought within the SARFAESI Act only because of merger and the appellant is allowed to take recourse under the SARFAESI Act, it would affect substantive rights of the contesting borrowers under Sections 69 and 69-A of the Transfer of Property Act. In the process, the High Court has noted that the views of the Uttarakhand High Court[3] and the Allahabad High Court[4] are contrary to the aforesaid view. However, it chose to agree with the view taken by the Division Bench of the Orissa High Court[5] in deciding that provisions of SARFAESI Act will not be applicable. Pertinently, the Full Bench of the Orissa High Court[6] itself has overruled its Division Bench judgment.

11. We may record at this stage that the main ground on which notice issued under the SARFAESI Act had been quashed is the impermissibility of invoking the provisions of the Act by the appellant herein who took over the assets and liabilities of IBFSL on merger. Insofar as the other issue, namely, the provisions of the SARFAESI Act could not be invoked as IBFSL had already invoked the machinery under the Arbitration Act by filing petitions under Section 9 thereof is concerned, this is decided as the subsidiary issue. Insofar as this subsidiary question is concerned, the learned counsel for the respondent did not press this ground seriously and it was virtually conceded that merely because IBFSL had filed applications under Section 9 of the Arbitration Act, would not create a bar for proceeding under the SARFAESI Act. Even otherwise, we find that the High Court was in error in deciding[1] this issue. It is not correct to say that proceedings under the SARFAESI Act cannot be placed on high pedestal. We find that SARFAESI Act is a special enactment which was enacted by Parliament to provide speedy remedy to the banks and financial institutions without recourse to the court of law. On the other hand, the Arbitration and Conciliation Act, in contrast, is a statute of general nature. Merely because steps are taken under this general law would not mean that remedy under the special statute is foreclosed. If at all, legal position is just the reverse. Matter is no more res integra and is covered by a judgment of this Court in *Transcore* v. *Union of India*[7]. In that case, after analysing the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Court summed up the position as under: (SCC p. 141, para 18)

> "*18.* On analysing the above provisions of the DRT Act, we find that the said Act is a complete code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates

3 *Unique Engg. Works* v. *Union of India*, 2003 SCC OnLine Utt 107 : (2004) 2 BC 241
4 *Pradeep Kumar Gupta* v. *State of U.P.*, 2009 SCC OnLine All 877 : AIR 2010 All 3
5 *Subhash Chandra Panda* v. *State of Orissa*, 2008 SCC OnLine Ori 10 : AIR 2008 Ori 88
6 *Sarthak Builders (P) Ltd.* v. *Orissa Rural Development Corpn. Ltd.*, 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83
1 *Deccan Chronicles Holdings Ltd.* v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78
7 (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116

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even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other. The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the debt due is concerned. It covers secured as well as unsecured debts. However, it does not rule out applicability of the provisions of the TP Act, in particular Sections 69 and 69-A of that Act. Further, in cases where the debt is secured by pledge of shares or immovable properties, with the passage of time and delay in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, value of the assets in the hands of the bank/FI invariably depletes which, in turn, leads to asset-liability mismatch. These contingencies are not taken care of by the DRT Act and, therefore, Parliament had to enact the NPA Act, 2002."

12. Thereafter, the Court in *Transcore case*[7] analysed the provisions of the SARFAESI Act and then noted, in para 37 of the judgment, three points of determination which arose for consideration. We are concerned with Point (*i*) formulated therein, which reads as under: (SCC p. 149)

"(*i*) Whether the banks or financial institutions having elected to seek their remedy in terms of the DRT Act, 1993 can still invoke the NPA Act, 2002 for realising the secured assets without withdrawing or abandoning the OA filed before DRT under the DRT Act."

13. After detailed discussion on this question, the Court in *Transcore case*[7] rejected the applicability of the doctrine of election by holding that simply because remedy under the provisions of the DRT Act was availed would not mean that the financial institution was precluded from taking steps under the SARFAESI Act. Thus, answering the question in the affirmative, essence of the discussion can be captured in the following paragraphs: (SCC pp. 162-63, paras 64-66)

"*64*. In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to *American Jurisprudence*, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to *Snell's Principles of Equity* (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any

7 *Transcore* v. *Union of India*, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116

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event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.

65. In our view, the judgments of the High Courts which have taken the view that the doctrine of election is applicable are erroneous and liable to be set aside.

66. We have already analysed the scheme of both the Acts. Basically, the NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section 13 of the NPA Act is recovery by non-adjudicatory process. A secured asset under the NPA Act is an asset in which interest is created by the borrower in favour of the bank/FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of the NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceed on the basis that security interest in the bank/FI needs to be enforced expeditiously without the intervention of the court/tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, the NPA Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor."

14. With this, we now address the central issue on which detailed arguments were advanced by both the parties. We may note that our discussion is not on a virgin field as the terrain has already been covered by this Court in *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.*[8] The learned Senior Counsel appearing for the appellant had submitted that this case, which is directly on point, not only lays down the proposition that even successor-in-interest (like the appellant herein) would be authorised to invoke the provisions of the SARFAESI Act even if the original lender was not a financial institution covered by the Act, it has specifically overruled the judgment[1] of the Andhra Pradesh High Court, which is the subject-matter of appeal at hand. On that basis, it was submitted that it was not even necessary to have further probe in the matter.

15. The learned counsel for the appellant is factually correct in pointing out that the impugned judgment[1] of the Andhra Pradesh High Court is specifically noted and overruled by this Court in *M.D. Frozen Foods*[8]. Therefore, it would be apt to discuss the said judgment in the first instance.

8 (2017) 16 SCC 741

1 *Deccan Chronicles Holdings Ltd.* v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78

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16. In *M.D. Frozen Foods*[8] the appellants had borrowed monies for their business from the respondents against security of immovable properties by creating an equitable mortgage. Loan agreement contained an arbitration clause. Since the appellant defaulted in making the payment and the account became NPA, the respondent invoked the arbitration clause on 16-11-2016. However, three months before this invocation, a Notification was issued on 5-8-2016 specifying certain non-financial banking companies (NFBCs) covered under clause (*f*) of Section 45-I of the RBI Act, with assets of more than Rs 500 crores and above, as financial institutions and directing that the provisions of the SARFAESI Act shall apply to such financial institutions with the exceptions of provisions of Sections 13 to 19 of that Act. Sections 13 to 19 were made applicable, as per the notification, only to such security interest which is obtained for securing repayment of secured debt with principal amount of Rs 1 crore and above. The respondent was specifically covered by the said notification which was issued in exercise of powers conferred under sub-clause (*iv*) of clause (*m*) of sub-section (1) of Section 2 read with Section 31-A of the SARFAESI Act. In view of the aforesaid notification, the respondent issued a notice under Section 13(2) of the SARFAESI Act on 24-11-2016 for one of the seven properties mortgaged to it against the aforesaid loan which was advanced to the appellants.

17. Having regard to the aforesaid facts in *M.D. Frozen Foods*[8], the Court formulated following three questions which had arisen for consideration: (SCC p. 748, para 11)

> "*11.1.* (*i*) Whether the arbitration proceedings initiated by the respondent can be carried on along with the SARFAESI proceedings simultaneously?
>
> *11.2.* (*ii*) Whether resort can be had to Section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement/mortgage created prior to the application of the SARFAESI Act to the respondent?
>
> *11.3.* (*iii*) A linked question to Question (*ii*), whether the lender can invoke the SARFAESI Act provision where its notification as financial institution under Section 2(1)(*m*) has been issued after the account became an NPA under Section 2(1)(*o*) of the said Act?"

These questions amply demonstrate that the instant case is virtually on the same footing.

18. Insofar as Question (*i*) is concerned, the Court categorically held that merely because remedy under the Arbitration Act was invoked was no ground to debar the respondent from taking recourse to the SARFAESI Act. The discussion from that judgment is reproduced below: (*M.D. Frozen Foods case*[8], SCC pp. 751-54, paras 26-29 & 33-34)

> "*26.* A claim by a bank or a financial institution, before the specified laws came into force, would ordinarily have been filed in the civil court

8 *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741

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having the pecuniary jurisdiction. The setting up of the Debts Recovery Tribunal under the RDDB Act resulted in this specialised Tribunal entertaining such claims by the banks and financial institutions. In fact, suits from the civil jurisdiction were transferred to the Debts Recovery Tribunal. The Tribunal was, thus, an alternative to civil court recovery proceedings.

27. On the SARFAESI Act being brought into force seeking to recover debts against security interest, a question was raised whether parallel proceedings could go on under the RDDB Act and the SARFAESI Act. This issue was clearly answered in favour of such simultaneous proceedings in *Transcore* v. *Union of India*[7]. A later judgment in *Mathew Varghese* v. *M. Amritha Kumar*[9] also discussed this issue in the following terms: (*Mathew Varghese case*[9], SCC pp. 640-41, paras 45-46)

> '*45*. A close reading of Section 37 shows that the provisions of the SARFAESI Act or the Rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of the RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, the SARFAESI Act and the RDDB Act, would be complementary to each other. In this context, reliance can be placed upon the decision in *Transcore* v. *Union of India*[7]. In para 64 it is stated as under after referring to Section 37 of the SARFAESI Act: (SCC p. 162)
>
> > "*64*. … According to *American Jurisprudence*, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. *In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply*. Even according to *Snell's Principles of Equity* (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. *In any event, there is no repugnancy nor inconsistency between the two remedies*, therefore, the doctrine of election has no application."
>
> *46*. A reading of Section 37 discloses that the application of the SARFAESI Act will be in addition to and not in derogation of the provisions of the RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB

7 (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116
9 (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254

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Act. We are also fortified by our above statement of law as the heading of the said section also makes the position clear that application of other laws are not barred. The effect of Section 37 would, therefore, be that in addition to the provisions contained under the SARFAESI Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other Acts mentioned in Section 37, namely, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, or any other law for the time being in force.' (emphasis in original)

28. These observations, thus, leave no manner of doubt and the issue is no more res integra, especially keeping in mind the provisions of Sections 35 and 37 of the SARFAESI Act, which read as under:

> '**35.** ***The provisions of this Act to override other laws***.—The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.
>
> * * *
>
> **37.** ***Application of other laws not barred***.—The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.'

29. The aforesaid two Acts are, thus, complementary to each other and it is not a case of election of remedy.

* * *

33. SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.

34. We are, thus, unequivocally of the view that the judgments of the Full Bench of the Orissa High Court in *Sarthak Builders (P) Ltd.* v. *Orissa Rural Development Corpn. Ltd.*[6], the Full Bench of the Delhi High Court in *HDFC Bank Ltd.* v. *Satpal Singh Bakshi*[10] and the Division Bench of the Allahabad High Court in *Pradeep Kumar Gupta* v. *State of U.P.*[4] lay down the correct proposition of law and the view expressed by the Andhra

6 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83
10 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566
4 2009 SCC OnLine All 877 : AIR 2010 All 3

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Pradesh High Court in *Deccan Chronicles Holdings Ltd.* v. *Union of India*[1] following the overruled decision of the Orissa High Court in *Subhash Chandra Panda* v. *State of Orissa*[5] does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand."

19. Insofar as Questions (*ii*) and (*iii*) are concerned, the Court again referred to the conflicting opinion of different High Courts and after discussion held that the SARFAESI Act was retroactive in nature and, therefore, once this Act came into force, the respondent in the said case had right to invoke the provisions of the Act even if loan agreement was entered into and mortgage created prior to the coming into force of the SARFAESI Act. Paras 36 to 39 of the judgment need to be reproduced in this behalf, which are to the following effect: (*M.D. Frozen Foods case*[8], SCC pp. 754-55)

"*36*. The SARFAESI Act was brought into force to solve the problem of recovery of large debts in NPAs. Thus, the very rationale for the said Act to be brought into force was to provide an expeditious procedure where there was a security interest. It certainly did not apply retrospectively from the date when it came into force. The question is whether the Act being applicable to the respondent at a subsequent date and thereby allowing the respondent to utilise its provisions with regards to a past debt, would make any difference to this principle. We are of the view that the answer to the same is in the negative.

37. The Act applies to all the claims which would be alive at the time when it was brought into force. Thus, qua the respondent or other NBFCs, it would be applicable similarly from the date when it was so made applicable to them.

38. The Full Bench of the Orissa High Court in *Sarthak Builders (P) Ltd.* v. *Orissa Rural Development Corpn. Ltd.*[6] has, in fact, succinctly set out this aspect. No doubt, till the respondent was not a "financial institution" within the meaning of Section 2(1)(*m*)(*iv*) of the SARFAESI Act, it was not a "secured creditor" as defined under Section 2(1)(*zd*) of the SARFAESI Act and, thus, could not invoke the provisions of the SARFAESI Act. However, the right to proceed under the SARFAESI Act accrued once the Notification was issued.

39. The Full Bench referred to a Division Bench judgment of the Uttarakhand High Court in *Unique Engg. Works* v. *Union of India*[3] which dealt with the issue of retrospectivity and retroactivity. In case of retroactivity, Parliament takes note of the existing conditions and promulgates the remedial measures to rectify those conditions. In fact the

1 2014 SCC OnLine AP 104 : AIR 2014 AP 78
5 2008 SCC OnLine Ori 10 : AIR 2008 Ori 88
8 *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741
6 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83
3 2003 SCC OnLine Utt 107 : (2004) 2 BC 241

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SARFAESI Act, in our view, was to remedy such a position and provide a measure against secured interests. The scheme of the SARFAESI Act is really to provide a procedural remedy against security interest already created. Therefore, an existing borrower, who had been granted financial assistance was covered under Section 2(1)(*f*) of the said Act as a "borrower". Not only this expression, the definition clauses dealing with "debt securities", "financial assistance", "financial assets", etc., clearly convey the legislative intent that the SARFAESI Act applies to all existing agreements irrespective of the fact whether the lender was a notified "financial institution" on the date of the execution of the agreement with the borrower or not. The scheme of the SARFAESI Act sets out an expeditious, procedural methodology, enabling the bank to take possession of the property for non-payment of dues, without intervention of the court. The mere fact that a more expeditious remedy is provided under the SARFAESI Act does not mean that it is substantive in character or has created an altogether new right. To accept the argument of the appellants would imply that they have an inherent right to delay the enforcement against the security interest!"

20. The Court also referred to certain judgments laying down distinction between retroactive and retrospective operation of a particular statute[11].

21. The fact situation was, thus, almost the same in the instant case. The only difference is that here the loan was initially sanctioned by IBFSL which stands merged with the appellant and the appellant is the successor-in-interest which is covered by the SARFAESI Act. In the aforesaid case, though the entity which disbursed the loan remained the same, however, at the time when the loan was given by the respondent to the appellant it was not a financial institution covered under the SARFAESI Act, which status was attained by the respondent in view of Notification dated 5-8-2016 issued much after the loan was disbursed to the appellant therein. This does not make any difference in the outcome, as discussed in detailed hereinafter.

22. The learned counsel for the respondents could not dispute that the aforesaid judgment covers the present case in its entirety. This position had to be accepted by them having regard to the fact that the judgment[1] of the High Court which is impugned in these proceedings has been specifically overruled by this Court in *M.D. Frozen Foods case*[8]. Faced with this stark reality staring at the face of the respondents, a valiant effort was made to convince this Bench to take a contrary view and in the process it was submitted that in *M.D. Frozen Foods*[8] some important legal aspects have not been considered.

11 *West* v. *Gwynne*, (1911) 2 Ch 1 at pp. 11, 12 (CA); *Trimbak Damodhar Rajpurkar* v. *Assaram Hiraman Patil*, 1962 Supp (1) SCR 700 : AIR 1966 SC 1758 and *Athlumney, In re, ex p Wilson*, (1898) 2 QB 547

1 *Deccan Chronicles Holdings Ltd.* v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78

8 *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741

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23. To put it pithily, the submissions of the learned counsel for respondents revolved around the following aspects:

23.1. The appellant had neither advanced nor granted any loan or financial assistance to Respondent 1 and, therefore, it could not have invoked the provisions of the SARFAESI Act.

23.2. Respondent 1 could not be treated as "borrower" as defined under Section 2(1)(*f*) of the SARFAESI Act read with Sections 2(1)(*c*) and 2(1)(*m*) of that Act. Submission was that Respondent 1 is not a person who has been granted financial assistance by any bank or financial institution nor can Respondent 1 be brought under the ambit of the definition of being a person who has given a guarantee or create any mortgage or pledge as security for the financial assistance granted by any bank or financial institution i.e. the appellant. It was argued that the definition of the term "borrower" is clear and unambiguous itself and the rule of literal interpretation deserves to be deployed. The respondents relied upon the dictum in *P.K. Unni* v. *Nirmala Industries*[12] wherein it is held that the Court must proceed on an assumption that the legislature did not make a mistake and that it intended to say what it said it was further held that even assuming that there was a defect or omission in the words used by the legislature, the Court would not go to its said to correct or make up the deficiency. The Court cannot add words to a statute or read words into it which are not there, especially when the literal reading produces an intelligible result. The courts are not authorised to alter a word so as to produce a "casus omissus". Support from the judgment in *Union of India* v. *Elphinstone Spg. and Wvg. Co. Ltd.*[13] was also taken in this behalf. The learned counsel also referred to yet another case viz. *Delhi Financial Corpn.* v. *Rajiv Anand*[14] wherein this aforesaid principle is reiterated.

23.3. The loan agreements dated 8-12-2011 and 5-1-2012 which were entered into between Respondent 1 and IBFSL cannot be classified as "security arrangement" within the meaning of Section 2(1)(*zb*) of the SARFAESI Act.

23.4. These agreements did not create "security interest" within the meaning of Section 2(1)(*zb*) of the SARFAESI Act. It was argued that the term "security assets" as defined under Section 2(1)(*zc*) of the Act means the property on which the security interest is created. The term "security interest" is defined under Section 2(1)(*zf*) to mean right, title, interest of any kind whatsoever upon property created in favour of a secured creditor [as defined under Section 2(1)(*zb*) and includes a mortgage, charge, hypothecation or assignment other than specified in Section 31]. Similarly security agreement is defined under Section 2(1)(*zb*).

23.5. The submission was that the agreements dated 8-12-2011 and 5-1-2012 do not fall within the purview of Section 2(1)(*zb*) since at the time when the said agreements were entered into, the entity in favour of which they were executed i.e. Indiabulls Financial Services Ltd., was not a secured

12 (1990) 2 SCC 378
13 (2001) 4 SCC 139
14 (2004) 11 SCC 625

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creditor within the meaning of Section 2(1)(*zd*) of the SARFAESI Act. Under the circumstances the necessary ingredients of Sections 13(1) and 13(2) being absent, no action could have been taken under Section 13(2) or Section 13(4) of the Act. It is this say of the respondents that the clauses contained in the scheme of amalgamation, firstly do not manifest any intention to create any new right in favour of the amalgamated company. Secondly, clauses in scheme of amalgamation, albeit sanctioned by Court, cannot be raised to the pedestal of statutory provisions creating a right in favour of subsequent acquirer of rights not statutorily provided, nor can such clauses be held to create a deeming fiction not statutorily provided.

23.6. Amalgamation of an entity not lying within the ambit of SARFAESI Act then entity which falls within realm of the said Act would not entitle amalgamated entity to invoke the provisions of the SARFAESI Act, in respect of a transaction/agreement entered into much prior to the amalgamation. The submission was that the imprimatur created by virtue of sanctioning of a scheme by the High Court under Sections 391 to 394 of the Companies Act cannot be held to create rights, liabilities and obligations which were not statutorily envisaged. It was argued that the provisions of SARFAESI Act, cannot be held to be purely procedural, they create substantial right in favour of the secured creditor for recovery of its dues by way of enforcement of security interest without invocation of the court. Section 13(1) creates substantive rights and by no stretch of imagination, and cannot be said to be a provision, procedural in nature. The procedure for enforcement of that substantial right is provided under sub-section (2) on the happening of the eventuality as mentioned therein. That a further procedure of prescribing the details in a notice is to be given by virtue of Section 13(3) and provide for making a representation under Section 13(3-A) and further provides for a procedure for release and recovery of secured debt under Section 13(4). In absence of a substantial right being created by Section 13(1), procedural provisions contained in sub-sections (2) to (4) are meaningless as it would not provide a remedy for the enforcement of substantial right created under Section 13(4). It would not, therefore, be correct to treat the SARFAESI Act as a merely procedural statute.

24. It was submitted that this was a *reverse merger* inasmuch as IBFSL was a holding company and the appellant Company was only a subsidiary company and holding company was sought to be amalgamated and merged with the subsidiary company.

25. It was also submitted that the entire exercise of merger was undertaken to transfer loan from financial company to a financial company in order to take advantage of provisions of the SARFAESI Act, which according to the respondents is not permissible in law. On the aforesaid basis, the first submission of the learned counsel for the respondents was that there was no transfer and vesting of loan in the appellant Company provisions as per the scheme. It was argued that the scheme envisaged, under Para 4, that with effect from the appointed date i.e. 1-4-2012, the amalgamating company comprising the amalgamating undertaking shall, pursuant to the sanction of the scheme by

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the High Court and compliance of statutory provisions, be and stand transferred to and vested in the amalgamated company as a going concern without any further act, instrument, deed, matter or thing so as to become, as and from the appointed date 1-4-2012, the undertakings of the amalgamated company by virtue of and in the manner provided in the scheme.

26. Various other clauses of the Scheme were referred to, to buttress the aforesaid submission. In this hue, it was argued that since as per Clause 8 of the Scheme, all suits, actions and other proceedings including legal and taxation proceedings, etc. are to be continued or enforced by or against the amalgamating company. The proceedings instituted by IBFSL under Section 9 of the Arbitration Act against the respondents would be deemed to be an act of the appellant. In other words, the amalgamating company can have no better and further right that one possesses by IBFSL.

27. The learned counsel for the respondents attempted to strengthen the aforesaid architecture with the help of some legal precedents. In the first instance, reference was made to the judgment in *Rishabh Agro Industries Ltd.* v. *PNB Capital Services Ltd.*[15] wherein this Court held as under: (SCC pp. 521-22, para 6)

> "*6*. The learned counsel appearing for the respondent has submitted that such an interpretation would defeat the ends of justice and make the petitions under the Companies Act, infructuous inasmuch as any unscrupulous litigant, after suffering an order of winding up, may approach the Board merely by filing a petition and consequently get the proceedings in the company case stayed. Such a grievance may be justified and the submission having substance but in view of the language of Sections 15 and 16 of the Act particularly the Explanation to Section 16 inserted by Act 12 of 1994, this Court has no option but to adhere to its earlier decision taken in *Real Value Appliances*[16]. While interpreting, this Court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it by having recourse to appropriate procedure, if deemed necessary."

It was argued that the above observations of this Court clearly negate the submission of the appellant that because the SARFAESI Act has been enacted to overcome the accumulated NPA in public interest, the term "borrower" has to be widely construed.

28. Reliance was also placed on the Constitution Bench judgment in *Padma Sundara Rao* v. *State of T.N.*[17] wherein this Court has held as under: (SCC pp. 542-43, paras 12-15)

> "*12*. The rival pleas regarding rewriting of statute and casus omissus need careful consideration. It is well-settled principle in law that the

15 (2000) 5 SCC 515
16 *Real Value Appliances Ltd.* v. *Canara Bank*, (1998) 5 SCC 554
17 (2002) 3 SCC 533

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court cannot read anything into a statutory provision which is plain and unambiguous. A statute is an edict of the legislature. The language employed in a statute is the determinative factor of legislative intent. The first and primary rule of construction is that the intention of the legislation must be found in the words used by the legislature itself. The question is not what may be supposed and has been intended but what has been said. "Statutes should be construed, not as theorems of Euclid", Judge Learned Hand said, "but words must be construed with some imagination of the purposes which lie behind them". (See *Lehigh Valley Coal Co.* v. *Yensavage*[18].) The view was reiterated in *Union of India* v. *Filip Tiago De Gama of Vedem Vasco De Gama*[19], SCC p. 284, para 16

13. In *D.R. Venkatachalam* v. *Transport Commr.*[20] it was observed that courts must avoid the danger of a priori determination of the meaning of a provision based on their own preconceived notions of ideological structure or scheme into which the provision to be interpreted is somewhat fitted. They are not entitled to usurp legislative function under the disguise of interpretation.

14. While interpreting a provision the court only interprets the law and cannot legislate it. If a provision of law is misused and subjected to the abuse of process of law, it is for the legislature to amend, modify or repeal it, if deemed necessary. (See *Rishabh Agro Industries Ltd.* v. *PNB Capital Services Ltd.*[15]) The legislative casus omissus cannot be supplied by judicial interpretative process. Language of Section 6(1) is plain and unambiguous. There is no scope for reading something into it, as was done in *Narasimhaiah case*[21]. In *Nanjudaiah case*[22] the period was further stretched to have the time period run from date of service of the High Court's order. Such a view cannot be reconciled with the language of Section 6(1). If the view is accepted it would mean that a case can be covered by not only clause (*i*) and/or clause (*ii*) of the proviso to Section 6(1), but also by a non-prescribed period. Same can never be the legislative intent.

15. Two principles of construction — one relating to casus omissus and the other in regard to reading the statute as a whole — appear to be well settled. Under the first principle a casus omissus cannot be supplied by the court except in the case of clear necessity and when reason for it is found in the four corners of the statute itself but at the same time a casus omissus should not be readily inferred and for that purpose all the parts of a statute or section must be construed together and every clause of a section should be construed with reference to the context and other clauses

18 218 Fed 547 (2d Cir 1914)
19 (1990) 1 SCC 277
20 (1977) 2 SCC 273
15 (2000) 5 SCC 515
21 *N. Narasimhaiah* v. *State of Karnataka*, (1996) 3 SCC 88
22 *State of Karnataka* v. *D.C. Nanjudaiah*, (1996) 10 SCC 619

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thereof so that the construction to be put on a particular provision makes a consistent enactment of the whole statute. This would be more so if literal construction of a particular clause leads to manifestly absurd or anomalous results which could not have been intended by the legislature. 'An intention to produce an unreasonable result', said Danckwerts, L.J., in *Artemiou* v. *Procopiou*[23] (QB p. 888 : All ER p. 544-I), 'is not to be imputed to a statute if there is some other construction available'. Where to apply words literally would 'defeat the obvious intention of the legislation and produce a wholly unreasonable result', we must "do some violence to the words" and so achieve that obvious intention and produce a rational construction. [Per Lord Reid in *Luke* v. *IRC*[24] where at AC p. 577 he also observed: (All ER p. 664-I) 'This is not a new problem, though our standard of drafting is such that it rarely emerges.']"

29. It was contended that in the light of the abovestated principles enunciated in the Constitution Bench decision[17], since the language of Section 2(1)(*f*) and 2(1)(*zf*) is unambiguous, the casus omissus cannot be applied by a judicial interpretation process. It was submitted that there is no scope of reading something into, which it does not exist.

30*. The counsel for the respondents also placed strong reliance upon the judgment in *ICICI Bank Ltd.* v. *APS Star Industries Ltd.*[25] which centres around the Banking Regulation Act, 1949 and guidelines of RBI issued on the subject of inter se transfer of non-performing assets by the Bank. It was held that the Banking Regulation Act, 1949 does not come in the way of such transfers. Banks/Banking companies are covered under the SARFAESI Act in any event. As such, transfers inter se bank would not give rise to the question of change in the nature of the lender leading to change in the status of applicability of the SARFAESI Act. On that basis, it was submitted that such a transfer would not change the status of a borrower who, if earlier created a security interest, continues to be a borrower of another secured creditor. However, in the present case, there is sought to be a complete change in the status of the borrower and that too without his consent.

31. The learned counsel, at the end, made a passionate plea about the far-reaching consequences which may ensue if the appellant is permitted to take recourse to the provisions of the SARFAESI Act as debts would be transferred to SARFAESI companies to take advantage of that enactment.

32. After considering the aforesaid submissions, we are of the opinion that entire edifice is built on the pleas which are squarely answered in *M.D. Frozen Foods*[8] and there is no reason to take a different view therefrom for the reasons that follow hereinafter.

23 (1966) 1 QB 878 : (1965) 3 WLR 1011 : (1965) 3 All ER 539 (CA)
24 1963 AC 557 : (1963) 2 WLR 559 : (1963) 1 All ER 655 (HL)
17 *Padma Sundara Rao* v. *State of T.N.*, (2002) 3 SCC 533
* **Ed.**: Para 30 corrected vide Official Corrigendum No. F.3/Ed.B.J./24/2018 dated 24-5-2018.
25 (2010) 10 SCC 1 : (2010) 4 SCC (Civ) 1
8 *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741

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33. In the instant case, loan was given by IBFSL which was not a financial institution covered by the SARFAESI Act when the loan was given. However, this entity has got merged with the appellant and appellant is a SARFAESI company. In this backdrop, the entire thrust of the argument of the respondent is that as a successor company, the appellant cannot take advantage. In order to deal with this aspect, we will have to first taken into consideration, the effect of such a merger scheme as approved by the High Court. It is to be kept in mind that the loan/debts/financial assets stood vested in the appellant pursuant to the amalgamation scheme filed by the two companies under Sections 391 and 394 of the Companies Act, 1956 whereunder the predecessor company, IBFSL got amalgamated with the appellant, the effect of such a merger is explained by this Court in *Saraswati Industrial Syndicate Ltd.* v. *CIT*[26] in the following manner: (SCC pp. 679-80, para 5)

> "*5.* Generally, where only one company is involved in change and the rights of the shareholders and creditors are varied, it amounts to reconstruction or reorganisation of scheme of arrangement. In amalgamation two or more companies are fused into one by merger or by taking over by another. Reconstruction or "amalgamation" has no precise legal meaning. The amalgamation is a blending of two or more existing undertakings into one undertaking, the shareholders of each blending company become substantially the shareholders in the company which is to carry on the blended undertakings. There may be amalgamation either by the transfer of two or more undertakings to a new company, or by the transfer of one or more undertakings to an existing company. Strictly "amalgamation" does not cover the mere acquisition by a company of the share capital of other company which remains in existence and continues its undertaking but the context in which the term is used may show that it is intended to include such an acquisition. See: *Halsbury's Laws of England* (4th Edn. Vol. 7 para 1539). Two companies may join to form a new company, but there may be absorption or blending of one by the other, both amount to amalgamation. When two companies are merged and are so joined, as to form a third company or one is absorbed into one or blended with another, the amalgamating company loses its entity."

34. Thus, on sanction of the scheme of amalgamation, all loans, recoveries, security, interest, financial documents, etc. in favour of IBFSL got transferred to and stood vested in the appellant including the loans given by IBFSL to the respondent borrowers, debts recoverable by IBFSL from the respondent borrowers in favour of IBFSL, security documents executed by the respondent borrowers in favour of IBFSL, etc. On the sanctioning of the scheme, the respondent borrowers became the borrower of the appellant as if the financial assistance was granted by the appellant to the respondent borrowers.

26 1990 Supp SCC 675

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35. There is a force in the contention raised by the appellant that the debt with underlying securities is the asset of IBFSL and that IBFSL had right to transfer/assign its assets to any person without seeking consent of the borrower. Such transfer/assignment is recognised and that this Court in *APS Star Industries*[25] has recognised and upheld such an assignment.

36. In the aforesaid backdrop, the factor which assumes importance and has to be kept in mind is that the appellant is an assignee of a debt through the amalgamation of original lender with the appellant which was effected invoking the statutory provisions of the Companies Act. Once this is kept in mind, there would not be any difference as far as consequences in law are concerned from *M.D. Frozen Foods*[8] and this case. Therefore, *M.D. Frozen Foods case*[8] would apply to the facts of this case in all force.

37. Further, it is too farfetched to argue that just to realise the dues from the respondents, IBFSL and the appellant devised the plan of merger so as to attract the provisions of the SARFAESI Act and we are not inclined to accept such a submission. Various judgments which are relied upon by the respondents also would not apply as we neither find it to be a case of the Court creating any legislation or supplying any casus omissus.

38. Apart from the factual parity, even legally the arguments of the respondents do not carry any weight. The view taken in *M.D. Frozen Foods*[8] is that the SARFAESI Act is retroactive in nature. In the process, the Court approved the Full Bench decision of the Orissa High Court in *Sarthak Builders (P) Ltd.* v. *Orissa Rural Development Corpn. Ltd.*[6] and made the following observations: (*M.D. Frozen Foods case*[8], SCC pp. 755-56, paras 39-42)

> "*39.* … In case of retroactivity, Parliament takes note of the existing conditions and promulgates the remedial measures to rectify those conditions. In fact the SARFAESI Act, in our view, was to remedy such a position and provide a measure against secured interests. The scheme of the SARFAESI Act is really to provide a procedural remedy against security interest already created. Therefore, an existing borrower, who had been granted financial assistance was covered under Section 2(1)(*f*) of the said Act as a "borrower". Not only this expression, the definition clauses dealing with "debt securities", "financial assistance", "financial assets", etc., clearly convey the legislative intent that the SARFAESI Act applies to all existing agreements irrespective of the fact whether the lender was a notified "financial institution" on the date of the execution of the agreement with the borrower or not. The scheme of the SARFAESI Act sets out an expeditious, procedural methodology, enabling the bank to take possession of the property for non-payment of dues, without intervention of the court. The mere fact that a more expeditious remedy is provided under the SARFAESI Act does not mean that it is substantive in character or has created an altogether new right. To accept the argument of the appellants

25 *ICICI Bank Ltd.* v. *APS Star Industries Ltd.*, (2010) 10 SCC 1 : (2010) 4 SCC (Civ) 1
8 *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741
6 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83

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would imply that they have an inherent right to delay the enforcement against the security interest!

40. The catena of judgments referred to by the learned Senior Counsel for the appellants on substantive law not being retrospective in operation, unless expressly stated so in the Act would, thus, have no application to the matter in issue, in view of what we have observed aforesaid. On the other hand, as observed by Buckley, L.J. in *West* v. *Gwynne*[27], retrospective operation is one matter and interference with existing rights is another. In that context, it was ruled that the provisions of the Conveyancing and Law of Property Act, 1892 were held applicable to leases containing a covenant, condition or agreement against assigning, under-letting or parting with possession or disposing of land or property leased without license or consent to all leases whether executed before or after the commencement of the Act. Such a construction was held not to make the Act retrospective in operation but merely effected the future existing rights under all leases whether executed before or after the date of that Act. (Discussed in *Trimbak Damodhar Rajpurkar* v. *Assaram Hiraman Patil*[28].)

41. In a similar vein are the observations made in *Athlumney, In re, ex p Wilson*[29], where the question posed before the Queen's Division Bench was whether Section 23 of the Bankruptcy Act, 1890 was retrospective in its operation. In the aforementioned context, Wright, J., speaking for the Bench, illuminatingly opined: (QB pp. 551-52)

> '... Perhaps no rule of construction is more firmly established than this — that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, *otherwise than as regards matter of procedure*, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. ... it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. *It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception*.'

42. Similarly, the date on which a debt is declared as an NPA would again have no impact. We are, thus, of the view that the provisions of the SARFAESI Act would become applicable qua all debts owing and live when the Act became applicable to the respondent in terms of the parameters

27 (1911) 2 Ch 1 (CA)
28 1962 Supp (1) SCR 700 : AIR 1966 SC 1758
29 (1898) 2 QB 547

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contended by the learned Senior Counsel for the respondent and enlisted at Serial Nos. (*i*) to (*iv*) in para 18." (emphasis in original)

It, thus, follows that there is only a procedural change in respect of forum for recovery of debt and no substantive rights are affected.

39. In view of the aforesaid judgment, argument of the respondents herein predicated on Sections 69 and 69-A of the Transfer of Property Act, which weighed with the High Court, is without any substance.

40. The aforesaid view also gets support from the judgment of this Court in *Mardia Chemicals Ltd.* v. *Union of India*[30] wherein the background and salient feature of the SARFAESI Act have been extensively discussed and analysed and the Court has also highlighted the objective behind enacting such a legislation.

41. These sentiments are echoed in the subsequent judgment in *United Bank of India* v. *Satyawati Tondon*[31] wherein it was held that the Act is intended to give impetus to industrial development in the country by providing speedy procedure of recovery. On account of lack of infrastructure and manpower, regular courts were not able to cope with the speed in adjudication of recovery cases. In the light of recommendations of the Tiwari Committee, special tribunals came to be set up under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for recovery of huge accumulated NPAs of the bank loans. On the recommendations of the Narasimham Committee and Andhyarujina Committee, SARFAESI Act was enacted to empower banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. In this regard, reference may be made to the following observations of this Court in *Satyawati Tondon*[31]: (*Sarthak Builders case*[6], SCC OnLine Ori Paras 15-16)

> "*15.* ... '*1.* ... With a view to give impetus to the industrial development of the country, the Central and State Governments encouraged the banks and other financial institutions to formulate liberal policies for grant of loans and other financial facilities to those who wanted to set up new industrial units or expand the existing units. Many hundred thousand took advantage of easy financing by the banks and other financial institutions but a large number of them did not repay the amount of loan, etc. Not only this, they instituted frivolous cases and succeeded in persuading the civil courts to pass orders of injunction against the steps taken by banks and financial institutions to recover their dues. Due to lack of adequate infrastructure and non-availability of manpower, the regular courts could not accomplish the task of expeditiously adjudicating the cases instituted by banks and other financial institutions for recovery of their dues. As a result, several hundred crores of public money got blocked in unproductive ventures.

30 (2004) 4 SCC 311
31 (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260
6 *Sarthak Builders (P) Ltd.* v. *Orissa Rural Development Corpn. Ltd.*, 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83

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2. In order to redeem the situation, the Government of India constituted a committee under the Chairmanship of Shri T. Tiwari to examine the legal and other difficulties faced by banks and financial institutions in the recovery of their dues and suggest remedial measures. The Tiwari Committee noted that the existing procedure for recovery was very cumbersome and suggested that special tribunals be set up for recovery of the dues of banks and financial institutions by following a summary procedure. The Tiwari Committee also prepared a draft of the proposed legislation which contained a provision for disposal of cases in three months and conferment of power upon the Recovery Officer for expeditious execution of orders made by adjudicating bodies.' (*Satyawati case*[31], SCC pp. 113-14, paras 1-2)

16. Thus, the Act intends to provide remedy in respect of pre-existing loans. The interpretation that the Act will apply only to future debt transactions defeats the very purpose of law of reducing the non-performing assets. This object is clearly mentioned in the Statement of Objects and Reasons. As noted in *Satyawati Tondon*[31] amount of rupees one lakh twenty thousand crores was due to the banks in the year 2001 which had adversely affected the economy of the country. Obviously, the Act is intended to recover the said pre-existing loans by the machinery provided under the SARFAESI Act. The pre-existing loans are not excluded from the purview of the Act. Similarly, the object of notifying the financial institution in question is to enable such institution to avail the provisions of SARFAESI Act in respect of existing loans. This salient object of the Act does not appear to have been noticed in *Subhash Chandra Panda*[5]."

42. We may also reproduce the following discussion from that judgment[6] which completely answers most of the arguments raised by the learned counsel for the respondents: (*Sarthak Builders case*[6], SCC OnLine Ori Para 17)

"*17*. Further, the settled principle of interpretation that while the statute affecting the substantive rights is presumed to be prospective, a statute changing the forum of remedy and the procedure is retrospective has also not been kept in mind. These principles are the basis of the view taken in *Unique Engg. Works*[3] and *Pradeep Kumar Gupta*[4]. The said considerations are valid and legitimate, supported by ample authority of binding precedents of the Apex Court, to which reference may be made and relevant observations extracted:

31 *United Bank of India* v. *Satyawati Tondon*, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260
5 *Subhash Chandra Panda* v. *State of Orissa*, 2008 SCC OnLine Ori 10 : AIR 2008 Ori 88
6 *Sarthak Builders (P) Ltd.* v. *Orissa Rural Development Corpn. Ltd.*, 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83
3 *Unique Engg. Works* v. *Union of India*, 2003 SCC OnLine Utt 107 : (2004) 2 BC 241
4 *Pradeep Kumar Gupta* v. *State of U.P.*, 2009 SCC OnLine All 877 : AIR 2010 All 3

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(1) *Rafiquennessa* v. *Lal Bahadur Chetri*[32]: (AIR p. 1514, para 9)

'*9*. … Mr Chatterjee has relied upon the well-known observations made by Wright, J. in *Athlumney, In re, ex p Wilson*[29] when the learned Judge said that it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. *He added that there was one exception to that rule, namely, that where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights. In order to make the statement of the law relating to the relevant rule of construction which has to be adopted in dealing with the effect of statutory provisions in this connection, we ought to add that retrospective operation of a statutory provision can be inferred even in cases where such retroactive operation appears to be clearly implicit in the provision construed in the context where it occurs. In other words, a statutory provision is held to be retroactive either when it is so declared by express terms, or the intention to make it retroactive clearly follows from the relevant words and the context in which they occur*.' " (emphasis in original)

43. The aforesaid discussion, thus, leads us to conclude that Respondent 1 would be treated as "borrower" within the meaning of Section 2(1)(*f*) of the SARFAESI Act; the arrangement would be classified as "security arrangement" under Section 2(1)(*zb*); the agreements created "security interest" under Section 2(1)(*zf*); and the appellant became "secured creditor" within the meaning of Section 2(1)(*zd*) of the SARFAESI Act.

44. As a result, we hold that the judgment[1] of the High Court is erroneous and set aside the same. This appeal is allowed. No orders need to be passed in the contempt petitions, which stand disposed of.

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32 AIR 1964 SC 1511
29 (1898) 2 QB 547
1 *Deccan Chronicles Holdings Ltd.* v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78