3

BANKING AND INSURANCE LAWS

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I INTRODUCTION

THE BANKING and insurance institutions, as financial instrumentalities of State, are required to strive to fulfill, not only the object of achieving commercial efficiency, but also the public interest. Generally, courts will not interfere with economic policy nor they decide on the matters of economic policy which is the function of experts in the field. However, in certain areas of commercial transactions, intervention of courts has become a routine affair and apex court sometimes plays an activist role in the interest of economic progress of the country. In the year 2015, apex court witnessed several instances where the borrowers abused the process of law to evade the re-payment of loans and advances availed by them. It also witnessed the negative attitude of the trial courts and some of the high courts to dispense of cases relating to commercial transactions. The apex court went ahead to define the term non-performing assets (NPA). It is a matter of concern in the banking sector, that the High Court of Jammu and Kashmir refused to apply the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 to the state. In the insurance sector, most of the cases relate to the breach of contract by the parties. This year however, apex court gave a landmark ruling relating to the insurer's liability in case of marine insurance. It also expressed its concern over social security nature of life insurance policies. This survey is an attempt to focus on some of the relevant areas examined by the courts in banking and insurance sectors which will have an impact on the economic progress of our country.

II SECURITIZATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST ACT, 2002 (SARFAESI)

The object of SARFAESI Act was to ensure speedy recovery of the dues and quicker resolution of disputes arising out of action taken for recovery of such dues. However, the effectiveness of implementing this legislation becomes an issue. Generally, judicial intervention in this area becomes excessive, inspite of the settled position in law. The apex court examined the issue relating to the power of the appellate tribunal under SARFAESI Act to condone the delay in filing an appeal beyond the

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prescribed period of limitation under section 18(1) of the Act.[1] Earlier this issue has been examined by the various high courts like Madhya Pradesh,[2] Andhra Pradesh,[3] Bombay,[4] and Madras.[5] Majority of the high courts have taken a view that delay in filing an appeal can be condoned by the Tribunal while the High Court of Madhya Pradesh took a different view. Hence, apex court examined this issue in *Baleshwar Dayal Jaiswal* case.[6] It examined the application of section 18 (2) of the SARFAESI Act and came to a conclusion that appellate tribunal under the SARFAESI Act has the power to condone the delay in filing an appeal before it. Further, a perusal of section 28(2) of SARFAESI Act makes it clear that appellate tribunal has to dispose of an appeal in accordance with the provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (RDDBFI) Act. The apex court observed that SARFAESI Act and RDDBFI Act are complementary to each other[7] and held that unless the scheme of the statute expressly excludes the power of condonation, there is no reason to deny such power to an appellate tribunal when the statutory scheme so warrants. The court observed:[8]

> The change intended in SARFAESI Act has to be seen from the statute and not from beyond it. No doubt the period of limitation for filing appeal under section 18 of the SARFAESI Act is 30 days as against 45 days under Section 20 of the RDB Act. To this extent, legislative intent may be deliberate. The absence of an express provision for condonation, when Section 18(2) expressly adopts and incorporates the provision of the RDB Act which contains provision for condonation of delay in filing of an appeal, cannot be read as excluding the power of condonation. As already observed, the proviso to section 20 (3) which provides for condonation of delay (45 days under RDB Act) stands extended to disposal of appeal under the SARFAESI Act (to the extent that condonation is of beyond 30 days). There is no reason to exclude the proviso to section 20 (3) in dealing with an appeal under the SARFAESI Act. Taking such a view will be nullifying section 18 (2) of the SARFAESI Act.

The court overruled the decision of the High Court of Madhya Pradesh which held that the power of condonation of delay stood excluded by the principle of interpretation and that if a later statute has provided for shorter period of limitation

1 *Baleshwar Dayal Jaiswal* v. *Bank of India*, AIR 2015 SC 2881.
2 *Seth Banshidhar Media Rice Mills (P.) Ltd* v. *State Bank of India*, AIR 2011 MP 205.
3 *Sajida Begum* v. *State Bank of India*, AIR 2013 AP 24.
4 *UCO Bank,Mumbai* v. *Kanji Manji Kothari & Co* 2008 (4) Mh LJ 424.
5 *Punnu Swami* v. *Debts Recovery Tribunal*, 2009 (3) BJ 401.
6 *Supra* note 1.
7 This view was earlier affirmed by apex court in *Travancore* v. *Union of India* (2008) 1 SCC 125.
8 *Supra* note 1 at 2885.

without express provision of condonation, it could be implied that there was no power of condonation. Therefore, though this approach of apex court can be appreciated considering the literal interpretation of the provisions of the statute, however, it cannot be ignored that this approach will defeat the very objective of the SARFAESI Act since it will be a ground for the litigants to linger on the process of law.

Another question that arose for consideration in this case was whether the Appellate Tribunal under the SARFAESI Act was a court in order to attract section 29 (2) of the Limitation Act, 1963. The High Court of Andhra Pradesh held that the tribunal is a court.[9] Earlier the apex court in *Nahar Industrial Enterprises Ltd* v. *Hong Kong and Shanghai Banking Corporation,*[10] held that the Tribunal was a court but not a civil court for the purposes of section 24 of the Code of Civil Procedure, 1908 (CPC). The apex court has taken a view that it is not required to answer this question in the particular case. Therefore, the question whether the tribunal under the banking statutes is a court or not for the purposes of section 29 (2) of the Limitation Act, 1963 remains unanswered.

In *Naresh* v. *The Authorised Officer, Washim Urban Co-op. Bank Ltd*.,[11] the High Court of Bombay examined the issue with regard to the condonation of delay in filing appeal under section 17 of the SARFAESI Act. In this case, personal notice was neither served on one of the joint owners of mortgaged property by the bank nor did they publish an auction notice in newspaper with respect to auction of property in the auction sale conducted. However, the bank served the notice to the legal heirs of the deceased co-owner of the property. The petition filed by the joint owner for the appeal along with the condonation of delay application under the provisions of the Act was rejected by the concerned authorities under the Act. On this ground, the aggrieved person approached the high court. The high court condoned the delay and observed that the approach of the Debt Recovery Tribunal (DRT) in deciding the application was not just and proper. It did not consider the matter in the right perspective and took an extremely pedantic approach in deciding the application filed by the aggrieved person. It also ignored the ruling given by the apex court in *Mathew Varghese*.[12]

Right of secured creditor

The apex court upheld the right of secured creditor to enforce his security interest without any intervention of court or tribunal in *Pegasus Assets Reconstruction P Ltd* v. *M/s. Haryana Concast Limited*.[13] The question that was to be decided by apex court was whether a company court, directly or through an official liquidator, can wield any control in respect of sale of secured asset by a secured creditor in exercise of powers available to such creditor under the SARFAESI Act. The court observed

9 *Supra* note 3.
10 (2009) 8 SCC 646.
11 [2015]131 SCL 677; 2015 (5) Mh L J 603.
12 *Mathew Varghese* v. *M. Amritha Kumar,* AIR 2015 SC 50.
13 (2016) 4 SCC 47.

that the relevant provisions of the Companies Act, 1956 (Companies Act) have been incorporated harmoniously in the SARFAESI Act especially with regard to company under liquidation or winding up in respect of dues of workmen and their protection under section 529 A of the Companies Act and the official liquidator as a representative of the borrower company under winding up has to be associated not for supplying any omission in the SARFAESI Act but because of express provisions therein as well as in the rules. Section 13 of the SARFAESI Act confirms the same and in case of any grievance, the borrower has the right to seek redressal under sections 17 and 18 of the SARFAESI Act. The court opined: [14]

> [T]hat there is no lacuna or ambiguity in the SARFAESI Act to warrant reading something more into it. For the purpose it has been enacted it is a complete code and the earlier judgments rendered in the context of SFC Act or RDB act vis-à-vis the Companies Act, cannot be held applicable on all force to the SARFAESI Act. There is nothing lacking in the Act so as to borrow anything from the Companies Act till the stage the secured assets are by the secured creditors in accordance with the provisions in the SARFAESI Act and the Rules. At the post sale stage, the rights of the persons or parties having any stake in the sale proceeds are also taken care of by sub-section (9) of Section 13 and its five provisos (not numbered). It is significant that as per sub-section (9) a sort of consensus is required amongst the secured creditors, if they are more than one, for the exercise of rights available under sub-section (4). If borrower is a company in liquidation, the sale proceeds have to be distributed in accordance with the provisions of Section 529 A of the Companies Act even where the company is being wound up after coming into force of the SARFAESI Act, if the secured credit of such company opts to stand out of the winding up proceedings, it is entitled to retain the sale proceeds of its secured assets after depositing the workmen's dues with the liquidator... .

Hence, in this case, the apex court clarified the position that SARFAESI Act is a complete Code and the earlier judgments rendered in the context of State Financial Corporation,1951(SFC)Act or RDDBFI Act *vis-à-vis* the Companies Act, cannot be held applicable to the SARFAESI Act and, therefore, a company court, directly or through an official liquidator, cannot wield any control in respect of sale of a secured asset by a secured creditor in exercise of powers available to such creditor under the SARFAESI Act. Nonetheless, it should be remembered that proper procedure prescribed under the Act and rules framed thereunder need to be followed while making the sale of secured assets. Also, while exercising the power to sell the secured assets by the secured creditor, proper notice to the mortgagor need to be given and he has

14. *Id*. at 63.

the right to redeem the property until the completion of sale.[15] Prior to this decision, apex court examined the principles relating to the sale of debtor's property in *Vedica Procon (P) Ltd* v. *Balleshwar Greens (P) Ltd*.[16] The court held that once the court comes to the conclusion that the price offered for auction sale is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale. The duty of the court is to satisfy itself the market value of the property and the price offered is reasonable and also that there is no allegation of fraud and irregularity. The court upheld the principles laid down so far through various judgments and summarised thus:[17]

> The principles which should govern confirmation of sales are well established. Where the acceptance of the offer by the liquidator is subject to confirmation of the court, the offeror does not by mere acceptance get any vested right in the property so that he may demand automatic confirmation of his offer. The condition of confirmation by the court operates as a safeguard against the property being sold at inadequate price whether or not it is a consequence of any irregularity or fraud in the conduct of the sale. In every case it is the duty of the court to satisfy itself that having regard to the market value of the property the price offered is reasonable. Unless the court is satisfied about the adequacy of the price the act of confirmation of the sale would not be a proper exercise of judicial discretion. It is well to bear in mind the other principle which is equally well settled, namely, that once the court comes to the conclusion that the price offered is adequate, no subsequent higher offer can constitute a valid ground for refusing confirmation of the sale or offer already received.

The question regarding the "first charge" on the sale proceeds of the properties under the e-auction proceedings under the SARFAESI Act came up before the High Court of Madras in *State Bank of India* v. *Joint Director General of Foreign Trade, Ministry of Commerce*.[18] In this case a public notice was issued by the Joint Director General of Foreign Trade, Ministry of Commerce claiming that from the sale proceeds of auction by the consortium of banks from the defaulting company, first settlement will be the revenue due to the Government towards custom duty. The court observed that section 35 of SARFAESI Act, has an overriding effect over other laws and the Customs Act, 1962 and Central Excise Act, 1944, have no provision creating first charge over the dues of the secured creditor. The court held that since there is no provision for claiming a first charge under the Central Excise Act and the Customs Act, there is legal basis for the Central Government to claim any such priority. The

15 *Supra* note 12. *Vasu P Shetty* v. *Hotel Vandana Palace*, AIR 2014 SC 1947.

16 (2015) 10 SCC 94.

17 *Id*., para 36 to 40.

18 WP.Nos.24864 and 32325 of 2015, decided on Dec.18, 2015.

court upheld the object of the SARFAESI Act which provides a speedy remedy to the bank and the secured creditor to recover the loan amounts.

However, with regard to sale of mortgaged property, the High Court of Delhi in *Nupur Enterprises* v. *Punjab National Bank,*[19] held that in order to sell the mortgaged property by private treaty, consent of mortgager is essential within the meaning of rule 8 (8) of Security Interest (Enforcement) Rules, 2002. These rules though, provide for several modes of disposal of the property at the hands of the secured creditor including the method of obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying such assets, by inviting tenders from the public or by private treaty, it must necessarily be 'on such terms as may be settled between the parties in writing.'It is one of the pre-conditions for initiation of the process through any of the modes of sale. Nonethless, the court in this particular case found that the borrowers abused the process of law to their advantage at every stage, to delay the process of sale by the bank and hence devoid of any equitable relief.

Waiver of pre-deposit

This is another instance where the litigants knock the door of apex court inspite of the settled position of law in this regard. The matter is relating to the waiver of pre-deposit under SARFAESI Act.[20] The High Court of Bombay (Nagpur) Bench decided in *Narayana Farm Produce Pvt. Ltd* v. *The Bank of Maharashtra,*[21] the question whether provision of section 18 of SARFAESI Act pertaining to pre-deposit for entertainment of appeal is unconstitutional and against principles of natural justice. The court held that appellate tribunal did not have jurisdiction to waive condition of pre-deposit though in view of third proviso to section 18 of Act, 2002, it could have reduced security deposit to the extent of not less than 25 percent of debt referred to in second proviso. In this case the appellate tribunal rightly held that condition precedent of making pre-deposit for filing appeal under section 18 of Act, 2002 was mandatory and complete waiver of pre-deposit was not envisaged even while filing appeals against interlocutory orders. The court applied the ruling given by the apex court in this case and rightly observed that pre-deposit criteria cannot be waived off by any court since it is provided in the statute and is not unconstitutional.

Definition of 'Borrower' under SARFAESI Act

In *Kotak Mahindra Bank Ltd*. v. *Trupti Sanjay Mehta,*[22] the High Court of Bombay held that by virtue of restrictive definition of borrower under section 2 (f) only debts which are assigned to a bank from another financial institution or to financial institution from a bank, alone are covered under the term 'borrower'. It does not include a debt which is assigned to a bank or financial institution by non-banking financial institution. The secured creditor can initiate measures under the SARFAESI

19 [2015]131 SCL 248.
20 *Narayana Chandra Ghosh* v. *UCO Bank* (2011) 4 SCC 548.
21 WP. No. 5818 OF 2015, decided on Dec. 16, 2015.
22 [2015]131 SCL 699; AIR 2016 Bom 123.

Act only against the borrower as defined under the Act. The definition of borrower fulfills two criteria (i) who has been granted financial assistance by any bank or financial institution and (ii) who has given any guarantee or created any mortgage or pledge as a security for financial assistance granted by any bank or financial institution and includes a person who becomes a borrower of securitisation company or reconstruction company upon acquisition by it of any rights or interest of any bank or financial institution in relation to such assistance. This definition clearly restricts non-banking financial institution or a private person. The question that came for consideration in this case was whether the bank to whom a debt has been assigned by the non-banking financial corporation is entitled to adopt proceedings under the SARFAESI Act or not. The court held that it is not entitled to adopt proceeding under the Act and upheld the order passed by DRT and confirmed by DRAT.

Applicability of SARFAESI Act to State of Jammu and Kashmir

In *Bhupinder Singh* v. *Union of India*,[23] the High Court of Jammu and Kashmir took a very contrary approach towards the application of SARFAESI Act in the state. It held that the Parliament does not have legislative competence to make laws contained in sections 13,17(A),18(B),34,35 and 36 so far as they relate to the State of Jammu and Kashmir. It further held that the provisions of the SARFAESI Act can only be availed by the banks originating from the state. This decision is going to have far reaching effect in the banking sector. The court observed that in the event of framing such law, it should ensure that interests of state subjects/citizens of Jammu and Kashmir *qua* their immovable properties are not affected by transferring the same to non-state subjects. This judgment left the financial institutions at the mercy of borrowers. This approach of the court is not justified in the interest of financial institutions because while they provide loan to borrowers they should be left with power to recover it from them in case of non-repayment. This is an essential banking function. The economic development of the state will also get affected if this view is taken, though technically court may be justified for their constitutional interpretation. The court opined:[24]

> The Parliament has no legislative competence to make laws in respect of J&K, which would affect the interests of the State subjects/citizens of the State as defined by law and section 6 of the Constitution of J&K qua their immoveable properties. It is the State in terms of section 5 of the Constitution of J&K, which has the absolute sovereign power to legislate laws touching the rights of its State subjects/ citizens qua their immoveable properties. The State legislature, in terms of section 140 of Transfer of Property Act, 1882, has authorized for mortgage of property in favour of the Institutions mentioned therein. In respect of

23 AIR 2015 (NOC 1262) 492: (2016) 1 BC 127.
24 *Id*., para 46

> schedule first, only simple mortgage has been authorized to be executed in their favour. The sale of immoveable property in pursuance to a Civil Court Decree obtained by the bank/financial Institution in respect of the mortgaged property cannot be made in favour of the non-State subjects. Since the field of legislation as prescribed in List I, Entries of some of which have been extended to the State of J&K, do not authorize the Union Parliament to legislate law, as already stated, which affects the interests of the State subjects/citizens of J&K qua their immovable property, the competence of the Parliament to legislate section 13 (1) and (4) is held to be beyond its legislative competence to the extent of State of J&K. Similarly sub section (1) of section 13 of the Act of 2002, which prescribes that "notwithstanding anything contained in section 69 & 69-A of Transfer of Property Act", would not be applicable to the State of J&K, inter alia, the Union Parliament has not legislative competence to enact law relating to transfer of property in the State of J&K and secondly reference is made to provisions of Transfer of Property Act, which are applicable to the entire country excepting the State of J&K, which has its own law called Transfer of Property Act, 1882. Furthermore, section 13 cannot be made applicable in its entirety in view of its non-obstanate clause to the State of J&K. Similarly section 17 (A) of the Act of 2002, is beyond the legislative competence of the Union Parliament as even extending jurisdiction of the existing Court in the *State of J&K* is covered by Entry 'administration of justice' and Union Parliament lacks legislative power to enact such provision in respect of State of Jammu and Kashmir. Same reasoning applies to section 18(B) as well. On the same analogy, Union Parliament lacks legislative competence to enact provisions like section 34, 35 and 36 of the Act of 2002. Section 13(1) and section 13(4), being the kernel of the Act of 2002, further, as already stated, the Union Parliament having no legislative competence to enact laws, vide 17(A), 18(B), 34, 35, 36, the Act of 2002 cannot be implemented in the State of J&K.

Therefore, this decision of the High Court of Jammu and Kashmir opens up the debate regarding the competence of Parliament to legislate even in the commercial field. It is now for the apex court to define the parameters of application of banking law and the term 'banking' as per the constitutional provisions.

Norms for classifying borrower's account as Non-Performing Assets (NPA)

The apex court had an occasion to look into a very important question regarding the nature of NPA in *Keshavlal Khemchand and Sons Ltd.* v. *Union of India*.[25] It examined the issue whether the function of prescribing the norms for classifying a

25 AIR 2015 SC 1168.

borrower's account as a NPA is an essential legislative function or not. The court asserted that it is not an essential legislative function because laying down norms for NPA requires a constant and close monitoring of the financial system and demands considerable amount of expertise in the areas of public finance, banking *etc*., and that they require a periodic revision. Therefore, the definition of expression 'non-performing asset' under section 2(1)(o) is valid and the argument that different regulators are authorized to fix different norms for NPA with reference to different creditors also does not violate the constitutional provision under article 14 since creditors do not form homogenous class. In this case, the definition provided under section 2(1)(o) of the SARFAESI Act as amended by Act 30 of 2004 was challenged. This was challenged before various high courts. The High Court of Gujarat, by a common judgment on April 24, 14 in a batch of writ petitions, held that the amended section 2(1)(o) of the SARFAESI Act is unconstitutional and *ultra vires* article 14 of the Constitution and restored the earlier provisions *i.e.* prior to the amendment of 2004. On the other hand, the High Court of Madras rejected the challenge to the same in the common judgment on May 18, 2014 and held that the Parliament, while defining a non-performing asset under section 2(1)(o) of the Act, only adopted the norms prescribed from time to time by the Reserve Bank of India (RBI) for the purpose of identifying the NPA. Hence, once the legislature has approved the power of RBI classify assets, subsequent amendment pertaining to such classification is justified. The High Court of Gujarat opined that the amended definition of the expression 'NPA' creates two classes of borrowers. In the context of the classification of the account of a borrower as a NPA of the creditor, while one class of borrowers is governed by the guidelines issued by the RBI, the other class of borrowers is governed by the guidelines issued by different authorities.[25a]

The apex court thus rejected the argument by the petitioners that there are no guidelines for treating the debt as a non-performing asset and that the new amendment of the definition of NPA creates uncertainty with regard to the authority to decide

25a The provision reads as follows:

(1) Unless the context otherwise requires:

(o) "Non-Performing Asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss assets, in accordance with the directions or under guidelines relating to assets classification issued by the Reserve Bank.

After the amendment in 2004 it defines:

(1) Unless the context otherwise requires:

(o) "Non-Performing Asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset–

(a) In case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) In any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank.

NPA. The court found that the guidelines of the RBI which lay down the terms and conditions and circumstances in which the debt is to be classified as non-performing assets is clear and the court upheld the validity of the amended definition of NPA under SARFAESI Act and the norms laid down therein.

Similarly, the High Court of Madras also discussed the constitutionality of section 2(1)(o) of the SARFAESI Act as well as the statutory flavour of the guidelines issued by the RBI pertaining to the classification of assets as 'Non Performing Assets' in *Deccan Chronicles Holding Ltd* v. *Union of India*.[26] In this case, it was argued that issuing directions or guidelines relating to asset classification is an essential legislative function and therefore it cannot be delegated and the guidelines issued by RBI cannot be used for defining a NPA under SARFAESI Act. The court held that the RBI got the power to issue guidelines and the definition of NPA under master circular and subsequent categorization of a sub-standard, doubtful or loss asset would not make provision ultra vires nor it would make norms as unconstitutional. The definition of NPA provided under section 2(1)(o) of SARFAESI Act will have to be construed only for the purpose of recovery. The court observed that RBI's norms for asset classification have evolved over a period and are one of the building blocks for financial soundness of Indian banks. Any deviation will render the banking system weaker and are applicable to all banks. With regard to the question of delegated legislation, the court observed:[27]

> There is no delegated legislation involved in the case on hand. The power exercised by the Reserve Bank of India in a separate enactment has been taken note of by the Legislature in the subsequent one. It is only a definition clause, which has been adopted by the Legislature. This has been done to put its machinery into use towards is avowed appropriate recovery. Therefore, no delegated legislation-object of activity is involved and, therefore, contentions raised on the power of delegation and thereafter it is excessive, has no force. Even assuming that there is a delegated legislation involved, the same is not excessive as there are sufficient guidelines available in the earlier enactment and based upon which the circular has been issued by the Reserve Bank of India, being a specialized body.

In *F.S. Saggu* v. *Union of India*,[28] the High Court of Delhi recognised the power of RBI to issue guidelines to banking and financial institutions and also classification of an asset as NPA. It also said that even if the source of power is not mentioned in a document that by itself will not render the document bereft of legal force and rejected

26 [2015]129 SCL 751.
27 *Id*., para 29.
28 [2015]131 SCL 8158.

the argument raised by the petitioner that since the source of power was not declared in the document, it was *per se* bad in law and, therefore, all actions which flow consequently were also without authority of law.

This trend shows that courts are interpreting the powers of RBI in favour of the commercial activities according to the existing practice by commercial world. Even the terms like NPA are interpreted accordingly by the courts. Once the Parliament gives the power to the financial authorities to regulate the specialized and technical field a diversion to this stream will hamper the economic progress of the country.

Power of RBI to issue master circular and caution advice to banks

The power of the RBI to issue master circular and caution advice to banks while dealing with customers became a matter of litigation under article 226 of the Constitution in *S.P. Singla Construction Pvt. Ltd* v. *Reserve Bank of India*,[29] before the High Court of Punjab and Haryana. The court observed that the RBI has been empowered generally to issue directions to the banking companies or to any banking company in particular, keeping in view the banking policy and public interest involved. The need to issue caution advice is to prevent frauds committed by the parties involved in banking transactions and to maintain transparency with regard to advancement of loans to various borrowers. Keeping in view the delicate issue of country's economy, the failure of one bank can have a disastrous effect on the whole banking system. The court found that the caution advice is not a black-listing. The basic purpose is to inform the banks to exercise caution while dealing with a particular entity, corporation, individual etc. Mere inclusion of name in the caution advice is not a direction to the bank to stop existing facilities enjoyed by them or granting facilities. It is only a suggestion to the banks to make detailed and in-depth enquiries before granting or enhancing credit facilities. It is also based on information supplied by various banks and circulated in confidence for the advantage of other banks which are to deal with the request for credit facilities. It is only the internal correspondence which is of confidential nature between the RBI and financial institutions. The court held that the caution advice issued by the RBI is not violative of article 19(1)(g) of the Constitution of India and upheld the legality and validity of the advice issued by RBI. In this case the petitioner's name was included in the caution advice circulated by RBI to all banks and financial institutions.

III PROTECTION TO BANK AUTHORITIES FROM ABUSE OF CRIMINAL JUSTICE SYSTEM

In *Priyanka Srivastava* v. *State of Uttar Pradesh*,[30] the apex court held that the remedy available under section 156(3) of Criminal Procedure Code, 1993 (CrPC) is not of routine nature and cannot be invoked without any responsibility. It should not

29 CWP No. 13207 decided on Dec.15, 2015

30 (2015) 6 SCC 287, per Dipak Misra, Prafulla C Pant JJ.

be invoked merely to harass certain people who are discharging their entrusted duties. It also made it mandatory to have a supported affidavit while filing an application to seek registration of FIR to prevent the abuse of the process of law. In this case when the bank authorities initiated action against the borrower under SARFAESI Act, the borrower instead of resorting to the remedy available under the relevant Act, took recourse to section 156(3) Cr PC to get FIR registered against bank authorities merely to harass them with sole intent to avoid loan repayment. Because of this criminal action initiated, the bank authorities were compelled to concede to borrower's request for one time settlement.

The court strongly protested the practice of the abuse of process of law by the litigants and the trial courts acting without application of mind to the application before them. Judicial Magistrate passed order under section 156(3) Cr PC directing registration of impugned FIR against appellant bank authorities without any application of mind by merely narrating allegations made in application under the Cr PC and ignoring section 32 of SARFAESI Act which gives protection to a secured creditor or its officers for acts done in goodfaith under the Act. The court pointed out that the litigant should approach the court with clean hands and not with malicious intention to settle the scores. The court pointed out:[31]

> ...[A] litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.
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> [A]stage has come in this country where section 156(3) applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of the said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.

31 *Id.* at 306.

This decision highlights the fact as to how the borrowers resort to several ways to avoid re-payment of loan advanced to them by financial institutions and take shelter in the process of law by making unnecessary litigations and wasting the time of judiciary and also hindering the economic progress of the nation. It is unfortunate to see that even the persons who are responsible to govern the country resort to such abuses and hinder the smooth functioning of the financial system. For instance, apex came across such a situation in *State, Rep. by Inspector of Police, Central Crime Branch* v. *R.Vasanthi Stanley*.[32] The respondent who pleaded innocence of the loan sanctioned by banks happened to be a member of 'Rajya Sabha' and also former assistant commissioner of commercial taxes who took voluntary retirement to join public life. She was the co-applicant with her husband to avail loan from the banks by executing pronotes. In other cases, she was a guarantor for her husband to avail loan. It was found by banks that certain documents were forged. This fraud necessitated banks to take recourse to criminal law procedure and FIR was lodged against the borrowers who are involved in this process. At this juncture, the respondent agreed to settle the claims by banks and paid the amount after which she invoked inherent jurisdiction of the High Court of Madras under section 482 of CrPC as also the extraordinary jurisdiction under article 226 of the Constitution for quashment of the criminal proceedings. The quashment of the criminal proceedings was resisted by the bank in the high court stating that certain loan availed of by her husband in which she was the guarantor also remained unpaid. During the pendency of the cases before the high court, the husband breathed his last. The high court quashed all the proceedings against the accused including the respondent in this case. Hence, the matter came up before the Supreme Court by invoking article 136 of the Constitution of India. The court had an occasion to analyse the financial fraud committed by the borrowers and knocking the doors of high courts to escape the penalties provided under the law. The court set aside the order passed by the high court and directed the trial Magistrate to proceed in accordance with law. The court observed[33]

> [A]s far as the load on the criminal justice dispensation system is concerned, it has an insegragable nexus with speedy trial. A grave criminal offence or serious economic offence or for that matter the offence that has the potentiality to create a dent in the financial health of the institutions, is not to be quashed on the ground that there is delay in trial or the principle that when the matter has been settled it should be quashed to avoid the load on the system. That can never be an acceptable principle or parameter, for that would amount to destroying the stem cells of law and order in many a realm and further strengthen the marrows of the unscrupulous litigations. Such a situation should never be conceived of.

32 AIR 2015 SC 3691.
33 *Id.*, para 14.

The respondent during the argument before the court contended that she was not aware of the business activities carried on by her husband and also that she had signed the documents as instructed by her husband without any intention or knowledge to cheat the banks. However, the apex court brush aside all these arguments and advised the high courts to be cautious while exercising inherent power under section 482 Cr PC especially when the matter relates to economic offences. It advised that they must exercise this power only when there was manifest injustice or was abuse of the process of the court if such power is not exercised. The criminal proceedings initiated should not be quashed merely on the ground of settlement of amount by the parties. The reason being that it is not a case of simple assault, or a theft of trivial nature but a offence which is well planned and committed with a deliberate motive of making personal profit regardless of the consequence of it to the society at large. This same approach was again upheld by the apex court in *Central Bureau of Investigation* v. *Maninder Singh.*[34] In this case the borrower opened two different current accounts just to ensure that the pecuniary limits allowed will be enjoyed without any limits. Accordingly, he availed various financial facilities from the bank. He submitted forged documents as genuine in order to embezzle the public money. After facing serious charges of forgery, the borrower settled the matter with bank and approached high court to quash the criminal proceedings against him. The High Court of Delhi quashed the proceedings placing reliance upon *Nikhil Merchant's* case.[35] Nonethless, high court ignored the decision of apex court in *Vikram Anantrari Doshi,*[36] where court distinguished *Nikhil Merchants* case and observed that frads in by banking sector exposits fiscal impurity and such financial fraud is an offence against society at large. The high court in the present case ignored the facts that the borrower used the state machinery to keep the matter pending for so many years coupled with the fraudulent conduct of the respondent. It also ignored the impact of this kind of offence on the society. Therefore, apex court once again was forced to remind the high courts not to use its inherent power sparingly especially when it relates to economic offences involving financial institutions and public money.

IV RESERVE BANK OF INDIA ACT: OVERRIDING EFFECT

The question of overriding effect of the provision under section 45-MB(1) of the Reserve Bank of India Act, 1934 (RBI) and sections 391 to 394 of the Companies Act arose in *Integrated Finance Company Limited* v. *Reserve Bank of India.*[37] The apex court held that chapter III B of the RBI Act, incorporated by the RBI (Amendment) Act, 1997 overrides section 391 to 394 of the Companies Act and also that chapter III B has been given an overriding effect over all other laws including the Companies Act. In this case, RBI issued a circular to a non-banking finance company (NBFC)

34 AIR 2015 SC 3657.
35 AIR 2009 SC 428.
36 2014 AIR SCW 5567.
37 (2015)13 SCC 772.

prohibiting it from accepting deposits from any person, in any form whether by way of fresh deposits or renewal of the existing deposits. However, when the appellant company faced severe problems in running its operations due to decline in its profits, a scheme of compromise was entered into by the company with its creditors and bond holders. Accordingly, instead of repaying the amount in accordance with the terms and conditions of deposit, such amount were converted to debentures with interest @ 6%, convertible into equity shares within a period of one year. The court held that this scheme was introduced only with a view to avoid repayment to small depositors and contradicts the mandatory requirements under section 45-QA(1) and was contrary to public policy. With regard to question of applicability of section 45-Q of the RBI Act, 1934 to a scheme of compromise with creditors under sections 391 to 394 of the Companies Act 1956, the court held that section 45-QA of the RBI Act, 1934 was a bar to a scheme under sections 391 to 394 of the Companies Act [38]:

> [W]hilst approving the scheme, the Company Court does not act as a rubber stamp. The Companies Act has to be satisfied that the meetings of the creditors concerned have been duly held. It has to be satisfied that in the meetings concerned, the creditors or members of any class have been provided with relevant material to enable them to take an informed decision as to whether the Scheme is just and fair. The Court is also required to conclude that the proposed Scheme of compromise or arrangement is not violative of any provision of law and is not contrary to public policy. Furthermore, the Court has to be satisfied that members or class of members or creditors who may be in majority are acting bonafide and have not coerced the minority into agreement. Above all, the Court has to be satisfied that the Scheme is fair and reasonable from the point of view of a prudent man of business taking commercial decisions, which are beneficial to the class represented by them. It is true that whilst sanctioning the Scheme, the Company Court is not required to act as a *Super Auditor*. No doubt whilst considering the proposal for approval, the Company Judge is not required to examine the scheme in the way of a *carping critic*, *a hair-splitting expert*, *a meticulous accountant* or a *fastidious counsel*. However at the same time, the Court is not bound to superficially add its seal of approval to the scheme merely because it received the approval of the requisite majority at the meeting held for that purpose.

This decision shows how the company interprets the circulars issued by regulator of financial sector to their benefit ignoring the interest of the consumers of financial services who reposed faith in the system.

38 *Id*., at 794.

RBI's duty of confidentiality *viz a viz* right to information under Right to Information Act, 2005

In *Reserve Bank of India* v. *Jayantilal N. Mistry*,[39] several applicants through RTI application sought certain information under the Right to Information Act, 2005 regarding the details of the loans taken by the industrialists which had not been repaid, the names of top defaulters who had not repaid their loans to public sector banks, details of the show-cause notices and fines imposed by RBI on various banks, investigation and audit reports relating to banks, advisories issued to foreign branches of Indian banks *etc*. The Central Information Commission (CIC) through its order directed RBI to disclose the information to the applicants. However, RBI denied it on the ground of economic interest, commercial confidence, fiduciary relationship with other banks and public interest involved with the banking sector. RBI relied on the exemptions provided under section 8 (1) (a) and (e) of the RTI Act. RBI approached by way of writ petitions before the high courts of Bombay and Delhi against the decision of CIC. Subsequently, RBI also filed a petition in the Supreme Court to transfer the pending cases before the apex court. The issue involved in these cases was whether the information sought for under the Right to Information Act, 2005 could be denied by RBI and other banks to the public at large on the ground of economic interest, commercial confidence, and fiduciary relationship with other bank on the one hand and the public interest on the other.

The apex court discussed the scope of information received by banks from RBI relating to financial health and probity in banking and financial system of the country such as the details of unpaid loans by industrialists, names of top defaulters, investigation and audit reports relating to banks, advisories issued to foreign branches of Indian banks.etc.. The apex court held that when it comes to national economic interest, disclosure of information about currency or exchange rates, interest rates, taxes, regulation or supervision of banking insurance and other financial institutions, proposals for expenditure or borrowing and foreign investment could in some cases harm the national economy, particularly if released prematurely. Hence, they can be justified in withholding it from disclosure. However, lower level economic and financial information like contracts and departmental budgets should not be withheld under this exemption and directed RBI to disclose the information and affirmed the orders of CIC. The court upheld the scope of fiduciary relationship which consists of the following rules: [40]

(i) No conflict rule – A fiduciary must not place himself in a position where his own interests conflict with that of his customer or the beneficiary. There must be 'real sensible possibility of conflict.

(ii) No profit rule – A fiduciary must not profit from his position at the expense of his customer, the beneficiary.

39 (2016) 3 SCC 525.

40 *Id*., at 530.

(iii) Undivided loyalty rule – A fiduciary owes undivided loyalty to the beneficiary, not to place himself in a position where his duty towards one person conflicts with a duty that he owes to another customer. A consequence of this duty is that a fiduciary must make available to a customer all the information that is relevant to the customer's affairs.

(iv) Duty of confidentiality – A fiduciary must only use information obtained in confidence and must not use it for his own advantage, or for the benefit of another person.

The court further observed that when the RBI obtains the reports of the inspections, statements of the banks, information related to the business, they are not under the pretext of confidence or trust so there is no fiduciary relationship between RBI and financial institutions. Neither RBI nor the banks act in the interest of each other. RBI is supposed to uphold public interest and not the interest of individual banks. The court gave emphasis on the concept of economic interest. It stated:[41]

> Economic interest of a nation, in most common parlance, are the goals which a nation wants to attain to fulfill its national objectives. It is the part of our national interest, meaning thereby national interest cannot be seen with the spectacles (glasses) devoid of economic interest. It includes in its ambit a wide range of economic transactions or economic activities necessary and beneficial to attain the goals of a nation, which definitely includes as an objective, economic empowerment of its citizens. It has been recognized and understood without any doubt now that one of the tools to attain this goal is to make information available to people, because an informed citizen has the capacity to reasoned action and also to evaluate the action of the legislature and executives, which is very important in a participative democracy and this will serve the nation's interest better, which as stated above also includes its economic interests. Recognising the significance of this tool it has not only been made one of the fundamental rights under Article 19 of the Constitution but also a Central Act has been brought into effect on 12.10.2005 as the Right to Information Act, 2005.

If the information is available with a regulatory agency not in fiduciary relationship, there is no reason to withhold the disclosure of the same. The financial institutions have an obligation or duty to provide all the information to RBI and such information shared under an obligation cannot be considered to being within the purview of fiduciary relationship.

41 *Id*., at 532.

V RECOVERY OF DEBTS DUE TO BANKS AND FINANCIAL INSTITUTIONS ACT, 1993

In *Indian Bank* v. *Manilal Govindji Khona*,[42] the question was with regard to the authority of high court to condone the delay and remand the matter relating to recovery of debts to DRT for reconsideration inspite of the rejection of condonation of delay by DRT and Delhi Recovery Apellate Tribunal DRAT. In this case a consent decree was passed against respondent and in the execution of that decree, the court directed court receiver to sell the mortgaged property of respondent in a public auction, despite the fact that DRT concerned had already been established prior to the said direction. The appellant bank purchased mortgaged property. Later, respondent filed a miscellaneous application for setting aside said sale and rectification of recovery certificate and decree. There was a delay of 23 days. This delay of condonation was rejected by both the DRT courts. The apex court held that high court rightly condoned the delay by exercising its discretionary power keeping in view rights of respondent mortgagor in respect of the immovable property concerned. The court further held that after coming into existence of DRT, the proceedings before court stood automatically transferred to DRT in view of section 31 of 1993 Act and hence it was not permissible in law for court to direct the court receiver to sell the property of respondent in public auction by executing court decree and such a sale is void *ab initio* in law.

In *GSL (India) Ltd* v. *Asset Reconstruction Co.(India) Ltd*,[43] the High Court of Bombay decided on the question of territorial jurisdiction of DRTs to entertain the securitization application. The DRT-III, Mumabi, held that it had no territorial jurisdiction to entertain the securitization application as the secured property is situated in the State of Gujarat. DRAT also agreed with the order of DRT-III, Mumbai, hence the aggrieved parties approached the High Court of Bombay challenging the correctness, legality and validity of the order. The high court addressed the issue whether the jurisdiction of the DRT for entertaining a securitization application under section 17 of the SARFAESI Act is to be determined on the basis of the principles enshrined in section 16 of the CPC or section 19(1) of the RDDBFI Act. The court observed that wide powers have been given to banks and financial institutions to enforce their security without the intervention of the court. If the borrower or any other person is aggrieved by such enforcement, it has to approach the DRT under section 17 of the Act which will decide whether the measures taken under section 13(4) by the secured creditor are valid or otherwise pass appropriate orders accordingly. The court concluded that the securitization application filed under section 17 of the SARFAESI Act is to be disposed of by the DRT, in accordance with the provisions of the RDDBFI Act, insofar as they are applicable. Section 19(1) of the RDDBFI Act

42 (2015) 3 SCC 712.
43 AIR 2016 Bom 43.

categorically circumscribes the jurisdiction of the DRT to entertain an original application filed by a bank/financial institution for recovery of its dues. The provision section 16 of CPC would be wholly inapplicable. The court did not agreed with the full bench decision of High Court of Delhi in *Amish Jain* v. *ICICI Bank Ltd*,[44] and agreed with the decision of High Court of Bombay in *Tushar P Shah* v. *International Asset Reconstruction Co P. Ltd*.[45] and High Court of Gujarat,[46] where the court upheld the overriding effect of provisions under SARFAESI and RDDBFI over the provisions of any other law including Code of Civil Procedure, 1905 CPC.

Interpretation of the term 'debt' under RDDBFI Act

In *Srinivasa Desai* v. *Canara Bank, Bengaluru*,[47] the High Court of Karnataka gave a very flexible interpretation to the word 'debt'. The question for interpretation was whether the employee of the bank can be considered as a debtor within the meaning of section 2(g) of the Act. The court held that if the bank employees has been scrupulous in verifying papers and had acted in a bona fide manner, without any negligence, then bank employees can be excluded from the purview of the definition provided under the Act. However, in this particular case, it held that when bank employees fraudulently and knowing fully well that they are processing the papers for sanctioning the loan in respect of a non-existing property and has not title, and are parties to the fraud with an intention to sanction the loan to favour the borrower and are also beneficiary directly or indirectly then the word 'debt' has to be construed as recoverable debt from the employees of the bank legally. In this case, the fraud was played by the employee of the bank in sanctioning housing loan in respect of a non-existing property without even verifying the title deeds. The employees of the bank were hand -in- glove with the original borrower of the loan.

This decision of the court is remarkable in the context of growing number of bank frauds in connivance with the employees of the bank. The court in the instant case relied on the decision of the apex court in *Union Bank of India* v. *DRT*.[48] The apex court suggested giving flexible meaning to the term 'debt' in the interest of economic reasons. The literal interpretation of the term 'debt' defined in section 2 (g) would not have allowed the court to bring the employees of the bank under the purview of the Act. The court held that a person need not be a direct borrower to bring under the definition of debtor because of the fraudulent act done by the employee in this particular case. It is to be seen whether it will be justified to apply this as a precedent by other high courts of the country because this is only based on facts of the case and not the interpretation of letter of law in the Act.

44 2013 (1) D.R.T.C. 70 (Delhi).
45 2012 (6) Bom. C R 200.
46 *Bank of Baroda* v. *Balbir Kumar Kaul*, AIR 2010 Guj 124.
47 AIR 2015 Kar. 65.
48 AIR 1999 SC 1381.

VI BANKING REGULATION ACT, 1949

Wilful defaulter

In *Kingfisher Airlines Ltd* v. *Union of India*,[49] the question before High Court of Bombay was whether the denial of legal representation of petitioner company through its advocate to appear before redressal grievance committee amounted to denial of reasonable opportunity of defending itself and violation of natural justice. The court held that there is no violation of principles of natural justice and denial was justified. In this case, a notice was sent to Kingfishers airlines under RBI's master circular to include its name in list of wilful defaulters. This direction was issued by the RBI by exercising its power under section 35-A of the Banking Regulation Act, 1949. This circular laid down guidelines for the purpose of permitting banks to declare a borrower as 'wilful defaulter' and procedure that need to be followed by the grievance redressal committee was also laid down. The court observed that the purpose of the master circular issued by RBI is to find out whether the defaulter is siphoning of funds or diverting funds and if the bank comes to that conclusion then it can put further restrictions on the borrowing ability of the borrower. There is no adjudication made by the grievance redressal committee but it only makes the assessment of facts and the conclusion is arrived at thereafter on the basis of these facts. Hence, there is no substance to the argument advanced by the petitioner that the nature and function was not administrative but quasi-judicial which provides a legal right to be represented by a lawyer. The division bench, however, considering the peculiar facts and circumstances of the case and to avoid further delay, the petitioner was permitted to appoint an advocate to represent it provided the petitioner gives an undertaking that hearing of the matter would be concluded in one day. Similarly, the High Court of Calcutta in *Kingfisher Airlines Ltd* v. *Union of India*,[50] held that for the hearing purpose before the Grievence Redressal Committee (GRC) the presence of an advocate is not required. The fact that GRC is not to decide any *lis* between the parties, nor it is to adjudicate any dispute and to inquire into any charge and record its findings, is the basis for reaching this conclusion by court. It is only to take a view on the basis of records of banks related to borrowers loan account. However, the High Court of Delhi in *Punjab National Bank* v. *Kingfisher Airlines Ltd*,[51] gave a contrary view and disagreed with the views expressed by the High Courts of Calcutta and Bombay and held that GRC constituted by the bank as per the RBI master circular, erred in denying representation through the advocates. Therefore, the borrowers who are proposed to be classified as willful defaulters need to be given an opportunity of hearing before the GRC and are entitled to be represented through an advocate. However, it further held that GRC is empowered to control the duration and guide the hearing.

49 2015 (6) Bom. CR 315.
50 (2015) 1 Comp L J 151 (Cal).
51 2016 (154) DRJ 164.

The purpose of declaration of will ful defaulter by the banks/financial institutions is to put in place a system to disseminate credit information pertaining to will ful defaulters for cautioning banking institutions regarding the risk of advancing loan facilities to them and also to ensure that further bank finance are not made available to them. The list of will ful defaulters needs to be prepared by the financial institutions on quarterly basis and communicated thereof to the SEBI and Credit Information Bureau (India) Ltd. The proposal to classify the borrower as will ful defaulter along with the reasons needs to be intimated to the borrower and 15 days time to make representation against the proposed decision need to be given.

Once the guidelines framed are not violating the natural justice principle, insisting for the representation by an advocate before the GRC by the borrower needs analysis. On the one hand, borrower makes default in repaying the loan advanced to him, mostly they are corporate clients and the amount of loan advanced is huge. Secondly, once the lawyers are allowed representation, lot of adjournments and various interpretations of the terms agreed by the parties will take place which will delay the process and cause commercial harm. This can be witnessed in the case of a borrower, who was allowed representation by lawyer by apex court in *State Bank of India* v. *Kingfisher Airlines Ltd.*[52] However, inspite of declaring the defalut borrower as wilful defaulter by State Bank of India, the borrower escaped from India without repaying the huge amount of loan due to banks from him. It is appreciable that RBI has extended the ambit of 'wilful defaulter' to include not only the primary defaulting entity, but also the guarantors of its loans, and individuals on the boards of companies. However, the Courts approach to these cases need to be vigilant.

VII PREVENTION OF MONEY LAUNDERING ACT, 2002

Money Laundering has become a growing threat to the national interest. The Prevention of Money Laundering Act, 2002 (PMLA) is a special legislation which deals with the offence of money laundering, it will have an overriding effect on the general provisions of the Cr PC in case of conflict between them. Courts cannot brush aside this fact while deciding the case before it even if it relates to the procedure of granting bail for the offence. PMLA lays down the conditions for grant of bail to any person accused under it. The conditions laid down in it are mandatory in nature. Apart from this, the burden of proof to prove that the proceeds of crime are not involved in money laundering lies with the accused. In *Rajiv Chanana* v. *Deputy Director, Directorate of Enforcement,*[53] the High Court of Delhi examined the question whether the attachment of property must be lifted when a person accused of a scheduled offence under PMLA has been acquitted. The court held that the power of attachment of property is limited to attaching 'proceeds of crime'. The expression 'proceeds of crime' is defined under clause (u) of section 2 (1) of the PMLA. The edifice of PMLA

52 Special Leave to Appeal Case Nos.26420-26421/2015 on Sep. 18, 2015.
53 [2015]129 SCL 771.

rests on the foundation of existence of a scheduled offence. Therefore, acquittal of the concerned person of charges of a scheduled offence, ipso facto, erodes the foundation of the offence of money laundering.

The court gave a literal interpretation to the provisions of PMLA and came to the conclusion that attachment of proceeds of crime cannot continue if the alleged scheduled offence is not established after trial. It further observed that given the scheme of the PMLA attachment of property (proceeds of crime) must be lifted if it is found that the scheduled offence, on the basis of which attachment was affected, does not exist. In the absence of a scheduled offence, the question of existence of any proceeds will not arise.

In another instance, the High Court of Delhi refused to entertain the writ petition filed challenging the impugned order passed by the adjudicating authority under the Act in *Rose Valley Hotels & Entertainment Ltd* v. *Secretary, Department of Revenue, Ministry of Finance*.[54] This is on the basis that alternative remedy is available for filing appeal under section 26 of PML. Section 26 of the PMLA act provides for appeals to the appellate tribunal by any person aggrieved by an order made by the adjudicating authority under the Act. The same approach was taken again by the High Court of Delhi in *Gautam Khaitan* v. *Union of India*,[55] when it decided whether a provisional attachment of properties by the officer concerned without filing charge sheet under section 173 Cr PC is valid. The court held that since the concerned officer had reason to believe that properties in issue were involved in money laundering he was justified in doing so. The reason being that if the properties were not attached that will lead to frustration of proceedings. Burden of proof was on the accused to prove that concerned officer lacked jurisdiction. It is to be noted that the property in question was proceeds of crime. If attachment was not ordered, proceeds were likely to be concealed or transferred from one place to another making it difficult for the authorities concerned to prove it. Therefore, provisional attachment of properties by officer concerned without filing charge sheet under section 173 Code was valid.

The court in this case observed that petitioners cannot bypass the remedy available under the statute and invoke the writ jurisdiction under 226 of the Constitution. When the adjudication officer instituted a complaint under section 5(1) of the PMLA and notice has been served on the aggrieved persons, they had complete opportunity to demonstrate, as to why the order of attachment ought not to continue. Apart from this, an appeal is available under section 26 of the PMLA against the order of the adjudicating authority before an appellate tribunal. A remedy of second appeal before the concerned high court under section 42 of the PMLA is also available. Moreover, the time taken for the trial of offences under both the PMLA and scheduled offences is not predictable, it will result in making the object of PMLA futile. If properties which reflect the proceeds of crime change hands it could lead to creation

54 [2015]131 SCL 749.
55 2015 Cri L J 2112.

of *bona fide* interest which may make it difficult if not impossible for the concerned authorities to retrieve the proceeds of crime.

It can be seen that litigants always take the shortest route to get the legal remedies and the approach of high court to examine the provision of PMLA is remarkable in the interest of economic justice.

In *Arun Kumar Mishra* v. *Directorate of Enforcement*,[56] the High Court of Delhi addressed the question whether proceedings initiated under sections 3 and 4 of the PMLA can be quashed. The court held that provisions of law cannot be retrospectively applied as it is against article 20(1) of Constitution. No person can be prosecuted for an alleged offence which occurred earlier applying provisions of law which have come into force after alleged offence. In this case, the alleged offence was committed prior to the coming to the enforcement PMLA.

In *Gautam Kundu* v. *Manoj Kumar, Assistant Director, Eastern Region, Directorate of Enforcement (Prevention of Money Laundering Act) Govt. of India*,[57] apex court examined the question whether the refusal to grant bail in the offence relating to money laundering by High Court of Calcutta under section 439 Cr PC was arbitrary and capricious. In this case the appellant was arrested on suspicion of commission of offence punishable under provisions of PMLA. The Supreme Court refrained from deciding the question regarding the offence of money laundering since it related only to a bail application. Moreover, since the matter is pending before the division bench of the high court, any observations or remarks made by the court may cause prejudice to the case. Therefore, the Supreme Court found that at the time of refusing the bail application by the high court, it has exercised its discretion judiciously keeping in mind the nature of the offence and the probability of commission of further offence by the accused while on bail. Therefore, it can be seen that the courts are taking a very cautious approach towards the offence relating to the PMLA.

VIII DEPOSIT INSURANCE AND CREDIT GUARANTEE CORPORATION ACT, 1961(DICGC ACT)

The DICGC Act was passed to safeguard the interest of small depositors who had parked their funds with banking companies and to guarantee that a certain amount will be repaid to investors when the banks goes into liquidation and winding up. The question in this regard was raised for the first time in the year 1948 when some bank went into liquidation. In *Deposit Insurance & Credit Guarantee Corpn.* v. *Raghupathi Raghavan*,[58] Supreme Court gave a landmark decision in a special leave petition filed by the corporation. It suggested for the revision of insurance amount of deposit from one lakh to five lakh considering the depletion in the money value since 1993 and the power vested with the corporation under section 16(1) of the Act in consultation with the central government.

56 2015 VAD (Del) 353.
57 AIR 2016 SC 106.
58 (2015) 9 SCC 629.

However, in this case, the court held that the high court had exceeded its authority while giving a direction to the official liquidator to pay the depositors in excess of rupees one lakh as insurance amount against the statutory provisions provided under the Act. According to the statutory provisions mentioned, the investors will be provided with the insurance coverage of one lakh rupees irrespective of the amount of deposit held by them with the bank. According to section 21 of the Act, DICGC had got a right to get money from the official liquidator. Moreover, it also clarifies that there shall not be any other preferential creditor who would be getting any amount from the official liquidator till the amount payable is paid to the DICGC.

In *BHS Industries* v. *Export Credit Guarantee Corp*.,[59] the apex court examined the question relating to the liability of insurer to indemnify loss to the insured on the basis of the payment of premium alone. The insurance risk covered in the present case related to the commercial transaction under marine insurance contract. The court made the strict interpretation to the terms of contract entered into between the parties and held that since the insurer undertakes to compensate the loss suffered by the insured on account of risks covered by the insurance policy, the terms of the agreement have to be strictly construed to determine the extent of liability of the insurer. The insured cannot claim anything more than what is covered by the insurance policy. Hence the repudiation of acceptance of goods by the buyer followed by repudiation of insurance claim by the insurer is justified. The court clarified that payment of premium alone does not make corporation liable to indemnify loss or fasten liability on it. In this case, the aggrieved person made default in following the agreed terms in the contract of insurance.

Though the strict interpretation of the insurance contracts is justified especially in marine insurance, same need not be made applicable to all the other insurance contracts because of the unilateral, standard form of contract agreement entered by the insurer with the insurance companies.

Assignment and transfer of insurance policies

In *LIC of India* v. *Insure Policy Plus Services Pvt. Ltd*,[60] the apex court examined the question whether insurance policies are freely tradable and assignable, prior to the Insurance Law (Amendment) Act, 2015. This is an appeal case from the High Court of Bombay. The high court observed that life insurance policies were personal, and moveable property of the policy holder and can be said to be an actionable claim within the meaning of section 3 of the Transfer of Property Act, 1882. Life insurance policies are not social securities, therefore, they are not allowed to be traded. The apex court held that the Insurance Laws (Amendment) Act, 2015 was neither a declaratory nor clarificatory piece of legislation and was not retrospective in nature. Prior to the amendment, insurer was bound by the provision of section 38 to accept a transfer or endorsement except in cases where it could establish fraud. However,

59 AIR 2015 SC 2824.
60 (2016) 2 SCC 507.

amendment to section 38(2) gives insurer a discretion as to whether or not to accept an assignment provided its decision is predicated on transfer or assignment being (a) malafide, or (b) contrary to the interest of the policy holder, or (c) against public interest, or (d) only for trading in the policy. On the other hand, section 38(9) of the Insurance Laws (Amendment) Act, 2015 protects the rights and remedies of assignees that arose prior to the commencement of the amendment Act. The court also held that the assignment of insurance policy cannot be denied on the ground that it is contrary to the public policy. The court observed:[61]

> It is not appropriate to import the principles of public policy, which are always imprecise, difficult to define, and akin to an unruly horse, into contractual matters. The contra proferentem rule is extremely relevant in as much as it is the appellant who has drafted the insurance policy and was, therefore, well positioned to include clauses making it specifically impermissible to assign policies. In the absence of any such covenant, the appellant cannot be heard to say that such transfers or assignments violate public policy. In any event, the general global practice is to permit assignments of insurance policies.

It is to be remembered that generally, life insurance policies are a measure of social security for the family members of the life assured in the absence of adequate savings. These policies are often the only financial security available to the family members of the deceased life assured. Therefore, in order to curb the fraudulent activities taking place in this sector, the corporation should be given power to regulate the assignments and the interference from the court need to be limited.

IX CONCLUSION

While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sectors do not have a level playing field as compared to other participants in the financial markets of the world. Constant judicial interference in matters like condonation of delay, powers of DRT *etc* where law is settled, needs to be avoided. It is a matter of concern when defaulters of loan use the mechanism of judiciary to their utmost convenience to stall the process of recovery and enjoy a sense of impunity. Courts, in the past, have consciously refused to interfere on graver issues like constitutionality of legislations empowering banks and/or RBI to make rules and regulations *etc*. In reality, the courts from time to time, through their decisions have expressed their reluctance to intervene into the complex and sensitive field of economic and financial matters. With regard to the question of wilful defaulter, it is to be examined whether the reasoning given to validate remedy provided to banks for

61 *Id*., at 520.

recovering their loans under the SARFAESI Act can be squarely applied to the powers vested with the banks to declare borrowers as wilful defaulters, although it is not a recovery mechanism. Considering the sensitivity to the issue of declaration of wilful defaulter, a cautious approach needs to be adopted in the interest of business community. The apex court ruling that section 38 of the Insurance Act, 1938 was substantive law raises concern over the powers of life insurance corporation to issue circulars to deal with the insurance business. In insurance matters also, judicial interference needs to be restricted since it is the contract of *uberimafide* (utmost goodfaith).