3

BANKING AND INSURANCE LAW

*Susmitha P. Mallaya**

I INTRODUCTION

BANKING SECTOR has witnessed very remarkable changes in 2016 with the demonetization drive initiated by the government to curb the challenges of tax evasion and black money in the economic system. As a legislative measure to help the banking sector from the burden of its Non-Performing Assets (NPA), Enforcement of Security Interest and Recovery of Debt Laws and Miscellaneous Provision (Amendment) Act, 2016 was implemented which aims to ameliorate the execution of business activities and facilitate investment leading to higher economic growth and development. Most pivotal legislative contribution in the banking law is the enforcement of Insolvency and Bankruptcy Code, 2016 (IBC) which aims to restructure the borrowings disputes in a time-bound manner. Of course, we have both the Securitization and Debt Recovery Tribunals which are considered as the steps to empower banking institutions to take effective legal action against the defaulters. The judiciary also played a proactive role to address the issues relating to the banking industry, firstly by refraining itself from interfering with the decision of demonetization by providing reasons of non-interference in the policy decision of the government as well as in another instance as a social measure it gave protection to the tenants of borrowers' property from recovery proceeding initiated by the banking institutions for nonpayment of liability. The survey examines some of the selected judgments of the Supreme Court and high courts. It also analyses some important judicial development in the field of the insurance sector.

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

SARFAESI Act empowers banking institution to take effective legal action against the defaulters of loans and advances. In the contemporary scenario, revitalisation of stressed assets has been a key concern for the banking industry. The

* Assistant Professor, The Indian Law Institute, New Delhi.

delay in the process for recovery of debt can be addressed only when the banks aim to look at and work according to the strict guidance and the specifications of various circulars which are issued by the RBI and synergize their actions accordingly. The role of the courts also becomes pivotal since the defaulters approach the court with grievances against the mode of recovery by the banking institutions. Thus in *Vishal N Kalasaria* v. *Bank of India*,[1] the court held that banks cannot arbitrarily evict tenants residing in said tenanted premises by using provisions under SARFAESI Act. It further held that the non-obstante clause in section 35 of the Act cannot be used to deny statutory rights vested with tenants under Rent Control Act. The question of overriding effect of provisions under SARFAESI Act over provisions of Maharashtra Rent Control Act 2000 was considered by the apex court in this case. The court clarified that its earlier decision[2] with regard to the overriding effect of statute cannot be understood to have held that the provisions of the SARFAESI Act override the provisions of the Rent Control Act, and that the banks are at liberty to evict the tenants residing in the tenanted premises which have been offered as collateral securities for loans on which default has been done by the debtor landlord.[3]

It is analysed that it is true that innocent tenants should not be the victims of the recovery proceedings initiated by banking institutions as per SARFAESI Act, since a tenant can be evicted only after following the due process of law, as prescribed under the provision of Rent Control Act which comes under the purview of state legislation and not arbitrarily using the provisions of the SARFAESI Act. On the otherhand, this legal protection should not be used by cunning landlords to delay the repayment of the loan advanced by the financial institutions by giving the mortgaged property in rent. This situation cannot be ignored by the courts and precisely the apex court directed to adjudicate dispute of sham tenancy by giving opportunity to tenant to participate in it, by chief metropolitan magistrate or district magistrate as the case may be, in *Sanjiv Kumar Surajpraksh Aggarwal* v. *State Bank of India*.[4] In this case, the bank which is a secured creditor alleged that tenancy was a sham.

In another instance, the question of an interplay between the Sick Industrial Companies (Special Provisions) Act, 1986 (SICA) and the SARFAESI Act was considered by the apex court in *Madras Petrochem Ltd* v. *BIFR*.[5] In this case, Kurian Joseph and R.F. Nariman, JJ stated that the new legislative scheme *qua* recovery of debts contained in the SARFAESI Act is given precedence over the SICA, unlike the old scheme for recovery of debts contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI). The court examined the meaning of expression "or any other law for time being in force" contained in section 37 of

1 AIR 2016 SC 530: (2016) 3 SCC 762.

2 *Harshad Govardhan Sondgar* v. *International Assets Reconstruction Co. Ltd*. (2014) 6 SCC 1.

3 *Supra* note 1, para 28.

4 (2016) 14 SCC 532.

5 AIR 2016 SC 898.

SARFAESI Act. It observed that if a literal meaning is given to the expression, section 35 will become completely otiose as all other laws will then be in addition to and not in derogation of the SARFAESI Act. However, this could not have been the Parliamentary intendment after providing the same in section 35 of the SARFAESI Act which provides that it will prevail over all other laws that are inconsistent therewith. In this context, SICA will not be included because of the reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market. Hence, the court held that SARFAESI Act will prevail over SICA and it is covered by a non obstante clause in section 35 of the SARFAESI Act and not included in section 37 of the SARFAESI Act.

In this case, the appellant company having eroded its net worth completely, filed a reference under section 15(1) of the SICA before the BIFR. After making an inquiry under section 16(1) of the SICA, the appellant company was declared sick and ICICI was appointed as the operating agency to formulate a rehabilitation scheme. While the process was continuing and the winding up petition was filed before the High Court of Bombay finding that the revival of the company is very difficult, the ICICI issued a notice under section 13(2) of the SARFAESI Act and a sale notice for and on behalf of all the secured creditors of the company. This action by the ICICI was challenged before various forums including the DRT, DRAT and High Court of Delhi. The appeal before the apex court was filed against the order of the High Court of Delhi which held that in view of section 15(1), proviso 3 of the SICA, when construed to include all proceedings under the SICA, it would make the proceedings under SICA, abate on the facts of this case.

This approach of the apex court to give overriding effect to the SARFAESI Act over SICA can be justified from the point of view of secured creditors and the company facing winding up proceedings. However, the court takes a different approach when it comes to rent control legislations where eviction petition is filed. It makes a distinction on the fact that eviction petitions have been held not to be suits for recovery of money. Therefore, a balance approach is taken by the courts in the matter connected with the recovery proceedings under the SARFAESI in the interest of justice to protect the innocent people and punish the financial offenders under the securitization law.

Abuse of process of law by borrowers

The apex court is already over-burdened with cases involving constitutional validity of many provisions under various legislations. Apart from this, it is always forced to decide questions pertaining to the SARFAESI Act. At this scenario, it is painful to see the litigants approaching apex court with the same relief which it has already obtained in the high courts. Thus, in *Pratibha Ramesh Patel* v. *Union of India*[6] court awarded the cost of Rs.1,00,000 for the abuse of process of the court. In this case, the petitioner challenged the constitutional validity of sections 2, 12 and 15(a) of Enforcement of Security Interest and Recovery of Debts Laws (Amendment)

6 (2016) 12 SCC 375.

Act, 2012 by which Multi-State Co-operative Societies were brought within the ambit of SARFAESI Act and Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDDBFI). The petitioner however instituted a writ petition before the apex court under article 32 when a petition was pending before the high court under article 226 for the same relief and on same grounds. This approach by the petitioner resulted in the abuse of process of law. Thus, the court rightly held that having invoked a constitutional remedy before the high court under article 226 of the Constitution, the petitioner, cannot file another petition under article 32 of the Constitution on an identical set of facts for identical relief under the law.

Classification of non-performing assets

Generally, the conflicts always arise between the borrower and banks with regard to the classification of the non-payment of liability into non-performing assets (NPA). In *Morbet Health Care (P) Ltd* v. *Punjab National Bank,*[7] the High Court of Uttarakhand rejected a claim by the borrower company that the declaration of NPA made by the bank before the lapse of six months is against the instructions of the Reserve Bank of India and held that it lacks significance as they are executive instructions without statutory backing. In this case, the borrower company was declared as NPA by the bank since it was found that the company was selling out most of the hypothecated goods leaving for less than the amount due to the bank. The company approached the high court to issue an order or direction in the nature of mandamus commanding the respondent bank not to proceed under the SARFAESI Act against the company and also quash the action of the bank to classify the account of the company as NPA. The court observed:[8]

> It is the settled law that the secured creditor has obligation to communicate the reasons for non-acceptance of the representation or the objection of the borrower. In the instant case, in reply dated 07.01.2016 (Annexure 6 of the petition), the secured creditor has given sufficient reasons for not accepting the objections of the borrower. There is no violation of statutory provisions so as to quash the notice of the respondent bank in exercise of extra ordinary jurisdiction. It does not appear that the secured creditor has arbitrarily classified the accounts of the borrower company as NPA.
>
> The respondent bank, no doubt, is required to protect the loan, which it had sanctioned but, at the same time, the respondent bank should adopt a practical and pragmatic approach for which the RBI has framed guidelines which are binding upon them and which are required to be

7 AIR 2016 Utt 53.

8 *Id.*, para 18.

> followed meticulously. The bank has not acted against the petitioner contrary to the guidelines issued by RBI.[9]

Hence, the high court rightly concluded that there is nothing on record wherefrom one can come to a definite conclusion that the accounts of the writ petitioner were not NPAs as on the date of issuance of the notice under section 13(2) of the Act.

This case shows how the provisions of the legislature are misused by the borrowers which in turn hinders the purpose of the SARFAESI legislation.

Invoking writ jurisdiction under article 226 and 227 when alternative remedy is available

The High Court of Karnataka in *Deepak Apparels Pvt. Ltd* v. *City Union Bank Ltd*.,[10] held that a writ remedy cannot be permitted to be availed as a routine matter, but only in exceptional circumstances like when the statutory body has not acted in accordance with the provisions which are repealed, or when an order has been passed in total violation of principles of natural justice, or when the powers of the statute is under challenge. The court held that writ petition under article 226 of the Constitution should not be entertained when the alternate remedy is available under the SARFAESI Act. Further, the court held that article 227 which relates to the power of superintendence of high courts over all courts and tribunals has to be exercised sparingly when there is a patent error or gross injustice in the view taken by the subordinate court/tribunal. Though, the exercise of the jurisdiction is no doubt discretionary, but the discretion must be exercised on sound judicial principles and the power under article 226 has to be exercised to effectuate the rule of law and not for abrogating it. In this case, the order passed by the debts recovery tribunal, while disposing of an appeal filed under section 17 of the SARFAESI Act was challenged by the petitioners before the single judge of high court, who raised a question as to 'whether a writ petition would be maintainable in view of the alternative and efficacious remedy of an appeal provided under section 18 has not been exhausted by the borrower'. The single judge bench referred the matter for reconsideration by the larger bench in view of divergent views of the two division benches in *Hotel Vandana Palace* v. *Authorized Officer under Securitization & Reconstruction of Financial Assets & Enforcement Security Interest Act,2002* case[11] which was decided by the Dharward division bench of High Court of Karnataka and *Lily Joseph* v. *Authorised Officer, State Bank of India* case[12] which was decided by the Bangalore division bench of High Court of Karnataka. Accordingly, the Chief Justice of High Court of Karnataka constituted a special member bench to decide the question of maintainability of writ when alternative remedy is available under a statute.

9 *Id*., para 22.
10 AIR 2016 Kant 101.
11 2013 (1) AKR 370.
12 2014 (1) AKR 40.

Thus, at the outset, the three member bench justified the reference made by the single judge for which they relied on the decision of the apex court in *Lala Sri Bhagwan* v. *Ram Chand* [13] in which it was held that it is hardly necessary to emphasise that considerations of judicial propriety and decorum are required if a single judge hearing a matter is inclined to take the view that the earlier decisions of the high court, whether of a division bench or of a single judge, need to be reconsidered, he should not embark upon that enquiry sitting as a single judge, but should refer the matter to a division bench or, in a proper case, place the relevant papers before the chief justice to enable him to constitute a larger bench to examine the question. This is a proper and traditional way to deal with such matters and it is founded on healthy principles of judicial decorum and propriety.

The borrower in this case, filed the writ petition before the high court by non-availing of appeal remedy before the debts recovery appellate tribunal for the reason that it requires a deposit of huge court fee, which is neither efficacious nor feasible. This is the usual approach taken by the borrowers by making default in the repayment of the loan availed by them and delay the judicial process. The whole objective of the SARFAESI Act of speedy recovery gets defeated because of this reason. The court observed:[14]

> A perusal of S.13 of the SARFAESI Act shows that without the intervention of the Court or Tribunal, there can be enforcement of security interest by the secured creditor in accordance with the provisions of the Act. Sub-section (4) of S.13 envisages the 'measures' to secure the borrowers' interest, when secured creditor proposes to proceed against the secured asset. One of the 'measures' provided by the statute is to take possession of the secured asset of the borrower, including the right of transfer by way of lease, assignment or realizing the secured asset. S.17 confers right to any aggrieved person to question the 'measures' referred to in sub-section (4) of S.13 of the Act, when taken by the secured creditor. Thus, if any aggrieved person has got any grievance against any 'measures' taken under sub-section (4) of S.13 of the Act, he can approach the Tribunal for the relief.

Thus, the court rightly observed that it is the objective of SARFAESI Act to enable the banks and financial institutions to realize long-term assets and also to manage the problems of liquidity, asset liability mismatches which in turn will improve the exercise of recovery powers to take possession of securities and sell them. This will help the financial institutions to reduce NPA. Of course, in order to prevent the misuse of such wide powers and to prevent prejudice being caused to a borrower on

13 AIR 1965 SC 1767.

14 *Supra* note 4, para 19.

account of an error on the part of the banks, certain checks and balances have been introduced in section 17 of the SARFAESI Act which allows any person, including the borrower, aggrieved by any of the measures referred to in section 23(4) taken by the secured creditor, to make an application to the debt recovery tribunal which has jurisdiction in the matter connected with recovery proceedings, within 45 days from the date of such measures having taken for the reliefs indicated in section 23(3) thereof.

Therefore, this action by the borrower to invoke the writ jurisdiction is not justified. It is a matter of concern that despite repeated pronouncements of apex court to exhaust the statutory remedy available,[15] high courts continue to ignore the availability of statutory remedies under the DRT and SARFAESI Act and exercise jurisdiction under article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues.

In *Shivabassappa I. Kankanwadi* v. *Mapua Urban Co-operative Bank of Goa Ltd,*[16] however, the Goa bench of High Court of Bombay held that when respondent has acted without jurisdiction there is no bar for the high court to exercise its power under articles 226 and 227 of the Constitution even though petitioners may have an alternate remedy. The sole reason the court relied on the exercise of its power is because of the acting of the respondent without jurisdiction.

This shows that many high courts generally take different approaches while dealing with the issues under the SARFAESI Act which in turn provides a platform for the increase in litigation in apex court ultimately resulting in making the objective of this legislation in banking law infructuous.

Compassionate approach of apex court

At present, the banking sector is facing a lot of challenges. Recovery of loans advanced to the customers is crucial to them. In this scenario, humanitarian approach of apex court towards the defaulting customer of the bank in order to do complete justice is reflected in *State Bank of Travancore* v. *R.Sobhana.*[17] In this case, the respondent availed a loan of Rs.15000 along with her husband from the petitioner bank by creating an equitable mortgage by deposit of title deeds in respect the property they owned. However, they failed to repay the loan amount to the bank. The bank filed a civil suit before the subordinate judge, Thiruvananthapuram for recovery of an amount due along with interest. The suit was decreed and as a result the property was put to auction in the execution petition filed by the bank. As none came forward, the bank bid for the property in the auction and a sale certificate was issued in favour of the bank. Later, after several years, the bank sold the said property for Rs.10,10,001 by inviting tenders.

15 *Vishnu Kumar* v. *Canara Bank* (2013) 10 SCC 652; *Pegasus Assets Reconstruction P Ltd* v. *M/s.Haryana Concast Limited* (2016) 4 SCC 47; Susmitha P Mallaya, *Banking and Insurance Laws*, LI *ASIL* 105.

16 (2016) 3 AIR Bom R 501 : 2016 SCC OnLine Bom 2574.

17 2016 (8) SCALE 542.

At this time when the bank made a huge profit by selling the property, the respondents approached the bank with a request to return the excess amount which the bank earned. They also sought for payment of rent that the bank earned by letting out the property. On the bank's failure to respond to their request, a mandamus writ petition was filed before the High Court of Kerala to return the excess sale amount in respect of the property along with the rent collected by the bank for the property. The bank stated that it became the absolute owner of the property after a sale certificate was issued and it relied upon section 65 of the Code of Civil Procedure to plead that it had perfected its right, title, interest and possession over the property covered by the sale certificate. They also pleaded that the petitioners i.e. the customers did not have any right to the property which was purchased by the bank in the auction conducted by the court. The single judge of the High Court of Kerala upheld the claims of bank and dismissed the writ filed by the petitioners. Aggrieved by this order, a writ appeal was filed before the high court. A division bench of the High Court of Kerala took note of the fact that the first respondent was paralyzed on account of meningitis, one daughter was mentally retarded and another son was a psychiatric patient. In view of the misery faced by the respondent's family, the managing director of the bank was directed to consider sharing of a substantial amount of profit accrued to the bank by way of sale of the property, with the customer. However, the bank refused to share their profit with the customer. Hence, the high court directed refund of Rs. 6.5. lakhs to the customer within a period of two weeks from the date of production of the copy of the judgment.

This judgment of the division bench of the High Court of Kerala was challenged before the apex court assailing the legality and validity of the same. Apex court found that the bank has not indulged in any illegality either in purchasing the property in the auction conducted by the court or in the sale of the property. It remarked that division bench of high court should not have made scathing remarks about the conduct of the bank and the adverse comments made by the court are unwarranted and deserve to be expunged. Apex court also found that the high court erred in directing the bank to pay Rs.6.5. lakh to the respondent customer towards their share in the proceeds of the sale of property accrued by the bank. The court held in favour of the bank, however, the apex court considered the extreme adversity faced by the family of the respondent customer and directed bank to pay Rs.5 lakh as *ex-gratia* in order to do complete justice.

The compassionate approach of the apex court towards the distressed customer of the bank is remarkable. It is very interesting to note that the borrower availed a loan for a very small amount of Rs.15000 compared to the value of money in the present day scenario and the profit received by the bank by selling the property is very huge. Hence, action by the bank by refusing to share the profit with the borrower is not justified in the interest of social justice. Sometimes, banks need to show concern towards the borrowers especially people belonging to the lower class of society and be stern with the corporate borrowers who sometimes are the real culprits. In reality,

we can see that contrariwise happens. *Kingfisher Airlines*[18] case is an instance of this reality.

Therefore, in the rising situations of the fraudulent financial transactions while availing loans and advances by the customers especially many corporate companies from the banking companies and later after making default in making payment, pleading innocence and approaching the courts for relief, a cautious approach is needed to be taken by the courts in the interest of financial institutions and national economic interest by balancing its commitment to social justice.

Therefore, this case should be treated as an exception and not as a rule to be followed by the courts throughout the country to deal with the cases relating to the recovery of loan proceeds by banks.[19]

Applicability of SARFAESI Act to State of Jammu and Kashmir

The High Court of Jammu and Kashmir last year in *Bhupinder Singh* v. *Union of India*,[20] took a restrictive approach towards the application of SARFAESI Act in the state. The apex court brought the finality to the question raised by invoking constitutional principles in *State Bank of India* v. *Santosh Gupta*.[21] In this case, the apex court discussed the application of constitutional principles in the area of banking law. It addressed the issue in the realm of commercial activities, whether the special constitutional status granted to the State of Jammu and Kashmir can be invoked to curtail the powers of Parliament to legislate in the State. The apex court tried to interpret the expressions like "banking" and "administration of justice" which weighed so heavily in the minds of the High Court of Jammu and Kashmir. The respondent argued vehemently that the sovereignty of the State of Jammu and Kashmir vests outside the Constitution of India and both the Constitution of India and the Constitution of Jammu and Kashmir have equal status which also constitutes the residents in the State a separate class of citizens as far as the application of securitization law under banking is concerned.

This case is an appeal on the decision of High Court of Jammu and Kashmir which held that the Union Parliament does not have any legislative competence to make laws contained in section 13, 17(A), 18(B), 34, 36 under the SARFAESI Act, as they are in conflict with section 140 of the Transfer of Property Act of Jammu and Kashmir, 1920 so far as they relate to the State of Jammu and Kashmir.

The moot question was whether SARFAESI in its application to State of Jammu and Kashmir would be held to be within the legislative competence of Parliament or

18 *Kingfisher Airlines Ltd* v. *Union of India*, 2015 (6) Bom. CR 315; (2015) 1 Comp LJ 151 (Cal) ; *Punjab National Bank* v. *Kingfisher Airlines Ltd*, 2016 (154) DRJ 164.

19 Reproduced from XVIII *ILI Newsletter*19-20 (July-Sep. 2016).

20 2015 SCC OnLine J&K 126 : AIR 2015 (NOC 1262) 492 : (2016) 1 BC 127.

21 2016 (12) SCALE 1044 : 2016 SCC OnLine SC 1493 : (2017) 2 SCC 538. Also, see XVIII *ILI Newsletter* 21-22 (Oct.-Dec. 2016).

not. It was argued by the respondent that the section 17A and 18B of the SARFAESI Act, being sections relatable to the administration of justice will fall under the State subject and therefore *ultra vires* Parliament.

The apex court upheld the applicability of SARFAESI Act to the State of Jammu and Kashmir and set aside the decision of High Court of Jammu and Kashmir. It also agreed that by applying the doctrine of pith and substance to SARFAESI Act, it is clear that in pith and substance the entire Act is referable to entry 45, List I read with entry 95 List I of the Constitution which deals with recovery of debts due to banks and financial institutions, *inter alia* through facilitating SARFAESI Act and sets up a machinery in order to enforce the provisions of the Act and does not deal with "transfer of property". The court observed:[22]

> [I]n fact, in so far as banks and financial institutions are concerned, it deals with recovery of debts owing to such banks and financial institutions and certain measures which can be taken outside of the court process to enforce such recovery. Under Section 13(4) of SARFAESI, apart from recourse to taking possession of secured assets of the borrower and assigning or selling them in order to realise their debts, the banks can also take over the management of the business of the borrower, and/or appoint any person as manager to manage secured assets, the possession of which has been taken over by the secured creditor. Banks as secured creditors may also require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom money is due or payable to the borrower, to pay the secured creditor so much of the money as is sufficient to pay the secured debt. It is thus clear that the transfer of property, by way of sale or assignment, is only one of several measures of recovery of a secured debt owing to a bank and this being the case, it is clear that SARFAESI, as a whole, cannot possibly be said to be in pith and substance, an Act relatable to the subject matter "transfer of property". At this juncture it is necessary to point out that insofar as the State of Jammu & Kashmir is concerned, Sections 17A and Section 18B of SARFAESI, which apply to the State of Jammu & Kashmir, substituted 'District Judge' and the 'High Court' for the 'Debts Recovery Tribunal' and the 'Appellate Tribunal' respectively.

From the constitutional perspective, it further held that the State of Jammu and Kashmir has no vestige of sovereignty outside the Constitution of India and hence its residents do not constitute a separate and distinct class in themselves.

22 *Id*., para 36.

It is a matter for concern when borrowers, after availing the loan from the banking institutions, fail to repay it and take shelter under the other legislations such as the Transfer of Property Act as happened in this case, and delay the repayment of loan which hampers the economic development of state in particular and country in general. Therefore, a technical interpretation as initiated by the High Court of Jammu and Kashmir needs to be overlooked in the interest of economic development of the nation. Nonetheless, the apex court, in this case, has not defined the banking function, rather mainly focused on the constitutional interpretations.

The constitutionality of this legislation was earlier upheld by the apex court in *Mardia Chemicals Ltd.* v. *Union of India*.[23] In spite of the enactment of this legislation, the recovery of finance by the lending institutions from borrowers in our country is proceeding on snail's pace affecting the financial health of the country. In this scenario, this is a very remarkable judgment delivered by the apex court in the banking law jurisprudence.

Sale of mortgaged property of tribals to non-tribals

In *UCO Bank* v. *Dipak Debbarma*,[24] the apex court considered to question of the sale of hypothecated/mortgaged property of tribals to buyers who were non-tribals by the banks to recover its dues under SARFAESI Act. In this case, the respondents belong to the scheduled tribe of the State of Tripura. They contended that the sale notification by the appellant bank under the provisions of the SARFAESI Act is in infraction of section 187 of the Tripura Land Revenue and Land Reforms Act, 1960 (Tripura Act). According to the Tripura Act, there is a legislative embargo on the sale of mortgaged properties by the bank to any person who is not a member of the scheduled tribe. The auction purchasers in the present case happened to be the persons who are not the member of any scheduled tribe. The High Court of Tripura held that since the Tripura Act is included in the Ninth Schedule of the Constitution and enjoys the protection of section 31-B of the Constitution, it would prevail over the SARFAESI Act and invalidated the sale notification of the bank.

Though the apex court considered this case purely from the angle of the banking legislation and is justified, it cannot ignore the real problems faced by the tribal community people while taking the financial assistance from the banks for their livelihood and become the victims of fraudulent financial advisors.

Recovery of secured asset

In case of enforcement of security interest, SARFAESI Act does not destroy pre-existing rights that were created prior to the creation of security. This was held by the High Court of Bombay in *JM Financial Asset Reconstruction Company Pvt. Ltd* v. *Board of Trustees of the Port of Mumbai*.[25] In this case, the petitioner challenged

23 2003 (9) SCALE 185.

24 (2017) 2 SCC 585.

25 2016 SCC OnLine Bom 5355 : (2017) 3 Mah LJ 194.

the jurisdiction of estate officer to issue the show cause notice on the ground that the petitioner, being an asset reconstruction company and having taken possession under section 13(4) of the SARFAESI could not be evicted under the provisions of the Public Premises (Eviction of Unauthorized Occupants) Act, 1958 (PP). It also asserted that the provisions of the SARFAESI Act override the provisions of the PP Act. The court observed:[26]

> Having noted the purposes of the two Acts, it is quite clear that both operate in different fields. As far as the SARFAESI Act is concerned, it provides a mechanism for a secured creditor to recover its secured debt by selling the securities without the intervention of the Court. It does not, in any way, destroy the rights that were created in favour of a third party prior to the security being created in favour of the secured creditor. On the other hand, the PP Act provides a mechanism for evicting unauthorized persons from public premises. If a statutory authority (as defined under the PP Act) finds that any of its public premises are in unauthorized occupation of any person, that statutory authority can put in motion, proceedings for evicting that person under the provisions of the PP Act.

The court found that there is no conflict between the provisions of the SARFAESI Act and the PP Act. Therefore, the overriding effect of the legislation does not arise in this case. The court categorically affirmed that the SARFAESI Act does not destroy the pre-existing rights that were created prior to the creation of the mortgage or security interest and relied on the earlier Supreme Court decisions which are discussed above i.e. *Harshad Govardhan Sondgar*[27] and *Vishal N Kalsaria*[28] where the apex court took the view that the SARFAESI Act does not destroy the rights of the tenants if the tenancy was created prior at a point of time to the mortgage being created in favour of the secured creditor. Therefore, ownership rights including the right to terminate the lease will not get affected by the provisions of the SARFAESI Act and also the rights of pre-existing tenants remain unaffected merely because the landlord had mortgaged its ownership rights and the tenants cannot be thrown out of the property by exercising powers under SARFAESI.

This being the case, a question will arise that if the tenancy agreement is created after mortgaging the property to the secured creditor and later the borrower makes default in the repayment of the loan then what will be the option left for financial institutions to recover their secured assets. Though, this ruling by apex court is justified

26 *Id*., para 15.

27 *Harshad Govardhan Sondgar* v. *International Assets Reconstruction Co. Ltd.* (2014) 6 SCC 1.

28 (2016) 3 SCC 762.

on the principle of social justice, its misuse by the borrowers especially the 'corporate house borrowers' requires a cautious approach.

III BANK OFFICIALS STATUS UNDER THE PREVENTION OF CORRUPTION ACT, 1988

The apex court examined the question whether chairman, directors and officers of private bank can be said to be public servants for the purpose of their prosecution under the Prevention of Corruption Act, 1988 in *Central Bureau of Investigation, Bank Securities and Fraud Cell and Ors* v. *Ramesh Gelli*.[29] The apex court held that the managing director and executive director of a banking company operating under license issued by Reserve Bank of India, are public servants, and as such they cannot be excluded from the definition of 'public servant'. Further, the court held that the definition of 'public servant' given in the Prevention of Corruption Act, 1988 read with section 46A of Banking Regulation Act holds the field for the purpose of offences under the said Act rather than the definition under section 21 of the Indian Penal Code. Earlier, the trial court and the High Court of Judicature at Bombay had held that cognizance cannot be taken against the accused involved in corruption cases on the ground that they are not public servants.

The court interpreted the definition of "public servant" contained in section 2(c) of the Prevention of Corruption Act, 1988 by looking into the object of Prevention of Corruption Act, 1988. Accordingly, the court highlighted the fact that the object of the legislation was to make the anti-corruption law more effective and widen its coverage. Moreover, section 46A of the Banking Regulation Act, 1949 states that a chairman appointed on a whole time basis, managing director, director, auditor, liquidator, manager and any other employee of a banking company is deemed to be a public servant for the purposes of chapter IX of the Indian Penal Code. The court applied the exception to the rule of *casus omissus* to fill the gap which occurred after deletion of sections 161 to 165A of the Indian Penal Code from chapter IX by section 31 of the Prevention of Corruption Act, 1947. In this process of repealing the provisions under Indian Penal Code, the legislature omitted to incorporate corresponding insertion of provision in section 46A of the Banking Regulation Act, 1949 with regard to the deeming provision therein, being continued in respect of officials of a Banking Company insofar as the offences under sections 7 to 12 the Prevention of Corruption Act are concerned. This unintended legislative omission was filled by the process of interpretation. For this, the court relied on *Seaford Court Estates Ltd* v. *Asher,*[30] *Magor and St.Mellons Rural District Council* v. *Newport Corporation*.[31] The fact of the case states that the chairman and managing director of global trust bank (later amalgamated/

29 2016 (2) SCALE 579.
30 (1949) 2 All ER 155.
31 (1950) 2 All ER 1226.

merged with oriental bank of commerce) and one executive director of the bank were also the promoters of the banking company. They obtained the license from the Reserve Bank of India for doing banking business as private limited banking company. Later, they fraudulently instructed the branch heads of their bank to sanction the credit facilities to various individuals and companies without following any norms of granting loans. This scam resulted in the creation of large quantum of NPA jeopardizing the interests of thousands of depositors; however, they succeeded in painting a rosy financial picture of the financial assets of the bank. On the amalgamation of global trust bank with oriental bank of commerce, audits were conducted and these frauds came to light. Subsequently, CBI started an investigation and accordingly charge sheet was filed against the accused under Prevention of Corruption Act.

It was argued before the court by the counsel of accused that the transaction between the banker and customer are commercial in nature and as such no public duty is involved and they are not public servants, therefore the provisions of Prevention of Corruption Act are not applicable to them. On the other hand, on behalf of the counsel appearing for the CBI *i.e*. appellants argued that a private body discharging a public duty or positive obligation of public nature actually performs a public function, hence the accused need to be treated as 'public servants' for the purpose of application of Prevention of Corruption Act. The court finally favored the argument advanced by the counsel of appellants.

In this context, the approach of the apex court to bring the employees of private institutions under the purview of 'public servants' and giving a wide understanding of the definition of 'public servant' may have the effect of obliterating all distinctions between the holder of a private office and a public office. This view can be appreciated.

Nonetheless, in the present situation where more private institutions are coming up which discharge the public functions, this distinction is diluted, so it is time for the legislature to cure the defects in the legislation which will have an impact on the growing economy of the country.[32]

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

Interpretation of the term 'debt'

A question arose before the High Court of Calcutta in *Jeevan Diesel and Electrical Ltd* v. *State Bank of India*,[33] whether an amount inadvertently transferred by the bank into account of a company to which company is not legally entitled can be treated as debt. The generic terms used to define debt clearly show that 'debt' is to be understood in the wider sense to 'include any liability alleged as due from any person by bank whether secured or unsecured or otherwise'. In this case, the petitioner alleged that the debt recovery appellate tribunal acted beyond its jurisdiction and

32 Reproduced *verbatim* from XVIII *ILI Newsletter*19-20 (Jan-Mar 2016).

33 AIR 2016 Cal 139.

failed to appreciate that the amount remitted to the account of petitioner through RTGS was not a loan or a financial assistance nor it was transferred even from the *corpus* of the applicant bank and therefore it does not come within the purview of section 29 of the RDDBFI Act. However, the high court interpreted the term 'debt' according to section 2(g) of RDDBFI which incorporated "liability", "whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise" and "legally recoverable".

Accordingly, the term 'debt' was given the widest amplitude and held that any liability, which is alleged as due from any person by a bank whether secured or unsecured or otherwise, comes under the purview of 'debt' and the bank is justified in recovering the amount inadvertently transferred by it and the high court upheld the decision of the DRAT.[34]

Discretionary power of DRAT to waive pre-deposit

With regard to the question of the discretionary power of waiver of pre-deposit by the DRAT, though a settled position in law, the doors of high courts are knocked by the borrowers which delay the process of recovery of debts due to banks and financial institutions. During this year, the High Court of Calcutta in *Madhav Goenka* v. *Allahabad Bank*[35] observed that the power to waive the condition for pre-deposit vested in the DRAT should be exercised judicially and not capriciously or whimsically. The discretionary order based on logic and upon consideration of material facts available on record should not be readily interfered with by a higher forum. Also that the high forum should be reluctant to interfere with the discretion exercised by the subordinate court unless the subordinate court has not given proper weightage to the consideration required in determining the relief to be granted. In this case, DRAT took a balanced approach to direct the payment of pre-deposit amount by considering various factors including the financial position, the assets in the hands of a judgment-debtor and also the interest of the decree-holder who emerged successfully from one tier of the adjudicatory system as well.

Therefore, the high court rightly refused to interfere in the decision taken by the DRAT and restrained itself from exercising its power under article 227 of the Constitution.

General lien over pre-deposit

The apex court, in *Axis Bank* v. *S.B.S Organics Private Limited*,[36] examined the question whether a bank can exercise a general lien over the pre-deposit made under the provision of the SARFAESI Act. The apex court ruled that the pre-deposit made under section 18 is neither secured asset nor secured debt and therefore secured creditor

34 See also *Eureka Forbes Ltd* v. *Allahabad Bank*, AIR 2011 SC 2538.

35 AIR 2016 Cal 153.

36 (2016) 12 SCC 18.

does not have a lien on it. Even though, the bank has right to proceed under section 13(11) against guarantors or sell pledged assets, such guarantors have no right either to approach the tribunal under section 17 or to appeal under section 18. Hence, the partial deposits made under section 18 cannot be equated with the secured debt of such guarantors and such pre-deposit made by the borrower need to be refunded to him. The court observed:[37]

> Section 172 of the Contract Act, 1872 provides for retention of the goods bailed to the bank by way of security for the general balance of account. The pre-deposit made by a borrower for the purpose of entertaining the appeal under Section 18 of the Act is not with the bank but with the Tribunal. It is not a bailment with the bank as provided under Section 148 of the Contract Act, 1872. Conceptually, it should be an argument available to the depositor, since the goods bailed are to be returned or otherwise disposed of, after the purpose is accomplished as per the directions of the bailor.

The provisions under SARFAESI Act especially section 17 and 18 come under challenge before the apex court.[38] This year, the court had an occasion to consider the nature of pre-deposit made under section18 of the SARFAESI Act. Section 18 provides for an appeal against the decision of the debt recovery appellate tribunal (DRAT) which can be entertained only if the borrower deposits fifty percent of the total amount with the DRAT to be paid to the secured creditor in terms of the order passed by the debt recovery tribunal under section 17 or fifty percent of the amount due from the borrower as claimed by the secured creditor, whichever is less. Of course, the DRAT may reduce the amount to twenty-five percent if it desires so depending upon the matter before it. The court categorically stated once again the objective of section 18 of the SARFAESI Act:[39]

> The appeal under Section 18 of the Act is permissible only against the order passed by DRT under Section 17 of the Act. Under Section 17, the scope of enquiry is limited to the steps taken under Section 13(4) against the secured assets. The partial deposit before DRAT as a precondition for considering the appeal on merits in terms of Section 18 of the Act, is not a secured asset. It is not a secured debt either, since the borrower or the aggrieved person has not created any security interest on such pre-deposit in favor of the secured creditor. If that be so, on disposal of the appeal, either on merits or on withdrawal, or on

37 *Id.*, para 23.

38 See, Susmitha P. Mallaya, "Banking and Insurance Laws", L *ASIL* 105 (2015).

39 *Supra* note 24, para 21

> being rendered infructuous, in case, the appellant makes a prayer for refund of the pre-deposit, the same has to be allowed and the pre-deposit has to be returned to the appellant, unless the Appellate Tribunal, on the request of the secured creditor but with the consent of the depositors, had already appropriated the pre-deposit towards the liability of the borrower, or with the consent, had adjusted the amount towards the liability of the borrower, or with the consent, had adjusted the amount towards the dues, or if there be any attachment on the pre-deposit towards the liability of the borrower, or with the consent, had adjusted the amount towards the dues, or if there be any attachment on the pre-deposit in any proceedings under Section 13(10) of the Act read with Rule 11 of the Security Interest (Enforcement) Rules, 2002, or if there be any attachment in any other proceedings known to law.

This case contrasted with the deposit made in appeals under other statutes. The apex court once again affirmed its view and set aside the decision of High Court of Delhi,[40] in *Kumar Aluminium Ltd* v. *Asset Reconstruction Company India Limited*.[41] Hence, it is settled that pre-deposit made by the borrower before the DRAT is not a secured asset which can be adjusted towards liability of borrower and hence, it needs to be returned to the borrower. The apex court, however, left open the question of law as to why borrower should make a further pre-deposit in respect of the same recovery in an appeal to DRAT.[42]

Application of the doctrine of *dominua litis* in banking cases

In *Anjani Kumar* v. *Union of India,*[43] the question with regard to the application of the doctrine of *dominus litis* in banking cases arose before the High Court of Patna. This doctrine signifies that plaintiff is the master of a suit. He has a real interest in the suit so he cannot be compelled to sue against a person from whom he does not claim any relief. In this case, a suit was filed by the bank for the recovery of debt. Proceedings were initiated against the erstwhile manager of bank and also against some borrowers, however no recovery was sought against current manager by the plaintiff bank. The presiding officer of the Debt Recovery Tribunal (DRT) however, ordered the bank to make the current manager also part to the suit irrespective of the fact that no claim was made by the petitioner bank against him. The petitioner challenged this order before the high court. The high court held that presiding authority of DRT is not competent to order the plaintiff bank to proceed against the petitioner as a defendant in the recovery suit, therefore, issuance of the certificate of recovery is improper. The

40 *Kumar Aluminium Ltd* v. *Asset Reconstruction Co. India Ltd*, 2014 SCC OnLine Del 4170.

41 (2016) 9 SCC 361.

42 *S.D.Bhoskar & Co* v. *Bank of Baroda* (2017) 2 SCC 485.

43 AIR 2016 Pat 153.

doctrine of *dominus litis* is applied in this case. The court observed that the dispute between the parties can be adjudicated effectively even otherwise, without impleading the current manager, therefore the action of the presiding officer is improper and not justified. The provision of order 1, rule 10 of Code of Civil Procedure, 1908 is not available to DRT for adding any person as a defendant in view of section 22 of RDDBFI Act.

Distinction between original jurisdictions and the appellate jurisdiction of tribunal under DRT Act

In *State Bank of Patiala* v. *Mukesh Jain,*[44] appellant bank advanced a term loan to the respondent petitioner on certain terms and conditions as a security for the debt. When default in re-payment of loan advanced was committed, the bank initiated proceedings under the provisions of SARFESI Act after serving notice under section 13(2) of SARFESI Act. The respondent Mukesh Jain challenged these proceedings initiated against him by the bank by filing a civil suit in the court of a civil judge. In this suit, the appellant bank filed an application under order 7, rule 11 of the Code of Civil Procedure (CPC) contending that the court had no jurisdiction to entertain the suit in view of the provisions of section 34 read with section 13(2) of RDDBFI Act which prohibits a civil court from dealing with the matters arising under the provisions of this Act. However, this application was rejected by the trial court. On appeal before the High Court of Delhi, the high court confirmed the trial court order and held that suit is maintainable in view of the fact that the subject matter of the suit *i.e.* the amount which was sought to be recovered by the bank was less than rupees ten lakh. It observed that according to the provisions of section 1(4) of the RDDBEFI Act, if the subject matter of the suit is less than ten lakh, DRT has no jurisdiction to entertain an appeal against the order passed under the provisions of the Act and only a civil suit is maintainable. Aggrieved by these orders, the bank approached the apex court in the present case.

The apex court highlighted the distinction between the original and appellate jurisdiction of the tribunal when recovery proceedings are initiated against the borrower under section 13 and section 17of the SARFAESI Act which provides for filing an appeal before the tribunal. The apex court held that the tribunal can exercise its appellate jurisdiction when the action initiated under the provisions of section 13 of the SARFAESI Act is challenged before the tribunal. Therefore, the application submitted by the appellant bank under order 7, rule 11 would have been granted by the trial court and according to section 34 of the SARFAESI Act, a civil court has no jurisdiction to entertain any appeal arising under the Act and DRT has jurisdiction to entertain an appeal as per section 17 of the SARFAESI Act even if the amount involved is less than rupees ten lakh. However, the said appellate jurisdiction need not be misunderstood with the original jurisdiction of the Tribunal. The court observed:[45]

44 AIR 2016 SC 5140.

45 *Id.*, paras 24 &25.

> The issue with regard to availability of a forum for challenging the action under the provisions of the Act had been dealt with by this Court in the case of Mardia Chemicals Ltd.(AIR 2004 SC 2371) (supra). This Court, in the said case, unequivocally held that the aggrieved debtor can never be without any remedy and we firmly believe that the legislature would normally not leave a person without any remedy when a harsh action against him is initiated under the provisions of the Act. So as to know the appellate jurisdiction of the Tribunal, one has to look at the provisions of the Act as Section 17 of the Act specifically provides a right to the aggrieved debtor to challenge the validity of an action initiated under section 13(4) of the Act before the Tribunal. Moreover, the Act was enacted in 2002 and the legislature is presumed to have knowledge about the provisions of Section 1 (4) of the DRT Ac. So harmonious reading of both the aforestated Sections would not be contrary to any of the legal provisions.

Therefore, it can be inferred from these deliberations that the interpretations of the provision of the SARFAESI Act is continuing because of the lack of proper understanding of the provisions by the lower courts and some of the high courts which will bring down the objective for speedy recovery of de-stressed assets by the creditor of the SARFAESI Act.

Similarly, the question with regard to the application of section 34 of the SARFAESI Act to the third party and the power of DRT to adjudicate the dispute involving the allegation of fraud arose before the High Court of Orissa in *Ranjan Kumar Das* v. *Punjab National Bank.*[46] The court held that the said provision is not applicable when rights of the third party are involved. It observed that[47]

> (T)he role of the tribunal shall be confined to action of the secured creditor vis-a vis the loanee and or guarantor taking note of provision contained in Section 13 of Act, 2002 and under the circumstance, as to whether there is practice of fraud and absurdity and right of third party over the disputed property are completely outside the domain of the Tribunal particularly in exercise of power under the Act, 2002. Further, Section 17 of the Act, 2002 referring to any person must confine parties involved in the dues recoverable i.e. the loanee, the guarantor and the financier and further, parties involved in the measures taken by the Bank in exercise of power under section 13 of the Act and cannot cover third party or the parties who have no involvement in such measures at all. Further in view of the provisions for deciding the

46 AIR 2016 Ori 58.

47 *Id.*, para 8.

> proceeding by following summary procedure, there is absolutely no scope to go into the issues under the special category and as such contentious issues can only be decided by the Civil Court which has a wider power. Accordingly bar under Section 34 of the Act, 3003 cannot have any play under the circumstances.

The court rightly re- affirmed the decisions of the apex court in *Nahar Industrial Enterprises Ltd* v. *Hong Kong and Shanghai Banking Corporation*[48] which observed that DRT cannot pass a decree. It can issue only recovery certificates and the power of the tribunal to grant interim order is attenuated with circumspection. Concededly in the proceeding before the DRT detailed examination, cross-examinations, provisions of the Evidence Act as also application of other provisions of the CPC like interrogatories, discoveries of documents and admission need not be gone into. Taking recourse to such proceedings would be an exception. Therefore, when allegation of fraud by third party is involved, DRT cannot go into details of evidence and the entire focus of the proceedings before the DRT is towards legally recoverable dues of the bank. For all these matters, the jurisdiction of civil court needs to be invoked. It is of course, this lacunae which lingers the recovery proceedings by the banks in case of debt due to it from the borrowers.

V BANKING REGULATION ACT, 1949

Wilful defaulter

It is a settled position in law that borrowers cannot claim right of representation by an advocate before a wilful defaulters identification committee of the bank and that committee cannot be regarded as 'tribunal'.[49] The same issue arose before the High Court of Calcutta in *Dynametic Overseas Pvt Ltd.* v. *State Bank of India.*[50] The court observed that the proceeding of the grievances redressal committee (GRC)/ identification committee for the inclusion of a defaulting borrower in the list of wilful defaulters is essentially a fact-finding exercise, followed by an administrative decision. Such proceeding does not assume the character of a proceeding before a tribunal, where the adjudicator appointed to decide rights of parties has to proceed without bias and predilection and maintain absolute fairness and impartiality. If such an authority were regarded as a 'tribunal' it would stand to reason that its decision could be made amenable to the jurisdiction of the high courts under article 227 or under article 136 of the Supreme Court. The position in law obviously is not so, since the GRC/identification committee does not decide any *lis*. Generally the GRC/ identification committee of the lender bank, after considering the cause shown by the

48 (2009) 8 SCC 646.

49 Susmitha P Mallaya, *Banking and Insurance*, LI *ASIL* 105 at 124 (2015).

50 AIR 2016 Cal 303.

borrower and after hearing its version decides either in favour or against the inclusion of the borrower's name in the list of wilful defaulters. This function of the GRC is mere administrative or executive act and it has not been delegated any judicial functions by the state and cannot be regarded as a 'tribunal' within the meaning of section 30(ii) of the Advocates Act, 1961. With regard to the master circular issued by the Reserve Bank of India in respect of the wilful defaulter list, the court observed:[51]

> [T]here is no doubt that the lender identifies a defaulting borrower who ought to be placed in the list of wilful defaulters and upon hearing the version of the defaulting borrower ultimately decides in regard to its inclusion/non-inclusion in the list. Notwithstanding the requirement of the master circular regarding the requirement of compliance with natural justice, the GRC/Identification Committee of the lending bank not being authorised to take evidence cannot be said to discharge functions other than administrative. Having regard to the above, there is no question of holding in favour of representation of the petitioners borrowers before the GRC/Identification Committee by an advocate. It cannot be gainsaid that the right of an advocate to practice is not unrestricted and is subject to reasonable restrictions.

Reserve Bank of India Act, 1934: Scope of judicial interference

Demonetising currency notes

The apex court in *Vivek Narayan Sharma* v. *Union of India,*[52] examined the extension of the scope of judicial interference in the wake of notification of demonetising the currency notes of the value of Rs.500 and Rs.1000 as legal tender *w.e.f.* Nov. 8, 2016 and the time-limit fixed for the exchange of demonetised currency notes.

The court addressed several questions like whether the said notification is *ultra vires* section 26(2) and sections 7,17,23,24,29 and 42 of the Reserve Bank of India Act, 1934 (RBI) as well as whether it contravenes the provisions of article 300-A of the Constitution and is ultra vires articles 14 and 19 of the Constitution. It also framed the question regarding the scope of judicial review in matters relating to the fiscal and economic policy of the government among other questions. The court, however, referred the matter to the larger bench of five judges for an authoritative pronouncement considering the public importance and the far-reaching implications which the answers to the questions may have. However, the bench consisting of T.S.Thakur C.J A.M. Khanwilkar, and D.Y.Chandrachud JJ addressed the issue whether restrictions placed on the district cooperative banks (DCB) to accept deposits or exchange demonetized currency of Rs. 500 and Rs. 1000 amounts to discrimination in comparison to other commercial banks. In the notification issued, the government excluded completely

51 *Id*., para 43.

52 (2017) 1 SCC 388.

DCB from accepting deposits or exchanging demonetized notes. The court, however, refrained from giving any decision since it felt that the decision of the government to exclude these banks from the purview of other commercial banks is the outcome of financial policy which the government has adopted on the basis of its experience. The court observed:[53]

> [I]n particular, an apprehension has been expressed about the possibility of demonetized notes being converted or exchanged without proper audit, control or supervision. The District Cooperative Banks, it has been urged, are not directly under the control of Reserve Bank of India but within the purview of NABARD. The dispensation provided by NABARD is, according to the Attorney General, not in conformity with the strict regime provided under the provisions of the Banking Regulation Act, 1949 and the Reserve Bank of India Act, 1934.

The apex court though raised several valid questions with regard to the outcome of decision of sudden demonetization policy of the government, it only made observations to few questions which they felt is relevant at that time and left the other questions to be addressed by the larger bench and refused to give any interim relief when common people were facing difficulty in withdrawing their own money deposited with the banks. Nonetheless, the court is justified when it observed that the said decision is taken by the government to unearth the black money or unaccounted money as well as to dry up the terror fund and defeat the attempt of circulation of large-scale counterfeit currency. However, the constitutional duty of the courts to provide legal interpretation based on the legislative principles could not have overlooked considering the welfare of common people.

VI PREVENTION OF MONEY LAUNDERING ACT, 2002

The offence of money laundering through banking institutions are reported widely and the courts also started taking note of these cases though largely it relates to the bail application. Thus the High Court of Calcutta had an occasion to deal with the issue of the validity of reopening of assessment by Commissioner of Income Tax (CIT), Kolkatta under section 263, in the backdrop of possible money laundering in *Rajmandir Estates(P) Ltd* v. *Principal Commissioner of Income Tax, Kolkata-III*.[54] In this case, the CIT, in his order dated March 22, 2013 passed under section 263, opined that this was or could be a case of money laundering which went undetected due to lack of requisite inquiry and non-application of mind. He entertained the belief that unaccounted money is laundered as clean share capital by creating a facade of paper

53 *Id*., para 5.

54 (2016) 287 CTR (Cal) 512.

work, routing the money through several bank accounts and getting it the seal of statutory approval by getting the case reopened under section 147 *suo motu*. Accordingly, he concluded that assessment order passed under section 143(3)/147 was erroneous and prejudicial to the interest of the revenue. He therefore, set aside the same and issued directions for a thorough enquiry.

The High Court of Calcutta in its elaborate order after referring to the Prevention of Money Laundering Act, 2002 (PMLA) and observing various facets and evidence of possible money laundering under the peculiar facts of the case upheld the order of CIT under section 263 in the following words:[55]

> We have indicated above the pieces of evidence which go to show that the Commissioner had reasons to entertain the belief that this was or could be a case of money laundering which went unnoticed because the assessing officer did not hold requisite investigation except for calling for the records…. The fact that the assessing officer did not apply his mind to those pieces of evidence would be evident from the assessment order itself… XXXX
>
> The question for consideration is whether in the presence of materials discussed above the Commissioner was justified in treating the assessment order erroneous and prejudicial to the interest of the revenue. The question in the facts and circumstances has to be answered in the affirmative.

It is important to note that the high court distinguished some of the Supreme Court precedents cited by the appellant to support his case *inter alia* on the ground that the PMLA was not there on the statute book at that point of time. Therefore, though offences under the Income Tax Act, 1961(IT) *per se* are not scheduled offences for the purpose of PMLA, nevertheless assessing officer can proceed in assessment as well as CIT can direct further investigation in order to verify possibility of income/ assets added or declared under section 68, 69, 69 A *etc*. of the IT Act being sourced out of proceeds of crime as defined under section 2(u) of the PMLA, so that further action under PMLA, if necessary, can be taken.

In another case, the High Court of Jharkhand in *Bhanu Pratap Shahi* v. *State of Jharkhand,*[56] granted bail on the basis of ill-health to the petitioner who has been accused of the offence arising out of the schedule offence of Prevention of Corruption Act, 1988 under section 3 of the PMLA. It is alleged by the directorate of enforcement that the petitioner who was a cabinet minister in the State of Jharkhand acquired huge property by illegal means and a CBI case has been registered against him for the

55 *Id*., para 27.

56 2016 SCC OnLine Jhar 2089.

same. During the investigation, it was found that indirect benefits in the form of rent derived from the property acquired through the proceeds of crime, is involved. It is very interesting in this case that the petitioner took the plea of serious illness and also pleaded to consider the liberty to renew his prayer of bail after one year by the Supreme Court while it rejected his bail application at that time. The high court overlooked the objection raised by the enforcement directorate to grant him bail which stated that during the investigation it was found that the petitioner was interfering in the investigation and had also tried to tamper with the evidence of the case. The stringent provision under section 45 of the PMLA was also ignored by the court while granting the petitioner bail. The apex court last year in *Gautam Kundu* v. *Manoj Kumar, Assistant Director, Eastern Region, Directorate of Enforcement (Prevention of Money Laundering Act) Govt. of India*[57] categorically held that at the time of considering the bail application by the high court under section 439 of Cr PC, it has to exercise 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.

In *S. Ramesh Pothy* v. *Adjudicating Authority*[58] a writ petition was filed under article 226 of the Constitution to quash the order of provisional attachment passed by the adjudicating authority, New Delhi who attached the properties under section 5(1) of the PMLA. The High Court of Madras observed:[59]

> It may not be necessary to recount the history of PMLA not is it necessary to expound on its objects and reasons. Suffice it to say that PLLA is intended to economically suffocate crimsters. Action u/s 5 and other provisions of the PMLA for confiscation of properties is an action in rem and not action in personam.
>
> In my opinion, PMLA seeks to fell two mangoes in one stone, viz., (1) to send a stern message to offenders that they cannot enjoy the fruits of their labour; and (2) to dissuade the innocent purchasers from entering into any deal for purchase of properties from shady characters. In the long run, people will not only scrutinize the legal title documents of a property, but would also take efforts to find out if their vendor is a person above reproach.

The court further went to analyse section 2(u) of PMLA which defines "proceeds of crime" and satisfied that the properties attached were from the proceeds of crime. Further, as per section 5 of PMLA, even if there is one cause which is sufficient for the deputy director to believe that a particular property is proceeds of a crime, action under section 5(1) can be initiated and observed that the court cannot step into the

57 AIR 2016 SC 106.

58 2016 SCC OnLine Mad 33104 : (2017) 1 CTC 408.

59 *Id.*, paras 8, 9.

shoes of the deputy director and appraise the material that formed the basis for initiating action under section 5 of PMLA. Another contention that was raised by the petitioner is that the section 27 applies to the appellate tribunal and not to the adjudicating authority. This contention was not accepted by the court and it justified the action taken by the adjudicating authority.

This case highlights many of the issues that require the attention of the judiciary while deciding the cases relating to PMLA considering the complex nature of the offence involved.

Power of adjudicating authority under PMLA

The power of adjudicating authority to attach the property under section 5(1) of the PMLA and the legality and justifiability of their decision based on natural justice principles was considered by the High Court of Jharkhand in *Dehati Stapana Nyas* v. *Directorate of Enforcement*.[60] This case is the letters patent appeal before the division bench where the court rejected the writ under article 226 of the Constitution when alternate remedy is available under PMLA Act. It is contended by the appellant that there is a breach of rules of natural justice when the statute itself provides notice to a person before an order is passed. The court held that the principle that a court will not issue a prerogative writ when an adequate alternative remedy is available would not apply when a party comes to the court with an allegation that his fundamental right has been infringed. However, in this case, the managing trustee who is also the authorized signatory of the trust was heard, it must be construed in law that the appellant-trust has been heard before an order under section 6 is passed and a writ proceeding over the right claimed by the appellant over the properties cannot be adjudicated. The court examined the importance of the PMLA and whether it provides an efficacious remedy to "a person aggrieved". It states:[61]

> [C]onsidering the consequence of attachment under Section 5, the power of attachment has been conferred upon Director or any other officer not below the rank of Deputy Director authorised by the Director. A further rider has been incorporated which requires the authorized officer to pass an order under Section 5, "on the basis of material in his possession". The Adjudicating Authority under Section 6 consists of Chairperson and two other members. Under Section 11 the Adjudicating Authority has been vested with powers of a civil Court in the matters enumerated under sub-section (1)(a) to (f). The Act further provides for "access to information, power to impose fine, power of survey, search and seizure, power to arrest, retention of property, retention of records etc." Section 26 provides that the Director or any person aggrieved by an order made by the Adjudicating Authority may prefer

60 2016 SCC OnLine Jhar 2374.

61 *Id*., para 6.

> an appeal to the Appellate Tribunal. Section 26(4) confers wide powers on the Appellate Tribunal to confirm or modify or set-aside the order appealed against. Sub-section (6) provides that the appeal shall be dealt with as expeditious as possible and it shall be disposed of finally preferably within six months. Section 35 vests powers akin to a civil Court in the Appellate Tribunal in respect of matters enumerated under sub-section 2(a) to (i) and under sub-section (3) an order made by the Appellate Tribunal is executable as a decree of civil Court and for this purpose, the Appellate Tribunal has been vested with all the powers of the civil Court….

This case has examined the provisions of PMLA in a very precise and accurate manner which is appreciable. It has confirmed that the PMLA is perhaps drafted aptly especially with regard to regulating the attachment of property, confiscation, appeal, revision etc. and found that the remedy provided to an aggrieved person is efficacious.

Nature of power of arrest under PMLA

The question with regard to the power of arrest under section 19 of PMLA, whether it depends upon the question as to whether offence is cognizable or non-cognizable was considered by the High Court of Bombay in *Chhagan Chandrakant Bhujbal* v. *Union of India*.[62] In this case, the petitioner alleged that requisite procedure for arrest was not followed in view of the amendment effected to section 45 of PMLA by the Amendment Act of 2005 in which all the offences under the PMLA were made non-cognizable and the procedure required under section 155(2) of the Code needs to be followed. Accordingly, the petitioner claimed that unless the cognizance of the offence is taken by the magistrate or the special court, the arrest could not have been effected. The petitioner, in this case, was arrested on the basis of some enforcement case information reports, which were an internal document and not an FIR. With regard the question whether the offences under PMLA are non-cognizable after the amendment to section 45 of the Act in 2005, the court observed:

> [T]he section-heading constitutes an important part of the Act itself, as it not only explains the provisions of the section but it also affords key to the construction of the provision. In the instant case, it is pertinent to note that the Legislature has though deleted Clause (a) of sub-section (1) of section 45 of PML Act, it has not changed the heading, thereby giving clear indication that Legislature did not intend to make the offence 'non-cognizable' but only wanted to clear the conflict between the powers of arrest as regards police and the authorities established under the Act.[63]

62 2016 SCC OnLine Bom 9938: 2017 Cr LJ (NOC 301) 89:[2017]140 SCL 40.

63 *Id*., para 109.

The court analysed the statement made by the then Finance Minister while introducing the amendment in section 45(1) and reached a conclusion that the amendment was made only to ensure that there should not be any conflict between the power of the police officer, who can arrest, in cognizable offence, without warrant and the power of the authority established under section 19 of the PMLA, who can arrest on the satisfaction of the conditions laid down therein. It further pointed out that "If the Legislature really intended to make the offence no-cognizable, there was no difficulty for Legislature to amend the heading of section 45. The very fact that the Legislature has neither amended the heading nor made any positive statement or assertion that the offences are non-cognizable makes it necessary to infer that the Legislature did not intend to do so."[64]

This judgment is a very elaborate judgment which discusses in detail the provisions of PMLA with regard to the power of arrest, investigation, application of the provisions of the Cr PC *etc*. PMLA is a complete Code in itself and also being a special law enacted with a particular object, in view of the section of the Cr PC, the provisions of PMLA will prevail and will have an overriding effect on the provisions of the Cr PC. The provisions of Cr PC will apply, only if they are not inconsistent with the provisions of PMLA.

The high court rightly dismissed the writ petition for *habeas corpus* since the arrest is not illegal, null and void and the special court has passed the remand order with the application of its mind and judiciously following the legislative provisions.

VII INSURANCE

Insurance law is an important part of the commercial law, which gained importance in this contemporary time when people face a lot of risk and uncertainties in their day to day activities. It evolved as a process of safeguarding the interest of people from loss and uncertainty. The legislative measures were initiated by the government as a social welfare to reduce the risk of loss to life and property. It is primarily based on contractual principles. The courts, therefore, give importance to interpret the cases before it by applying strict interpretation principle of commercial contract. The cases selected for the survey in the year reflect this approach of the court while deciding the matter relating to insurance before it.

Non Payment of premium by LIC agent

In the insurance cases, mostly, there is the active presence of insurance agents who convince the consumers to take the insurance policies and also for payment of premium to the insurance company. Sometimes, some strangers who pose as insurance agents or through some acquaintances approach consumers and persuade to execute insurance policy. Many consumers do so with utmost trust on these agents and later

64 *Id*., para 115.

find that they are fraudulent people who misappropriated the policy or made delay in the payment of premium resulting in the lapse of insurance policy.

Apart from this, normally authorized agents who delays the payment to the insurance company resulting in the lapse of policy is also a matter of serious concern. Thus, in *the Branch Manager, the Kota Central Cooperative Bank Ltd* v. *The District Legal Services Authority,*[65] the High Court of Rajasthan considered the question with regard to the non-payment of premium by LIC agent and the liability of the insurance company to pay the insured amount to the policy holders. This writ petition is filed by the bank against the order passed by the permanent *Lok Adalat* by which the bank has been required to pay the respondent claimant towards the insurance coverage for death claim of a widow. The bank has collected the amount of premium but delayed in making the payment to the insurance company. *Lok Adalat* absolved the insurance company of its liability to pay on the premise that insurance company cannot be held liable till it has received the amount of premium. Aggrieved by this decision the bank approached the high court.

The husband of the respondent-claimant took a loan from the bank along with insurance policy for a personal accident under the government scheme meant for Kisan credit card holders and also paid the required premium of Rs.15/. The insurance coverage was of Rs.50,000 for a period of one year. Similar insurance coverage was extended to several other farmers, who were issued kisan credit card. The petitioner bank collected premium from such farmers through gram sewa sahakari samiti and sent a consolidated cheque of premium amounts to the insurance company.

The question of implied agency was brought up before the court and by applying this principle the bank is considered as an agent of the insurance company. The high court accordingly held the insurance company is liable to pay the sum insured and inferred that bank had implied authority to act as an agent of LIC in view of section 186 of the Contract Act. The court referred the decision of the Supreme Court in *Chairman, Life InsuranceCorporation* v. *Rajiv Kumar Bhaskar,*[66] where the court held that employer, though not agent of LIC *qua* its regulations, it can be inferred that employer has implied authority to act as agent of LIC in view of section 186 of the Contract Act,1872. Therefore, failure on the part of the employer to make payment of premium would not disentitle the employer to the payment of assured amount.

This is a right approach adopted by the High Court of Rajasthan where it held that LIC cannot shirk its responsibility to pay the assured amount which needs to be followed by other courts in order to protect the interest of innocent consumers of insurance service. The court is, however, silent on the issue of other agents who deceive the consumers in paying the premium amount and the liability of the insurance company for the same.

65 AIR 2016 Raj 1.

Insurance policy: strict interpretation

The question with regard to the interpretation of the terms of policy came up in *Industrial Promotion and Investment Corporation of Orissa* v. *New India Assurance Company*.[67] In this case, the appellant company seized the assets of a borrower when the default of the payment of the loan advanced was made by him. The seized assets were insured with the respondent insurance company for the policy of accident, fire, burglary and house-breaking. The appellant company noticed that certain parts of the seized assets were missing so initiated criminal proceedings by the investigators and insured made claim before the insurance company as per the terms agreed for insurance. The claim was, however, repudiated by the insurance company on the ground that forceful entry was not established. This was challenged before the then Competition Law Regulator, Monopolies and Restrictive Trade Practices Commission (MRTP Commission) under sections 12-B and 36-A, which upheld the repudiation of the claim. The apex court also upheld the decision of MRTP Commission on the ground that the case of theft made by the appellant company was without a forcible entry. The terms and conditions of the proposal form for burglary and housebreaking insurance (business premises) mandate for a proof of force or violence as a precondition for placing a claim of insurance. The scope of cover provides that "This Insurance Policy provides cover against loss or damage by burglary or housebreaking i.e. (theft following an actual, forcible and violent entry of and/or exit from the premises) in respect of contents of offices, warehouses, shops etc. and cash in safe or strong room and also damage caused to the premises…". However, the appellant company failed to establish the same. The court found that there is no ambiguity in words employed under the policy and, therefore, doctrine of *contra proferentem* is not applicable in this case. The court applied the principle of strict interpretation of the commercial contract. The court categorically stated that:[68]

> It is well-settled law that there is no difference between a contract of insurance and any other contract, and that it should be construed strictly without adding or deleting anything from the terms thereof. On applying the said principle, we have no doubt that a forcible entry is required for a claim to be allowed under the policy for burglary/housebreaking.
>
> We proceed to deal with the submission made by the counsel for appellant regarding the rule of *contra proferentem*. The Common Law rule of construction "*verba chartarum forties accipiunturcontra proferentem*" means that ambiguity in the wordings of the policy is to be resolved against the party who prepared it.

66 AIR 2005 SC 3087.

67 (2016) 15 SCC 315.

68 *Id.*, paras 9, 10.

This case shows that the insurance policy is a document which requires careful study of the terms and conditions of the contract by the insured, which generally, does not happen. The insurance agency convinces regarding the positive side and with the blind faith in the insurance agent policy is taken and all the concerns and issues arise at the time of making claim from recovery of loss.

Similarly, in another case an interesting question was whether the items kept in display the window and those lying outside safe custody were stolen will be covered under theft/burglary insurance in *United India Insurance Company Limited* v. *Orient Treasures Private Limited*.[69] In this case, the respondent company is engaged in the business of jewelry, it got its jewellery in its shop insured with the insurance company. A burglary was committed in the shop at night as a result of which items kept in the display window and those lying outside the safe were stolen. The interesting point in this case is that as per clause 4 and 5 of proposal form read with clause 12 of insurance policy, items kept in display window or lying out of safe, though covered under the policy during daytime in business hours, were excluded under the policy after business hours at night and, therefore, the insurance company is not liable to reimburse the loss in respect of the policy since it took place during night. This shows that it was the obligation of the insured company to keep such items inside safe during night hours till the opening of a shop on next day. Hence, the apex court found that there is no ambiguity in the terms of the insurance policy and the insured company has not paid any additional premium to get coverage of aforesaid two instances to avoid rigors of clause 4, 5 and 12. In this case, also court refused to apply the doctrine of *contra proferentem* rule and stated that the *contra proferentem* will not be applied in the contract of insurance when the language used in relevant clauses of the insurance policy was plain, clear and unambiguous and carrying only one meaning. The court rightly pointed out:[70]

> A contract of insurance is one of the species of commercial transaction between the insurer and insured. It is for the parties (insurer/insured) to decide as to what type of insurance they intend to do to secure safety of the goods and how much premium the insured wish to pay to secure insurance of their goods as provided in the tariff. If the insured pays additional premium to the insurer to secure more safety and coverage of their insured goods, it is permissible for them to do so. In this case the respondent did not pay any additional premium to get the coverage of even two instances mentioned above to avoid rigour of note of Clauses 4,5 and Clause 12.

Both these cases show that insurance covers the risk, therefore, when the policy of risk is taken the policy holder need to be clear with the terms of contract they are

69 (2016) 3 SCC 49 : AIR 2016 SC 363.

70 *Id*., para 46.

entering into with the company. The approach of the court in giving a strict interpretation of commercial contract especially in case of an insurance contract is justified in the interest of insurance sector where a lot of fraudulent insurance claims are placed for claiming sum insured. However, sometimes innocent people also become the victim of terms of policy if they fail to understand the risk covered by the insurance company.

Forfeiture of commission on termination of agency

In *P.G. Natarajan* v. *Life Insurance Corporation of India,*[71] the apex court decided the question whether in the absence of actual fraud, the commission of insurance agent can be forfeited after terminating the agency. The court referred to rule 19 of Life Insurance Corporation of India (Agents) Regulations, 1972, which states that the payment of commission on discontinuance of the agency cannot be withheld except in the case of fraud. The Life Insurance Corporation of India (LIC) however, failed to establish the appellant's fraud. Hence, the court held that though, the action of LIC to terminate the agency is justified, it cannot withhold the renewal commission due to the appellant. In this case, the agency of the appellant was canceled on the ground that the acts of the appellant were prejudicial to the interest of the LIC though the LIC did not suffer any actual loss on such action by the appellant. The charge against the appellant was that the appellant had "committed fraud by suppressing the existence of previous policy details" of two policy holders. Accordingly, a departmental enquiry was initiated against him, which found him guilty of misrepresentation against the corporation and as per rule 16(1)(b) of Life Insurance Corporation of India (Agents) Regulations,1972 proposed to terminate his agency with forfeiture of renewal commission under rule 19(1) of the regulations. The departmental remedy taken by filing appeals was dismissed by the LIC. Aggrieved by this action of the LIC, the appellant approached the High Court of Kerala, which also dismissed the case of appellant. Hence, he approached the apex court. The apex court found that in so far as action of termination of agency is concerned, it was proved by the LIC that there was suppression of certain facts while issuing policies to the persons concerned and the authorities are justified in concluding that this action of the appellant is prejudicial to the interest of the corporation. Hence, termination of the agency of the appellant is legal and justified. However, with regard to the question whether the action of forfeiture of commission taken by the respondent is justified in law, the apex court observed that though in the show-cause notice, the charge of commission of fraud by suppressing the existence of previous policy details were alleged by the LIC, in the final order which was passed, no such finding of having committed fraud was arrived at by the competent authority. It alleged that the appellant "tried to defraud". Thus it is only an allegation of attempt to fraud which is proved against the appellant. It is presumed that this is because of the reason that the insurance corporation did not suffer any

71 (2016) 14 SCC 232.

pecuniary loss or disadvantage. Therefore, the payment of commission on discontinuance of the agency cannot be withheld except in case of fraud. And since the fraud of agent is not established in this instant case, the action of LIC to forfeit his commission is not justified.

This case shows the intricacies involved in insurance law regarding the nature of the relationship between the principal (LIC) and agent concerned as well as the impact of action of agents while dealing with the policy holders. The sacrosanct principle of an Insurance contract is utmost good-faith. The policy holders need to disclose all the relevant details to the agent while purchasing the policies in order to avoid future rejection of the policies at the time to make a claim. Further, the agents need to make a balanced approach to protect the interests of both the policy holders and the LIC.

Waiver of right

The question with regard to waiver of the right of duration clause under the concerned insurance policy came before the apex court in *Galada Power and Telecommunication Ltd* v. *United India Insurance Co Ltd*.[72] In this case, the appellant company dispatched its goods to a consignee in 21 trucks through carrier. These goods were insured with the respondent insurance company. The consignee noticed that there was transit loss of goods, this was brought to the notice of the respondent insurance company who appointed a surveyor to assess the loss of goods insured. After the assessment of loss on the claim made by the appellant company, the respondent insurer repudiated the claim by invoking duration clause mentioned in the policy and emphasised that the loss was occasioned beyond the duration for which the insurance cover subsisted. The appellant approached district consumer forum which dismissed the complaint but the state commission allowed complaint. Subsequently, the insurer company approached the national commission which reversed the orders passed by the state commission. Aggrieved by this decision, the insured company approached the apex court. Apex court held that once the positive action was taken by the insurer, it cannot go back and repudiate claim. The insurer by its conduct of appointing a surveyor in this case, waived its right under duration clause. The letter of repudiation did not mention anything about duration clause, it only mentioned claim was not coming under the purview of transit loss. Thus the apex court upheld the decision of state commission and justified its action while the decision of National Commission was reversed and observed that the scope of revisional jurisdiction of National Commission is very limited. Dipak Misra J examined all the relevant principles of the right of waiver and analysed the contractual rights of waiver and remission under the law of contract. The court reiterated that waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. Also that a right can be waived by the party for

72 (2016) 14 SCC 161.

whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein.[73]

This case shows how technically a policy is drafted by the insurance company. Many people find difficulties at the time of making a claim, since the company tries to interpret the terms to their advantage. The application of the principle of waiver is an appreciable step since the insurer is in custody of the policy and also prescribed the clause relating to duration. It tried to overlook its fault by repudiating the claim after getting the assessment of loss from the surveyor by relying on this duration clause. Hence, the lower courts need to give importance to these aspects while dealing with cases of this nature.

In another case, the apex court in *Heaven Diamonds Pvt. Ltd* v. *Oriental Insurance Co,*[74] it upheld the decision of national commission which justified the stand of the insurance company in repudiating the claim on the basis that the insurance policy excluded the loss, damage or expense caused by the insufficiency or unsuitability of packing. In this case the buyer refused to accept the shipment from the appellant company as one box was found totally broken and contents of other box were very rusty with holes. The surveyor appointed in this case opined that the damage must have been sustained at some time prior to and/or during the packing.

Marine insurance

Assignment of policy

Assignment of policy is one of the essential features of marine insurance. Sections 17, 52 and 79 of the Marine Insurance Act, 1963 (MI) deal with the assignment of the policy. A question as to when can an assignor maintain claim for enforcement of rights accrued under marine insurance policy even after the assignment arose in *United India Insurance Company* v. *Leisure Wear Exports Limited,*[75] before the Supreme Court of India. The court held that as per section 17 of MI Act, marine insurance policy can be transferred by assignment either prior to or after loss but rights of assignor under said contract of insurance policy continue to remain with assignor unless express agreement or implied agreement between assignor and assignee is made for transferring rights of assignor to assignee. In this case, the claim for loss of goods by the respondent company was repudiated by the insurance company on the ground that respondent company had already assigned said policy in favour of its consignee, and therefore, it does not have locus to file complaint against the loss with the insurance company and it had lost all rights and interest in said policy *qua* insurer.

The provision of assignment under the statute is very clear as regards the rights of assignor and assignee and an express or implied agreement between the parties for transfer of rights is essential. In this case, there was no express or implied agreement

73 The court relied on the earlier decisions in *Manak Lal* v. *Prem Chand Singhvi*, AIR 1957 SC 425 ; *Krishna Bahadur* v. *Purna Theatre* (2004) 8 SCC 229.

74 2016 SCC OnLine SC 599.

75 (2016) 11 SCC 348.

between respondent assured and consignee-assignee for transfer of rights of assured under the contract of insurance in favour of assignee. Hence, the respondent company is legally entitled and had *locus* to file a complaint against insurance company for enforcement of all contractual rights available to it under the said insurance policy for claiming compensation for loss caused by appellant.

VIII CONCLUSION

The survey of cases relating to banking shows that most of the cases coming before the apex court and high courts relate to securitization, overriding effect of SARFAESI Act over other legislations, *etc*. These cases are mostly appeals from DRT and DRAT from various states. The high courts sometimes overlook the settled principles of law in this regard while deciding the writ petitions before them. There is no doubt that the courts in India face the problem of the backlog of cases, these cases in majority may relate to the banking cases relating to recovery apart from cheque dishonor. Though there is no ambiguity in the SARFAESI legislation which was enacted for fast recovery of distressed assets of financial institutions which in turn will reduce NPAs, the reality is different. Judiciary need to play a very active role by not entertaining the case if it lacks substance prima facie as per the settled principles of law in this regard. This is required because of the pertinent reason that after protracted litigation even if the bank succeeds in the case, considering the long time taken, the chances of recovery from assets will be reduced due to the depreciation of the value of assets secured with it by the borrower. Another suggestion is that the court can direct the parties to invoke arbitration measures, this will reduce the time involved in settling the disputes as well as reduce the burden on the judiciary. Hence, it can be foreseen that in the interest of banking sector implementation of Insolvency and Bankruptcy Code is a right approach. The apex court in *Innoventive Industries Ltd* v. *ICICI,*[76] gave an extensive ruling on several crucial issues relating to the implementation of the IBC with an object that all courts and tribunals may observe the paradigm shift in the law engendered by insolvency and bankruptcy proceedings. Similarly, the approach of courts to decide insurance cases with strict interpretation rule is commendable since it follows the principles of contract.

76 2017 SCC OnLine SC 1025.