

HIGH COURT OF JAMMU AND KASHMIR
AT SRINAGAR

OWP No.530/2007 +

OWP No.1031/2004

and the connected matters shown in the enclosed cause lists.

Date of Decision :16.07.2015

Bhupinder Singh Sodhi and Ors *vs.* Union of India and Ors

Santosh Gupta vs. Union of India and Ors

CORAM:

HON'BLE MR. JUSTICE MUZAFFAR HUSSAIN ATTAR—JUDGE

HON'BLE MR. JUSTICE ALI MOHAMMAD MAGREY-JUDGE

(i) Whether to be reported in Media/Press

(ii) *Whether to be reported in*

: Yes

Appearing Counsel :

FOR THE PETITIONER(s) : Mr. P.N.Raina, Sr. Advocate.

Mr. A .Haqani, Advocate.

Mr. M.A.Qayoom, Advocate and the 1d. counsel whose names are mentioned in the enclosed cause lists.

FOR THE RESPONDENT(s) : Mr. R.A.Jan, Ld. Advocate General.

Mr. Z.A.Shah, Ld. Sr. Advocate with Mr.Hanan, Adv.

Mr. S.A.Makroo, Ld. ASGI and the Ld.counsel whose names are mentioned in the enclosed cause lists.

(MUZAFFAR HUSSAIN ATTAR)

01/ The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (for short the Act of 2002) was enacted by the Parliament in the year 2002. It was enforced on 17th December, 2002. The purpose of the Act is to regulate scrutinization and reconstruction of financial assets and enforcement of security interests and for matters connected

therewith or incidental thereto. The Act of 2002 was amended in the year 2004 and 2012.

02/ The legislative evolution, in the field of financial matters of Banks reached to its zenith by the enactment of Act of 2002. It was enacted to facilitate and ensure immediate recovery of finances/money which was/is due to financial Institutions from the borrowers.

03/ In the fast changing global financial scenario, the recovery of finances/ money by the lending banks/financial Institutions, from borrowers in our country would proceed on snails pace, thus, affecting the financial health of country. In order to meet the domestic and global financial challenges, it was deemed imperative and essential to have a legislation, which would ensure speedy and hassle free recovery of finances/money from the borrowers/loanees. On proper appraisal of the issues, it was found that the slow speed with which the money is being recovered by the banks/financial Institutions, in view of existing legal system and further for the reason that some of the borrowers/loanees would delay payment of finances/amount by adopting different delaying tactics, it was deemed necessary to enact a law which would arm the financial institutions/banks to recover money without delay.

04/ For the overall growth and development in different walks of life and to keep pace with the ever changing financial scenario

of the world and further to ensure that the country does not lag behind in its overall growth in all the related fields, it was deemed necessary to enact a law which would ensure immediate, speedy and hassle free recovery of finances/money from the borrowers/loanees. It further appears that because of withholding of the huge amounts by the borrowers/loanees, without any just and reasonable cause, the industrial, agricultural and technological development of the country was badly affected. The huge public interest would suffer by the dubious tactics employed by few individuals, who, illegally and immorally, at the cost of public interest, would make huge benefits, by retaining public money, which they received from the banks/financial Institutions. It is people's money, which is deposited in the banks/financial Institutions. This money is to be spent for the overall benefit of the people at large, which solemn purpose is/was being defeated by individual borrowers/loanees by not repaying amounts within the time frame fixed in the agreements arrived at between the borrowers/loanees and banks/financial Institutions.

05/ Initially, in order to overcome the aforesated difficulties, the Parliament enacted "*Recovery Of Debts Due To Banks & Financial Institutions Act 1993*" (for short the Act of 1993). With the passage of time, it was found that the Act of 1993 could not measure up to the expectations of the banks/financial Institutions,

in as much as, the speed, which was required for recovery of finances/money, was not achieved.

06/ It is in this backdrop that the Act of 2002 was enacted to secure the financial interests of the nation.

07/ Section 2(a) of the Act of 2002 defines Appellate Tribunal. Clause (b) defines ‘Assets Reconstruction and Clause 2(c) defines ‘banking’. Similarly ‘Banking Company’, ‘Power’, ‘Borrower’, ‘Debt’, ‘Default’, ‘Financial Assistance’, ‘Financial Assets’, ‘Financial Institutions’, ‘Hypothecation’, ‘Non Performing Asset’, ‘Property’, ‘Secured Creditor’, ‘Secured Debt’ and ‘Secured Interest’, also stand defined by section (2) of the Act, 2002. The aforesaid relevant clauses are taken note of :

“2. Definitions :--(1) In this Act, unless the context otherwise requires,--

(a) “Appellate Tribunal” means a Debts Recovery Appellate Tribunal established under sub-section (1) of section 8 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);

(b) “asset reconstruction” means acquisition by any securitization company or reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realization of such financial assistance;

(c) “bank” means-

- (i) a banking company; or*
- (ii) a corresponding new bank’ or*
- (iii) the State Bank of India; or*
- (iv) a subsidiary bank; or*

[(iva) a multi-State co-operative bank; or].

- (v) Such other bank which the Central Government may, by notification, specify for the purpose of this Act;
- (d) “banking company” shall have the meaning assigned to it in clause (c) of section 5 of the Banking Regulation Act, 1949 (10 of 1949);
- (e)
- (f) “borrower” means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitization company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;
- (g).....
- (h).....
- [(ha) “debt” shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);
- (i) “Debts Recovery Tribunal” means the Tribunal established under sub-section (1) of section 3 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);
- (j) “default” means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor [***];
- (k) “financial assistance” means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution;
- (l) “financial asset” means debt or receivables and includes---

- (i) a claim to any debt or receivables or part thereof, or charge on, immovable property; or
 - (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
 - (iii) a mortgage, charge, hypothecation or pledge of movable property; or
 - (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
 - (v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
 - (vi) any financial assistance;
- (m) "financial institution" means----
- (i) a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956);
- (ii) any institution specified by the Central Government under sub-clause (ii) of clause(h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);
- (iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958);
- (iv) any other institution or non-banking financial company as defined in clause (f) of section 45-1 of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act;
- (n) "hypothecation" means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallization of such charge into fixed charge on movable property;

(o) “non-performing asset” means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, [doubtful or loss asset,----

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

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

(p).....

(q).....

(r).....

(s).....

(t) “property” means----

(i) immovable property;

(ii) movable property;

(iii) any debt or any right to receive payment of money, whether secured or unsecured;

(iv) receivables, whether existing or future;

(v) intangible assets, being know-how, patent, copyright, trade mark, license, franchise or any other business or commercial right of similar nature;

(u).....

(v).....

(w).....

(x).....

(y).....

(z).....

(zc) “secured asset” means the property on which security interest is created;

(zd) “secured creditor” means any bank or financial institution or any consortium or group of banks or financial institutions and includes----

(i) debenture trustee appointed by any bank or financial institution; or

(ii) securitization company or reconstruction company, whether acting as such or managing a trust set up by such securitization company or reconstruction company for the securitization or reconstruction, as the case may be; or

(iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;

(ze) “secured debt” means a debt which is secured by any security interest;

(zf) “security interest” means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;”

08/ Chapter II of the Act of 2002, deals with regulation of securitisation and reconstruction of financial assets of Banks/Financial Institutions. Chapter III, which is relevant for disposal of these writ petitions, deals with enforcement of security interest. It commences from section 13. The different sub sections of section 13 provide manner and method for speedy recovery of the secured interest. It also provides for taking over possession of secured assets of the borrower as also the management of the business of borrower with further right to transfer it by way of lease, assignment, or sale for realizing the secured assets. Section 13, which, is beset on all sides by the challenge thrown to it by the writ petitioners, is taken note of :

“13. Enforcement of security interest:

1. *Notwithstanding anything contained in section 69 or section 69A of the Transfer of property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.*

2. *Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).*

3. *The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.*

[(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate [within fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower;

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District judge under section 17A.]

4. In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for releasing the secured asset;

[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

5. Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person valid discharge as if he has made payment to the borrower.

[(5A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorized by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.]

[(5B) Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of section 13.]

[(5C) The provisions of section 9 of the Banking regulation act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).]

6. *Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.*

7. *Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.*

8. *If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.*

9. *In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than [sixty per cent.] in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:*

Provided that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realize his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen' dues with the liquidator in accordance with the provisions of section 529A of that Act.

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's due cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

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

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

Explanation:-.....

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.”

09/ Section 17(A) of the Act of 2002, provides for making of Application to the Court of District Judge in certain cases. This is a special provision made for the borrowers residing in the state of J&K. similarly section 18(B) provides for appeal to the High Court in certain cases, which appeal can be filed by the borrower residing in the State of J&K and who would be aggrieved by any order made by the Court of District Judge u/s 17(A). These provisions are also taken note of :

“17A. Making of application to Court of District judge in certain cases:-

In the case of a borrower residing in the State of Jammu & Kashmir, the application under section 17 shall be made to the Court of

District Judge in that State having jurisdiction over the borrower which shall pass an order on such application.”

“18B. Appeal to High Court in certain cases:-

Any borrower residing in the State of Jammu & Kashmir and aggrieved by any order made by the Court of District Judge under section 17A may prefer an appeal, to the High Court having jurisdiction over such Court, within thirty days from the date of receipt of the order of the Court of District Judge:

Provided that no appeal shall be preferred unless the borrower has deposited, with the Jammu And Kashmir High Court, fifty percent. Of the amount of the debt due from him as claimed by the secured creditor or determined by the Court of District Judge, whichever is less:

Provided further that the High Court may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five percent. Of the debt referred to in the first proviso.”

- 10/ Section 34 of the Act of 2002 provides that no Civil Court shall have jurisdiction to entertain any Suit or proceedings in respect of any matter, which a Debts Recovery Tribunal or Appellate Tribunal is empowered by or under the Act to determine and it further provides that no injunction shall be granted by the Court or any other Authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act of 2002 or Act of 1993. Section 34 is taken note of :

“34. Civil court not to have jurisdiction:-

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any

matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).”

11/ Section 35 of the Act of 2002 provides that the provision of the Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or instrument having effect by virtue of any such law. Section 35 is also taken note of :

“35. The provisions of this Act to override other laws:-

The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.”

12/ Section 36, which prescribes the period of limitation is also reproduced hereunder :

“36. Limitation.

No secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963).”

13/ Section 37 prescribes that the provisions of the Act of 2002 or rules made thereunder, are in addition to, and not in derogation of the laws, which are mentioned in the said section.

The said provision is taken note of :

37. Application of other laws not barred. -

The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956(1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.”

- 14/ Section 38 confers power on the Central Government to make rules. This provision is also taken note of :

“38. Power of Central Government to make rules:-

The Central Government may, by notification and in the Electronic Gazette as defined in clause (s) of section 2 of the Information Technology Act, 2000 (21 of 2000), make rules for carrying out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:-

(a) the form and manner in which an application may be filed under sub-section (10) of section 13;

(b) the manner in which the rights of a secured creditor may be exercised by one or more of his officers under sub-section (12) of section 13;

[(ba) the fee for making an application to the Debts Recovery Tribunal under sub-section (1) of section 17;

(bb) the form of making an application to the Appellate Tribunal under sub-section (6) of section 17;

(bc) the fee for preferring an appeal to the Appellate Tribunal under sub-section (1) of section 18;]

(c) the safeguards subject to which the records may be kept under sub-section (2) of section 22;

(d) the manner in which the particulars of every transaction of securitization shall be filed under section 23 and fee for filing such transaction;

(e) the fee for inspecting the particulars of transactions kept under section 22 and entered in the Central Register under sub-section (1) of section 26;

(f) the fees for inspecting the Central Register maintained in electronic form under sub-section (2) of section 26;

(g) any other matter which is required to be, or may be, prescribed, in respect of which provision is to be, or may be, made by rules.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be mad, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.”

15/ The Central Government, in exercise of powers conferred by sub section (1) and clause (b)(2) of section 38 read with sub section (4)(10) & (12) of section 13 of the Act of 2002, has framed rules called “The Security Interest (Enforcement) Rules 2002”.

16/ The petitioners, in all the writ petitions, are those persons, who have borrowed money from different banks/financial

Institutions and have hypothecated their properties in favour of the banks/financial Institutions.

17/ The notices, u/s 13(2) of the Act of 2002, have been issued by the banks/secured creditors to the **petitioners** in respect of debt, which has been classified as Non Performing Asset, whereunder they have been asked to discharge in full the liabilities and pay the money due to the secured creditor within sixty days from the date of notice.

18/ Section 13(4) confers power on the secured creditor to take the measures for recovering the secured debt which powers are delineated in clause (a), (b),(c) & (d).

19/ All the writ petitioners have challenged the notices issued u/s 13(2) of the Act of 2002 on the grounds, which are broadly set out as under :

- a) The Parliament has no power to enact a law which would affect the immoveable property of the State subjects ;
- b) article 370 of the Constitution of India restricts power of the Parliament to enact a law which would affect the immoveable properties of the state subjects/citizens of the State of J&K ;
- c) creation of an Authority for recovery of secured debts falls within the definition of '*administration of justice*' and the Central Government has no authority and power to enact a law in this behalf as the List – I, (Union List) of Schedule 7th of the Constitution of India, does not have any such Entry incorporated therein and the Entry

- II-A figures in List – III, (Concurrent List) of 7th Schedule of the Constitution of India is not applicable to State of J&K;
- d) the legislature of the State of J&K, alone being competent to make laws about the land, immoveable properties, and section 13 of the Act of 2002, which provides that, “notwithstanding anything contained in section 69 or 69-A of Transfer of Property Act, 1882” is beyond the legislative competence of the Parliament ;
- e) the constitutional scheme and framework, as projected by the Constitution of India and Constitution of J&K, does not authorize for making of law like the Act of 2002 by the Parliament in respect of the State of J&K ;
- f) the limited extension of provision of the Constitution of India with further modifications, would make the Act of 2002 applicable to the country excepting the State of J&K ;
- g) in presence of Suits, already instituted for recovery of debt, recourse cannot be had to the provisions of the Act of 2002 for recovering the same amount.

20/ Mr. A.Haqani, learned counsel appearing for some of the writ petitioners, vehemently argued that the authority created and mechanism prescribed by the Act of 2002 is covered by the expression '*administration of justice*' and the Parliament has no power to legislate any law in this behalf. Learned counsel, while referring to section 13 of the Act of 2002, was at pains to explain that the authority created and mechanism prescribed by section 13 of the Act of 2002, is in essence, a judicial authority, who is required to act judicially and this being the legal position, the Act

of 2002 be declared illegal being beyond the legislative competence of the Parliament. Learned counsel referred to and relied upon the following judgments:-

1. *Jaswant Sugar Mills Ltd. Meerut vs. Lakshmi Chand and Ors*
reported in 1962 STPL(LE)2091 SC.
2. *State of T.N. vs. G.N.Venkataswamy and ors Etc.Etc.*
reported in 1994 STPL(LE)19294 SC.
3. *Associated Cement Companies Ltd., vs. PN.Sharma and Another*
reported in 1964 STPL(LE)3022 SC.
4. *Dev Singh and Ors vs. The Registrar, Punjab and Haryana High Court, and Others*
reported in 1987 STPL(LE)13705 SC.
5. *S.Ganapathraj Surana vs. State of Tamil Nadu*
reported in 1992 STPL(LE) 16834 SC.
6. *Sangram Singh vs. Election Tribunal Kotah and Anr.*
reported in 1955 STPL(LE)678SC.

21/ Mr. M.A.Qayoom, learned counsel appearing for some of the writ petitioners, invited attention of the Court to Article 370 of the Constitution of India and submitted that the mechanism prescribed in the said article for application of laws to the State of J&K, has not been followed. Learned counsel, while referring to article 370, submitted that clause B (i) of article 370 has restricted the power of Parliament, to make laws for the State of J&K, to those matters in the Union List and the Concurrent List, which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession. Learned counsel also referred to clause B(ii) of article 370 and submitted that other matters in the Union List may be applied to the State of J&K with concurrence of the Government of the State by the president, which may be specified by an order by the President. He further submitted that this

constitutional mechanism has not been followed for application of law to the State of J&K. Learned counsel also referred to an Application/Affidavit filed by the State of J&K in a writ petition, filed in Jammu Wing of the Court and submitted that the State of J&K itself has raised objection in respect of enforcement of the Act of 2002 in the State of J&K. Learned counsel also referred to section 140 of the Transfer of Property Act, 1882 (a State Act) to indicate that application of the Act of 2002 has directly impacted the fields of legislation, for which laws can be exclusively made by the State legislature. Mr. Qayoom, in support of his contention, referred to and relied upon following judgments:-

1. *S.Mubarik Shah Naqishbandi v. Income Tax Officer*
reported in AIR 1971 SC page 120.
2. *Madan Mohan Choudhary vs. State of Bihar & Ors*
reported in (1999) 3 Supreme Court Cases 396.
3. *Prem Nath vs. State of J&K*
reported in AIR 1959 Supre Court 749.
4. *High Court of Judicature for Rajasthan vs. P.P.Singh and anr.,*
reported in AIR 2003 S.C.1029.
5. *L&T MCNEIL LTD. v. GOVT. OF T.N*
reported in (2001) 3 Supreme Court Cases 170.
6. *K.P.Mohapatra v. Ram Chandra Nayak*
reported in AIR 2002 Supreme Court 3578.

22/ Other learned counsel, appearing for some other writ petitioners, made statement at the bar that they adopt the arguments, which were advanced by Mr. Haqani.

23/ Mr. P.N.Raina, learned Senior Counsel, appearing on behalf of some writ petitioners, submitted that the expression 'banking' which appears in List – I, (Union List) at Entry 45 of 7th Schedule of the Constitution of India, would not authorize the

Parliament to make a law like the Act of 2002 for effecting recovery of secured debt from the borrowers. Learned counsel, submitted that ours is a federal Constitution and the different limbs of the State have to confine their executive, legislative and judicial activities to the sphere of their delineated territorial, legal and constitutional jurisdictions. Learned counsel argued at great length by making reference to the decision of Hon'ble the Supreme Court, reported in 1970(1) SCC 248 in case titled *Rustom Cavaasjee Cooper, Petitioner v. Union of India, Respondent*. He read the judgement in extenso to canvass his point that the expression 'banking' appearing in Entry 45 of List – I, of 7th Schedule of the Constitution of India, would not mean and connote making a law for recovery of debt amount from the borrowers. Learned counsel also referred to the Banking Regulation Act 1949 (for short Act of 1949), more particularly, sections 5&6 thereof to indicate that banking has been, for the first time, defined by the said Act of 1949 and it does not refer to recovery of the amount. Besides this, learned counsel referred to article 370 of the Constitution of India. Mr. Raina submitted that the Act of 2002 violates the federal structure of the Constitution of India and it is an intrusion upon the legislative powers of the State Legislature. Learned counsel submitted that the impact of the Act of 2002 has to be considered in the backdrop of federal structure of our Constitution. He further submitted that

application of the Act of 2002 to the State of J&K, effectively violates the federal structure of the Constitution. Learned counsel also submitted that preceding the enactment of the Act of 2002, an ordinance was promulgated by the President of India in respect of scrutinization and reconstruction of financial assets, which ordinance was not made applicable to the State of J&K. Mr. Raina further submitted that the Central Government was conscious that such type of legislation would not be applicable to the State of J&K, which occupies a *special position* in the country. Learned counsel submitted that it is a sufficient indicator that the Act of 2002 would not be applicable to the State of J&K. learned counsel reiterated the argument, which was projected by M/s. Qayoom and Haqani that section 13 of the Act of 2002 has the potential of transferring the interests in the immoveable property of the State Subjects to Non State Subjects, as the bank is a juristic person and most of the banks, who are not banks of the State of J&K, whose Head Offices/Corporate Offices are located outside the State of J&K and whose Board of Directors comprises of Non State Subjects alone, it is not permissible, in view of the State laws, for them to create interest the immoveable property in the State of J&K. For the above stated reasons, more particularly, in the backdrop of article 370 of the Constitution of India, Mr. P.N.Raina, learned Senior Advocate, submitted that the Act of 2002 cannot be made applicable to the

State of J&K. Learned counsel referred to the following judgments:-

1. (1969) 2 SCC 55
2. (1996) 3 SCC 709
3. 1953 SC 375
4. 1958 SC 560
5. 1959 SC 648
6. 1959 SC 749
7. 1969 J&K 77
8. 1970 J&K 77
9. 1970 SC 564
10. 1972 SC 1061
11. 1972 Kerala 27
12. 2000 SC 2181
13. 2002 SC 834
14. 2002 SC 1334
15. 2002 SC 1479/2002(4) SCC 274
16. 2004 SC 2371/2004(4) SCC 311
17. 2007 SC 712

24/ Other learned counsel including the Senior Counsel, appearing in other cases, submitted at bar that they adopt the arguments advanced by Mr. P.N.Raina, Senior Counsel.

25/ One of the learned counsel submitted that his case be referred to the Legal Service Authority. Yet another learned counsel submitted that the Act of 2002 would not be applicable to the State of J&K, however, for recovery of advances, made by the bank outside the State of J&K, recourse can be taken to the Act of 2002.

26/ Mr. R.A.Jan, learned Advocate General, while referring to the Affidavit of State Authority, submitted that the State Government has taken cognizance of the issues involved in these cases. He further submitted that the State Government be given time to take final call on the subject.

27/ Mr. Zafar A.Shah, learned Senior Advocate, appearing for J&K Bank, argued at great length. He submitted that in view of Entry 45 of List – I, (Union List) of 7th Schedule of the Constitution of India, the Parliament is competent to legislate the Act of 2002. He further submitted that the Central Government has amended the Rules of 2002 and it has been prescribed that while enforcing the Act of 2002, the interests in the immoveable property can be transferred only in favour of the State subject. He also submitted that in view of the amendment made in the Rules of 2002, grievances of the petitioners stand redressed. Mr. Shah, while referring to article 370, submitted that in view of Constitution (Application to Jammu and Kashmir) Order of 1954 (C.O.48-S.R.O 1610 dated 14.05.1954) issued by the President of India, the Central Government has been authorized to legislate laws in respect of Entries in the List – I, (Union List) of 7th Schedule of the Constitution of India including entry 45, which Entry stands extended to the State of J&K in terms of the aforesaid constitutional order. He further submitted that it has been held by Hon'ble the Supreme Court, in case reported in (2009) 4 SCC 94 that the Act of 1993 as also Act of 2002 have been enacted in terms of Entry 45 of List – I, (Union List) of 7th Schedule of the Constitution of India. Learned counsel submitted that in view of the Authoritative Pronouncement of Hon'ble the Supreme Court, the issue that enactment fall within the purview

of Entry 11(a) of List – III, (Concurrent List) of 7th Schedule of the Constitution of India, is rendered irrelevant. Mr. Shah also submitted that huge amounts have crystallized into Non Performance assets. He submitted that withholding of huge amounts by the borrowers is directly and adversely affecting the economic growth of the State of J&K. Learned counsel, in support of his contention, referred to and relied upon the following judgments:-

1. *P.L.Lakhanpal vs. State of J&K* reported in AIR 1956 SC page 197
2. *Mohd Subhan & Ors vs. State* reported in AIR 1956 J&K Page 1
3. *Prem Nath Koul vs. State of J&K* reported in AIR 1959 SC page 749
4. *Sampat Prakash vs. State of J&K* reported in AIR 1970 SC page 118
5. *Jamaluddin vs. Abu Saleh* reported in 2003(4)SCC page 257
6. *Indian National Congress vs. Institute of Social Welfare and Ors* reported in 2002(5)SCC page 685
7. *Mardia Chemicals vs. UOI* reported in 2004(4) SCC page 311
8. *State of Bombay vs. Narottamdas* reported in AIR 1951 SC 69
9. *Central Bank of India vs. State of Kerala* reported in 2009(4) SCC page 94
10. *State of A.P vs. MsDowell & Co.* reported in 1996(3)SCC page 709
11. *Sunanda Kumari vs. Standard Chartered Bank* reported in 2007 135 CompCas 604 Kar, ILR KAR 16
12. *Abdul Aziz vs. PNB* reported in III(2006) BC 279
13. *A. Venkatramani vs. Housing Finance Ltd.* dated 28.09.2006
14. *M/s Transcore vs. Union of India* dated 29.11.2006
15. *Delhi Bar Association vs. UOI* reported in 2002(4)SCC.

28/ Mr. S.A.Makroo, learned Assistant Solicitor General of India submitted that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is valid and is capable of being enforced in the State of J&K. Learned counsel in support of his submission referred to the judgment titled *Suganthi Suresh Kumar-Appellant vs. Jagdeeshan-Respondent* reported in 2002(1) Supreme 227.

29/ Learned counsel, appearing for other respondent banks, in one voice, defended the Act of 2002. They submitted that the Act of 2002 does not impinge either upon the federal structure of Constitution or the State Constitution. Learned counsel referred to (2009) 4 SCC 94, more particularly, paragraph 36 thereto to show that Hon'ble the Supreme Court has already ruled that the Acts of 1993 and 2002 have been enacted by the Parliament under Entry 45 List – I, (Union List) of 7th Schedule of the Constitution of India. Learned counsel, accordingly, prayed for dismissal of the writ petitions.

30/ In order to appreciate the contentions raised and submissions made at bar, it is deemed appropriate to take note of some of the relevant provisions of the Constitution of India, which have been made applicable to the State of J&K :

- a) **By the Constitution (application to J&K) Order of 1954 (C-0-48-SRO 1610) ; Ministry of Law, New Delhi, 14th May, 1954 (for short order of 1954).**
- b) **Article 14, 19(1) (7), 21, 35 A (amended in terms of Constitution Order) 256 (2), 368 (2), 152, 245, 246 (as applicable to the State of J&K in terms of constitutional order), Article 370 and section 140 of the Transfer of Property Act, 1882 and section 5 and 6 of the Constitution of J&K, List Ist and III of seventh schedule.**

“14. Equality before law

The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”

“Right to freedom

19. Protection of certain rights regarding freedom of speech, etc.

- (1)** All citizens shall have the right-
 (a) to freedom of speech and expression;
 (b) to assemble peaceably and without arms;
 (c) to form associations or unions;
 (d) to move freely throughout the territory of India;
 (f) to acquire, hold and dispose of property; and
 (g) to practice any profession, or to carry on any occupation, trade or business.”
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“[(7) The words “reasonable restrictions” occurring in clauses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable.]”

“21. Protection of life and personal liberty

No person shall be deprived of his life or personal liberty except according to procedure established by law.”

“35 –A. Saving of laws with respect to permanent residents and their rights

Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,-

- (a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
- (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects-

 - (i) employment under the State Government;
 - (ii) acquisition of immovable property in the State;
 - (iii) settlement in the State; or
 - (iv) right to scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India any provision of this Part.

“256 Obligation of States and the Union

(1).....

(2) The State of Jammu and Kashmir shall so exercise its executive power as to facilitate the discharge by the Union of its duties and responsibilities under the Constitution in relation to that State; and in particular, the said State shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, or if the property belongs to the State, transfer it to the Union on such terms as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India.”

“368. [Power of Parliament to amend the Constitution and procedure therefor]

(1).....

(2) An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by majority of not less than two-thirds of the members of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that if such amendment seeks to make any change in-

- (a) article 54, article 55, article 73, article 162 or article 241, or
- (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or
- (c) any of the Lists in the Seventh Schedule, or
- (d) the representation of States in Parliament, or
- (e) the provisions of this article,

the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

[Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause(1) of article 370.]

(emphasis supplied)

“152. Definition

In this Part, unless the context otherwise, requires, the expression “State” does not include the State of Jammu and Kashmir.”

“245. Extent of laws made by Parliament and by the Legislatures of States

(1) Subject to the provisions of this Constitution, Parliament may make laws for the whole or any part of the territory of India, and the Legislature of a State may make laws for the whole or any part of the State.
 (2) No law made by Parliament shall be deemed to be invalid on the ground that it would have extra territorial operation.”

“246. Subject matter of laws made by Parliament and by the Legislatures of States

(1) Notwithstanding anything in clauses (2), Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule (in this Constitution referred to as the Union List)
 (2) Parliament, and, subject to clause (1), the Legislature of any State also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the Concurrent List).”

PART XXI**TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS****370. Temporary provisions with respect to the State of Jammu and Kashmir.—**

(1) Notwithstanding anything in this Constitution,—
 (a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;
 (b) the power of Parliament to make laws for the said State shall be limited to—
 (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the

Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation.—For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification"

Section 140 of Transfer of Property Act.

“140. Exemptions of certain instruments from restriction imposed on transfer of immovable property.

Nothing contained in Irshad dated 29th Maghar, 1943, or any law, rule order, notification, regulation, hidyat, ailan, circular, robkar, yadasht, irshad, State Council resolution or any other instrument having the force of law prohibiting or restricting the transfer of immovable property in favour of a person who is not a permanent resident of the State shall apply to—

1[(a) a mortgage of immovable property other than land as defined in the Jammu and Kashmir Alienation of Land Act, Samvat 1995, in favour of—

(i) the life Insurance Corporation of India established under the life Insurance Corporation Act, 1956 (3 of 1956) and having an office for transacting the business in the State; or

(ii) the Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1948; or

(iii) the Jammu and Kashmir State Financial Corporation established under the State Financial Corporation Act, 1951; or

(iv) the Jammu and Kashmir Bank Ltd. or the Industrial Development Bank of India or a Bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 and having an office for transacting the business of banking in the State ;or

(v) the Industrial Credit and Investment Corporation of India; or

(vi) the Housing and Urban Development Corporation Ltd., New Delhi; or

(vii) the Unit Trust of India; or

2[(viii) The Jammu and Kashmir Housing Board Constituted under the Jammu and Kashmir Housing Board Act, 1976;

Provided that in any suit based on such mortgage the mortgaged property shall be sold only to a permanent resident of the State;]

3[(aa) a simple mortgage of land in favour of -

(i) the Jammu and Kashmir Bank Ltd. or the Industrial Development Bank of India or a Bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 and having an office for transacting the business of banking in the State; or

(ii) the Jammu and Kashmir State Financial Corporation established under the State Financial Corporation Act, 1956; or

(iii) the Life insurance Corporation of India established under the Life Insurance Corporation Act, 1956; or

(iv) the Industrial Finance Corporation of India established under the Industrial Finance Corporation Act, 1948; or

(v) the industrial credit and Investment Corporation of India; or

(vi) the Housing Urban Development Corporation Ltd. new Delhi; or

1[(viii) The Jammu and Kashmir Housing Board constituted under the Jammu and Kashmir Housing Board Act, 1976;]

2{ix) The Housing Development Finance Corporation Limited, 3[***],]; or

4[(x) The Jammu and Kashmir Scheduled Castes and other Backward Classes Development Corporation Limited registered under the Companies Act, 1956]; or

5[(x) The Jammu and Kashmir Police Housing Corporation Ltd. Jammu/Srinagar.

Provided that in any suit based on such mortgage the mortgaged land shall be sold only to permanent resident of the State, who is a member of an agricultural class for purposes of the Jammu and Kashmir Alienation of Land Act, Svt. 1995];

(b) a transfer of immovable proper situate at Katra and the village contiguous to it in favour fo the Vishwayatan Yogashram, a Society registered under the Societies

Registration Act, 1860 (Central Act. No. 21 of 1860) effected in furtherance of the declared purpose of the Society;

1[(c) a transfer of immovable property in favour of Sher-i-Kashmir National medical Institute Trust Srinagar;]

2[(d) a transfer of immovable property situate in District Udhampur acquired or requisitioned on behalf and at the expense of the Union, in favour of National Hydro Electric power Corporation Limited for construction , commissioning, running and maintenance of the Salal Hydro Electric Project;]

3[(e) a transfer of immovable property by the Government in favour of:-

(i) the Jammu and Kashmir Tourism Development Corporation Ltd.;

(ii) the Jammu and Kashmir Industries Ltd.;

(iii) the Jammu and Kashmir Minerals Ltd.;

(iv) the Jammu and Kashmir State Industrial Development Corporation Ltd.;

(v) the Jammu and Kashmir handicrafts (Sale and Export) Corporation Ltd.;

(vi) the Jammu and Kashmir Road Transport Corporation Ltd.;

(vii) the Jammu and Kashmir Agro Industries Corporation Ltd.;

(viii) the Jammu and Kashmir Projects Construction Corporation Ltd.;

(ix) the Jammu and Kashmir Bank Ltd.;

4[(f) a simple mortgage of immovable property in favour of -

- (i) Hindustan Machine Tools, Watch Factory, Zainakote, Srinagar;
- (ii) Oriental Insurance Company Limited, having an office for transacting the business in the State;
- (iii) New India Assurance Company Limited, having an office for transacting the business in the State;
- (iv) National Insurance Company Limited, having an office for transacting the business in the State; or
- (v) Indian Telephone Industries Limited, Hyderpora, Srinagar.

By their employees respectively, who are permanent residents of the State, for obtaining loan for construction or purchase of residential accommodation in the State.

Provided that in any suit based on such mortgage, the mortgaged property shall be sold only to a permanent resident of the State];

1[(g) a transfer of immovable property in favour—

- (i) Sher-i-Kashmir University of Agriculture Science and Technology, established and incorporated under the Sher-i-Kashmir University of Agricultural Science and Technology Act, 1982, in furtherance of the objects of the university;
- (ii) Jammu and Kashmir Small Scale Industries Development Corporation Limited and Jammu and Kashmir State Industrial Development Corporation (State owned Corporations) for Industrial development in the state];
- 2[(iii) Jammu and Kashmir Cable Car Corporation Ltd.;
- 3[(iv) The Jammu and Kashmir Bank Ltd.]
- 4[(v) the Jammu and Kashmir State Power Development Corporation Limited.]

1[(h) a simple mortgage of immovable property executed or created in favour of a public financial institution, as specified in section 4-A of the Companies Act, 1956, a Scheduled bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 and the Trustees for the holders of debentures to secure the loans, guarantees, issue of debentures or other form of financial assistance provided for developmental projects in the State of Jammu and Kashmir Like Baghliar Project of Jammu and Kashmir State Power Development Corporation Limited.

Provided that in any suit based on such mortgage, the mortgaged property shall be sold or transferred only to a 2[a permanent resident of the State or any financial institution or corporation managed and owned by the Government of India];]

- 3[(i) a lease of immovable property in favour of
 - (i) Shri Mata Vaishno Devi University established under the Jammu and Kashmir Shri Mata Vaishno Devi University Act, 1999; and
 - (ii) Baba Ghulam Shah Badshah University established under the Jammu and Kashmir Babab

Ghulam shah for fulfillment of the objectives of the University.]”

“67- Rights to foreclosure or sale

In the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage-money has become 1[due] to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided, a right to obtain from the Court 2[a decree] that the mortgagor shall be absolutely debarred of his right to redeem the property, or 2[a decree] that the property be sold.

A suit to obtain 2[a decree] that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure. Nothing in this section shall be deemed— 3[

(a) to authorise any mortgagee other than a mortgagee by conditional sale or a mortgagee under an anomalous mortgage by the terms of which he is entitled to foreclose, to institute a suit for foreclosure, or an usufructuary mortgagee as such or a mortgagee by conditional sale as such to institute a suit for sale; or]

(b) to authorise a mortgagor who holds the mortgagee's rights as his trustee or legal representative, and who may sue for a sale of the property, to institute a suit for foreclosure; or

(c) to authorise the mortgagee of a railway, canal, or other work in the maintenance of which the public are interested, to institute a suit for foreclosure or sale; or

(d) to authorise a person interested in part only of the mortgage-money to institute a suit relating only to a corresponding part of the mortgaged property, unless the mortgagees have, with the consent of the mortgagor, severed their interests under the mortgage.”

Section 67-A of Transfer of Property Act.

“67-A Mortgagee when bound to bring one suit on several mortgages.

A mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under section 67, and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has come due.”

“HEREDITARY STATE SUBJECT

New entrant into State service to be Hereditary State Subject—Definition of “Hereditary State Subject”.

(Private Secretary's circular order dated 31st January, 1927, published in Government Gazette dated 26th Magh, 1983).

High Highness the Maharaja Bahadur has been pleased to command that in future in the case of every new entrant into State service, the authority empowered to make the appointment should certify that he has satisfied himself after due enquiries that the persons appointed is a hereditary State subject. Further, that in the absence of such a certificate the Accountant General should not pass the pay bill of such State servant without the definite orders of His Highness in Council to the contrary.

For the purposes of this Order the term "hereditary State Subject" will be held to mean and include all persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur and also persons who settled therein before the commencement of Samvat 1942, and have since been permanently residing therein. The certificate will be given after due enquiry by the Deputy Commissioner in whose charge the candidate for State service resides and the form of such certificate should be submitted by the Accountant General for the approval of His Highness in Council. In the meantime this order will have effect from the date of issue, namely 31st January, 1927. "

Section 5 & 6, 76 of The Jammu and Kashmir Constitution Act, 1996(1939 A.D) (for short 1939 AD)

"5. His Highness Inherent powers- Notwithstanding anything contained in this or any other Act, all powers, legislative, executive and judicial, in relation to the State and its government are hereby declared to be and to have always been inherent in and possessed ad retained by His Highness and nothing contained in this or any other Act shall affect or be deemed to have affected the right and prerogative of His Highness to make laws, and issue proclamations, orders and ordinances by virtue of his inherent authority."

THE EXECUTIVE

"6. Vesting of the civil administration in the council- Subject always to the provisions of sections 4 and 5 and subject also to such rules of business and allocation of portfolios and such other directions as to consultations with or reports to and confirmation by His Highness on special matters as His Highness may give from time to time by general or special orders in that behalf, the superintendence, direction and control of the civil administration and government of the State shall be vested in the Council."

"76. Repeal and saving of Laws and rules- (1) The Regulations specified in Schedule V are hereby repealed to the extent shown in the third column of the said Schedule.

(2) Notwithstanding the repeal of Regulation 1 of 1991 but subject to the other provisions of this Act, all the law in force in the State immediately before the commencement of this Act shall continue in force until altered or repealed or amended by competent authority.

(3) All notifications published, proclamations issued, powers conferred, jurisdiction vested, forms prescribed, local limits defined, and orders, rules and appointments made under any Regulations, Order, Law or Rule, hitherto in force, which are in force immediately before the coming into operation of this Act and which are not inconsistent with any of the provisions of this Act, shall be deemed to have been respectively published, issued, conferred, vested, prescribed, defined and made under this Act and shall remain in force until repealed or modified either expressly or by implication by competent authority.”

Section 5 and 6 of Constitution of J&K:

“5. Extent of executive and legislative power of the State-

The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India.”

“6. Permanent residents (1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954—

(a) he was a State Subject of Class I or of Class II; or

(b) having lawfully acquired immovable property in the State ,he has been ordinarily resident in the State for not less than ten years prior to that date.

(2) Any person who, before the fourteenth day of May, 1954, was a State Subject of Class I or of Class II and who having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the State under a permit for re-settlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

(3) In this section, the expression "State Subject of Class I or of Class II" shall have the same meaning as the [State Notification No. I-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twenty-seventh June, 1932].”

31/ In view of the significant constitutional issues raised as also for answering those issues, it becomes necessary to delve, to some extent, into the historical and constitutional development of the relations between the State of J&K and the Union. In this regard, Hon'ble the Supreme Court has referred to these developments in its decision reported in AIR 1959 SC 749 in case titled *Prem Nath Koul versus State of J&K*. The apex Court has taken cognizance of necessary developments from paragraph 6 to 21. However, paragraphs 6 to 15, which are relevant for the present cases, are taken note of :

“(6) In dealing with this appeal it is necessary to narrate in some detail the events which took place in Kashmir and the constitutional changes which followed them in order to appreciate fully the background of the impugned legislation. A clear understanding of this background will help us to deal with the appellant's case in its proper perspective. In 1925 Maharaja Hari Singh succeeded Maharaja Pratap Singh as the Ruler of Kashmir. It appears that for some time prior to 1934 there was public agitation in Kashmir for the establishment of responsible government. Presumably as a sequel to the said agitation Maharaj Hari Singh issued Regulation 1 of 1991 (1934). The Regulation began with the statement of policy that it was the declared intention of the Maharaja to provide for the association of his subjects in the matter of legislation and the administration of the State and that it was in pursuance of the said intention that the Regulation was being promulgated. This Regulation consisted of 46 sections which dealt with the legislative, executive and judicial power of the Maharaja himself referred to the subjects which should be reserved from the operation of the Regulation, made provision for the constitution of the Legislature of the State, conferred authority on the Council to make rules for specified purposes and referred to other relevant and material topics. It is relevant to refer to only two sections of this Regulation. Section 3 provides that all powers legislative, executive and judicial in relation to the State and its government are hereby declared to be ,& to have been always, inherent in possessed and retained by His Highness the Maharaja of Jammu and Kashmir and

nothing contained in the Regulation shall affect or be deemed to have affected the right prerogative of His Highness to make and pass regulations, proclamations & ordinances by virtue of his inherent power. Section 30 lays down that no measure shall be deemed to have been passed by the Praja Sabha until and unless His Highness has signified his assent thereto. The Regulation leaves it to the absolute discretion of His Highness whether to assent to such a measure or not.”

“(7) Five years later the Maharaja promulgated the Jammu and Kashmir Constitution Act 14 of 1996 (1939). From the preamble to this constitution it appears that, before its promulgation, the Maharaj had issued a proclamation on 11-2-1939, in which he had announced his decision as to the further steps to be taken to enable his subjects to make orderly progress in the direction of attaining the ideal of active co-operation between the executive and the Legislature of the State in ministering to the maximum happiness of the people. In accordance with this desire the text of the Constitution contained in Regulation 1 of 1991 was thoroughly overhauled and an attempt was made to bring the amended text into line with that of similar Constitutions of its type. This constitution is divided into six parts and includes 78 sections. Part 1 introductory. Part 2 deals with the executive; Part 3 with the Legislature; Part 4 with the Judicature; part 5 contains miscellaneous provisions; and Part 6 provides for repeal and saving and includes transitional provisions. It is significant that S. 5 of this Act, like S. 3 of the earlier Regulation, recognises and preserves all the inherent powers of His Highness, while S. 4 provides that the State was to be governed by and in the name of His Highness, and all rights, authority and jurisdiction which appertain or are incidental to by His Highness except in so far as may be otherwise provided by or under the Act or as may be otherwise directed by His Highness. The other provisions of the Act are all subject to the overriding powers of His Highness specifically preserved by S. 5. As we will point out later on, in substance the Constitutional powers of the Maharaja under the present Act were exactly the same as those under the earlier Act.”

“(8) While the State of Jammu and Kashmir was being governed by the Maharaja and the second Constitution as amended from time to time was in operation, political events were moving very fast in India and they culminated in the passing of the Indian Independence Act, 1947, Under S. 7(1)(b) of this Act the suzerainty of His Majesty over the Indian States lapsed and with it lapsed all treaties and agreements in force at the date of the passing of the Act between His Majesty and the Rulers of the Indian States, all obligations of His Majesty existing at that date towards Indian States or the Rulers thereof, and all powers, rights, authority or jurisdiction

exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise. The proviso to the said section, however, prescribed that, notwithstanding anything in para (b), effect shall, as nearly as may be, continue to be given to the provisions of any such agreement as therein referred to in relation to the subjects enumerated in the proviso or other like matters until the provisions in question are denounced by the Ruler of the Indian State on the one hand or by the Dominion or Province concerned on the other hand, or are superseded by subsequent agreements. Thus, with the lapse of British paramountcy the State of Jammu and Kashmir, like the other Indian States, was theoretically free from the limitations imposed by the said paramountcy subject to the provisions of proviso just mentioned."

"(9) On 22-10-1947, the tribal raiders invaded the territory of the State; and this invasion presented a problem of unprecedented gravity before the Maharaja. With the progress of the invading raiders the safety of the State was itself in grave jeopardy and it appeared that, if the march of the invaders was not successfully resisted, they would soon knock at the doors of Srinagar itself. This act of aggression set in motion a chain of political events which ultimately changed the political constitution of Kashmir with unexpected speed".

"(10) On 25-10-1947, the Maharaja signed an Instrument of Accession with India which had then become an Independent Dominion. By the first Clause of the Instrument the Maharaja declared that he had acceded to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion Authority established for the purpose of the Dominion shall, by virtue of the Instrument of Accession, subject always to the terms thereof and for the purpose only of the Dominion, exercise in relation to the State of Jammu and Kashmir such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India on 15-8-1947."

"(11) We may usefully refer to some other relevant clauses of this Instrument. By cl. 3 the Maharaja agreed that the matters specified in the Schedule attached to the Instrument of Accession were the matters with respect to which the Dominion Legislature may make laws for this State. Clause 5 provides that the Instrument shall not be varied by any amendment of the Government of India Act, 1935, or of the Indian Independence Act, 1947, unless such amendment is accepted by the Maharaja by an Instrument supplementary to the original Instrument of Accession.

By cl. 7 it was agreed that the Maharaja would not be deemed to be committed to the acceptance of any future Constitution of India nor would his discretion be fettered to enter into agreements with the government of India under any such future constitution. Clause 8 is very important. It says that nothing in the Instrument effects the continuance of the Maharaja's sovereignty in and over his State, or, save as provided by or under the Instrument, the exercise of any powers, authority and rights then enjoyed by him as ruler of the State, or the validity of any law then in force in the State. The Schedule attached to the Instrument refers to four topics, defence, external affairs, communications and ancillary, and under these topics twenty matters have been serially enumerated as those in respect of which the Dominion Legislature had the power to make laws for the State. Thus, by the Instrument of Accession, the Maharaja took the very important step of recognising the fact that his State was a part of the Dominion of India."

"(12) Meanwhile, the invasion of the State had created tremendous popular fervour and patriotic feelings in resisting the act of aggression and this popular feeling inevitably tended to exercise pressure on the Maharaja for introducing responsible and popular government in the State. The Maharaja tried to pacify the popular demand by issuing proclamation on 05-3-1948. By this proclamation he stated that in accordance with the traditions of his dynasty he had from time to time provided for increasing association of his people with the administration of the State with the object of realising the goal of full responsible government at as early a date as possible, and he added that he had noted with gratification and pride the progress made so far and the legitimate desire of his people for the immediate establishment of a fully democratic constitution based on adult franchise with hereditary Ruler from his dynasty as the constitutional head of an executive responsible to the Legislature. It appears that before this proclamation was issued the Maharaja had already appointed Sheikh Mohammad Abdullah who was then the popular leader of the people as the head of the emergency administration. By the proclamation the Maharaja replaced the emergency administration by a popular interim government and provided for its powers, duties and functions pending the formation of a fully democratic constitution. Clause 1 of the proclamation provides for the composition of the Ministry, whereas by cl. 2 the Prime Minister and other ministers are required to function as cabinet and act on the principle of joint responsibility. A Dewan appointed by the Maharaja is to be a member of the Cabinet. Clause 4 provides that the Council of Ministers shall take appropriate steps, as soon as restoration of normal conditions has been completed, to convene a National

Assembly based on adult franchise having due regard to the principle that the number of representatives from each voting area should, as far as practicable, be proportionate to the population of that area. Clause 5 then lays down that the Constitution to be framed by the national Assembly shall provide adequate safeguards for the minorities and contain appropriate provisions guaranteeing freedom of conscience, freedom of speech and freedom of assembly. Clause 6 states that when the work of framing the Constitution is completed by the National Assembly the Constitution would be submitted through the Council of Ministers to the Maharaja for his acceptance. The proclamation ended with the expression of hope that the formation of a popular interim government and the inauguration in the near future of a fully democratic Constitution would ensure the contentment, happiness and the moral and material advancement of the people of the State. Though under this proclamation a popular interim government was set up, the constitutional position still was that the popular government had theoretically to function under the Constitution of 1939. It appears that before the popular government was thus installed in office the Maharaja had deputed four representatives of the State to represent the State in the Constituent Assembly called in the Dominion of India to frame the Constitution of India.”

“(13) After the popular interim government began to function the political events in the State gathered momentum and the public began to clamour for the framing of a democratic Constitution at an early date. When the atmosphere in the State was thus surcharged the Maharaja issued his final proclamation on 20-6-1949, by which he entrusted to Yuvaraj Karan Singh Bahadur all his powers and functions in regard to the government of the State because he had decided for reasons of health to leave the State for a temporary period. “Now therefore I hereby direct and declare”, says the proclamation, “all powers and functions whether legislative, executive or judicial which are exercisable by me in relation to the State and its government including in particular my right and prerogative of making laws, of issuing proclamations, orders and ordinances, or remitting, commuting or reducing sentences and of pardoning offenders, during the period of my absence from the State, be exercisable by Yuvaraj Karan Singh Bahadur.” As subsequent events show this was the last official act of the Maharaja before he left the State.”

“(14) After Yuvaraj Karan Singh took the Maharaja’s place and began to function under the powers assigned to him by the said proclamation, the interim popular government installed earlier was functioning as before. On November, 25, 1949, Yuvaraj Karan Singh issued a

proclamation by which he declared and directed that the Constitution of India shortly to be adopted by the Constituent Assembly of India shall, in so far as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationship between the State and the contemplated Union of India and shall be enforced in the State by him, his heirs and successors in accordance with the tenor of its provisions. He also declared that the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which were then in force in the State. The preamble to this proclamation shows that it was based on the conviction that the best interests of the State required that the constitutional relationship established between the State and the Dominion of India should be continued as between the State and the contemplated Union of India; and it refers to the fact that the Constituent Assembly of India which had framed the Constitution of India included the duly appointed representatives of the State and that the said Constitution provided a suitable basis to continue the constitutional relationship between the State and the contemplated Union of India. On January 26, 1950, the Constitution of India came into force."

"(15) This proclamation was followed by the Constitution (application to Jammu and Kashmir) Order, 1950 (C. O. 10) which was issued on January 26, 1950, by the President in consultation with the Government of Jammu & Kashmir and in exercise of the Powers conferred by Cl. (1) of Art. 370 of the Constitution. It came into force at once. Clause 2 of this order provides that for the purposes of sub-cl. (i) of Art. 370 of the Constitution, the matters specified in the First Schedule to the Order correspond to matters specified in the Instrument of Accession governing the accession of the State of Jammu and Kashmir to the Dominion of India as the matter with regard to which the Dominion Legislature may make laws for that State; and accordingly the power of Parliament to make laws for that State shall be limited to the matters specified in the said first Schedule. Clause (3) provides that, in addition to the provisions of Art. 1 and Art. 370 of the Constitution the only other provisions of the Constitution which shall apply to the State of Jammu and Kashmir shall be those specified in the Second Schedule to the Order and shall so apply subject to the exceptions and modifications specified in the said Schedule. The First Schedule to the Order specified 96 items occurring in the Union List; while the Second Schedule set out the articles of the Constitution made applicable to the State together with the exceptions and modifications. Later on we will have occasion to refer to some of these articles on which the appellant has relied."

32/ Further, paragraphs 4 to 6 & 12 of the judgement of Hon'ble the Supreme Court in case titled *Sampat Prakash versus State of J&K*, reported in AIR 1970 SC 1118, are taken note of :

“4. Article 370 of the Constitution is as follows:-

“370. (1) notwithstanding anything in this Constitution,-

- (a) The provisions of Art. 238 shall not apply in relation to the State of Jammu & Kashmir;
- (b) the power of Parliament to make laws for the said State shall be limited to-

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation. For the purposes of this article, the Government of the State means the person for the time being recognized by the President as the Maharaja of Jammu & Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of article (1) and of this article shall apply in relation to that State;

(d) of that clause be given before the Constituent shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State

referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State;

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification."

The first argument was that this article contained temporary provisions which ceased to be effective after the Constituent Assembly convened for the purpose of framing the Constitution the Jammu & Kashmir State had completed its task by framing the Constitution for that State. Reliance was placed on the historical background in which this Art.370 was included in the Constitution to urge that the powers under this article were intended to be conferred only for the limited period until the Constitution of the State was framed, and the President could not resort to them after the Constituent Assembly had completed its work framing the Constitution of the State. The back ground or the legislative history, which reference was made was brought to our notice by learned counsel by drawing our attention to the speech of the Minister ,Sri N. Gopalaswami Ayyangar when he moved in the Constituent Assembly clause 306A of the Bill, which now corresponds 'with Article 370 of the

Constitution. It was stated by him that conditions in Kashmir were special and required special treatment. The special circumstances, to which reference was made by him were :--

- (1) that there had been a war going on within the limits of Jammu & Kashmir State;
- (2) that there was a cease-fire agreed to at the beginning of the year and that cease-fire was still on;
- (3) that the conditions in the State were still unusual and abnormal and had not settled down;
- (4) that part of the State was still in the hands of rebels and enemies;
- (5) that our country was entangled with the United Nations in regard to Jammu & Kashmir and it was not possible to say when we would be free from this entanglement;
- (6) that the Government of India had committed themselves to the people of Kashmir in certain respects which commitments included an undertaking that an opportunity be given to the people of the State to decide for themselves whether they would remain with the Republic or wish to go out of it; and
- (7) that the will of the people expressed through the Instrument of a Constituent Assembly would determine the Constitution of the State as well as the sphere of Union Jurisdiction over the State.

Learned counsel urged that, in this background, Art. 370 of the Constitution could only have been intended to remain effective until the Constitution of the State was framed and the will of the people of Jammu & Kashmir had been expressed and, thereafter, this article must be held to have become ineffective, so that the modifications made by the President in exercise of the powers under this article, subsequent to the enforcement of the Constitution of the State, would be without any authority of law. The Constitution of the State came into force on 26th January, 1956 and, therefore, the two Orders of 1959 and 1964 passed by the President in purported exercise of the power under Art 370 were void. It was also urged that the provisions

of clause (2) of Art. 370 support this view, because it directs that, if the concurrence of the Government of the State is given under para (ii) of sub-clause (b) of clause (1) or under the second proviso to sub-clause (d) of that clause before the Constituent Assembly for ,the purpose of framing the Constitution of the State is convened, that concurrence has to be placed before such Assembly for such decision as it may take thereon. From this, it was sought to be inferred that the power of the President, depending on the concurrence of the Government of the State, must be exercised before the dissolution of the Constituent Assembly of the State, so that the concurrence could be placed for its decision, and that. Power must be held to cease to exist after the dissolution of the Constituent Assembly when that course became impossible.”

“5. We are not impressed by either of these two arguments advanced by Mr. Ramamurthy. So far as the historical background is concerned, the Attorney-General appearing on behalf of the Government also relied on it to urge that the provisions of Art. 370 should be held to be continuing in force, because the situation that existed when this article was incorporated in the Constitution had not materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying the Indian Constitution while that situation remained unchanged. There is considerable force in this submission. The legislative history of this article cannot, in these circumstances, be of any assistance for holding that this article became ineffective after the Constituent Assembly of the State had framed the Constitution for the State.”

(emphasis supplied)

“6. The second submission based on clause (2) of Art. 370 does not find support even from the language of that clause which only refers to the concurrence given by the Government of the State before the Constituent Assembly was convened, and makes no mention at all of the completion of the work of .the Constituent Assembly or its dissolution.”

“12. The legislative history of this article will also fully support this view. It was because of the special situation existing in Jammu & Kashmir that the

Constituent Assembly framing the Constitution decided that the Constitution should not become applicable to Jammu & Kashmir under Art. 394 under which it came into effect in the rest of India, and preferred to confer on the President the power to apply the various provisions of the Constitution with exceptions and modifications. It was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision, the situation might demand an exception or modification of the provision applied; but subsequent changes in the situation might justify the rescinding of those modifications or exceptions. This could only be brought about by conferring on the President the power of making orders from time to time under Art/ 370 and this power must, therefore, be held to have been conferred on him by applying the provisions of Section 21 of the General Clauses Act for the interpretation of the Constitution.”

(emphasis supplied)

33/ The issue whether expression ‘*banking*’ in Entry 45 List – I, (Union List) of 7th Schedule of the Constitution of India, would include providing of mechanism by which the moneys, due to the banks/financial Institutions, can be recovered, has been settled by the apex Court in case titled *Union of India and another – Appellants versus Delhi High Court Bar Association and others - respondents*, reported in 2002 (4) SCC 275 and case titled *Central Bank of India v. State of Kerala and Ors* reported in (2009) 4 SCC 94.

Paragraph 14 of the judgement titled *Union of India and another – Appellants versus Delhi High Court Bar Association*

and others - respondents, reported in 2002 (4) SCC 275 is taken note of :

“14.The Delhi High Court and the Guwahati High Court have held that the source of the power of Parliament to enact a law relating to the establishment for the Debts Recovery Tribunal is Entry 11-A of List III which pertains to “*administration of justice; constitution and organization of all courts, except the Supreme Court and the High Courts*”. In our opinion, Entry 45 of List I would cover the types of legislation now enacted. Entry 45 of List I relates to “banking”. Banking operations would, inter alia, include accepting of loans and deposits, granting of loans and recovery of the debts due to the bank. There can be little doubt that under Entry 45 of List I, it is Parliament alone which can enact a law with regard to the conduct of business by the banks. Recovery of dues is an essential function of any banking institution. In exercise of its legislative power relating to banking, Parliament can provide the mechanism by which monies due to the banks and financial institutions can be recovered. The Tribunals have been set up in regard to the debts due to the banks. The special machinery of a tribunal which has been constituted as per the preamble of the Act, “*for expeditious adjudication and recovery of debts due to banks and financial intuitions and for matters connected therewith or incidental thereto*” would squarely fall within the ambit of Entry 45 of List I. As none of the items in the lists are to be read in a narrow or restricted sense, the terms “banking” in Entry 45 would mean legislation regarding all aspects of banking including ancillary or subsidiary matter relating to banking. Setting up of an adjudicatory body like the Banking Tribunal relating to transactions in which banks and financial intuitions are concerned would clearly fall under Entry 45 of List I giving Parliament specific power to legislate in relation thereto.”

(emphasis supplied)

(2009) 4 SCC page 94 para 36 is taken note of:-

“36. Undisputedly, the DRT Act and the Securitisation Act have been enacted by Parliament under Entry 45 in List I in the Seventh Schedule whereas the Bombay and Kerala Acts have been enacted by the State Legislature concerned under entry 54 in List II in the Seventh Schedule. To put it differently, two sets of legislations have been enacted with reference to entries in different lists in the Seventh Schedule. Therefore, Article 254 cannot be invoked per se for striking down State

legislations on the ground that the same are in conflict with the Central legislations. That apart, as will be seen hereafter, there is no ostensible overlapping between two sets of legislations. Therefore, even if the observations contained in Kesoram Industries case are treated as law declared under Article 141 of the Constitution, the State legislations cannot be struck down on the ground that the same are in conflict with Central legislations.”

(emphasis supplied by us)

34/ Hon’ble the Supreme Court, in case titled Central Bank of India – Appellant versus State of Kerala and others – respondents, reported in (2009) 4 SCC 94, at paragraph 36, has most specifically held that the Act of 2002 has been enacted by the Parliament under Entry 45 List – I, (Union List) of 7th Schedule of the Constitution of India.

35/ Mr. P.N.Raina, learned Senior Advocate, while referring to case titled *Rustum Cavasjee Cooper vs. Union of India*, reported in 1970(1) SCC 248, submitted that this judgement of the Hon’ble bench of eleven Judges has not been brought to the notice of the apex Court in *Union of India and another – Appellants versus Delhi High Court Bar Association and others - respondents* case reported in 2002(4) SCC 275 and (2009) 4 SCC 94. While referring to Cooper’s case supra, contention of learned counsel was that the expression ‘banking’ would not include providing of mechanism for recovery of moneys due to the banks from the borrowers. Learned counsel, as already stated, read the judgement at great length to canvass his point.

36/ The issue involved in Cooper's case was not whether the entry '*banking*' would include setting up and providing of mechanism for recovery of moneys due to the banks from the borrowers. In the said case, the declaration was sought that the Banking Companies (Acquisition & Transfer of Undertakings) Ordinance 8 of 1969, promulgated on 19th July, 1969 and the Banking Companies (Acquisition & Transfer of Undertakings) Act , of 1969, impair the rights of the owners of Banks guaranteed under articles 14, 19 & 31 of the Constitution and on that count are invalid. The apex court, by its majority decision, declared that the aforesaid Act is valid, and the Act was held to be within the legislative competence of the Parliament. However, it was declared that the Act made hostile discrimination against the named banks, in that, it prohibited the named banks from carrying on banking business, whereas other banks – Indian & foreign, were permitted to carry on banking business and even new banks could be opened, which may engage in banking business. It was further held that the impugned Act, in reality, restricted the named banks, whose undertakings were taken over under the said Act from carrying on business other than banking, as defined in section 5(B) of the Banking Regulation Act 1949 and it was further declared that the Act violated the right for payment of compensation guaranteed under article 31.

37/ The question, which is subject matter of these petitions, viz. the mechanism provided for recovery of the moneys due from the borrowers in terms of the Act of 2002 was not the issue involved in Cooper's case. Whole hog reliance placed by Mr. P.N.Raina, on Cooper's judgement, is of no consequence for determination of the issue involved in these writ petitions.

38/ Entry 45 'banking' of List – I, (Union List) of 7th Schedule of the Constitution of India as also the expression '*banking*' as defined in Banking Regulation Act 1949, would not mean that a bank, in the course of its banking business, though has the power to advance loans but has no power to recover the same. No sensible Government, Corporation or a private Company or an individual will indulge in '*banking*' if it is to be held that a banker, in the course of his banking, can only advance the money and cannot recover the same. The banking business cannot even take off if such a view is taken. Even otherwise, it does not stand to reason that in banking business, when money is advanced by a banker, it would not include his right to recover the same. Right to recover the money advanced and the money due to the banks/financial Institutions, is inherent in banking business.

39/ Recovery of moneys due to the banks can be effected on the basis of agreement arrived at between the lender and borrower and recovery can be effected through remedies available in

common law. In common law, the ordinary mode of seeking recovery of money by the banks is by institution of Suits in the Courts established by the State. The mechanism can also be prescribed for recovery of moneys due to the banks by enacting laws. The validity of the Act of 1993, which is not applicable to the State of J&K, has been upheld by Hon'ble the Supreme Court in Union of India versus Delhi High Court Bar Association's case. Similarly the apex Court has upheld the validity of the Act of 2002 in Mridula's case reported in AIR 2004 SC 2371 – (2004) 4 SCC 311. In the said case, challenge was thrown to the Act of 2002 on the ground that same is arbitrary and violative of article 14 of the Constitution of India.

40/ In view of observations of the apex Court in Central Bank of India – Appellant versus State of Kerala and others – respondents and Union of India versus Delhi High Court Bar Association cases, these writ petitions would require to be dismissed, but regard being had to the special constitutional and legal position occupied by the State of J&K in the community of States of Union of India and in view of the constitutional and legal issues raised by learned counsel about the same, the applicability of some of the provisions of the Act of 2002, more particularly, section 13(1) and (4) thereof, has come under cloud. The issues raised at bar would require to be considered from this stand point now.

41/ Hon'ble the Supreme court in Prem Nath Koul's case, from paragraph 6 onwards, has dealt, in some detail, with the events and constitutional changes, which took place in Kashmir from 1925 onwards, which are briefly summarized as under :

A) *In 1925, Maharaja Hari Singh succeeded Maharaja Pratap Singh as ruler of Kashmir ;*

Ai) In the year 1934, in pursuance to peoples' demand for establishment of responsible Government, Maharaja Hari Singh issued Regulation No.1 of 1991(1934).

Aii) The preamble of the Regulation expressed the intention of Maharaja to provide for association of his subjects in the matter of legislation and administration of the State and in pursuance to the said intention, the Regulation were promulgated.

Aiii) The Regulation consisted of 46 sections which dealt with legislative, executive and Judicial powers of Maharaja himself. It also referred to the subjects which were reserved from the operation of Regulation.

Aiv) Maharaja made provision for constitution of legislature of the State.

Av) Conferred authority on council to make rules for specific purposes and referred to other relevant and material topics.

Avi) Section 3 provided that all powers viz. legislative,

Executive and judicial in relation to the State and its Government, are declared to be and to have been always, inherent in and possessed of and retained by— the Maharaja of J&K and nothing contained in

the Regulation shall affect or be deemed to have affected his right and prerogative to make and pass Regulations, Proclamations and Ordinances by virtue of his inherent powers.

Avii) Section 30 laid down that no measure shall be deemed to have been passed by the Praja Sabha until and unless the Maharaja signified his assent thereto.

Aviii) The Regulation left it to the absolute discretion of Maharaja whether to assent to such a measure or not .

(para 6 of Prem Nath Koul's judgement).

B/ Five years later, Maharaja promulgated the J&K Constitution Act 14 of 1996 (1939).

Bi) The preamble of the Constitution referred to a Proclamation issued on 11th June, 1939, in which the Maharaja's decision was expressed to further take steps to enable his subjects to make orderly progress in the direction of attaining the role of active cooperation between the executive and legislature of the State in ensuring maximum happiness of the people.

Bii) In accordance with the aforesaid desire, the text of the Constitution, contained in Regulation (I) of 1991 was thoroughly overhauled and effort was made to bring the amended Constitution in tune with the similar Constitutions of its type.

Biii) The Constitution is divided into 06 parts and includes 78 sections.

Biv) Section 5 of the Act, like section 3 of the earlier Regulation, recognized and preserved all

inherent powers of Maharaja, whereas section 4 provided that the State was to be governed by and in the name of His Highness, and all rights, authority and Jurisdiction which appertain to the Government of the State, are exercisable by His Highness, in so far as, may be otherwise provided by or under the Act or as may be otherwise directed by His Highness.

Bv) The other provisions of the Act were all subject to over riding powers of His Highness specifically preserved by section 5.

Bvi) The constitutional powers of the Maharaja under the Act of 1939 were, in substance, exactly same as those under the earlier Act.

(para 7 of Prem Nath Koul's judgement).

C) The Indian Independence Act 1947 (for short Act of 1947) was enacted and during this time, the State of J&K was being governed by Maharaja, and the second Constitution, as amended from time to time, was in operation.

Ci) Under section 7(1)(b) of the Act of 1947, the suzerainty of His Majesty over the Indian States lapsed and with it lapsed all the treaties and agreements in force at the date of passing of the Act of 1947 between His Majesty and the rulers of the Indian States.

Cii) All obligations of His Majesty existing at that time towards Indian States or the rulers thereof, and all powers, rights authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, agreement, usage, sufferance or otherwise also lapsed.

Ciii) The proviso to said section, however, prescribed that notwithstanding anything in para (b), effect shall, as nearly as may be, continue to be given to provisions in such agreements as therein referred to in relation to the subjects enumerated in the proviso or other like matters until the provisions in question are denounced by the ruler of Indian State on the one hand, or are superseded by his subsequent agreements on the other hand.

Civ) With the lapse of British paramountcy, the State of J&K was free from limitations imposed by the said paramountcy subject to provisions of the proviso aforesaid.

(para 8 of Prem Nath Koul's judgement).

D) The tribal leaders invaded the State on 22nd October, 1947. The Maharaja on 29th October, 1947 signed Instrument of Accession with India, which had then become an independent dominion.

Di) By the first clause of the Instrument of Accession, the Maharaja declared that he had acceded to the dominion of India with the intent that Governor General of India, the dominion, legislature, the federal Court and any other dominion authority established for the purpose of dominion shall, by virtue of Instrument of Accession, subject always to the terms thereof and for the purpose only of the dominion, exercise, in relation to the State of J&K, such functions as may be vested in them by or under the Government of India Act 1935 as in force in the dominion of India on 15th August, 1947.

(para 9 & 10 of Prem Nath Koul's judgement).

E) By clause (3) of the Instrument of Accession, the Maharaja agreed with the matters specified in the schedule attached to the Instrument of Accession, where the matters with respect to which the dominion legislature may make laws for the State.

Ei) Clause (5) provided that the Instrument of Accession shall not be varied by any amendment to Government of India Act, 1935 or of the Indian Independence Act, 1947, unless such amendment was accepted by Maharaja by an Instrument supplementary to the original Instrument of Accession.

Eii) By clause (7), it was agreed that Maharaja shall not be deemed to be committed to the acceptance to any future Constitution of India nor would his discretion be fettered to enter into agreements with Government of India under any such future Constitution.

Eiii) Clause (8) provided that nothing in the Instrument affects the continuance of the Maharaja's sovereignty under and over his State, save as provided by or under the Instrument, the exercise of any powers, authority and rights then enjoyed by him as ruler of the State, or the validity of any law then in force in the State.

Eiv) The Schedule attached to the Instrument referred to four topics, Defence, External Affairs, Communication and ancillary and under these topics, 20 matters were serially enumerated as those in respect of which the dominion legislature had power to make laws in the State. Thus, by the Instrument of Accession, the Maharaja took the very

important step of recognizing the fact that his State was part of the dominion of India.
(para 11 of Prem Nath Koul's judgement).

F) *On 05th March, 1948, Maharaja replaced the emergency administration by interim Government and provided for its powers, duties and functions pending the formation of a fully democratic Constitution.*

Fi) Clause (4) of the Proclamation provided that the council of Ministers shall take appropriate steps, as soon as restoration of normal conditions are completed to convene a National Assembly based on adult franchise.

Fii) Clause (5) laid down that the Constitution to be framed by the National Assembly shall provide adequate safeguards for the minorities and contain appropriate provisions guaranteeing freedom of conscience, freedom of speech and freedom of assembly.

Fiii) Clause (6) provided that after completion of framing of the Constitution by the National Assembly, the same should be submitted through Council of Ministers to Maharaja for his acceptance.

(para 12 of Prem Nath Koul's case)

G) *On 26th June, 1943, Maharaja issued a Proclamation by which he entrusted to Yuvraj Karan Singh Bahadur all his powers and functions in regard to Government of the State.*

Gi) On 25th November, 1949, the Yuvraj Karan Singh issued a proclamation by which he declared and directed that the Constitution of India, shortly to be adopted by the Constituent Assembly of India, shall, in so far as, it is applicable to the State of J&K, govern the constitutional relationship between the State and contemplated Union of India and shall be enforced for the

State by him, his heirs and successors in accordance with the terms of its provisions.

Gii) He also declared that the provisions of the said Constitution, shall, as from the date of its commencement, substitute and abrogate all other constitutional provisions inconsistent therewith which were then in force in the State.

(para 14 of Prem Nath Koul's case)

H) The Proclamation aforesaid was followed by the Constitution (application to J&K) order, 1950 (C-o-10), which was issued on January 26, 1950 by the President in consultation with J&K and for exercise of powers conferred by clause (1) of article 370 of the Constitution of India.

(para 15 of Prem Nath Koul's case)

I) The Yuvraj Karan Singh, on 20th April, 1951 issued a Proclamation whereunder he directed that the Constituent Assembly, comprising all representations of the people elected on the basis of adult franchise, shall be constituted forthwith for purposes of framing a Constitution for the State of J&K. The Proclamation set out the manner in which the members of the Constituent Assembly would be elected and also made provisions for holding of said elections.

Ii) The Yuvraj Karan Singh also felt that the Proclamation issued by the Maharaja on 05th March, 1948, with regard to convening the National Assembly, no longer met the requirements of the situation of the State.

Iii) By the Constitution, thus framed, the hereditary rule of the State was abolished and a provision was made for election of Sadar-i-Riasat to be the head of the State.

Iii) On 15th November, 1952, the Constitution (application to J&K) 2nd amendment order 1952 (C-0-43) was issued which came into force on 17th November, 1952.

(paras 20 & 21 of Prem Nath Koul's case)

J) Hon'ble the Supreme Court rejected the argument that the execution of Instrument of Accession affected, in any manner, the legislative, Executive and judicial powers in regard to the Government of State which then vested in the ruler of the State.

Ji) At paragraph 27 of Prem Nath Koul's case, Hon'ble the Supreme Court has made it clear that until the Maharaja issued his proclamation on 29th June, 1949, all his powers, legislative, executive and judicial as well as his right and prerogative vested in him as before.

Jii) At paragraph 30 of Prem Nath Koul's case, it has been made clear by Hon'ble the Supreme Court that proclamation of 26th November, 1949, did not affect Yuvraj Karan Singh's authority and power as ruler of the State which had been conferred on him by proclamation of his father issued in that behalf. “

42/ Reference to Prem Nath Koul's and Sampat Prakash's decision has been made to show that the State of J&K has, legally and validly, framed its Constitution, which is not the position in respect of other States of the country. The provisions of Constitution of India which pertain to the States have also not been made applicable to the State of J&K. List – II, (State List) of 7th Schedule of the Constitution of India has also not been made applicable to the State of J&K.

43/ The laws made by Maharaja to define the State subjects and the laws made by him in respect of prohibition on alienation

of immovable property in favour of non State subjects have been protected by the constitutional laws viz. Section 76 of Act of 1939 AD and other statutory laws including that of section 140 of the Transfer of Property Act, 1882. The State of J&K is not only unique in view of having its own Constitution but has other special features, one of which has been referred to hereinabove.

44/ The power of Parliament to legislate laws for which field is prescribed by List – I, of the 7th Schedule of the Constitution of India and List – III (Concurrent List) thereof, pertain to not all the Entries made in these lists but only to those Entries, which have been applied to State of J&K by employing the constitutional procedure prescribed in article 370 of the Constitution of India. The Union Parliament is lacking the legislative competence to enact laws in respect of '*administration of justice and constitution of Courts*', which Entry has been shifted to List III (Concurrent List) by constitution (Forty second Amendment) Act 1976 carried in the Constitution in the year 1976, which amendment has not been made applicable to the State of J&K.

45/ Section 13(4) of the Act of 2002, authorizes the secured creditor, which, in the cases on hand, are the banks, who being juristic persons, are not State Subjects, to take possession of secured assets, which would include immovable properties of the borrowers and have been further armed with the power to

transfer by way of lease, assignment or sale for realizing the money due to them.

46/ The Parliament has no legislative competence to make laws in respect of J&K, which would affect the interests of the State subjects/citizens of the State as defined by law and section 6 of the Constitution of J&K qua their immoveable properties. It is the State in terms of the section 5 of the Constitution of J&K, which has the absolute sovereign power to legislate laws touching the rights of its State subjects/citizens qua their immoveable properties. The State legislature, in terms of section 140 of Transfer of Property Act, 1882, has authorized for mortgage of property in favour of the Institutions mentioned therein. In respect of schedule first, only simple mortgage has been authorized to be executed in their favour. The sale of immoveable property in pursuance to a Civil Court Decree obtained by the bank/financial Institution in respect of the mortgaged property cannot be made in favour of the non State subjects. Since the field of legislation as prescribed in List I, Entries of some of which have been extended to the State of J&K, do not authorize the Union Parliament to legislate law, as already stated, which affects the interests of the State subjects/citizens of J&K qua their immoveable property, the competence of the Parliament to legislate section 13 (1) and (4) is held to be beyond its legislative competence to the extent of State of J&K.

Similarly sub section (1) of section 13 of the Act of 2002, which prescribes that “notwithstanding anything contained in section 69 & 69-A of Transfer of Property Act”, would not be applicable to the State of J&K, *inter alia*, the Union Parliament has no legislative competence to enact law relating to transfer of property in the State of J&K and secondly reference is made to provisions of Transfer of Property Act, which are applicable to the entire country excepting the State of J&K, which has its own law called Transfer of Property Act, 1882. Furthermore, section 13 cannot be made applicable in its entirety in view of its non obstinate clause to the State of J&K. Similarly section 17(A) of the Act of 2002, is beyond the legislative competence of the Union Parliament as even extending the jurisdiction of the existing Court in the State of J&K is covered by Entry ‘*administration of justice*’ and Union Parliament lacks legislative power to enact such provision in respect of State of Jammu and Kashmir. Same reasoning applies to section 18(B) as well. On the same analogy, Union Parliament lacks legislative competence to enact provisions like section 34, 35 and 36 of the Act of 2002. Section 13(1) and section 13(4), being the kernel of the Act of 2002, further, as already stated, the Union Parliament having no legislative competence to enact laws, vide 17(A), 18(B), 34, 35, 36, the Act of 2002 cannot be implemented in the State of J&K.

47/ In Prem Nath Koul's case, it has been authoritatively ruled by Hon'ble the Supreme Court that signing of Instrument of Accession did not affect the sovereignty of Maharaja over his State. After the Instrument of Accession was signed by Maharaja, his successor in interest issued proclamation for electing Constituent Assembly for framing of Constitution of J&K. The Constituent Assembly was elected on the basis of adult franchise and the said Constituent Assembly framed Constitution, which is called Constitution of J&K. The Constituent Assembly, adopted and gave to the people of the State of J&K the Constitution on 17th day of November, 1956. Sections 2,3,4,5,6,7,8 & 158 came into force at once and the other provisions of Constitution of J&K came into force on 26th day of Jan 1957. The Yuvraj, who issued proclamation for convening of Constitutional Assembly and who possessed sovereign power, thus, by getting the Constituent Assembly elected through adult franchise, transferred sovereignty of the State to the people of the State. Even otherwise, the people are repository of sovereign power of the State. The State of J&K, thus, got its own Constitution for regulating its affairs.

48/ The Constitution of India, in the above legal situation, could not apply, by its own force, to the State of J&K. Article 370 of the Constitution of India, provided mechanism and procedure for applying constitutional provisions and statutes to the State of J&K. The dominion Government, however, could not extend

provisions of the Constitution or other laws to the State of J&K unilaterally. Same could be done either with consultation with the Government of J&K or with its concurrence. The sovereignty of the State of J&K under the rule of Maharaja , even after signing of Instrument of Accession and in view of framing of its own Constitution, thus, legally and constitutionally remained intact and untampered. The sovereign character of the State Constitution and State Assembly, which, like other wings of the State, is creature of State Constitution, has, thus, sovereign power to make laws for its subjects. The Parliament has been authorized to make laws in respect of those matters in the Union List and Concurrent List, which, in consultation with the Government of the State are declared by the President to correspond to matters specified in the Instrument of Accession, governing the accession of State to the dominion of India. The other laws in the said State could be made by the Parliament with concurrence of the Government of the State, which are to be specified by the President by an order.

49/ Entry 45 of List (I) of Schedule 7th of Constitution of India has been extended to the State of J&K in accordance with the mechanism and procedure prescribed by article 370. The Parliament has, thus, power to legislate laws in respect of banking. The Parliament, however, has no power to legislate law about the subject *“administration of justice, the land & the other immoveable properties”*. In terms of section 5 of the Constitution

of J&K, the State Legislature has power to enact laws, besides others, on the aforesaid subjects as well. In view of law laid down by Hon'ble the Supreme Court in cases reported in AIR 1951 SC 69 and AIR 1995 SC 21, the Entry “*administration of justice*” would include creation of Courts conferring jurisdiction on them as also enlarging and diminishing of jurisdiction of the Courts. The Parliament could not, of its own, thus, make law like section 17(A) and 18(B) of the Act of 2002 as same has conferred jurisdiction on the Courts in the State of J&K, which is, exclusively, the power of State Legislature, in as much as the Entry 11-A of List (III) (Concurrent List) has not been extended to the State of J&K. Similarly, the law regarding transfer of immoveable property, the Limitation Act and provision of the Act of 2002, which has the effect to supersede State laws, does not fall within the competence of the Parliament to the extent of State of Jammu and Kashmir. The provisions of the Act of 2002, more particularly, those, reference whereof has been made in this judgement, could not be legislated by the Parliament in respect of State of Jammu and Kashmir.

50/ The laws made by the Maharaja are protected by the Constitution of 1939 AD and the subsequent Constitution framed by the Constituent Assembly of the State of J&K, which includes protection given to the State subjects and non transferring of immoveable properties to non State subjects. The Act of 2002,

which, in view of discussion made in this judgement, affects these laws and rights of the State subjects, thus cannot be extended to the State of J&K.

51/ The Constitution of J&K, as already stated, is sovereign in character and the State Assembly, exercises sovereign power to legislate laws.

52/ In the community of States of India, in view of law laid down by Hon'ble the Supreme Court in Prem Nath Koul and Sampat Prakash's cases, the State of J&K occupies a distinct, unique and special position. Thus, in law, the State of J&K constitutes a class in itself and cannot be compared to the other states of the country. The constitutional provisions and laws, which have been extended to the State of J&K in accordance with the mechanism and procedure prescribed by article 370 and which constitutional provisions and laws have been made applicable to the State of J&K with modifications etc., make the distinct, unique & special position of the State of J&K more clear. The Constitutional provisions and laws, which have been extended to the State of J&K, are applied to a class of people, who are State subjects of the State of J&K. These laws have not been made applicable, in the same form, to the people of rest of the States of the country. Article 35(A), as has been applied to the State of J&K, not only recognizes but clarifies the aforestated constitutional and

legal position. This article, on its own, does not give anything new to the State of J&K.

53/ Article 14 of the Constitution of India, as has been made applicable to the State of J&K, thus, gave equal protection of laws to the State subjects/citizens as a class apart. Similarly, article 19(1)(f) of the Constitution of India, which has been made applicable to the State of J&K and till date continues to be in force in the State, recognizes the right to own, hold and dispose of property, which right otherwise is inherent in the State subjects/citizens of the State of J&K, who stand defined in terms of Elans/Orders of His Highness and the Constitution of J&K.

54/ Similarly the expression “*life*” appearing in article 21, has wide connotation. Human life has many essential components and attributes. The basic instinct is survival of human beings. Human life is created with a definite purpose. It comprises of many characteristics, viz. spiritual, physical and material. The physical existence and material support is necessary for attaining spiritual excellence. Human being acquires properties both moveable and immovable. These material things comprise an essential component of human being/*life*. A person can be deprived of his physical and material components by procedure established by law. Laws have their own universe. They operate in matter and not in vacuum. The laws are located in time and space. In the State of J&K, the immovable property of a State subject/citizen, cannot

be permitted to be transferred to a non State subject. This legal and constitutional protection is inherent in the State subjects of the State of J&K and this fundamental and basic inherent right cannot be taken away in view of peculiar and special constitutional position occupied by State of Jammu and Kashmir. No law can be made to abridge or affect this basic right of citizens of Jammu and Kashmir. The Act of 2002 does adversely impact the inherent, natural and constitutional rights of the State subjects. Even otherwise, as already stated, the Parliament lacks the power to enact such a law in view of express constitutional provisions in respect of Jammu and Kashmir.

55/ Article 35(A) of the Constitution of India, which has been applied to the State of J&K, as already stated, clarifies the already existing constitutional and legal position and does not extend something new to state of J&K. Article 35-A is clarificatory provision to clear the issue of constitutional position obtaining in rest of country in contrast to State of J&K. This provision clears the constitutional relationship between people of rest of country with people of J&K. It is in essence an information to the citizens of rest of country that on constitutional and legal plank they in all respects do not constitute a class with citizens of state of Jammu and Kashmir. The citizens of State of Jammu and Kashmir, as already stated, have their own constitution, and their sovereign character which cannot be challenged, altered or abridged. The

power of Parliament to make laws in respect of State of Jammu and Kashmir is circumscribed and it can make laws for it only where permitted by State and not otherwise, and that too in accordance with mechanism prescribed by Article 370 of Constitution of India.

56/- Article 152 and article 368 of the Constitution of India, while referring to State, provides that it does not include the State of J&K.

57/ Amendment to Rules of 2002, which provide that a non State subject cannot purchase the immoveable property in consequence to sale made in terms of section 13(4) of the Act of 2002 is rendered inconsequential and otiose in view of reasons recorded in this judgement. Section 13(4) empowers the non State subject to take possession of immoveable property which is not countenanced by State Constitution and State Laws. Furthermore, in view of the aforestated discussion, whereunder it has been held that section 17 (A) and 18(B) have been enacted without legislative competence, there being no redressal forum available against the action taken u/s 13 of the Act of 2002, it would not be applicable to the State of J&K. Section 34 takes away the jurisdiction of the civil Courts and section 35 has overriding effect on all other laws which include Transfer of Property Act of the State of J&K, more particularly, Section 140 thereof. Citizens of Jammu and Kashmir in view of their own constitution

constitute a separate and distinct class in themselves. In view of the discussion made in this judgment parliament lack power to enact law of the above nature in respect of State of J&K. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 modifies the State transfer of property Act, State Civil Procedure Code, Civil Courts Act, State Limitation Act and above all the adversely impacts the inalienable property rights of State Subjects. The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is made beyond legislative competence by Parliament to the extent of State of Jammu and Kashmir, thus cannot be extended to this State. Any law made by Parliament which affects the laws made by State legislature cannot be extended and applied to State of J&K. It also affects the rights of State subject/citizens recognized by the Constitution of India and Constitution of State of J&K. In view of aforesaid discussion, the other issues raised and referred to at para 19 need not to be dealt with.

58/ For the above stated reasons, these writ petitions are **disposed of** in the following manner :

“It is held that the Union Parliament does not have legislative competence to make laws contained in section 13, section 17(A), section 18(B) section 34, 35 and section 36, so far as they relate to the State of J&K ;

It is further held that in view of the aforesaid declaration, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 cannot be enforced in the State of J&K ;

It is further held that the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 can be availed of by the banks, which originate from the State of J&K for securing the monies which are due to them and which have been advanced to the borrowers, who are not State subjects and residents of the State of J&K and who are non State subjects/non citizens of the State of J&K and residents of any other State of India excepting the State of J&K.

In consequence to the above said declaration, the notices issued by the respondent – banks in terms of section 13 or any other coercive method taken under section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, are quashed, and set aside. The respondents Banks/Institutions are restrained from proceeding further in terms of action initiated on the basis of provisions of The Securitisation and Reconstruction of Financial Assets and Enforcement of

Security Interest Act, 2002 against the State Subjects/citizens of State of Jammu and Kashmir.

The respondent – banks are at liberty to recover the money due to them from the borrowers by having recourse to the appropriate laws and by approaching the appropriate forums.

The State of J&K would be at liberty to enact law similar to that of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for securing the interests of the banks/financial Institutions.

The State of J&K, in the event of framing such a law, has to ensure that interests of State subjects/citizens of J&K qua their immoveable properties are not affected by transferring the same to non State subjects.

Registry to place copy of this judgment on lead petitions of Srinagar and Jammu wings respectively and operative part of judgments be placed on all other petitions, details whereof are given in the cause lists annexed with this judgment. The record of writ petition be send to respective wings of the Court.

Srinagar
16.07.2015

(ALI MOHAMMAD MAGREY
Judge

(MUZAFFAR HUSSAIN ATTAR)
Judge

Tariq MOTA
SRINAGAR
16.07.2015

