CENTRAL BANK OF INDIA

v.

STATE OF KERALA AND ORS.

(Civil Appeal No. 95 of 2005)

FEBRUARY 27, 2009

[B.N. AGRAWAL, G.S. SINGHVI AND AFTAB ALAM, JJ.]

***Debt Recovery**: Recovery of Debts Due to Banks and Financial Institutions Act, 1993 – s.34 – Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 – s.35 – Bombay Sales Tax Act, 1959 – s.38C – Kerala General Sales Tax Act, 1963 – s.26B*

First charge – Held: Tax payable under State legislations would be first charge on the property of the dealer – DRT Act and Securitisation Act do not create first charge in favour of banks, financial institutions and other secured creditors – Provisions contained in s.38C of the Bombay Sales Tax Act and s.26B of Kerala General Sales Tax Act are not inconsistent with the provisions of the DRT Act and Securitisation Act so as to attract non- obstante clauses contained in s.34(1) of DRT Act or s.35 of Securitisation Act – Transfer of Property Act, 1882 – ss.69, 69A – Companies Act, 1956 – s.529A – Employees Provident Funds and Miscellaneous Provisions Act, 1952 – s.11(2) – Interpretation of statutes – Non-obstante clause.

Invoking of Article 254 of the Constitution – Held: DRT Act and Securitisation Act were enacted by Parliament under Entry 45 in List I in the Seventh Schedule whereas Bombay Sales Tax Act and Kerala General Sales Tax Act were enacted by concerned State legislatures under Entry 54 in List II in the Seventh Schedule – The two sets of legislations were enacted with reference to entries in different lists in the Seventh Schedule – Therefore, Article 254 can not be

invoked for striking down State legislations on the ground that the same were in conflict with the Central legislations – Constitution of India, 1950 – Article 254.

DRT Act and Securitisation Act – Enactment of – Legislative intent – Discussed.

Interpretation of statutes:

Non-obstante clause – Held: Is incorporated in statute to give overriding effect to a particular section or the statute as a whole – While interpreting *Non-obstante* clause, Court is required to find out the extent to which legislature intended to do so and the context in which the *non-obstante* clause is used.

Contextual interpretation – Rule of – Held: Requires that Court should examine every word of a statute in its context – In doing so, Court has to keep in view preamble of the statute, other provisions thereof, pari material statutes.

The questions which arose for consideration in these appeals were whether Section 38C of the Bombay Sales Tax Act, 1959 and Section 26B of the Kerala General Sales Tax Act, 1963 and similar provision contained in other State legislations by which first charge has been created on the property of the dealer or such other person, who is liable to pay sales tax etc., are inconsistent with the provisions contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for recovery of 'debt' and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for enforcement of 'security interest' and whether by virtue of *non obstante* clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act, two Central legislations would have primacy over State legislations.

Dismissing the appeals, the Court

HELD: 1. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 do not create first charge in favour of banks, financial institutions and other secured creditors and the provisions contained in Section 38C of the Bombay Act and Section 26B of the Kerala Act are not inconsistent with the provisions of the DRT Act and Securitisation Act so as to attract *non obstante* clauses contained in Section 34(1) of the DRT Act or Section 35 of the Securitisation Act. [Para 48] [819-H; 820-A]

2. The DRT Act and Securitisation Act were enacted by Parliament under Entry 45 in List I in the Seventh Schedule whereas Bombay Sales Tax Act and Kerala General Sales Tax Act were enacted by the concerned State legislatures under Entry 54 in List II in the Seventh Schedule. The two sets of legislations were enacted with reference to entries in different lists in the Seventh Schedule. Therefore, Article 254 can not be invoked *per se* for striking down State legislations on the ground that the same were in conflict with the Central legislations. [Para 15] [764-B-E]

3.1. The DRT Act and Securitisation Act were enacted in the backdrop of recommendations made by the expert committees appointed by the Central Government for examining the causes for enormous delay in the recovery of dues of banks and financial institutions which were adversely affecting fiscal reforms. The Committees suggested that the existing legal regime should be changed and special adjudicatory machinery be created for ensuring speedy recovery of the dues of banks and financial institutions. The Committees also suggested enactment of new legislation for securitisation and

A **empowering the banks etc. to take possession of the securities and sell them without intervention of the Court. The DRT Act facilitated establishment of two-tier system of Tribunals. The Tribunals established at the first level were vested with the jurisdiction, powers and authority** B **to summarily adjudicate the claims of banks and financial institutions in the matter of recovery of their dues without being bogged down by the technicalities of the Code of Civil Procedure. The Securitisation Act drastically changed the scenario inasmuch as it enabled banks,** C **financial institutions and other secured creditors to recover their dues without intervention of the Courts or Tribunals. The Securitisation Act also made provision for registration and regulation of securitization/ reconstruction companies, securitisation of financial** D **assets of banks and financial institutions and other related provisions. [Para 32] [789-F-H; 790-A-C]**

A.P. State Financial Corporation v. Official Liquidator **(2000) 7 SCC 291;** *Allahabad Bank v. Canara Bank and another* **(2000) 4 SCC 406;** *State of West Bengal v. Kesoram* E *Industries Ltd. and others* **(2004) 10 SCC 201;** *Govt. of A.P. and anr. v. J.B. Educational Society and anr.* **(2005) 3 SCC 212;** *Zaverbhai Amaidas v. State of Bombay* **(1955) SCR 799;** *The Attorney General of Ontario v. The Attorney General for the Dominion* **1896 A.C. 348;** *A.S. Krishna v. State of* F *Madras* **(1957) SCR 399;** *M/s. Hoechst Pharmaceuticals Ltd. and others v. State of Bihar and others* **(1983) 4 SCC 45, referred to.**

3.2. There is no provision in either of these G **enactments by which first charge is created in favour of banks, financial institutions or secured creditors qua the property of the borrower. Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest *vis-à-vis* Section 69 or Section 69A of the Transfer of Property** H

Act. In terms of that sub-section, secured creditor can enforce security interest without intervention of the Court or Tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a receiver of the income of the mortgaged property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. In an apparent bid to overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the *non obstante* clause in Section 13 and gave primacy to the right of secured creditor *vis a vis* other mortgagees who could exercise rights under Sections 69 or 69A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like Section 38C of the Bombay Act and Section 26B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc. [Para 32] [790-D-H; 791-A-B]

3.3. A *non obstante* clause is generally incorporated in a statute to give overriding effect to a particular section or the statute as a whole. While interpreting *non obstante* clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the *non obstante* clause is used. The Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs. [Para 28] [787-G-H; 788-A-B]

State of West Bengal v. Union of India **(1964) 1 SCR 371;** *Madhav Rao Jivaji Rao Scindia v. Union of India and another* **(1971) 1 SCC 85;** *R.S. Raghunath v. State of Karnataka and another* **(1992) 1 SCC 335;** *Aswini Kumar Ghose v. Arabinda*

A *Bose* **AIR 1952 SC 369**; *Dominion of India v. Shrinbai A. Irani* **AIR 1954 SC 596**; *Union of India v. G.M. Kokil* **1984 (Supp.) SCC 196**; *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* **(1986) 4 SCC 447 and** *A.G. Varadarajulu v. State of Tamil Nadu* **(1998) 4 SCC 231, relied on.**

B **3.4. The *non obstante* clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any** C **other law. If there is no provision in the other enactments which are inconsistent with the DRT Act or Securitisation Act, the provisions contained in those Acts cannot override other legislations. Section 38C of the Bombay Act and Section 26B of the Kerala Act also contain *non*** D ***obstante* clauses and give statutory recognition to the priority of State's charge over other debts, which was recognized by Indian High Courts even before 1950. In other words, these sections and similar provisions contained in other State legislations not only create first** E **charge on the property of the dealer or any other person liable to pay sales tax, etc. but also give them overriding effect over other laws. [Para 33] [792-A-C]**

Builders Supply Corporation v. Union of India **(1965) 2** F **SCR 289**; *Bank of India v. John Bowman and Ors.* **AIR (1955) Bom. 305**; *Madras High Court in Kaka Mohammad Ghouse Sahib & Co. v. United Commercial Syndicate and others* **(1963) 49 I.T.R. 25**; *Manickam Chettiar v. Income-tax Officer, Madura* **(1938) 6 ITR 180**; *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation and others* G **(1995) 2 SCC 19**; *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and others* **(2000) 5 SCC 694**; *State of M.P. and another v. State Bank of Indore and others* **(2002) 10 SCC 441 and** *Recovery Officer, Employees Provident Fund v. Kerala Financial Corporation* **(2002) 3 ILR Kerala 4, referred**

H

to.

4.1. The rule of contextual interpretation requires that the court should examine every word of a statute in its context. In doing so, the Court has to keep in view preamble of the statute, other provisions thereof, *pari material* statutes, if any, and the mischief intended to be remedied. Context often provides the key to the meaning of the word and the sense it carries. Its setting gives colour to it and provides a cue to the intention of the legislature in using it. [Para 25] [785-F-G]

Poppatlal Shah v. State of Madras **AIR 1953 SC 274;** *Reserve Bank of India v. Peerless General Finance and Investment Company Limited* **(1987) 1 SCC 424;** *R. v. National Asylum Support Services* **(2002) 4 All ER 654, referred to.**

Statutory Interpretation, Justice G.P. Singh, **referred to.**

4.2. While enacting the DRT Act and Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognized. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529A of the Companies Act or Section 11(2) of the EPF Act and ensured that dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, no such provision was incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the Court or Tribunal. [Para 38] [800-A-D]

A **4.3. If the provisions of the DRT Act and Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are** B **intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person *qua* the procedure adopted by the banks, financial institutions and other** C **secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks, etc. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State** D **legislations then provisions similar to those contained in Section 14A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Development and Regulation) Act, 1957, Section 30 of the Gift-Tax Act, and Section 529A of the Companies Act,** E **1956 would have been incorporated in the DRT Act and Securitisation Act. Undisputedly, the two enactments do not contain provision similar to Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any** F **conflict or inconsistency or overlapping between the provisions of the DRT Act and Securitisation Act on the one hand and Section 38C of the Bombay Act and Section 26B of the Kerala Act on the other and the *non obstante* clauses contained in Section 34(1) of the DRT** G **Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate *qua* or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or** H **enforcement of security interest, as the case may be. The**

Court could have given effect to the *non* *obstante* clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act *vis a vis* Section 38C of the Bombay Act and Section 26B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as the Parliament has not made any such provision in either of the enactments, the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors. [Para 39] [800-G-H; 801-A-G]

M.K. Ranganathan and another v. Government of Madras and others **(1955) 2 SCR 374;** *State of Gujarat v. Shyamlal Mohanlal Choksi and others* **AIR 1965 SC 1251 and** *Byram Pestonji Gariwala v. Union Bank of India and others* **(1992) 1 SCC 31, relied on.**

P. Murugian v. Jainudeen, C.L. **(1954) 3 W.L.R. 682;** *ICICI Bank Ltd. v. SIDCO Leathers Ltd. and others* **(2006) 10 SCC 452;** *Transcore v. Union of India and another* **(2008) 1 SCC 125;** *Union of India v. SICOM Limited and another* **(2009) 2 SCC 121;** *Rajasthan State Financial Corporation v. Official Liquidator* **(2005) 8 SCC 190;** *Bank of Bihar v. State of Bihar* **(1972) 3 SCC 196;** *Central Bank of India v. Siriguppa Sugars & Chemicals Ltd.* **(2007) 8 SCC 353;** *R.M. Arunachalam v. Commissioner of Income Tax, Madras* **(1997) 7 SCC 698;** *K.S. Paripoornan v. State of Kerala and others* **JT (1994) (6) SC 182;** *Land Acquisition Officer v. B.V. Reddy and others* **(2002) 3 SCC 463;** *Kesava Pillai vs. State of Kerala* **(2004) 1 KLT 55;** *South Indian Bank Limited vs. State of Kerala* **(2006) 1 KLT 65;** *Sherry Jacob v. Canara Bank* **(2004) 30 KLT 1089 and** *State of M.P. v. State Bank of Indore* **(2002) 10 KTR 366 (SC), referred to.**

A *Maxwell on Interpretation of Statutes*, **referred to.**

Case Law Reference:

(2000) 7 SCC 291	**referred to**	**Para 4**
(2000) 4 SCC 406	**referred to**	**Para 4**
(2004) 10 SCC 201	**referred to**	**Para 6**
(2005) 3 SCC 212	**referred to**	**Para 6**
1896 A.C. 348	**referred to**	**Para 9**
(1955) SCR 799	**referred to**	**Para 9**
(1957) SCR 399	**referred to**	**Para 9**
(1983) 4 SCC 45	**referred to**	**Para 10**
AIR 1953 SC 274	**referred to**	**Para 25**
(1987) 1 SCC 424	**referred to**	**Para 26**
(2002) 4 All ER 654	**referred to**	**Para 27**
(1964) 1 SCR 371	**relied on**	**Para 28**
(1971) 1 SCC 85	**relied on**	**Para 29**
AIR 1952 SC 369	**relied on**	**Para 30**
AIR 1954 SC 596	**relied on**	**Para 30**
1984 (Supp.) SCC 196	**relied on**	**Para 30**
(1986) 4 SCC 447	**relied on**	**Para 30**
(1992) 1 SCC 335	**relied on**	**Para 30**
(1998) 4 SCC 231	**relied on**	**Para 31**
(1938) 6 ITR 180	**referred to**	**Para 33**
AIR 1955 Bom. 305	**referred to**	**Para 33**

B C D E F G H

(1963) 49 I.T.R. 25	referred to	Para 33
(1965) 2 SCR 289	referred to	Para 33
(1995) 2 SCC 19	referred to	Para 34
(2000) 5 SCC 694	referred to	Para 35
(2002) 10 SCC 441	referred to	Para 36
(2002) 3 ILR Kerala 4	referred to	Para 37
(1955) 2 SCR 374	relied on	Para 39
AIR 1965 SC 1251	relied on	Para 39
(1992) 1 SCC 31	relied on	Para 39
(1954) 3 W.L.R. 682	referred to	Para 39
(2006) 10 SCC 452	referred to	Para 42
(2008) 1 SCC 125	referred to	Para 42
(2009) 2 SCC 121	referred to	Para 42
(2005) 8 SCC 190	referred to	Para 44
(1972) 3 SCC 196	referred to	Para 46
(2007) 8 SCC 353	referred to	Para 46
(1997) 7 SCC 698	referred to	Para 49
JT 1994 (6) SC 182	referred to	Para 50
(2002) 3 SCC 463	referred to	Para 50
2004 (1) KLT 55	referred to	Para 60
2006 (1) KLT 65	referred to	Para 61
2004 (30) KLT 1089	referred to	Para 63
(2002) 10 KTR 366(SC)	referred to	Para 65

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 95

A of 2005.

From the Judgment & Order dated 06.11.2002 of the Division Bench of the High Court of Kerala in Writ Appeal No. 1284 of 2002(D).

B WITH

C.A. No. 2811, 3549, 3973, 4174, 4909, 1288/2006 and C.A. No.1318 of 2009 @ S.L.P.(C) No. 24767 of 2005.

C D.A. Dave, Biswait Bhattarcharya, Shekhar Naphade, Indu Malhotra, Bishwajeet Bhattarcharya, T.LV. Iyer, Dinesh Mathur, Saurabh Jain, Rameshwar Prasad Goyal, Pramod B. Agarwala Praveen Gautam, Nitin Kant Setia, Debashish Mukherjee, Ajay Singh, P. Narasimhan, Vinay Navare, Naresh Kumar, Sunita Ojha, Kavita Wadia, Saurabh Jain, R.P. Goya, K. Rajeev, D Avinash Kumar, Debashish, Ajay, Dharmendra Kumar Sinha, Jay Kishor Singh and Subramonium Prasad for the Appellants.

R. Mohan, ASG, Rakesh Dwivedi, S.K. Dholakia, D.A. Dave, P. Krishnamoorthi, Ramesh Babu, C.N. Sree Kumar, G. E Prakash, Mukti Chowdhary, Anant Prakash, Amit Singh, Shantanu Krishna, S.K. Dholakia, Ravindra K. Adsure, Chinmoy Khaladkar, Malvika Trivedi, T. Mahipal, Ranjith K.C. V.B. Joshi, Kailash Pandey, V.K. Sidharthan, Nina Gupta, Akanksha, Neha S. Verma Swigin George, Bina Gupta, F Ramesh Singh, A.V. Rangam, Buddy A. Ranganadhan, K. Rajeev and Harshad V. Hameed for the Respondent.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted in S.L.P. (C) No.24767 G of 2005.

2. Whether Section 38C of the Bombay Sales Tax Act, 1959 [for short "the Bombay Act"] and Section 26B of the Kerala General Sales Tax Act, 1963 [for short "the Kerala Act"] H and similar provision contained in other State legislations by

which first charge has been created on the property of the dealer or such other person, who is liable to pay sales tax etc., are inconsistent with the provisions contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'the DRT Act') for recovery of `debt' and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Securitisation Act') for enforcement of `security interest' and whether by virtue of *non obstante* clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act, two Central legislations will have primacy over State legislations are the questions which arise for determination in these appeals.

3. For the sake of convenience, we have taken notice of the facts of Civil Appeal Nos.95/2005 and 2811/2006 and the reasons contained in the orders passed by Kerala and Bombay High Courts, which are under challenge in these appeals.

4. *C.A. No.95/2005 – Central Bank of India vs. State of Kerala & others* – Central Bank of India, which is a nationalized bank, gave cash/ credit facility to the tune of Rs.12 lakhs to Kerala Refineries (P) Ltd. The borrower executed mortgage of movable and immovable properties for securing repayment. As the borrower failed to repay the dues, the bank filed civil suit bearing O.S. No.234/1996 in the Court of Sub-Judge at Mavelikara. Later on the suit was transferred to Ernakulam Bench of the Debts Recovery Tribunal (hereinafter referred to as "the Tribunal"). By an order dated 1.12.2000, the Tribunal decreed the suit for an amount of Rs.55 lakhs with future interest. As a sequel to this, Recovery Certificate dated 1.11.2001 was issued in favour of the bank and the Recovery Officer issued notice for sale of the movable and immovable properties of the borrower. At that stage, Tehsildar, Mavelikara issued notice dated 26.11.2001 to the borrower for recovery of Rs.40,38,481/- as arrears of sales tax stating therein that its moveable and immovable properties had been attached on 2.2.2000 and 4.9.2000 and that steps are being taken to sell

A the attached property by public auction. The Tehsildar claimed that by virtue of Section 26B of the Kerala Act, as amended by Act No.23/1999, the State Government has got first charge over the attached properties. The bank challenged the notice of the Tehsildar by filing a petition under Article 226 of the B Constitution of India, which was registered as O.P. No.7835/ 2002(G). The bank relied on the decisions of this Court in *A.P. State Financial Corporation v. Official Liquidator* [(2000) 7 SCC 291] and *Allahabad Bank v. Canara Bank and another* [(2000) 4 SCC 406], and pleaded that being a Central C legislation, the DRT Act would prevail over the Kerala Act by which first charge was created in favour of the State. The learned Single Judge of the Kerala High Court negatived the bank's challenge by observing that proceedings under the Kerala Act had been initiated before the issue of certificate by D the Tribunal and that even if the Tribunal has got exclusive jurisdiction to recover the amount due to the bank, the Tehsildar was not obliged to approach it for recovery of the State dues. The learned Single Judge referred to Section 46 of the Kerala Revenue Recovery Act, 1968, which provides that within 14 days from the date of attachment of any immovable property E any person other than the defaulter can lodge objection to the attachment of the whole or any portion of such property on the ground that such property was not liable for the arrears of public revenue, and held that as the bank had claimed first charge or prior charge over the attached property, it can file appropriate F objections under Section 46 of the Kerala Revenue Recovery Act, 1968 and make a prayer that public revenue can be recovered after paying its dues. The learned Single Judge further observed that in terms of Section 47 of the Kerala Revenue Recovery Act, 1968 the petitioner can obtain release G of the attached property by paying arrears of the public revenue. The appeal preferred against the order of the learned Single Judge was dismissed by the Division Bench which held that the bank can avail remedy by filing objections under Sections 46 to 48 of the Kerala Revenue Recovery Act, 1968.

H

5. *C.A. No.2811/2006 – The Thane Janata Sahakari Bank Ltd. vs. The Commissioner of Sales Tax & others* – Appellant - Thane Janata Sahakari Bank Ltd., which is a scheduled cooperative society incorporated under the Maharashtra Cooperative Society Act, 1960 granted credit facilities to M/s. Charishma Cosmetics Pvt. Ltd. Co. (for short 'the Company'). As on 30.6.2004, the company had availed credit facility to the tune of Rs.2,32,00,000/- by creating equitable mortgage of its factory, land and building in favour of the bank. Due to the company's failure to repay the amount, its account was classified as non-performing asset and the bank initiated proceedings under the Securitisation Act by issuing notice under Section 13(2). The possession of movable and immovable properties of the company is said to have been taken by the bank on 15.2.2005 and the same were sold for a sum of Rs.66,31,001/-. On 11.7.2005, Assistant Commissioner of Sales Tax informed the bank that sales tax dues amounting to Rs.3,62,82,768/- constitute first charge against the company and, therefore, it could not have taken possession of the mortgaged assets and sold the same. After some correspondence, the Assistant Commissioner issued notice dated 16.8.2005 to the bank to show cause as to why action may not be taken against it under Section 39 of the Bombay Sales Tax Act, 1959 (for short "the Bombay Act") for recovery of Rs.49,68,614/- in addition to the auction proceeds. The bank unsuccessfully contested the notice and then filed writ petition for quashing the same. It was urged on behalf of the bank that in view of the conflict between Section 38C of the Bombay Act and Section 35 of the Securitisation Act, the latter being a Central legislation, the first charge created by the State Act cannot have priority over debts of the bank because while enacting the Securitisation Act the Parliament will be deemed to be aware of the provisions of the State legislation. It was also contended that under Section 169 of Maharashtra Land Revenue Code, 1966, the State Government can claim priority over unsecured dues, but being secured creditor, the bank has

A first and exclusive charge over the properties of the company and has priority over the sales tax dues of the State. The Division Bench of the High Court analysed the provisions of the Securitisation Act, the State Act and observed:-

B

> "..... if any Central Act provides for first charge, the charge created under Section 38C of Bombay Sales Tax Act is overridden. Conversely, if the Central Act does not provide for first charge in respect of the liability under the said Act, the first charge created under Section 38C of Bombay Sales Tax Act shall hold the field."

C

The Division Bench then noted that Section 13 of the Securitisation Act does not create first charge in favour of the banks; that it merely provides the machinery for realization by a secured creditor of the security interest without intervention D of the Court or Tribunal; that it overrides the provisions contained in Sections 69 or 69A of the Transfer of Property Act which empower the mortgagee to sell or concur in selling the mortgaged property or any part thereof in default of payment of the mortgage money without intervention of the Court in the E circumstances referred to in Section 69 and for payment of Court Receiver as provided in Section 69A and held:

> "The Bombay Sales Tax Act and the Securitisation Act have been enacted by the competent legislatures for different purposes and operate in different fields. The F Bombay Sales Tax Act is enacted by the State Legislature under Entry 54 of List II in the Seventh Schedule for levy of tax on the sale or purchase of certain goods in the State of Bombay (now State of Maharashtra). On the other hand, the Securitisation Act has been enacted by the Parliament G under Entry 54 of List I for regulating the Securitisation and reconstruction of financial assets and for enforcement of security interest. There is neither any conflict in these two Acts nor Section 38 C of the Bombay Sales Tax Act can be said to be inconsistent with Section 35 of the H Securitisation Act. The area of operation is entirely different

and there is no overlapping anywhere.

Section 35 of the Securitisation Act may have had some bearing, if there was some provision in the Securitisation Act for first charge in favour of the banks and financial institutions. But neither Section 13 nor any other provision under the Securitisation Act makes a provision for first charge.

There being no provision in the Securitisation Act providing for first charge in favour of the banks section 35 of the Securitisation Act cannot be held to override section 38C of the Bombay Sales Tax Act, 1959 that specifically provides that the liability under the said Act shall be the first charge. The overriding provision contained in Section 38C is only subject to the provision of the first charge in the Central Act holding the field. The case of the Bank is not covered by the expression, "subject to any provision regarding first charge in any Central Act for the time being in force" and that being the position, Section 38C is not overridden by section 35 of the Securitisation Act."

6. S/Shri Shekhar Naphde, Dushyant Dave, Bishwajeet Bhattacharya, T.L.V. Iyer and Ms. Indu Malhotra, learned senior counsel appearing for the appellants argued that as the DRT Act and Securitisation Act have been enacted by the Parliament under Article 246(1) read with Entry 45 in List I in the Seventh Schedule of the Constitution for speedy recovery of debts due to banks or financial institutions or for enforcement of security interest by the secured creditors and overriding effect has been given to these legislations *vis-a-vis* other laws, the provisions contained therein will have primacy over State legislations which have been enacted under Article 246(2) read with Entry 54 in List II in the Seventh Schedule and under which first charge has been created in favour of the State in respect of the dues of sales tax etc. Shri Dushyant Dave relied upon the judgments in *State of West Bengal v. Kesoram Industries Ltd. and others* [(2004) 10 SCC 201] and *Govt. of A.P. and*

A *anr. v. J.B. Educational Society and anr.* [(2005) 3 SCC 212], and argued that even though the Central and State legislations have not been enacted with reference to a particular entry in List III in the Seventh Schedule, Article 254 will get attracted, and the Kerala and Bombay High Courts committed an error
B by refusing to accept the submission that banks, financial institutions and secured creditors have priority in the matter of recovery of debts or enforcement of security interest *vis-à-vis* the State's right to recover the dues of sales tax etc. Shri Bishwajeet Bhattacharya submitted that in view of Article 254(1)
C of the Constitution, provisions contained in State laws which are repugnant to or inconsistent with Central legislations, are liable to be ignored. All the learned counsel laid considerable emphasis on the *non obstante* clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act, and argued that even though the language of Section 38C of
D the Bombay Act and Section 26B of the Kerala Act suggests that State legislations have been given overriding effect *vis a vis* other laws, the courts are duty bound to give full effect to the primacy of Central legislations over State legislations. Shri Shekhar Naphde and other learned counsel heavily relied on
E Section 13(1), (7) and (9) of the Securitisation Act and argued that when Parliament has designedly given priority to the right of banks etc. to recover their dues or enforce security interest, first charge created under the State legislation must be treated sub-servient to such right. Learned senior counsel made a
F pointed reference to the provisos incorporated in Section 13(9) for giving priority to the dues of the workers of the company in liquidation and argued that in the absence of similar provision in relation to sales tax dues etc. payable to the State, priority given to the dues of banks etc. cannot be diluted or stultified
G by giving over stretched interpretation to the provisions contained in the State legislations relating to first charge.

7. Shri Rakesh Dwivedi and Shri S.K. Dholakia, learned senior counsel appearing for the States of Kerala and
H Maharashtra respectively argued that even though the DRT Act

and Securitisation Act contain *non obstante* clauses suggesting that the provisions contained therein would prevail over other laws, the same must be interpreted keeping in view the legislative policy underlying those enactments and if they are so interpreted, Section 38C of the Bombay Act and Section 26B of the Kerala Act and similar provisions contained in other State legislations by which first charge has been created on the property of the dealer or any other person liable to pay sales tax etc. cannot be treated inconsistent with Central legislations. Shri Dwivedi submitted that the DRT Act and Securitisation Act have been enacted to speed up the recovery of the dues of banks, financial institutions and secured creditors but there is no provision in the two enactments by which first charge has been created in favour of banks, etc. and, therefore, the provisions contained in State legislations creating first charge in respect of the dues of sales tax etc. cannot be treated as inconsistent with Central legislations. Shri Dwivedi further submitted that levy and collection of tax etc. is sovereign function as well as necessity of the State and as such the State has exclusive plenary power to legislate on that subject and in the absence of any provision in the DRT Act or Securitisation Act creating first charge in favour of the banks etc., in lieu of their dues, these legislations cannot be given overriding effect qua the provisions contained in the State legislations and right of the State to recover the dues of sales tax etc. cannot be frustrated merely because a bank or financial institution or secured creditor has initiated action for recovery of debt etc. by filing application under Section 19 of the DRT Act or by resorting to the procedure contained in Section 13 of the Securitisation Act. In support of this argument, learned senior counsel invoked the doctrine of *sub silentio*.

8. We have considered the respective arguments/ submissions. Article 245 of the Constitution is the source of legislative power of Parliament and State legislatures. It provides that subject to the provisions of the 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. The legislative field of the Parliament and State legislatures has been specified in Article 246. In terms of Clause (1) of Article 246, Parliament has exclusive power to make laws with respect to any of the matters enumerated in List I in the Seventh Schedule. Under Clause (2) the 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. Subject to Clauses (1) and (2), the legislature of State has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule. It is thus evident that Parliament has exclusive power to legislate with respect to any of the matters enumerated in List I and State legislatures enjoys similar power with respect to any of the matters enumerated in List II. The combined effect of the different clauses of Article 246 is that in respect of any matter falling within List I, Parliament has exclusive power of legislation, whereas the State legislature has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule and with respect to the matters enumerated in List III, both the Parliament and State legislature have power to make laws. Article 254 which contains mechanism for resolution of conflict between Central and State legislations enacted with respect to any matter enumerated in List III of the Seventh Schedule reads as under:

> *"254. Inconsistency between laws made by Parliament and laws made by the Legislatures of States.*— (1) If any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provisions of clause (2), the law made by Parliament,

whether passed before or after the law made by the Legislature of such State, or, as the case may be, the existing law, shall prevail and the law made by the Legislature of the State shall, to the extent of the repugnancy, be void.

(2) Where a law made by the Legislature of a State with respect to one of the matters enumerated in the Concurrent List contains any provision repugnant to the provisions of an earlier law made by Parliament or an existing law with respect to that matter, then, the law so made by the Legislature of such State shall, if it has been reserved for the consideration of the President and has received his assent, prevail in that State:

Provided that nothing in this clause shall prevent Parliament from enacting at any time any law with respect to the same matter including a law adding to, amending, varying or repealing the law so made by the Legislature of the State."

9. Article 254 was interpreted by the Constitution Bench in *Zaverbhai Amaidas v. State of Bombay* [(1955) SCR 799] in the context of challenge to Bombay Act No. 36/1947 on the ground that the same is repugnant to Section 7(1) of the Essential Supplies (Temporary Powers) Act, 1946. The Constitution Bench referred to the judgment in *The Attorney General of Ontario v. The Attorney General for the Dominion* [1896 A.C. 348] and held "now by the proviso to Article 254(2) the Constitution has enlarged the powers of Parliament, and under that proviso, Parliament can do what the Central legislature could not under Section 107(2) of the Government of India Act and enact a law adding to, amending, varying, repealing a law of the State, when it relates to a matter mentioned in the Concurrent List. The proposition then is that under the Constitution Parliament can, acting under the proviso to Article 254(2), repeal a State law. *But when it does not expressly do so, even then the State law will be void under*

A *that provision if it conflicts with a later "law" with respect to the same matter",* that may be enacted by Parliament. In *A.S. Krishna v. State of Madras* [(1957) SCR 399] the Constitution Bench considered challenge to validity of Madras Prohibition Act, 1937 on the ground that the same is repugnant to the Indian B Evidence Act, 1872 and the Code of Criminal Procedure, 1898 which were enacted by the Parliament. The Constitution Bench repelled the challenge and held:

> "The position, then, might thus be summed up: When a law is impugned on the ground that it is ultra vires the powers C of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that, one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. If on such examination it is found that the legislation is in D substance one on a matter assigned to the legislature, then it must be held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence. It would be quite an erroneous approach to the question to view such a statute not as an organic E whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not. Now, the Madras Prohibition Act is, as F already stated, both in form and in substance, a law relating to intoxicating liquors. The presumptions in Section 4(2) are not presumptions which are to be raised in the trial of all criminal cases, as are those enacted in the Evidence Act. They are to be raised only in the trial of G offences under Section 4(1) of the Act. They are therefore purely ancillary to the exercise of the legislative power in respect of Entry 31 in List II. So also, the provisions relating to search, seizure and arrest in Sections 28 to 32 are only with reference to offences committed or suspected H to have been committed under the Act. They have no

operation generally or to offences which fall outside the Act. Neither the presumptions in Section 4(2) nor the provisions contained in Sections 28 to 32 have any operation apart from offences created by the Act, and must, in our opinion, be held to be wholly ancillary to the legislation under Entry 31 in List II. The Madras Prohibition Act is thus in its entirety a law within the exclusive competence of the Provincial Legislature, and the question of repugnancy under Section 107(1) does not arise."

10. In *M/s. Hoechst Pharmaceuticals Ltd. and others v. State of Bihar and others* [(1983) 4 SCC 45], this Court considered the question whether there is any conflict between Drugs (Price Control) Order, 1979 made under Section 3 of the Essential Commodities Act, 1955 which is a Central legislation and Section 5(3) of the Bihar Finance Act, 1981 by which surcharge was levied on certain dealers engaged in selling drugs. While negating challenge to the State legislation, a three-Judge Bench laid down the following principles:

(1) The various entries in the three lists are not "powers" of legislation but "fields" of legislation. The Constitution effects a complete separation of the taxing power of the Union and of the States under Article 246. *There is no overlapping anywhere in the taxing power and the Constitution gives independent sources of taxation to the Union and the States.*

(2) In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in the Concurrent List and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

A (3) *Taxation is considered to be a distinct matter for purposes of legislative competence.* There is a distinction made between general subjects of legislation and taxation. The general subjects of legislation are dealt with in one group of entries and power of taxation in a separate group. B *The power to tax cannot be deduced from a general legislative entry as an ancillary power.*

(4) The entries in the lists being merely topics or fields of legislation, they must receive a liberal construction inspired by a broad and generous spirit and not in a narrow C pedantic sense. The words and expressions employed in drafting the entries must be given the widest-possible interpretation. This is because, to quote V. Ramaswami, J., the allocation of the subjects to the lists is not by way of scientific or logical definition but by way of a mere D *simplex numeration* of broad categories. *A power to legislate as to the principal matter specifically mentioned in the entry shall also include within its expanse the legislations touching incidental and ancillary matters.*

E (5) Where the legislative competence of the legislature of any State is questioned on the ground that it encroaches upon the legislative competence of Parliament to enact a law, the question one has to ask is whether the legislation relates to any of the entries in List I or III. If it does, no F further question need be asked and Parliament's legislative competence must be upheld. Where there are three lists containing a large number of entries, there is bound to be some overlapping among them. In such a situation the doctrine of pith and substance has to be applied to determine as to which entry does a given piece G of legislation relate. Once it is so determined, any incidental trenching on the field reserved to the other legislature is of no consequence. The court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of H

ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded.

(6) The doctrine of occupied field applies only when there is a clash between the Union and the State Lists within an area common to both. There the doctrine of pith and substance is to be applied and if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in the field assigned to another legislature is to be ignored. While reading the three lists, List I has priority over Lists III and II and List III has priority over List II. However, still, *the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.*

[Emphasis supplied]

11. The three-Judge Bench also dealt with the scope of Article 254 and held:

"Article 254 of the Constitution makes provision first, as to what would happen in the case of conflict between a Central and State law with regard to the subjects enumerated in the Concurrent List, and secondly, for resolving such conflict. Article 254(1) enunciates the normal rule that in the event of a conflict between a Union and a State law in the concurrent field, the former prevails over the latter. Clause (1) lays down that if a State law relating to a concurrent subject is 'repugnant' to a Union law relating to that subject, then, whether the Union law is prior or later in time, the Union law will prevail and the State law shall, to the extent of such repugnancy, be void. To the general rule laid down in clause (1), clause (2) engrafts an

A exception viz. that if the President assents to a State law which has been reserved for his consideration, it will prevail notwithstanding its repugnancy to an earlier law of the Union, both laws dealing with a concurrent subject. In such a case, the Central Act, will give way to the State Act B only to the extent of inconsistency between the two, and no more. In short, the result of obtaining the assent of the President to a State Act which is inconsistent with a previous Union law relating to a concurrent subject would be that the State Act will prevail in that State and override C the provisions of the Central Act in their applicability to that State only. The predominance of the State law may however be taken away if Parliament legislates under the proviso to clause (2). The proviso to Article 254(2) empowers the Union Parliament to repeal or amend a D repugnant State law, either directly, or by itself enacting a law repugnant to the State law with respect to the 'same matter'. Even though the subsequent law made by Parliament does not expressly repeal a State law, even then, the State law will become void as soon as the E subsequent law of Parliament creating repugnancy is made. A State law would be repugnant to the Union law when there is direct conflict between the two laws. Such repugnancy may also arise where both laws operate in the same field and the two cannot possibly stand together."

F 12. In *State of West Bengal v. Kesoram Industries Ltd.* (supra), the majority of the Constitution Bench recognized the possibility of overlapping of legislations enacted under different entries in Lists I and II in the Seventh Schedule and observed:

G "While reading the three lists, List I has priority over Lists III and II and List III has priority over List II. However, still, the predominance of the Union List would not prevent the State Legislature from dealing with any matter within List II though it may incidentally affect any item in List I.

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In spite of the fields of legislation having been demarcated, the question of repugnancy between law made by Parliament and a law made by the State Legislature may arise only in cases when both the legislations occupy the same field with respect to one of the matters enumerated in List III and a direct conflict is seen. If there is a repugnancy due to overlapping found between List II on the one hand and List I and List III on the other, the State law will be ultra vires and shall have to give way to the Union law.

.... If there is conflict, the correct approach is to find an answer to three questions step by step as under:

One—Is it still possible to effect reconciliation between two entries so as to avoid conflict and overlapping?

Two—In which entry the impugned legislation falls, by finding out the pith and substance of the legislation. In this regard the court has to look at the substance of the matter. The doctrine of pith and substance is sometimes expressed in terms of ascertaining the true character of legislation. The name given by the legislature to the legislation is immaterial. Regard must be had to the enactment as a whole, to its main objects and to the scope and effect of its provisions. Incidental and superficial encroachments are to be disregarded. Interpretation is the exclusive privilege of the Constitutional Courts and the court embarking upon the task of interpretation would place such meaning on the words as would effectuate the purpose of legislation avoiding absurdity, unreasonableness, incongruity and conflict. As is with the words used so is with the language employed in drafting a piece of legislation. That interpretation would be preferred which would avoid conflict between two fields of legislation and would rather import homogeneity. It follows as a corollary of the abovesaid statement that while

A interpreting tax laws the courts would be guided by the gist of the legislation instead of by the apparent meaning of the words used and the language employed. The courts shall have regard to the object and the scheme of the tax law under consideration and the purpose for which the cess
B is levied, collected and intended to be used. The courts shall make endeavour to search where the impact of the cess falls. The subject-matter of levy is not to be confused with the method and manner of assessment or realization.

C and

Three – Having determined the field of legislation where in the impugned legislation falls by applying the doctrine of pith and substance, can an incidental trenching upon another field of legislation be ignored? Once it is so
D determined if the impugned legislation substantially falls within the power expressly conferred upon the legislature which enacted it, an incidental encroaching in/trenching on the field assigned to another legislature is to be ignored."

E 13. In *Govt. of A.P. and anr. v. J.B. Educational Society and anr.* (supra), the Court was called upon to decide whether there was any conflict between the provisions of All India Council for Technical Education Act, 1987 and the A.P. Education Act, 1982 and whether the State legislation was liable to be declared void and inoperative on the ground that
F the State legislature was not competent to enact law in the field occupied by the Central legislation. A two-Judge Bench analysed the provisions of the two enactments and held:

"Parliament has exclusive power to legislate with respect
G to any of the matters enumerated in List I, notwithstanding anything contained in clauses (2) and (3) of Article 246. The non obstante clause under Article 246(1) indicates the predominance or supremacy of the law made by the Union Legislature in the event of an overlap of the law made by
H Parliament with respect to a matter enumerated in List I

and a law made by the State Legislature with respect to a matter enumerated in List II of the Seventh Schedule. A

.....

With respect to matters enumerated in List III (Concurrent List), both Parliament and the State Legislature have equal competence to legislate. Here again, the courts are charged with the duty of interpreting the enactments of Parliament and the State Legislature in such manner as to avoid a conflict. If the conflict becomes unavoidable, then Article 245 indicates the manner of resolution of such a conflict. B C

Thus, the question of repugnancy between the parliamentary legislation and the State legislation can arise in two ways. First, where the legislations, though enacted with respect to matters in their allotted sphere, overlap and conflict. Second, where the two legislations are with respect to matters in the Concurrent List and there is a conflict. In both the situations, parliamentary legislation will predominate, in the first, by virtue of the non obstante clause in Article 246(1), in the second, by reason of Article 254(1). Clause (2) of Article 254 deals with a situation where the State legislation having been reserved and having obtained President's assent, prevails in that State; this again is subject to the proviso that Parliament can again bring a legislation to override even such State legislation." D E F

14. The ratio of the above noted judgments is that Article 254 gets attracted only when both Central and State legislations have been enacted on any of the matters enumerated in List III in Seventh Schedule and there is conflict between two legislations. Though in *State of West Bengal v. Kesoram Industries Ltd.* (supra) some observations appear to have been made suggesting that Article 254 gets attracted even though legislations may have been enacted in different entries in Lists G H

A I and II, but the same have to be read in consonance with the plain language of the said Article and other judgments including the three-Judge Bench judgment in *M/s. Hoechst Pharmaceuticals Ltd. and others v. State of Bihar and others* (supra), which has been expressly approved by the Constitution B Bench.

15. Undisputedly, the DRT Act and Securitisation Act have been enacted by Parliament under Entry 45 in List I in the Seventh Schedule whereas Bombay and Kerala Acts have been enacted by the concerned State legislatures under Entry C 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 D 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* (supra) are treated as law declared under Article 141 of the Constitution, the State legislations cannot be E struck down on the ground that the same are in conflict with Central legislations.

16. Before proceeding further we may notice the background in which the DRT and Securitisation Acts were F enacted, and schemes of the two legislations. After independence, the Government of India decided to give impetus to the industrial development of the country. Central and State Governments encouraged banks and other financial institutions to liberalize the grant of loans and other credit facilities to the industrial entrepreneurs. With the nationalization of banks, this G policy got a boost and the country witnessed rapid industrialization. The issue of repayment/recovery of loans etc. given by banks and financial institutions did not pose any serious problem in first three decades. However, with the passage of time, the human greed took over the righteousness H

and those who were granted loans and/or other financial facilities did not bother to repay. Not only this, the efforts made by banks and financial institutions for recovery of their dues were stultified by the defaulting borrowers who indulged in unwarranted and protracted litigation in civil courts. The slow and tardy progress of cases instituted in civil courts resulted in blocking of several thousand crores of public money, which was considered critical to the successful implementation of fiscal reform. The pioneers of financial sector reforms called for early solution of this problem. Therefore, the Government of India constituted a committee under the Chairmanship of Shri T. Tiwari to examine the legal and other difficulties faced by banks and financial institutions in the recovery of their dues and suggest remedial measures. The Tiwari Committee noted that the existing procedure for recovery was very cumbersome and suggested that special tribunals be set up for recovery of the dues of banks and financial institutions by following a summary procedure. The Tiwari Committee also prepared a draft of the proposed legislation which contained a provision for disposal of cases in three months and conferment of power upon the recovery officer for expeditious execution of orders made by adjudicating bodies. The issue was further examined by the Committee on the Financial System headed by Shri M. Narasimham. In its first report, Narasimham Committee also suggested setting up of special tribunals with special powers for adjudication of cases involving the dues of banks and financial institutions. Even in regard to priority among creditors, Narasimham Committee made the following suggestion:

> "The Adjudication Officer will have such power to *distribute* the sale proceeds to the banks and financial institutions being secured creditors, in accordance with inter se agreement/arrangement between them and to the *other persons* entitled thereto in accordance with the *priorities* in the law."

17. After considering the reports of two Committees and

A taking cognizance of the fact that as on 30th September, 1990 more than 15 lakhs cases filed by public sector banks and 304 cases filed by financial institutions were pending in various courts for recovery of debts etc. amounting to Rs.6,000 crores, the Central Government introduced "The Recovery of Debts
B Due to Banks and Financial Institutions Bill, 1993" in Lok Sabha on 13.5.1993. It, however, appears that before the Bill could be passed, Lok Sabha was adjourned. Therefore, the President of India in exercise of the powers conferred by Article 123(1) of the Constitution, promulgated "The Recovery of Debts Due
C to Banks and Financial Institutions Ordinance, 1993", which was replaced by the DRT Act. The new legislation facilitated creation of specialized forums, i.e., the Debts Recovery Tribunals and Debts Recovery Appellate Tribunals for expeditious adjudication of disputes relating to recovery of the debts due
D to banks and financial institutions. Simultaneously, the jurisdiction of the civil courts was barred and all pending matters were transferred to the Tribunals from the date of their establishment. For some years, the new dispensation of adjudication worked well. However, with the passage of time,
E proceedings before the Debts Recovery Tribunals also started getting bogged down due to invoking of technicalities by the borrowers. Faced with this situation, the Government again asked the Narasimham Committee to suggest measures for expediting recovery of debts etc. due to banks and financial institutions. In its 2nd Report, Narasimham Committee observed
F that the non-performing assets of most of the public sector banks were abnormally high and the existing mechanism for recovery of the same was wholly insufficient. In Chapter VIII of the report, the Committee observed that the evaluation of legal frame work has not kept pace with the changing commercial
G practice and financial sector reforms and as a result of this the economy has not been able to reap full benefits of the reform process. By way of illustration, the Committee referred to the scheme of mortgage under the Transfer of Property Act and suggested that the existing laws should be changed not only

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for facilitating speedy recovery of the dues of banks etc. but also for quick resolution of disputes arising out of the action taken for recovery of such dues. Andhyarujina Committee constituted by the Central Government for examining banking sector reforms also considered the need for changes in the legal system. Both Narasimham and Andhyarujina Committees suggested enactment of new legislation for securitisation and empowering the banks and financial institutions to take possession of the securities and sell them without intervention of the court. In the backdrop of these recommendations, the Parliament enacted the Securitisation Act.

Scheme of the DRT Act and Rules made thereunder

18. Section 2(g) of the DRT Act (as it stood before being amended by Act No. 30/2004) defined "debt" as – "any liability (inclusive of interest) which is alleged as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by bank or financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or whether payable under a decree or order of any civil court or otherwise and subsisting on, and legally recoverable on, the date of the application." After the amendment of 2004, "debt" means "any liability (inclusive of interest) which is alleged as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application." The provisions contained in Chapter II envisage establishment of the Debts Recovery Tribunals and the Debts Recovery Appellate Tribunals, qualifications of Presiding Officers and Members,

A term of their office, staff of the tribunals, salaries, allowances, etc. Section 17(1) of the DRT Act declares that a Tribunal shall have the jurisdiction, powers and authority to entertain and decide applications made by banks and financial institutions for recovery of debts due to them. Under Section 17(2), the B Appellate Tribunal has been vested with jurisdiction, powers and authority to entertain appeal against any order made or deemed to have been made by a Tribunal. Section 18 expressly bars the jurisdiction, powers and authority of all courts except the Supreme Court and a High Court exercising C jurisdiction under Articles 226 and 227 of the Constitution of India in relation to matters specified in Section 17. Section 19, which finds place in Chapter IV of the DRT Act contains procedure required to be followed by the Tribunal for deciding an application made for recovery of debt. It envisages making D of application by a bank or a financial institution for recovery of any debt from any person, issue of summons to the defendant to show cause as to why relief prayed for may not be granted to the applicant and also provides for passing of appropriate orders. By amending Act No.30/2004, three provisos were inserted in Section 19(1). In terms of first proviso, E a bank or a financial institution can, after obtaining permission of the DRT, withdraw the original application for the purpose of taking action under the Securitisation Act. Second proviso lays down that an application for withdrawal filed under first proviso must be disposed of within 30 days. The third proviso F requires recording of reasons in case the Tribunal refuses permission or leave for withdrawal of application under Section 19(1). Section 19(6) provides for the defendant's claim to set-off against the bank's demand for a certain sum of money. Section 19(8) gives right to the defendant to set up a counter G claim. Section 19(12) empowers the Tribunal to make an interim order by way of injunction, stay or attachment before judgment debarring the defendant from transferring, alienating or otherwise dealing with, or disposing of, his properties and assets. Under Section 19(13), the Tribunal is empowered to H direct the defendant to furnish security where it is satisfied that

the defendant is likely to dispose of the property or cause damage to the property in order to defeat the decree which may ultimately be passed in favour of bank or financial institution. Section 19(18), empowers the Tribunal to appoint a receiver of any property on the ground of equity. This can be done before or after grant of certificate for recovery of debt. Under Section 19(19), a recovery certificate issued against a company can be enforced by the Tribunal which can order the property to be sold and the sale proceeds distributed amongst the secured creditors in accordance with the provisions of Section 529A of the Companies Act, 1956 and pay the balance/surplus, if any, to the debtor-company. Section 20(1) lays down that any person aggrieved by an order made, or deemed to have been made, by a Tribunal may prefer an appeal to the Appellate Tribunal. Sub-section (2) of Section 20 declares that no appeal shall lie from an order made by the Tribunal with the consent of the parties. Sub-section (3) prescribes the period of limitation i.e. 45 days. Proviso to this sub-section empowers the Tribunal to entertain an appeal after the expiry of 45 days if it is satisfied that there was sufficient cause for not filing the appeal within the prescribed period. Sub-sections (4) to (6) contain the procedure to be followed by the Appellate Tribunal for disposal of an appeal. Section 21 lays down that the Appellate Tribunal shall not entertain an appeal unless the person preferring appeal deposits 75 per cent of the amount determined by the Tribunal under Section 19. Section 22 lays down that the Tribunal and the Appellate Tribunal shall not be bound by the procedure contained in the Code of Civil Procedure, but shall be guided by the principles of natural justice and subject to the other provisions of the Act or rules made thereunder, the Tribunal and the Appellate Tribunal shall be free to regulate their own procedure. Section 25 specifies three modes of recovery of debt, namely, (a) attachment and sale, (b) arrest of the defendant and (c) appointment of a receiver for the management of the properties of the defendant. Other modes of recovery are specified in Section 28 which states that where a certificate has been issued by the Tribunal

A under Section 19(7), the Recovery Officer may, without prejudice to the modes of recovery specified in Section 25, recover the amount of debt by any one or more of the modes mentioned in Section 28. By Section 29, the provisions of Second and Third Schedules to the Income Tax Act, 1961 and
B the Income Tax (Certificate Proceedings) Rules, 1962 have been made applicable to the recovery proceedings. Section 31(1) states that every suit or other proceeding pending before any court immediately before the date of establishment of a Tribunal, shall stand transferred to the Tribunal if the subject
C matter thereof would have been within its jurisdiction had the cause of action arisen after establishment of the Tribunal. Section 31A lays down that where a decree or order was passed by any court before the commencement of the Recovery of Debts Due to Banks and Financial Institutions (Amendment)
D Act, 2000 and the same had not been executed, then the decree-holder can apply to the Tribunal for recovery of the amount. Sub-section (1) of Section 34 contains a *non obstante* clause and declares that save as otherwise provided in sub-section (2), provisions of the DRT Act shall have effect
E notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than that Act. Amended sub-section (2) of Section 34 lays down that the provisions of the DRT Act or rules made thereunder shall be in addition to and not in derogation of Industrial Finance Corporation Act, 1948,
F The State Financial Corporation Act, 1951, The Unit Trust of India Act, 1963, Industrial Reconstruction Bank of India Act, 1984 and the Small Industries Development Bank of India Act, 1989.

G 19. In exercise of the power conferred upon it under Section 36 of the DRT Act, the Central Government has framed the Debts Recovery Tribunal (Procedure) Rules, 1993. These rules regulate the procedure for filing application in the prescribed form, scrutiny thereof, fee for application, contents of
H application, documents to be filed with the application, filing of

reply and documents by the respondent, date and place of hearing of the application, the manner of recording the order, publication of order and communication thereof to the parties. By an amendment made in 1997, Rule 5A was added to enable a party to apply for review of the order made by the Tribunal on the ground of some mistake or error apparent on the face of the record. For regulating the procedure of the Appellate Tribunal, the Central Government has framed the Debts Recovery Appellate Tribunal (Procedure) Rules, 1994. The provisions contained in these rules are similar to those contained in the rules regulating the procedure of the Tribunal.

Scheme of the Securitisation Act and Rules made thereunder

20. Section 2(b) defines "asset reconstruction" to mean acquisition by any Securitisation company or reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance. Section 2(f) defines the word "borrower" to mean, 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. It includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any right or interest of any bank or financial institution in relation to such financial assistance. Section 2(ha) declares that "debt" shall have the meaning assigned to it in clause (g) of Section 2 of the DRT Act. Section 2(k) defines "financial assistance" to mean any loan or advance 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. Section 2(l) defines "financial asset" to mean any debt or receivables and includes a claim to any debt or receivables or part thereof, whether secured or unsecured or any debt or

A receivables secured by, mortgage of, or charge on, immovable property, or a mortgage, charge, hypothecation or pledge of movable property or any right or interest in the security, whether full or part underlying such debt or receivables or any beneficial interest in property, whether movable or immovable, or in such B debt, receivables, whether such interest is existing, future, accruing, conditional or contingent or any financial assistance. Section 2(n) defines "hypothecation" to mean a charge created by a borrower in favour of a secured creditor as a security for financial assistance. Section 2(o) defines "non-performing C asset" to mean an asset or account of a borrower which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset. Section 2(z) defines "Securitisation" to mean acquisition of financial assets by any securitisation company or reconstruction company from any D originator whether by raising of funds by such securitisation company or reconstruction company from qualified institutional buyers by issue of security receipts representing undivided interest in such financial assets or otherwise. Section 2(zc) defines "secured asset" to mean the property on which security E interest is created. Section 2(zd) defines "secured creditor" to mean 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 institutions, or (ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitization F company or reconstruction company for the securitisation 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. Section 2(ze) defines G a "secured debt" to mean a debt which is secured by any security interest. Section 2(zf) defines "security interest" to mean right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation and assignment." Chapter II H which contains Sections 3 to 12 deals with regulation of

securitisation and reconstruction of financial assets of banks and financial institutions. Chapter III deals with enforcement of security interest. It comprises of seven sections including Section 13 which is crucial for decision of these appeals. Sub-section (1) of Section 13 contains a *non obstante* clause. It lays down that notwithstanding anything contained in Sections 69 or 69A of the Transfer of Property Act, 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. Sub-section (2) of Section 13 enumerates first of many steps needed to be taken by the secured creditor for enforcement of security interest. This sub-section provides that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of Section 13(4). Sub-section (3) of Section 13 lays down that notice issued under Section 13(2) shall contain details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by bank or financial institution. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for non acceptance are required to be communicated within one week. Sub-section (4) of Section 13 specifies various modes which can be adopted by the secured creditor for recovery of secured debt. The secured creditor can take possession of the secured assets of the borrower and transfer the same by way of lease, assignment or sale for realizing the secured assets. This is

A subject to the condition that the right to transfer by way of lease etc. shall be exercised only where substantial part of the business of the borrower is held as secured debt. If the management of whole or part of the business is severable, then the secured creditor can take over management only of such B business of the borrower which is relatable to security. The secured creditor can appoint any person to manage the secured asset, the possession of which has been taken over. The secured creditor can also, by notice in writing, call upon a person who has acquired any of the secured assets from the C borrower to pay the money, which may be sufficient to discharge the liability of the borrower. Sub-section (7) of Section 13 lays down that where any action has been taken against a borrower under sub-section (4), all costs, charges and expenses properly incurred by the secured creditor or any expenses incidental D thereto can be recovered from the borrower. The money which is received by the secured creditor is required to be held by him in trust and applied, in the first instance, for such costs, charges and expenses and then in discharge of dues of the secured creditor. Residue of the money is payable to the person entitled thereto according to his rights and interest. Sub- E section (8) imposes a restriction on the sale or transfer of the secured asset if the amount due to the secured creditor together with costs, charges and expenses incurred by him are tendered at any time before the time fixed for such sale or transfer. Sub-section (9) deals with the situation in which more F than one secured creditor has stakes in the secured assets and lays down that in the case of financing a financial asset by more than one secured creditor or joint financing of a financial asset by secured creditors, no individual secured creditor shall be entitled to exercise any or all of the rights under sub-section (4) G unless all of them agree for such a course. There are five unnumbered provisos to Section 13(9) which deal with *pari passu* charge of the workers of a company in liquidation. The first of these provisos lays down that in the case of a company in liquidation, the amount realized from the sale of secured H assets shall be distributed in accordance with the provisions

of Section 529A of the Companies Act, 1956. The second proviso deals with the case of a company being wound up on or after the commencement of this Act. If the secured creditor of such company opts to realize its security instead of relinquishing the same and proving its debt under Section 529(1) of the Companies Act, then it can retain sale proceeds after depositing the workmen's dues with the liquidator in accordance with Section 529A. The third proviso requires the liquidator to inform the secured creditor about the dues payable to the workmen in terms of Section 529A. If the amount payable to the workmen is not certain, then the liquidator has to intimate the estimated amount to the secured creditor. The fourth proviso lays down that in case the secured creditor deposits the estimated amount of the workmen's dues, then such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited with the liquidator. In terms of fifth proviso, the secured creditor is required to give an undertaking to the liquidator to pay the balance of the workmen's dues, if any. Sub-section (10) lays down that where dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application before the Tribunal under Section 17 for recovery of balance amount from the borrower. Sub-section (11) states that without prejudice to the rights conferred on the secured creditor under or by this section, it shall be entitled to proceed against the guarantors or sell the pledged assets without resorting to the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets. Sub-section (12) lays down that rights available to the secured creditor under the Act may be exercised by one or more of its officers authorised in this behalf. Sub-section (13) lays down that after receipt of notice under sub-section (2), the borrower shall not 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. Section 14 represents semblance of court's intervention by way of assistance to a

A B C D E F G H

A secured creditor in taking possession of the secured asset. The secured creditor can, for the purpose of taking possession or control of any secured asset, request in writing to the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction the secured asset or other document relating thereto
B is situated or found to take possession thereof. If such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset and document and forward the same to the secured creditor. Section 17 speaks of the remedies available
C to any person including borrower who may feel aggrieved by the action taken by the secured creditor under sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of
D abundant caution, an explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3A) shall not constitute a ground for filing application under Section 17(1). Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor
E for enforcement of security interest are in accordance with the provisions of the Act and rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in
F consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of Section 13 is
G in accordance with the provisions of the Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt. Sub-section (5)
H of Section 17 prescribes the time limit of sixty days within which

an application made under Section 17 is required to be disposed of. Proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously. Section 18 provides for an appeal to the Appellate Tribunal. Section 34 lays down that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken under the Securitisation Act or DRT Act. Section 35 of the Securitisation Act is substantially similar to Section 34(1) of the DRT Act. It declares that 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. Section 37, which is similar to Section 34(2) of the DRT Act lays down that the provisions of this Act or the Rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or any other law for the time being in force.

21. In exercise of powers vested in it under Sections 38(1) and (2)(b) read with Sections 13(4), (10) and (12) of the Securitisation Act, the Central Government framed the Security Interest (Enforcement) Rules, 2002. Rule 3 prescribes the mode of service of demand notice. Rule 4 details the procedure to be followed after issue of demand notice. Various sub-rules of

this rule specify the mode of taking possession of moveable security assets, their preservation and protection,

A valuation and sale. Rule 8 lays down similar procedure in respect of immovable security assets. Rule 9 regulates time of sale, issue of sale certificate and delivery of possession to the purchaser. Rule 10 provides for appointment of manager of the security assets of which possession has been taken over by
B the secured creditor. Rule 11 regulates procedure for recovery of shortfall of secured debt.

22. An analysis of the above noted provisions makes it clear that the primary object of the DRT Act was to facilitate creation of special machinery for speedy recovery of the dues
C of banks and financial institutions. This is the reason why the DRT Act not only provides for establishment of the Tribunals and Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of
D recovery of the amount determined by the Tribunal or Appellate Tribunal but also bars the jurisdiction of all courts except the Supreme Court and High Courts in relation to the matters specified in Section 17. The Tribunals and Appellate Tribunals have also been freed from the shackles of procedure contained
E in the Code of Civil Procedure. To put it differently, the DRT Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of banks and financial institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of
F civil courts for frustrating the proceedings initiated by the banks and financial institutions.

23. The enactment of the Securitisation Act can be treated as one of the most radical legislative measures taken by the
G Government for ensuring that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstruction. For the first time, the secured creditors have been empowered to take measures for recovery of their dues without the intervention of the Courts
H or Tribunals. The Securitisation Act has also brought into

existence a new dispensation for registration and regulation of securitisation companies or reconstruction companies, facilitating securitisation of financial assets of banks and financial institutions, easy transferability of financial assets by the securitisation company or reconstruction company to acquire financial assets of banks and financial institutions by issue of debentures or bonds or any other security in the nature of debenture, empowering the securitisation companies or reconstruction companies to raise funds by issue of security receipts to qualified institutional buyers, facilitating reconstruction of financial assets acquired by exercising power of enforcement of securities or change of management, declaration of any securitisation company or reconstruction company as a public financial institution for the purpose of Section 4A of the Companies Act, defining 'security interest' as any type of security including mortgage and charge on immovable properties given for due payment of any financial assistance given by any bank or financial institution, classification of borrowers account as non-performing asset and above all empowering banks and financial institutions to take possession of securities given for financial assistance and sale or lease the same or take over management.

24. In the light of the above, we shall now consider whether there is any conflict between the DRT Act and Securitisation Act on one hand and the Bombay and Kerala Acts and similar State legislations on the other, and whether by virtue of *non obstante* clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act, the provisions contained in those legislations override Section 38C of the Bombay Act, Section 26B of the Kerala Act and similar other State legislations. For reference sake, these provisions are reproduced below:

DRT Act

"34. Act to have over-riding effect.—(1) Save as otherwise

A provided in sub-section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

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(2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial C Reconstruction Bank of India Act, 1984 (62 of 1984), the Sick Industrial Companies (Special Provisions) Act, 1985 and the Small Industries Development Bank of India Act, 1989."

D *Securitisation Act*

"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 E by virtue of any such law."

37. Application of other laws not barred.—The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 F 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."

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Bombay Sales Tax Act, 1959

"38C. *Liability Under this Act to be First Charge*- Notwithstanding anything contained in any contract to the contrary but subject to any provision regarding first charge

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in any Central Act for the time being in force, any amount of tax, penalty, interest or any other sum, payable by a dealer or any other person under this Act shall be the first charge on the property of the dealer, or, as the case may be, person."

Kerala General Sales Tax Act, 1963

"26B. Tax payable to be first charge on the property.— Notwithstanding anything to the contrary contained in any other law for the time being in force, any amount of tax, penalty, interest and any other amount, if any, payable by a dealer or any another person under this Act, shall be the first charge on the property of the dealer, or such person."

Section 14A of the Workmen's Compensation Act, 1923, Section 11 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short 'the EPF Act'), Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Development and Regulation) Act, 1957, Section 30 of the Gift Tax Act, 1958 and Section 529A of the Companies Act, 1956 are some of the Central legislations by which statutory first charge has been created in favour of the State or workers, read as under:-

Workmen's Compensation Act, 1923

"14A. *Compensation to be first charge on assets transferred by employer.*– Where an employer transfers his assets before any amount due in respect of any compensation, the liability wherefor accrued before the date of the transfer, has been paid, such amount *shall, notwithstanding anything contained in any other law for the time being in force, be a first charge* on that part of the assets so transferred as consists of immovable property."

Employees' Provident Funds and Miscellaneous

A *Provisions Act, 1952*

"11. *Priority of payment of contributions over other debts.*– (1) Where any employer is adjudicated insolvent or, being a company, an order for winding up is made, the amount due–

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(a) from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under section 14B, accumulations required to be transferred under sub-section (2) of section 15 or any charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme; or

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(b) from the employer in relation to an exempted establishment in report of any contribution to the provident fund or any insurance fund in so far it relates to exempted employees, under the rules of the provident fund or any insurance fund, any contribution payable by him towards the Pension Fund under sub-section (6) of section 17, damages recoverable under section 14B or any charges payable by him to the appropriate Government under any provision of this Act or under any of the conditions specified under section 17,

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shall, where the liability therefor has accrued before the order of adjudication or winding up is made, be deemed to be included among the debts which under section 49 of the Presidency-towns Insolvency Act, 1909 (3 of 1909), or under section 61 of the Provincial Insolvency Act, 1920 (5 of 1920), or under section 530 of the Companies Act, 1956 (1 of 1956) are to be paid in priority to all other debts in the distribution of the property of the insolvent or the

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assets of the company being wound up, as the case may be.

Explanation. – In this sub-section and in section 17, "insurance fund" means any fund established by an employer under any scheme for providing benefits in the nature of life insurance to employees, whether linked to their deposits in provident fund or not, without payment by the employees of any separate contribution or premium in that behalf.

11(2) Without prejudice to the provisions of sub-section (1), if any amount is due from an employer, whether in respect of the employee's contribution deducted from the wages of the employee or the employer's contribution, the amount so due *shall be deemed to be the first charge* on the assets of the establishment, and shall, notwithstanding anything contained in any other law, for the time being in force, be paid in priority to all other debts."

Estate Duty Act, 1953

"74(1). Estate duty a first charge on property liable thereto.– (1) Subject to the provisions of section 19, the estate duty payable in respect of property, movable or immovable, passing on the death of the deceased, *shall be a first charge* on the immovable property so passing (including agricultural land) in whomsoever it may vest on his death after the debts and encumbrances allowable under Part VI of this Act; and any private transfer or delivery of such property shall be void against any claim in respect of such estate duty."

Mines and Minerals (Development and Regulation) Act, 1957

"25(2). Any rent, royalty, tax, fee or other sum due to the Government either under this Act or any rule made

A thereunder or under the terms and conditions of any reconnaissance permit, prospecting licence or mining lease may, on a certificate of such officer as may be specified by the State Government in this behalf by general or special order, be recovered in the same manner as if it B were an arrear of land revenue and every such sum which becomes due to the Government after the commencement of the Mines and Minerals (Regulation and Development) Amendment Act, 1972, together with the interest due thereon *shall be a first charge* on the assets of the holder C of the reconnaissance permit, prospecting licence or mining lease, as the case may be."

Gift-Tax Act (18 of 1958)

"30. *Gift-tax to be charged on property gifted.* – Gift-tax D payable in respect of any gift comprising immovable property *shall be a first charge* on that property but any such charge shall not affect the title of a *bona fide* purchaser for valuable consideration without notice of the charge."

E *Companies Act, 1956:*

"529A. Overriding preferential payments.— Notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, in F the winding up of a company –

(a) workmen's dues; and

(b) debts due to secured creditors to the extent such debts rank under clause (c) of the proviso to sub-G section (1) of section 529 pari passu with such dues,

shall be paid in priority to all other debts.

H (2) the debts payable under clause (a) and clause (b) of

sub-section (1) shall be paid in full, unless the assets are insufficient to meet them, in which case they shall abate in equal proportions." A

Section 46B of the State Financial Corporations Act, 1951 (for short 'the SFC Act') which contains a *non obstante* clause similar to the one contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act and the effect of which was considered by a Division Bench of the Kerala High Court *vis a vis* Section 11(2) of the EPF Act also read as under:- B

State Financial Corporations Act, 1951 C

"46B. Effect of Act on other laws.- The provisions of this Act and of any rules or orders made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in the memorandum or articles of association of an industrial concern or in any other instrument having effect by virtue of any law other than this Act, but save as aforesaid, the provisions of this Act shall be in addition to, and not in derogation of, any other law for the time being applicable to an industrial concern." D E

25. As a prelude to the consideration of question relating to conflict between Central and State legislations and priority, if any, given to the dues of banks, financial institutions and other secured creditors under the DRT Act and Securitisation Act, it will be useful to notice some rules of interpretation of statutes, one of which is the rule of contextual interpretation. This rule requires that the court should examine every word of a statute in its context. In doing so, the Court has to keep in view preamble of the statute, other provisions thereof, *pari materia* statutes, if any, and the mischief intended to be remedied. Context often provides the key to the meaning of the word and the sense it carries. Its setting gives colour to it and provides a cue to the intention of the legislature in using it. In his famous work on Statutory Interpretation, Justice G.P. Singh has quoted F G H

A Professor H.A. Smith in the following words:

> "'No word', says Professor H.A. Smith 'has an absolute meaning, for no words can be defined in vacuo, or without reference to some context'. According to Sutherland there
B is a 'basic fallacy' in saying 'that words have meaning in and of themselves', and 'reference to the abstract meaning of words', states Craies, 'if there be any such thing, is of little value in interpreting statutes'. ... in determining the meaning of any word or phrase in a statute the first
C question to be asked is — 'What is the natural or ordinary meaning of that word or phrase in its context in the statute? It is only when that meaning leads to some result which cannot reasonably be supposed to have been the intention of the legislature, that it is proper to look for some other possible meaning of the word or phrase.' The context, as
D already seen in the construction of statutes, means the statute as a whole, the previous state of the law, other statutes in pari materia, the general scope of the statute and the mischief that it was intended to remedy."

E In *Poppatlal Shah v. State of Madras* [AIR 1953 SC 274], this Court while construing the word 'sale' appearing in the Madras General Sales Tax Act, 1939 before its amendment in 1947, observed: "it is a settled rule of construction that to ascertain the legislative intent, all the constituent parts of a statutes are
F to be taken together, and each word, phrase or sentence is to be considered in the light of the general purpose of the Act itself".

26. In *Reserve Bank of India v. Peerless General Finance and Investment Company Limited* [(1987) 1 SCC 424], it was
G observed, "that interpretation is best which makes the textual interpretation match the contextual." Speaking for the Court, Chinappa Reddy, J. noted the importance of rule of contextual interpretation and held:-

H "Interpretation must depend on the text and the context.

They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression 'prize chit' in *Srinivasa* [(1980) 4 SCC 507] and we find no reason to depart from the Court's construction."

27. In *R. v. National Asylum Support Services* [(2002) 4 All ER 654], LORD STEYN observed "the starting point is that language in all legal texts conveys meaning according to the circumstances in which it was used. It follows that context must always be identified and considered before the process of construction or during it. It is, therefore, wrong to say that the court may only resort to the evidence of contextual scene when an ambiguity has arisen."

28. A *non obstante* clause is generally incorporated in a statute to give overriding effect to a particular section or the

A statute as a whole. While interpreting *non obstante* clause, the Court is required to find out the extent to which the legislature intended to do so and the context in which the *non obstante* clause is used. This rule of interpretation has been applied in several decisions. In *State of West Bengal v. Union of India* B [(1964) 1 SCR 371], it was observed that the Court must ascertain the intention of the legislature by directing its attention not merely to the clauses to be construed but to the entire statute; it must compare the clause with the other parts of the law and the setting in which the clause to be interpreted occurs.

C 29. In *Madhav Rao Jivaji Rao Scindia v. Union of India and another* [(1971) 1 SCC 85] Hidayatullah, C.J. observed that the *non obstante* clause is no doubt a very potent clause intended to exclude every consideration arising from other provisions of the same statute or other statute but "for that D reason alone we must determine the scope" of that provision strictly. When the section containing the said clause does not refer to any particular provisions which it intends to override but refers to the provisions of the statute generally, it is not permissible to hold that it excludes the whole Act and stands E all alone by itself. A search has, therefore, to be made with a view to determining which provision answers the description and which does not.

30. In *R.S. Raghunath v. State of Karnataka and another* F [(1992) 1 SCC 335], a three-Judge Bench referred to the earlier judgments in *Aswini Kumar Ghose v. Arabinda Bose* [AIR 1952 SC 369], *Dominion of India v. Shrinbai A. Irani* [AIR 1954 SC 596], *Union of India v. G.M. Kokil* [1984 (Supp.) SCC 196], *Chandavarkar Sita Ratna Rao v. Ashalata S. Guram* [(1986) G 4 SCC 447] and observed:

> ".....The *non-obstante* clause is appended to a provision with a view to give the enacting part of the provision an overriding effect in case of a conflict. But the *non-obstante* clause need not necessarily and always be H co-extensive with the operative part so as to have the

effect of cutting down the clear terms of an enactment and if the words of the enactment are clear and are capable of a clear interpretation on a plain and grammatical construction of the words the *non-obstante* clause cannot cut down the construction and restrict the scope of its operation. In such cases the *non-obstante* clause has to be read as clarifying the whole position and must be understood to have been incorporated in the enactment by the legislature by way of abundant caution and not by way of limiting the ambit and scope of the Special Rules."

31. In *A.G. Varadarajulu v. State of Tamil Nadu* [(1998) 4 SCC 231], this Court relied on *Aswini Kumar Ghose's case.* The Court while interpreting *non obstante* clause contained in Section 21-A of Tamil Nadu Land Reforms (Fixation of Ceiling on Land) Act, 1961 held :-

"It is well settled that while dealing with a *non obstante* clause under which the legislature wants to give overriding effect to a section, the court must try to find out the extent to which the legislature had intended to give one provision overriding effect over another provision. Such intention of the legislature in this behalf is to be gathered from the enacting part of the section. In *Aswini Kumar Ghose* v. *Arabinda Bose* Patanjali Sastri, J. observed:

> "The enacting part of a statute must, where it is clear, be taken to control the non obstante clause where both cannot be read harmoniously;"

32. The DRT Act and Securitisation Act were enacted by Parliament in the backdrop of recommendations made by the expert committees appointed by the Central Government for examining the causes for enormous delay in the recovery of dues of banks and financial institutions which were adversely affecting fiscal reforms. The committees headed by Shri T. Tiwari and Shri M. Narasimham suggested that the existing legal regime should be changed and special adjudicatory

A machinery be created for ensuring speedy recovery of the dues of banks and financial institutions. Narasimham and Andhyarujina Committees also suggested enactment of new legislation for securitisation and empowering the banks etc. to take possession of the securities and sell them without B intervention of the Court. The DRT Act facilitated establishment of two-tier system of Tribunals. The Tribunals established at the first level have been vested with the jurisdiction, powers and authority to summarily adjudicate the claims of banks and financial institutions in the matter of recovery of their dues C without being bogged down by the technicalities of the Code of Civil Procedure. The Securitisation Act drastically changed the scenario inasmuch as it enabled banks, financial institutions and other secured creditors to recover their dues without intervention of the Courts or Tribunals. The Securitisation Act D also made provision for registration and regulation of securitisation/reconstruction companies, securitisation of financial assets of banks and financial institutions and other related provisions. However, what is most significant to be noted is that there is no provision in either of these enactments E by which first charge has been created in favour of banks, financial institutions or secured creditors qua the property of the borrower. Under Section 13(1) of the Securitisation Act, limited primacy has been given to the right of a secured creditor to enforce security interest *vis-à-vis* Section 69 or Section 69A of the Transfer of Property Act. In terms of that sub-section, F secured creditor can enforce security interest without intervention of the Court or Tribunal and if the borrower has created any mortgage of the secured asset, the mortgagee or any person acting on his behalf cannot sell the mortgaged property or appoint a receiver of the income of the mortgaged G property or any part thereof in a manner which may defeat the right of the secured creditor to enforce security interest. This provision was enacted in the backdrop of Chapter VIII of Narasimham Committee's 2nd Report in which specific reference was made to the provisions relating to mortgages H under the Transfer of Property Act. In an apparent bid to

overcome the likely difficulty faced by the secured creditor which may include a bank or a financial institution, Parliament incorporated the *non obstante* clause in Section 13 and gave primacy to the right of secured creditor *vis a vis* other mortgagees who could exercise rights under Sections 69 or 69A of the Transfer of Property Act. However, this primacy has not been extended to other provisions like Section 38C of the Bombay Act and Section 26B of the Kerala Act by which first charge has been created in favour of the State over the property of the dealer or any person liable to pay the dues of sales tax, etc. Sub-section (7) of Section 13 which envisages application of the money received by the secured creditor by adopting any of the measures specified under sub-section (4) merely regulates distribution of money received by the secured creditor. It does not create first charge in favour of the secured creditor. By enacting various provisos to sub-section (9), the legislature has ensured that priority given to the claim of workers of a company in liquidation under Section 529A of the Companies Act, 1956 *vis a vis* secured creditors like banks is duly respected. This is the reason why first of the five unnumbered provisos to Section 13(9) lays down 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. This and other provisos do not create first charge in favour of the worker of a company in liquidation for the first time but merely recognize the existing priority of their claim under the Companies Act. It is interesting to note that the provisos to sub-section (9) of Section 13 do not deal with the companies which fall in the category of borrower but which are not in liquidation or are not being wound up. It is thus clear that provisos referred to above are only part of the distribution mechanism evolved by the legislature and are intended to protect and preserve the right of the workers of a company in liquidation whose assets are subjected to the provisions of the Securitisation Act and are disposed of by the secured creditor in accordance with Section 13 thereof.

A B C D E F G H

A 33. The *non obstante* clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in any other law or instrument having effect by virtue of any other law. In other words, if there B is no provision in the other enactments which are inconsistent with the DRT Act or Securitisation Act, the provisions contained in those Acts cannot override other legislations. Section 38C of the Bombay Act and Section 26B of the Kerala Act also contain *non obstante* clauses and give statutory recognition to C the priority of State's charge over other debts, which was recognized by Indian High Courts even before 1950. In other words, these sections and similar provisions contained in other State legislations not only create first charge on the property of the dealer or any other person liable to pay sales tax, etc. D but also give them overriding effect over other laws. In *Builders Supply Corporation v. Union of India* [(1965) 2 SCR 289], the Constitution Bench considered the question whether tax payable to the Union of India has priority over other debts. After making a reference to the judgments of the Bombay High Court in *Bank of India v. John Bowman and Ors.,* [AIR 1955 Bom. E 305], Madras High Court in *Kaka Mohammad Ghouse Sahib & Co. v. United Commercial Syndicate and others* [(1963) 49 I.T.R. 25] and *Manickam Chettiar v. Income-tax Officer, Madura,* [(1938) 6 ITR 180], the Court held :

F (i) "The Common Law doctrine of the priority of Crown debts had a wide sweep but the question in the present appeal was the narrow one whether the Union of India was entitled to claim that the recovery of the amount of tax due to it from a citizen must take precedence and priority over G unsecured debts due from the said citizen to his other private creditors. The weight of authority in India was strongly in support of the priority of tax dues.

(ii) The Common Law doctrine on which the Union of India based its claim in the present proceedings had been

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applied and upheld in that part of India which was known as 'British India' prior to the Constitution. The rules of Common Law relating to substantive rights which had been adopted by this country and enforced by judicial decisions, amount to 'law in force' in the territory of India at the relevant time within the meaning of Art. 372(1). In that view of the matter, the contention of the appellant that after the Constitution was adopted the position of the Union of India in regard to its claim for priority in the present proceedings had been alerted could not be upheld.

(iii) The basic justification for the claim for priority of Government debts rests on the well-recognised principle that the State is entitled to raise money by taxation, otherwise it will not be able to function as a sovereign government at all. This consideration emphasizes the necessity and wisdom of conceding to the State the right to claim priority in respect of its tax dues."

34. In *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation and others* [(1995) 2 SCC 19], the Court again recognized the priority of the State's statutory first charge under Section 11-AAAA of the Rajasthan Sales Tax Act, 1954 vis-à-vis claim of the bank to recover its dues from the borrower.

35. In *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co. and others* [(2000) 5 SCC 694], the Court reviewed case law on the subject and observed:

"The principle of priority of government debts is founded on the rule of necessity and of public policy. The basic justification for the claim for priority of State debts rests on the well-recognised principle that the State is entitled to raise money by taxation because unless adequate revenue is received by the State, it would not be able to function as a sovereign Government at all. It is essential

A that as a sovereign, the State should be able to discharge its primary governmental functions and in order to be able to discharge such functions efficiently, it must be in possession of necessary funds and this consideration emphasises the necessity and the wisdom of conceding
B to the State, the right to claim priority in respect of its tax dues (see *Builders Supply Corpn.*). In the same case the Constitution Bench has noticed a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts and that this rule of common law
C amounts to law in force in the territory of British India at the relevant time within the meaning of Article 372(1) of the Constitution of India and therefore continues to be in force thereafter. On the very principle on which the rule is founded, the priority would be available only to such debts
D as are incurred by the subjects of the Crown by reference to the State's sovereign power of compulsory exaction and would not extend to charges for commercial services or obligation incurred by the subjects to the State pursuant to commercial transactions. Having reviewed the available judicial pronouncements their Lordships have summed up
E the law as under:

1. There is a consensus of judicial opinion that the arrears of tax due to the State can claim priority over private debts.

F 2. The common law doctrine about priority of Crown debts which was recognised by Indian High Courts prior to 1950 constitutes "law in force" within the meaning of Article 372(1) and continues to be in force.

3. The basic justification for the claim for priority of State
G debts is the rule of necessity and the wisdom of conceding to the State the right to claim priority in respect of its tax dues.

4. The doctrine may not apply in respect of debts due to
H the State if they are contracted by citizens in relation to

commercial activities which may be undertaken by the State for achieving socio-economic good. In other words, where the welfare State enters into commercial fields which cannot be regarded as an essential and integral part of the basic government functions of the State and seeks to recover debts from its debtors arising out of such commercial activities the applicability of the doctrine of priority shall be open for consideration." A B

36. In *State of M.P. and another v. State Bank of Indore and others* [(2002) 10 SCC 441], this Court considered whether statutory first charge created under Section 33-C of the M.P. General Sales Tax Act, 1958 would prevail over the bank's charge. The facts of that case show that in 1974, respondent No.2 obtained a term loan from State Bank of Indore and executed a promissory note and pledged certain machinery to the bank for securing repayment of loan. Two more loans were taken by respondent no.2 in 1979. The bank sued respondent No.2 for recovery of its dues. During the pendency of the litigation, Section 33-C was inserted in the State Act. The State claimed first charge under Section 33-C upon the machinery of respondent No.2 in lieu of sales tax dues. The trial Court and the High Court declined to accept the State's claim. The High Court observed that the bank's charge on the machinery was prior to the insertion of Section 33-C in the State Act and the subsequent loans taken in 1979 do not alter the position in favour of the State. The High Court then proceeded to hold that the charge created in favour of the bank remain valid and operative till repayment of the loan. This Court reversed the judgments of the trial Court and High Court and held: C D E F

"Section 33-C creates a statutory first charge that prevails over any charge that may be in existence. Therefore, the charge thereby created in favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the Bank in respect of the loan taken by the second respondent. There is no question G H

A of retrospectivity here, as, on the date when it was introduced, Section 33-C operated in respect of all charges that were then in force and gave sales tax dues precedence over them."

37. Section 529A of the Companies Act and Section 11(2) B of the EPF Act both of which are Central legislations also contain *non obstante* clauses give statutory recognition to the priority of workers dues over other debts. In *Allahabad Bank v. Canara Bank and another* (supra), a two-Judge Bench recognized the priority of workers dues under Section 529A of C the Companies Act over other debts. In *Recovery Officer, Employees Provident Fund v. Kerala Financial Corporation* [(2002) 3 ILR Kerala 4], a Division Bench of Kerala High Court considered the primacy of first charge created under Section 11(2) of the EPF Act vis-à-vis Section 46B of the SFC Act. The D facts of that case were that a company by name M/s. Darpan Electronics (P) Ltd. had taken loan from the Kerala Financial Corporation and mortgaged its immovable property for securing repayment. During March 1990 and December 1990, the company defaulted in payment of contributions to the E Employees Provident Fund. It also committed default in repayment of loan. The Kerala Financial Corporation sold the moveable assets of the company for a sum of Rs.89,083/-. The recovery officer appointed under the EPF Act made an application for recovery of provident fund contribution. He also F attached 37 cents of land which had already been mortgaged by the company to the Financial Corporation and prohibited the bank from transferring the amount of Rs.89,083/- lying in the account of the company. The Corporation challenged this action by filing writ petition under Article 226 of the Constitution, which G was allowed by the learned Single Judge. The Division Bench referred to Section 11(2) of the EPF Act and held that the workers dues will have priority over other debts. Speaking for the Bench, B.N. Srikrishna, CJ (as he then was) observed as under:

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"Sub-section (2) of section 11 of the EPF and MP Act has two facets. First, it declares that the amount due from the employer towards contribution under the EPF and MP Act shall be deemed to be the first charge on the assets of the establishment. Second, it also declares that notwithstanding anything contained in any other law for the time being in force, such debt shall be paid in priority to all other debts. Both these provisions bring out the intention of the Parliament to ensure the social benefit as contained in the legislation. There are other provisions in the Act rendering the amounts of provident fund immune from attachment of civil court's decree, which also indicate such intention of Parliament."

The Division Bench then considered the argument based on Section 100 of the Transfer of Property Act and observed:

"With regard to the argument based on section 100 of the Transfer of Property Act, the matter is no longer *res integra*. In *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation and others,* this question came up specifically for consideration of the Supreme Court and the answer given by the Supreme Court is unmistakably against the first respondent. That was a case where the State Bank of Bikaner claimed priority over sales tax arrears due to the State on the ground that it was a secured creditor. Section 11 AAAA of the Rajasthan Sales Tax Act declares that any amount of tax, penalty, interest and any other sum, if any, payable by a dealer, or any other person under the Act, shall be the first charge on the property of the dealer, or such person. On behalf of the State Bank of Bikaner, section 100 of the Transfer of Property Act was relied upon to contend that, since there was a mortgage in favour of the Bank, the Bank would have precedence over the claim of sales tax dues, which was only by way of a charge. After analysis of section 100 of the Transfer of Property Act, and considering the

A distinction drawn between a mortgage and charge as discussed in the earlier decision in *Dattatreya Shanker Mote v. Anand Chintaman Datar,* it was held that the expression "transferee of property used in section 100 refers to transferee of entire interest in the property and it B does not cover the transfer of only an interest in the property by way of a mortgage. It was further held that the charge created under section 11 AAAA of Rajasthan Sales Tax Act over the property of the dealer or a person liable to pay sales tax or other dues was created in respect of C the entire interest in respect of the property, since the section declares the dues of the Sales Tax Department as a first charge, the first charge would operate over the entire title of the property which continue with the mortgagor. Therefore, when a statutory first charge is created on the D property of the dealer, the interest of the mortgage is not excluded from the first charge. The Supreme Court also relied on *Fisher and Lightwood's Law of Mortgage,* 10th Edn. and the Judgment of the Appeal Court in *Westminister City Council v. Haymarket Publishing Ltd.,* and finally concluded that since the statute created a first E charge, it clearly gave priority to the statutory charge over all other charges on the property including a mortgage. The expression "first charge" was explained to mean that, it would cover within its ambit a mortgage also. Consequently, when a first charge is created by statute, F that charge will have precedence over an existing mortgage."

The Division Bench negatived the argument that *non obstante* clause contained in Section 46B of the SFC Act will override G Section 11(2) of the EPF Act by assigning the following reasons:

"The contention of the first respondent based on the overriding effect of section 46 B of the S.F.C. Act has no substance in our judgment. Undoubtedly, the intention of H

Parliament in enacting section 46 B in the year 1956 was to ensure that a State Financial Corporation could quickly and effectively recover the amounts due by taking possession of the property of the defaulter instead of having resort to the cumbersome method of recovery through a court of law. While this was the law, Parliament amended section 11 of the E.P.F. and M.P. Act by specifically enacting sub-section (2) thereof, declaring that the amount due as contribution to the Employees Provident Fund has first charge on the assets of the establishment and that, notwithstanding anything contained in any other law for the time being in force, it shall be paid in priority against all other debts. In fact, the second facet of section 11(2) of the E.P.F. and M.P. Act goes one step further than what is provided in section 46-B of S.F.C. Act. The reason for this is obvious. While the State Financial Corporation would have to be helped to recover the debts due to it from a defaulting debtor, the Provident Fund payable to workers is of greater moment, since it is a matter of terminal social security benefit made available by statute to the working class. Taking into consideration that E.P.F. and M.P. Act is a social benefit legislation, and the evil consequences of Provident Fund dues being defeated by prior claims of secured or unsecured creditors, the Legislature took care to declare that irrespective of when a debt is created, the dues under the E.P.F. and M.P. Act would always remain first charge and shall be paid first out of the assets of the establishment. We are also not impressed by the contention of the first respondent that upon usage of non obstante clause in section 46 B of the S.F.C. Act. Sub-section (2) of section 11 of E.P.F. Act is of subsequent date. No doubt, both section 46 B of the S.F.C. Act and section 11(2) of the E.P.F. and M.P. Act declare their intent by usage of the non obstante clause. But, since section 11(2) of the E.P.F. and M.P. Act has been enacted later, we must ascribe to the Parliament the intention to override the earlier legislation also. It is,

A therefore, clear that section 11(2) of the E.P.F. and M.P. Act overrides all provisions of other enactments including section 46 B of the S.F.C. Act."

38. While enacting the DRT Act and Securitisation Act, Parliament was aware of the law laid down by this Court wherein priority of the State dues was recognized. If Parliament intended to create first charge in favour of banks, financial institutions or other secured creditors on the property of the borrower, then it would have incorporated a provision like Section 529A of the Companies Act or Section 11(2) of the EPF Act and ensured that notwithstanding series of judicial pronouncements, dues of banks, financial institutions and other secured creditors should have priority over the State's statutory first charge in the matter of recovery of the dues of sales tax, etc. However, the fact of the matter is that no such provision has been incorporated in either of these enactments despite conferment of extraordinary power upon the secured creditors to take possession and dispose of the secured assets without the intervention of the Court or Tribunal. The reason for this omission appears to be that the new legal regime envisages transfer of secured assets to private companies. The definition of "secured creditor" includes securitisation/reconstruction company and any other trustee holding securities on behalf of bank/financial institution. The definition of "securitisation company" and "reconstruction company" in Section 2(v) and (za) shows that these companies may be private companies registered under Companies Act, 1956 and having a certificate of registration from the Reserve Bank under Section 3 of Securitisation Act. Evidently, Parliament did not intend to give priority to the dues of private creditors over sovereign debt of the State.

39. If the provisions of the DRT Act and Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the

two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person *qua* the procedure adopted by the banks, financial institutions and other secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks, etc. If Parliament intended to give priority to the dues of banks, financial institutions and other secured creditors over the first charge created under State legislations then provisions similar to those contained in Section 14A of the Workmen's Compensation Act, 1923, Section 11(2) of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Development and Regulation) Act, 1957, Section 30 of the Gift-Tax Act, and Section 529A of the Companies Act, 1956 would have been incorporated in the DRT Act and Securitisation Act. Undisputedly, the two enactments do not contain provision similar to Workmen's Compensation Act, etc. In the absence of any specific provision to that effect, it is not possible to read any conflict or inconsistency or overlapping between the provisions of the DRT Act and Securitisation Act on the one hand and Section 38C of the Bombay Act and Section 26B of the Kerala Act on the other and the *non obstante* clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act cannot be invoked for declaring that the first charge created under the State legislation will not operate *qua* or affect the proceedings initiated by banks, financial institutions and other secured creditors for recovery of their dues or enforcement of security interest, as the case may be. The Court could have given effect to the *non obstante* clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act *vis a vis* Section 38C of the Bombay Act and Section 26B of the Kerala Act and similar other State legislations only if there was a specific provision in the two enactments creating first charge in favour of the banks, financial institutions and other secured creditors but as the Parliament has not made any such provision in either of the enactments,

A the first charge created by the State legislations on the property of the dealer or any other person, liable to pay sales tax etc., cannot be destroyed by implication or inference, notwithstanding the fact that banks, etc. fall in the category of secured creditors. In this connection, reference may be made B to the judgments in *M.K. Ranganathan and another v. Government of Madras and others* [(1955) 2 SCR 374], *State of Gujarat v. Shyamlal Mohanlal Choksi and others* [AIR 1965 SC 1251] and *Byram Pestonji Gariwala v. Union Bank of India and others* [(1992) 1 SCC 31]. In *M.K. Ranganathan's* case, C a three-Judge Bench of this Court interpreted the expression "any sale held without leave of the Court of any of the properties" which were added in Section 232(1) of the Indian Companies Act, 1913 by amending Act No. XXII of 1936 and held that the said expression refers only to sales held through the D intervention of the Court and not to sales effected by the secured creditor outside the winding up and without the intervention of the Court. While answering in negative the question whether amendment was intended to bring within the sweep of the general words "sales effected by the secured creditor outside the winding up", in negative, the Court referred E to Maxwell on Interpretation of Statutes, the judgment of Privy Council in *P. Murugian v. Jainudeen, C.L.* [(1954) 3 W.L.R. 682] and observed:

> "It is a legitimate rule of construction to construe words in F an Act of Parliament with reference to words found in immediate connection with them. It is also well-recognized rule of construction that the legislature does not intend to make a substantial alteration in the law beyond what it explicitly declares either in express words or by clear G implication and that the general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of preserving the existing policy untouched."

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40. In *Shyamlal Mohanlal Choksi's case* (supra), the Constitution Bench considered whether Section 94 of the Code of Criminal Procedure, 1898 apply to accused person under trial and held that it does not. The Court referred to Article 20(3) of the Constitution which declares that the accused cannot be compelled to incriminate himself and observed:

> "The Indian Legislature was aware of the above fundamental canons of criminal jurisprudence because in various sections of the Criminal Procedure Code it gives effect to it. For example, in Section 175 it is provided that every person summoned by a police officer in a proceeding under Section 174 shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture. Section 343 provides that except as provided in Sections 337 and 338, no influence by means of any promise or threat or otherwise shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge. Again, when the accused is examined under Section 342, the accused does not render himself liable to punishment if he refuses to answer any questions put to him. Further, now although the accused is a competent witness, he cannot be called as a witness except on his own request in writing. It is further provided in Section 342-A that his failure to give evidence shall not be made the subject of any comment by any parties or the court or give rise to any presumption against himself or any person charged together with him at the same trial.
>
> It seems to us that in view of this background the Legislature, if it were minded to make Section 94 applicable to an accused person, would have said so in specific words. It is true that the words of Section 94 are wide enough to include an accused person but it is well-recognised that in some cases a limitation may be put on

A the construction of the wide terms of a statute (*vide Craies on Statute Law*, p. 177). Again it is a rule as to the limitation of the meaning of general words used in a statute that they are to be, if possible, construed as not to alter the common law (*vide Craies on Statute Law*, p. 187)."

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41. In *Byram Pestonji Gariwala's case* (supra), the Court considered the question whether the amendment made in the Code of Civil Procedure in 1976 had the effect of curtailing the authority of counsel to compromise the matter, referred to some English decisions and observed:

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"It is a rule of legal policy that law should be altered deliberately rather than casually. Legislature does not make radical changes in law 'by a sidewind, but only by measured and considered provisions'. (Francis Bennion's D *Statutory Interpretation*, Butterworths, 1984, para 133). As stated by Lord Devlin in *National Assistance Board* v. *Wilkinson*: (QB p. 661)

> "It is a well established principle of construction that E a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion."

Statutes relating to remedies and procedure must receive F a liberal construction 'especially so as to secure a more effective, a speedier, a simpler, and a less expensive administration of law'. See Crawford's *Statutory Construction*, para 254. The object of the amendment was to provide an appropriate remedy to expedite proceedings G in court. That object must be borne in mind by adopting a purposive construction of the amended provisions. The legislative intention being the speedy disposal of cases with a view to relieving the litigants and the courts alike of the burden of mounting arrears, the word 'parties' must be H so construed as to yield a beneficent result, so as to

eliminate the mischief the legislature had in mind.

There is no reason to assume that the legislature intended to curtail the implied authority of counsel, engaged in the thick of proceedings in court, to compromise or agree on matters relating to the parties, even if such matters exceed the subject matter of the suit. The relationship of counsel and his party or the recognised agent and his principal is a matter of contract; and with the freedom of contract generally, the legislature does not interfere except when warranted by public policy, and the legislative intent is expressly made manifest. There is no such declaration of policy or indication of intent in the present case. The legislature has not evinced any intention to change the well recognised and universally acclaimed common law tradition of an ever alert, independent and active bar with freedom to manoeuvre with force and drive for quick action in a battle of wits typical of the adversarial system of oral hearing which is in sharp contrast to the inquisitorial traditions of the 'civil law' of France and other European and Latin American countries where written submissions have the pride of place and oral arguments are considered relatively insignificant. (See Rene David, *English Law and French Law* — Tagore Law Lectures, 1980). 'The civil law' is indeed equally efficacious and even older, but it is the product of a different tradition, culture and language; and there is no indication, whatever, that Parliament was addressing itself to the task of assimilating or incorporating the rules and practices of that system into our own system of judicial administration.

So long as the system of judicial administration in India continues unaltered, and so long as Parliament has not evinced an intention to change its basic character, there is no reason to assume that Parliament has, though not expressly, but impliedly reduced counsel's role or capacity to represent his client as effectively as in the past.

A On a matter of such vital importance, it is most unlikely that Parliament would have resorted to implied legislative alteration of counsel's capacity or status or effectiveness. In this respect, the words of Lord Atkin in *Sourendra* comparing the Indian advocate with the advocate in
B England, Scotland and Ireland, are significant: (AIR p. 161)

> "There are no local conditions which make it less desirable for the client to have the full benefit of an advocate's experience and judgment. One reason, indeed, for refusing to imply such a power would be
C a lack of confidence in the integrity or judgment of the Indian advocate. No such considerations have been or indeed could be advanced, and their Lordships mention them but to dismiss them."

D 42. We may now advert to the judgments of this Court in *Allahabad Bank's case* (supra), *A.P. State Financial Corporation v. Official Liquidator* (supra), *ICICI Bank Ltd. v. SIDCO Leathers Ltd. and others* [(2006) 10 SCC 452], *Transcore v. Union of India and another* [(2008) 1 SCC 125]
E on which reliance has been placed by learned counsel for the appellants and also a recent judgment in *Union of India v. SICOM Limited and another* [(2009) 2 SCC 121]. In *Allahabad Bank's* case, a two-Judge Bench was called upon to consider the question whether an application can be filed under the
F Companies Act, 1956 during the pendency of proceedings under the DRT Act. The facts of that case show that Allahabad Bank filed an O.A. before the Delhi Bench of the DRT under Section 19. The same was decreed on 13.1.1998. The debtor company filed appeal before DRAT, Allahabad. Canara Bank
G also filed application under Section 19 before DRT, Delhi. During the pendency of its application, Canara Bank filed Interlocutory Application before the Recovery Officer for impleadment in the proceedings arising out of O.A. filed by Allahabad Bank. That application was dismissed on 28.9.1998. In the auction conducted by the Recovery Officer, the property
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of the debtor company was auctioned and the sale was confirmed. Thereupon, Canara Bank filed applications under Section 22 of the DRT Act. During the pendency of the applications, Canara Bank filed company application in Company Petition No. 141 of 1995 filed by Ranbaxy Ltd. against M.S. Shoes Company under Sections 442 and 537 of the Companies Act for stay of the proceedings of recovery case No. 9/1998 instituted by the Allahabad Bank. By an order dated 9.3.1999, the learned Company Judge stayed further sale of the assets of the Company. Allahabad Bank challenged the order of the learned Company Judge by filing petition for special leave to appeal. It was argued on behalf of the appellant, i.e., Allahabad Bank that the DRT Act is a special statute intended for expeditious adjudication and recovery of debts due to banks and financial institutions and in view of Section 34(1) of that Act read with sub-section (2) thereof, the company courts do not have jurisdiction to entertain the application filed by the respondent-bank. It was argued on behalf of the appellant that in view of the amendment made in Section 19(19) of the DRT Act, only Section 529A of the Companies Act is attracted and that too for a limited purpose, i.e., recovery of dues of the workmen. On behalf of the respondent-bank it was argued that during the pendency of the winding up petition, the company court can pass appropriate order by entertaining an application filed under Section 446 read with Section 537 of the Companies Act. After noticing the rival contentions, this Court framed six points for determination, first four of which were:

> "(1) Whether in respect of proceedings under the RDB Act at the stage of adjudication for the money due to the banks or financial institutions and at the stage of execution for recovery of monies under the RDB Act, the Tribunal and the Recovery Officers are conferred exclusive jurisdiction in their respective spheres?
>
> (2) Whether for initiation of various proceedings by the banks and financial institutions under the RDB Act, leave

A of the Company Court is necessary under Section 537 before a winding-up order is passed against the company or before provisional liquidator is appointed under Section 446(1) and whether the Company Court can pass orders of stay of proceedings before the Tribunal, in
B exercise of powers under Section 442?

(3) Whether after a winding-up order is passed under Section 446(1) of the Companies Act or a provisional liquidator is appointed, whether the Company Court can stay proceedings under the RDB Act, transfer them to itself
C and also decide questions of liability, execution and priority under Section 446(2) and (3) read with Sections 529, 529-A and 530 etc. of the Companies Act or whether these questions are all within the exclusive jurisdiction of the Tribunal?

D

(4) Whether in case it is decided that the distribution of monies is to be done only by the Tribunal, the provisions of Section 73 CPC and sub-sections (1) and (2) of Section 529, Section 530 of the Companies Court also apply —
E apart from Section 529-A — to the proceedings before the Tribunal under the RDB Act?"

The Court referred to various provisions of the DRT Act (in the judgment that Act was referred to as "RDB Act") and Companies Act and held:

F

"21. In our opinion, the jurisdiction of the Tribunal in regard to *adjudication* is exclusive. The RDB Act requires the Tribunal alone to decide applications for recovery of debts due to banks or financial institutions. Once the Tribunal
G passes an order that the debt is due, the Tribunal has to issue a certificate under Section 19(22) [formerly under Section 19(7)] to the Recovery Officer for recovery of the debt specified in the certificate. The question arises as to the meaning of the word "recovery" in Section 17 of the
H Act. It appears to us that basically the Tribunal is to

adjudicate the liability of the defendant and then it has to issue a certificate under Section 19(22). Under Section 18, the jurisdiction of any other court or authority which would otherwise have had jurisdiction but for the provisions of the Act, is ousted and the power to *adjudicate* upon the liability is exclusively vested in the Tribunal. (This exclusion does not however apply to the jurisdiction of the Supreme Court or of a High Court exercising power under Articles 226 or 227 of the Constitution.) This is the effect of Sections 17 and 18 of the Act.

22. We hold that the provisions of Sections 17 and 18 of the RDB Act are exclusive so far as the question of *adjudication* of the liability of the defendant to the appellant Bank is concerned."

The Court then referred the recommendations of the Tiwari Committee and Narasimham Committee regarding priorities of the secured creditors and held:

"Section 19(19) is clearly inconsistent with Section 446 and other provisions of the Companies Act. Only Section 529-A is attracted to the proceedings before the Tribunal. Thus, on questions of *adjudication*, *execution* and working out *priorities*, the special provisions made in the RDB Act have to be applied.

For the aforesaid reasons, we hold that at the stage of *adjudication* under Section 17 and *execution* of the certificate under Section 25 etc. the provisions of the RDB Act, 1993 confer exclusive jurisdiction on the Tribunal and the Recovery Officer in respect of debts payable to banks and financial institutions and there can be no interference by the Company Court under Section 442 read with Section 537 or under Section 446 of the Companies Act, 1956. In respect of the monies realised under the RDB Act, the question of *priorities* among the banks and financial institutions and other creditors can be decided only by the

A Tribunal under the RDB Act and in accordance with Section 19(19) read with Section 529-A of the Companies Act and in no other manner. The provisions of the RDB Act, 1993 are to the above extent inconsistent with the provisions of the Companies Act, 1956 and the latter Act has to yield
B to the provisions of the former. This position holds good during the pendency of the winding-up petition against the debtor Company and also after a winding-up order is passed. No leave of the Company Court is necessary for initiating or continuing the proceedings under the RDB Act,
C 1993. Points 2 and 3 are decided accordingly in favour of the appellant and against the respondents."

On the issue of the workers' claim under Section 529A of the Companies Act, the Court observed/held:

D "61. The respondent's contention that Section 19(19) gives priority to all "secured creditors" to share in the sale proceeds before the Tribunal/ Recovery Officer cannot, in our opinion, be accepted. The said words are qualified by the words "in accordance with the provision of Section 529-
E A". Hence, it is necessary to identify the above limited class of secured creditors who have priority over all others in accordance with Section 529-A.

62. Secured creditors fall under two categories. Those who desire to go before the Company Court and those who like
F to stand outside the winding- up.

63. The first category of secured creditors mentioned above are those who go before the Company Court for dividend by relinquishing their security in accordance with
G the insolvency rules mentioned in Section 529. The insolvency rules are those contained in Sections 45 to 50 of the Provincial Insolvency Act. Section 47(2) of that Act states that a secured creditor who wishes to come before the official liquidator has to prove his debt and he can
H prove his debt only if he relinquishes his security for the

benefit of the general body of creditors. In that event, he will rank with the unsecured creditors and has to take his dividend as provided in Section 529(2). Till today, Canara Bank has not made it clear whether it wants to come under this category.

64. The second class of secured creditors referred to above are those who come under Section 529-A(1)(*b*) read with proviso (*c*) to Section 529(1). These are those who opt to stand outside the winding-up to realise their security. Inasmuch as Section 19(19) permits distribution to secured creditors only in accordance with Section 529-A, the said category is the one consisting of creditors who stand outside the winding up. These secured creditors in certain circumstances can come before the Company Court (here, the Tribunal) and claim priority over all other creditors for release of amounts out of the other monies lying in the Company Court (here, the Tribunal). This limited priority is declared in Section 529-A(1) but it is restricted only to the extent specified in clause (*b*) of Section 529-A(1). The said provision refers to clause (*c*) of the proviso to Section 529(1) and it is necessary to understand the scope of the said provision."

43. Similar view was expressed in *A.P. State Financial Corporation v. Official Liquidator* (supra). A learned Single Judge of the High Court allowed the applications filed by the appellant under Section 446(1) of the Companies Act read with Section 29 and 46 of the SFC Act subject to the condition that the appellant would undertake to discharge its liability due to workers under Section 529A of the Companies Act. While dismissing the appeal of the Corporation, this Court held that *non obstante* clause contained in Section 529A of the Companies Act being a subsequent enactment prevails over Section 29 of the SFC Act.

44. The judgment in *Allahabad Bank's* case was distinguished by a two-Judge Bench judgment in *ICICI Bank*

A *Ltd. v. SIDCO Leathers Ltd. and others* (supra). In that case the appellant and Punjab National Bank had advanced loans to respondent no.1 for setting up a plant for manufacture of leather boards and for providing working capital funds respectively. Respondent No. 1 created first charge in favour B of the appellant along with other financial institutions, i.e., IFCI and IDBI by way of equitable mortgage by deposit of title deeds of its immovable property. A second charge was created in favour of Punjab National Bank by way of constructive delivery of title deeds, clearly indicating that the charge in favour of the C latter was subject to and subservient to charges in favour of IFCI, IDBI and ICICI. On an application filed by respondent No.1, the Allahabad High Court passed winding up order and appointed official liquidator. The appellant filed suit for recovery of the amount credited to respondent No.1. The said suit was transferred to the Debts Recovery Tribunal, Bombay. During the D pendency of proceedings before the Tribunal, official liquidator was granted permission to continue in the proceedings in the suit. Punjab National Bank filed a civil suit for recovery of money payable to it by respondent No.1. While the proceedings were pending before the Tribunal and the Court of Civil Judge, E Fatehpur, the assets of the company were sold. The suit filed by Punjab National Bank was decreed but the proceedings before the Tribunal remained pending. After decree of the suit, the appellant along with IFCI and IDBI filed an application before the Company Judge for consideration of their claim on pro rata F basis and also for exclusion of the claim of Punjab National Bank. The learned Company Judge allowed the first prayer of the appellant but declined the second one by relying upon the judgment in *Allahabad Bank's* case (supra). The intra-court appeal was dismissed by the Division Bench by relying upon G the provisions of Section 529A. On further appeal, this Court referred to the judgment in *Allahabad Bank's* case (supra) as also *Rajasthan State Financial Corporation v. Official Liquidator* [(2005) 8 SCC 190] and held:

H "*Allahabad Bank* therefore, is not an authority for the

proposition that in terms of Section 529-A of the Companies Act the distinction between two classes of secured creditors does no longer survive. The High Court, thus, in our considered opinion, was not correct in that behalf.

In fact in *Allahabad Bank* it was categorically held that the adjudication officer would have such powers to distribute the sale proceeds to the banks and financial institutions, being secured creditors, in accordance with inter se agreement/arrangement between them and to the other persons entitled thereto in accordance with the priority in law.

Section 529-A of the Companies Act no doubt contains a non obstante clause but in construing the provisions thereof, it is necessary to determine the purport and object for which the same was enacted.

In terms of Section 529 of the Companies Act, as it stood prior to its amendment, the dues of the workmen were not treated pari passu with the secured creditors as a result whereof innumerable instances came to the notice of the Court that the workers may not get anything after discharging the debts of the secured creditors. It is only with a view to bring the workmen's dues pari passu with the secured creditors, that Section 529-A was enacted.

The non obstante nature of a provision although may be of wide amplitude, the interpretative process thereof must be kept confined to the legislative policy. Only because the dues of the workmen and the debts due to the secured creditors are treated *pari passu* with each other, the same by itself, in our considered view, would not lead to the conclusion that the concept of inter se priorities amongst the secured creditors had thereby been intended to be given a total go-by.

A A non obstante clause must be given effect to, to the extent Parliament intended and not beyond the same.

Section 529-A of the Companies Act does not *ex facie* contain a provision (on the aspect of priority) amongst the secured creditors and, hence, it would not be proper to read thereinto things, which Parliament did not comprehend."

45. In *Transcore v. Union of India* (supra), a two-Judge Bench made detailed analyses of the provisions of the DRT Act and formulated the following points for consideration:-

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

(*ii*) Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

(*iii*) Whether *ad valorem* court fee prescribed under Rule 7 of the DRT (Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the said Act.

In dealing with the afore-mentioned questions, the Court noticed the arguments of learned counsel for the parties and proceeded to observe:-

G "Keeping in mind the above circumstances, the NPA Act is enacted for quick enforcement of the security. The said Act deals with enforcement of the rights vested in the bank/ FI. The NPA Act proceeds on the basis that security interest vests in the bank/FI. Sections 5 and 9 of the NPA H Act are also important for preservation of the value of the

assets of the banks/FIs. Quick recovery of debt is important. It is the object of the DRT Act as well as the NPA Act. But under the NPA Act, authority is given to the banks/ FIs, which is not there in the DRT Act, to assign the secured interest to securitisation company/asset reconstruction company. In cases where the borrower has bought an asset with the finance of the bank/FI, the latter is treated as a lender and on assignment the securitisation company/asset reconstruction company steps into the shoes of the lender bank/FI and it can recover the lent amounts from the borrower.

Therefore, when Section 13(4) talks about taking possession of the secured assets or management of the business of the borrower, it is because a right is created by the borrower in favour of the bank/FI when he takes a loan secured by pledge, hypothecation, mortgage or charge. For example, when a company takes a loan and pledges its financial asset, it is the duty of that company to see that the margin between what the company borrows and the extent to which the loan is covered by the value of the financial asset hypothecated is retained. If the borrower company does not repay, becomes a defaulter and does not keep up the value of the financial asset which depletes then the borrower fails in its obligation which results in a mismatch between the asset and the liability in the books of the bank/FI. Therefore, Sections 5 and 9 talk of acquisition of the secured interest so that the balance sheet of the bank/FI remains clean. Same applies to immovable property charged or mortgaged to the bank/FI. These are some of the factors which the authorised officer of the bank/FI has to keep in mind when he gives notice under Section 13(2) of the NPA Act. Hence, equity exists in the bank/FI and not in the borrower. Therefore, apart from obligation to repay, the borrower undertakes to keep the margin and the value of the securities hypothecated so that there is no mismatch between the asset-liability in the

A books of the bank/FI. This obligation is different and distinct from the obligation to repay. It is the former obligation of the borrower which attracts the provisions of the NPA Act which seeks to enforce it by measures mentioned in Section 13(4) of the NPA Act, which B measures are not contemplated by the DRT Act and, therefore, it is wrong to say that the two Acts provide parallel remedies as held by the judgment of the High Court in *Kalyani Sales Co.* As stated, the remedy under the DRT Act falls short as compared to the NPA Act which refers C to acquisition and assignment of the receivables to the asset reconstruction company and which authorises banks/ FIs to take possession or to take over management which is not there in the DRT Act. It is for this reason that the NPA Act is treated as an additional remedy (Section 37), which D is not inconsistent with the DRT Act."

The Court then adverted to the concept of possession envisaged under Section 13(4) and held:

"The word possession is a relative concept. It is not an E absolute concept. The dichotomy between symbolic an physical possession does not find place in the NPA Act. Basically, the NPA Act deals with the mortgage type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for F this reason that the NPA Act ousts the intervention of the courts/tribunals. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in Section 13(4-A) as pleaded on behalf of the borrowers.

The scheme of Section 13(4) read with Section 17(3) of G the NPA Act shows that if the borrower is dispossessed, not in accordance with the provisions of the NPA Act, then DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the H borrower to get the dispute adjudicated upon are defeated

by the authorised officer taking possession. The NPA Act provides for recovery of possession by non-adjudicatory process; therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous.

Rule 8 of the Security Interest (Enforcement) Rules, 2002 ("2002 Rules") deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a Court Receiver under Order 40 Rule 1 CPC. The Court Receiver can take symbolic possession and in appropriate cases where the Court Receiver finds that a third-party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorised officer under Rule 8 has greater powers than even a Court Receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third-party interests are created overnight and in very many cases those third parties take up the defence of being a *bona fide* purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules."

The Court then considered three provisos inserted in Section 19(1) of the DRT Act by amending Act No.30 of 2004 and held that withdrawal of the OA pending before Tribunal under the DRT Act is not a condition precedent for taking recourse to the Securitisation Act.

46. In *Union of India v. SICOM Limited and another*

A (supra), this Court was called upon to decide whether realization of the duty under the Central Excise Act will have priority over the secured debts in terms of the SFC Act. The facts of that case were that respondent no.2 borrowed a sum of Rs.51 lakhs from the first respondent by an indenture of mortgage executed B on 22.12.1986. Respondent No.2 also owed Rs.19 lakhs by way of central excise duty for the period April 1983 to May 1988. By a notification issued under Section 46(1) of the SFC Act, the Government extended the provisions of Sections 27, 29, 30, 31, 32-A to 32-F, 41 and 41-A of the SFC Act in favour C of the first respondent. Since respondent no.2 defaulted in repayment of loan given by the first respondent, the latter invoked Section 29 of the SFC Act and took physical possession of the mortgaged assets. When the department expressed its intention to attach and seize the properties of D respondent no.2, the first respondent informed that it had first charge over the mortgaged properties. In August 2000, the first respondent issued a legal notice to the appellant and then filed a writ petition under Article 226 of the Constitution of India in the Aurangabad Bench of the Bombay High Court. The High Court considered the provisions of Rule 213(2) of the Central E Excise Rules read with Section 32(g) and Section 151 of the Maharashtra Land Revenue Code, 1966 and held that as security of the corporation was prior in point of time, the dues claimed by it will have priority over the dues of customs. A two-Judge Bench of this Court referred to the *non obstante* clause F contained in Section 46B of the SFC Act and provisions of priority contained in Section 529A of the Companies Act as also the provisions of EPF Act and the Employees State Insurance Act, the judgments in *Builders Supply Corporation v. Union of India* (supra), *Bank of Bihar v. State of Bihar* G [(1972) 3 SCC 196], *Dena Bank v. Bhikhabhai Prabhudas Parekh & Co.* (supra), *Central Bank of India v. Siriguppa Sugars & Chemicals Ltd.* [(2007) 8 SCC 353], *State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation and others* (supra), *ICICI Bank Ltd. v. SIDCO Leathers Ltd. and others* (supra) and approved the view taken by the High H

Court.

47. In none of the afore-mentioned judgments this Court held that by virtue of the provisions contained in the DRT Act or Securitization Act, first charge has been created in favour of banks, financial institutions etc. Not only this, the Court was neither called upon nor it decided competing priorities of statutory first charge created under Central legislation(s) on the one hand and State legislation(s) on the other nor it ruled that statutory first charge created under a State legislation is subservient to the dues of banks, financial institutions etc. even though statutory first charge has not been created in their favour. The ratio of the judgment in *Allahabad Bank's* case (supra) is that jurisdiction of adjudicatory mechanism established under the DRT Act is exclusive and no other court or authority created under any other law can interfere with the proceedings initiated by banks and financial institutions for recovery of their dues. The other proposition laid down in that case which appear to have been diluted by a co-ordinate bench in *ICICI Bank's* case is that while distributing the money recovered by a bank or a financial institution, priority given to the workers' dues in terms of Section 529A must be respected. Section 11 of the Central Excise Act, which was considered by the two-Judge Bench in *SICOM's* case, does not contain a provision similar to those in Central legislations like Section 14A of the Workmen's Compensation Act, 1923, Section 11 of the EPF Act, Section 74(1) of the Estate Duty Act, 1953, Section 25(2) of the Mines and Minerals (Development and Regulation) Act, 1957, Section 30 of the Gift Tax Act, 1958 and Section 529A of the Companies Act, 1956, under which statutory first charge has been created in respect of the dues of workmen or gift tax etc.

48. On the basis of above discussion, we hold that the DRT Act and Securitisation Act do not create first charge in favour of banks, financial institutions and other secured creditors and the provisions contained in Section 38C of the Bombay Act and

A Section 26B of the Kerala Act are not inconsistent with the provisions of the DRT Act and Securitisation Act so as to attract *non obstante* clauses contained in Section 34(1) of the DRT Act or Section 35 of the Securitisation Act.

B 49. Another argument of some of the learned counsel for the appellants is that the prior charge created in favour of the bank would prevail over the subsequent mortgage created in favour of the State. Dr. Bishwajit Bhattacharyya, learned senior counsel appearing for the Indian Overseas Bank heavily relied on the judgment of three-Judge Bench in *Dattatreya Shanker* C *Mote and others v. Anand Chintaman Datar and others* (supra) and argued that the view expressed in the subsequent judgments in *State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation and others* (supra) and *R.M. Arunachalam v. Commissioner of Income Tax, Madras* D [(1997) 7 SCC 698] requires reconsideration because the same are based on misrepresentation of the judgment in *Dattatreya's* case. He pointed out that Section 26B of the Kerala Act was inserted with effect from 1.4.1999 and argued that the same cannot prevail over the prior charge created in E favour of the bank in 1973 because the latter could not have had any notice of a charge created in future. Other learned senior counsel referred to the provisions of Sections 58, 69 and 100 of the Transfer of Property Act and argued that the charge is not a mortgage although principles applicable to simple F mortgage also apply to a charge and, therefore, the State cannot claim priority on the basis of *non obstante* clauses contained in Section 38C of the Bombay Act or Section 26B of the Kerala Act and similar other State legislations. They further argued that the provisions of the State Acts cannot apply G with retrospective effect so as to affect the right of banks and financial institutions and other secured creditors to recover their dues from the borrowers.

50. Shri Rakesh Dwivedi, learned senior counsel appearing for the State of Kerala argued that statutory first H

charge created in favour of the State will have precedence over a mortgage created in favour of bank etc. and the judgments in *State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation and others* (supra) and *R.M. Arunachalam v. Commissioner of Income Tax, Madras* (supra) do not require reconsideration. He pointed out that in *Dattatreya's case* the Court was not dealing with statutory first charge whereas in the other cases the Court had specifically dealt with such charge created in favour of the State. Shri Dwivedi pointed out that Section 69 does not apply to a case involving a secured creditor or Government. On the issue of retrospectivity, the learned senior counsel submitted that from the date of insertion of Section 26B in the Kerala Act, the dues of sales tax became first charge over the property of the borrower and the same would super-impose on the mortgage created in favour of the bank. In support of this argument, he relied on the judgments of *K.S. Paripoornan v. State of Kerala and others* [JT 1994 (6) SC 182 = (1994) 5 SCC 593] and *Land Acquisition Officer v. B.V. Reddy and others* [(2002) 3 SCC 463].

51. We shall first refer to the judgment in *Dattatreya's* case. In that case, the three-Judge Bench considered the question of priority between a charge created by a decree and a subsequent simple mortgage. The appellants in that case filed suit for recovery of Rs.1,34,000/- with interest from respondent Nos.1 to 7. On March 31, 1941, a compromise decree was passed under which a charge was created for the decretal amount on three pieces of property belonging to respondent Nos. 1 to 7. The decree was registered on April 7, 1941, but due to inadvertence the charge on Kakakuva Mansion at Poona was not shown in the index of registration. On June 27, 1949, respondent Nos. 1 to 7 mortgaged Kakakuva Mansion to plaintiff-respondent No. 14 for a sum of Rs.1,00,000/-. They also created a further charge on September 13, 1949 in favour of plaintiff-respondent no. 14 for Rs.50,000/-. On July 7, 1951,

A a charge was created by a decree in favour of respondent No.15 for a sum of Rs.59,521/11/-. In the meantime, the appellants recovered some amount by execution of the decree. They sold the property at Shukrawar Peth at Poona and the chawl at Kalyan. Thereafter, they filed a darkhast in the Court B of the 3rd Joint Civil Judge, Senior Division, Poona for sale of Kakakuva Mansion. Notices were issued under Order 21 Rule 66 CPC to respondent no. 14 and others. Later on, the executing court held that presence of plaintiff-respondent no.14 was not necessary. The latter challenged that order in First C Appeal No.668 of 1957 filed before the High Court of Bombay. He also filed a civil suit in the Court of Joint Civil Judge, Senior Division, Poona for recovery of Rs.2,18,564/- allegedly due to him under the two mortgages. During the pendency of that suit, the property was put up for sale on the darkhast of the D appellants, who themselves purchased the property with the leave of the Court. As a sequel to this, respondent no.14 impleaded the appellants as parties in suit no. 57 of 1958. The appellants contested the suit on the ground that they had a prior charge and the mortgage of respondent no. 14 was subject to that charge. The trial Judge decreed the suit in favour of E respondent no. 14. In appeal, the High Court modified the decree of the trial Judge holding that as the mortgage in favour of the respondent was protected under proviso to Section 100, it is free from the charge created in favour of the appellants. The High Court also gave priority to respondent no.15 for its F dues, though it had not filed any appeal. The majority judgment of the Court was delivered by Jaganmohan Reddy, J. who, after noticing various provisions of the Transfer of Property Act, observed:

G "A charge not being a transfer or a transfer of interest in property nonetheless creates a form of security in respect of immovable property. So far as mortgage is concerned, it being a transfer of interest in property the mortgagee has always a security in the property itself. Whether the H mortgage is with possession or a simple mortgage, the

interest in the property enures to the mortgagee so that any subsequent mortgage or sale always preserves the rights of the mortgagee whether the subsequent dealings in the property are with or without notice. The obvious reason for this is that in a mortgage there is always an equity of redemption vested in the owner so that the subsequent mortgagees or transferees will have, if they are not careful and cautious in examining the title before entering into a transaction, only the interest which the owner has at the time of the transaction.

Insofar as competing mortgagees are concerned, Section 48 of the Act gives priority to the first in point of time in whose favour transfer of an interest in respect of the same immovable property is created, if the interest which he has taken and the interest acquired subsequently by other persons cannot all exist or be exercised to their full extent together. This section speaks of a person who purports to create by transfer at different times rights in or over the same immovable property, and since charge is not a transfer of an interest in or over the immovable property he gets no security as against mortgagees of the same property unless he can show that the subsequent mortgagee or mortgagees had notice of the existence of his prior charge."

52. In *State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation and others* (supra), another Bench of three Judges considered the effect of Section 11-AAAA of the Rajasthan Sales Tax Act, 1954 by which first charge was created on the property of the dealer in lieu of the amount of tax, penalty etc. on an existing mortgage on the property of the dealer. It is borne out from the judgment that the appellant-bank had given cash credit facility to respondent no.1. For securing repayment, respondent no.1 mortgaged the factory premises in favour of the bank. In 1986, the appellant filed suit for recovery of Rs.3,79,672/- with interest. In that suit, Commercial

A Taxes Officer got himself impleaded as party by asserting that State had a prior claim for recovery of Rs.1,19,122/- as dues of sales tax. The mortgaged property was sold by auction under the orders of the Court. The Commercial Taxes Officer pleaded that the dues of sales tax should be paid first out of the sale B proceeds and the claim of the bank could be satisfied only out of the balance amount. The trial Court upheld the claim of the Commercial Taxes Officer. The revision filed by the bank was dismissed by the High Court. Before this Court it was argued that the bank's claim will have precedence over the claim of C the sales tax authorities because mortgage in their favour was prior in point of time. After noticing Section 11-AAAA of the Rajasthan Sales Tax Act which is *pari materia* to Section 38C of the Bombay Act and Section 26B of the Kerala Act as also Section 100 of the Transfer of Property Act and the judgment in *Dattatreya's case,* the Court observed: D

> "Section 100 of the Transfer of Property Act deals with charges on an immoveable property which can be created either by an act of parties or by operation of law. It provides that where immoveable property of one person is made E security for the payment of money to another, and the transaction does not amount to a mortgage, a charge is created on the property and all the provisions in the Transfer of Property Act which apply to a simple mortgage shall, so far as may be, apply to such charge. A mortgage F on the other hand, is defined under Section 58 of the Transfer of Property Act as a transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced as set out therein. The distinction between a mortgage and a G charge was considered by this Court in the case of *Dattatreya Shanker Mote* v. *Anand Chintaman Datar* [(1974) 2 SCC 799]. The Court has observed (at pages 806-807) that a charge is a wider term as it includes also a mortgage, in that, every mortgage is a charge, but every H charge is not a mortgage. The Court has then considered

the application of the second part of Section 100 of the Transfer of Property Act which inter alia deals with a charge not being enforceable against a *bona fide* transferee of the property for value without notice of the charge. It has held that the phrase "transferee of property" refers to the transferee of entire interest in the property and it does not cover the transfer of only an interest in the property by way of a mortgage."

The Court then considered the argument made on behalf of the bank that its dues will have priority because at the time when the statutory first charge came into existence, there was already a mortgage in respect of the same property and held:-

"The argument though ingenious, will have to be rejected. Where a mortgage is created in respect of any property, undoubtedly, an interest in the property is carved out in favour of the mortgagee. The mortgagor is entitled to redeem his property on payment of the mortgage dues. *This does not, however, mean that the property ceases to be the property of the mortgagor. The title to the property remains with the mortgagor. Therefore, when a statutory first charge is created on the property of the dealer, the property subjected to the first charge is the entire property of the dealer. The interest of the mortgagee is not excluded from the first charge. The first charge, therefore, which is created under Section 11-AAAA of the Rajasthan Sales Tax Act will operate on the property as a whole and not only on the equity of redemption as urged by Mr. Tarkunde.*

In the present case, the section creates a first charge on the property, thus clearly giving priority to the statutory charge over all other charges on the property including a mortgage. The submission, therefore, that the statutory first charge created under Section 11-AAAA of the Rajasthan Sales Tax Act can operate only over the equity of redemption, cannot be accepted. The charge operates

A *on the entire property of the dealer including the interest of the mortgagee therein.*

Looked at a little differently, the statute has created a first charge on the property of the dealer. What is meant by a B "first charge"? Does it have precedence over earlier mortgage? Now, as set out in Dattatreya Shankar Mote case a charge is a wider term than a mortgage. It would cover within its ambit a mortgage also. *Therefore, when a first charge is created by operation of law over any* C *property, that charge will have precedence over an existing mortgage."*

(Emphasis added)

53. In *R.M. Arunachalam v. Commissioner of Income* D *Tax, Madras* (supra), the Court reiterated the distinction between a charge and a mortgage in the context of the provisions contained in Sections 53(1) and 74(1) of the Estate Duty Act, 1953, referred to the judgments in *Dattatreya's* case, *State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling* E *Corporation and others* (supra) and observed:

"A charge differs from a mortgage in the sense that in a mortgage there is transfer of interest in the property mortgaged while in a charge no interest is created in the property charged so as to reduce the full ownership to a F limited ownership. The creation of a charge under Section 74(1) of the Estate Duty Act cannot, therefore, be construed as creation of an interest in property that is the subject-matter of the charge. The creation of the charge under Section 74(1) only means that in the matter of G recovery of estate duty from the property which is the subject-matter of the charge the amount recoverable by way of estate duty would have priority over the liabilities of the accountable person. In that sense the claim in respect of estate duty would have precedence over the

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claim of the mortgagee because a mortgage is also a charge. The High Court has, therefore, rightly held that as a result of the charge created under Section 74(1) of the Estate Duty Act, it could not be said that title of the assessee to the immovable properties received by him from Smt Umayal Achi was incomplete and imperfect in any way. In the context of the facts, the High Court has found that the assessee had admittedly become the full owner of the assets even before the payment of estate duty and on payment of the same he had not acquired a new right, tangible or intangible, in the assets. It cannot, therefore, be said that the amount proportionate to estate duty paid by the assessee on the properties that were transferred should be treated as "cost of acquisition of the assets" under Sections 48 and 49 read with Section 55(2) of the IT Act. Since the title of the assessee to the immovable properties acquired was not incomplete and imperfect in any way, it cannot also be said that as a result of the payment of the estate duty by the assessee there was an improvement in the title of the assessee and the said payment could be regarded as "cost of improvement" under Section 48 read with Section 55(1)(*b*) of the Act."

54. In our opinion, the judgments in *State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation and others* (supra) and *R.M. Arunachalam v. Commissioner of Income Tax, Madras* (supra) are based on a correct reading of the ratio of the *Dattatreya's* case and the propositions laid down therein do not call for reconsideration. At the cost of repetition, we consider it appropriate to observe that in *Dattatreya's* case the Court was not dealing with the statutory first charge created in favour of the State.

55. The argument of learned counsel for the appellants that the State legislations creating first charge cannot be given retrospective effect deserves to be negatived in view of the judgment in *State of M.P. and another v. State Bank of Indore*

A (supra). In that case, it was held that the charge created in favour of the State under Section 33C of the Madhya Pradesh General Sales Tax Act, 1958 in respect of the sales tax dues prevail over the charge created in favour of the bank in respect of the loan taken by 2nd respondent and the amendment made in the B State operates in respect of charges that are in force on the date of introduction of Section 33C.

56. We shall now deal with the individual cases.

57. *C.A. No. 95/2005 Central Bank of India v. State of* C *Kerala and others* – The facts of the case have been set out in the earlier part of the judgment. A recapitulation thereof shows that suit filed by the appellant bank in 1996 for recovery of its dues was, later on, transferred to the Tribunal and decreed on 1.12.2000. Before that the Tehsildar, Mavelikara had D attached the properties of the borrower on 2.2.2000 and again on 4.9.2000 for recovery of the arrears of sales tax. The bank challenged the notice issued by Tehsildar for recovery of the arrears of sales tax but could not persuade the learned Single Judge who held that in view of Section 26B of the Kerala Act, E dues of the State will have priority. The order of the learned Single Judge was approved by the Division Bench. In our opinion, the view taken by Kerala High Court is in consonance with what we have held in the earlier part of the judgment regarding primacy of the State's first charge over the dues of F banks, financial institutions and secured creditors. Therefore, the impugned orders do not call for any interference.

58. *C.A. No.2811/2006 – The Thane Janata Sahakari Bank Ltd. vs. The Commissioner of Sales Tax & Others* – In this case the bank had taken possession of the mortgaged G assets on 15.2.2005 and sold the same. On 11.7.2005, the officers of the Commercial Tax Department informed the bank about outstanding dues of sales tax amounting to Rs. 3,62,82,768/-. The Assistant Commissioner issued notice under Section 39 of the Bombay Act for recovery of Rs.48,48,614/-.

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The High Court negatived the bank's claim of priority and held that Section 35 of the Securitisation Act does not have overriding effect over Section 33C of the Bombay Act. The view taken by the High Court is unexceptional and calls for no interference.

59. *C.A. No.3549/2006 – Indian Overseas Bank vs. Kerala State and Others* – Respondent no.3 in this appeal, namely, Cheruvathur Brothers, Chalissery, Palakkad District availed various credit facilities from the appellant-bank and created mortgage in latter's favour for securing repayment. On 11.2.1994, Deputy Tehsildar (RR), Ottapalam (Kerala) requested the bank to furnish details of the properties mortgaged by respondent no.3 by stating that action was to be initiated under the Kerala General Sales Tax Act and the Kerala Revenue Recovery Act for recovery of the arrears of sales tax. The bank claimed that it was a secured creditor and had a prior charge over the mortgaged properties. Thereafter, recovery proceedings were initiated by Deputy Tehsildar. The bank filed suit for injunction bearing OS No.133/1994 with the prayer that State of Kerala and Deputy Tehsildar (RR), Ottapalam be restrained from attaching and selling the mortgaged property as described in the schedule attached with the plaint. The bank filed another suit against respondent no.3 and 4 for recovery of its dues. On the establishment of Chennai Bench of Tribunal, the second suit was transferred and numbered as T.A. No.1284/1997. By an order dated 31.12.1998, the Tribunal allowed the application of the bank and issued recovery certificate for a sum of Rs.23,80,430.95. Thereafter, Recovery Officer, DRT, Chennai issued notice dated 6.10.1999 to respondent nos.3 to 5 to pay the dues of bank in terms of the decree passed by the Tribunal.

60. The suit for injunction filed by the bank was dismissed by Sub Judge, Ottapalam vide judgment dated 21.12.1999. The trial Court held that the plaintiff has not produced any evidence to show that it had got a mortgage from defendant no.3 and

A on that premise the bank's plea for injunction was negated. Appeal Suit No.177/2000 filed by the bank was dismissed by the learned Single Judge of the High Court vide judgment dated January 19, 2005. Further appeal preferred by the bank was dismissed by the Division Bench of the High Court on
B 12.7.2005 by relying upon the judgment of the Full Bench of the High Court in *Kesava Pillai vs. State of Kerala* [2004 (1) KLT 55] by observing that the appeal is not maintainable. In our opinion, the bank cannot claim priority over the dues of sales tax because statutory first charge had been created in favour
C of the State by Section 26B which was inserted in the Kerala Act with effect from 1.4.1999 and the courts below did not commit any error by refusing to decree the suit for injunction filed by the bank.

61. *C.A. No.3973 of 2006 — Bank of Baroda vs. State*
D *of Kerala and others* – The appellant-bank extended the loan facilities to respondent no.2 – M/s. Eastern Cashew Company. Respondent No.3, Mrs. Meena Vasanth gave guarantee and mortgaged immovable property to secure the dues of the bank. On account of the borrower's failure to repay the loan amount,
E the bank filed O.S. No. 133/86 in the Court of Sub Judge, Kollam. The same was decreed on 23.3.1993. The judgment of the trial Court was challenged by the borrower in A.S. No. 229/1994. Notwithstanding this, the bank filed Execution Petition No. 159/1994 for execution of the decree. During the
F execution proceedings, Tehsildar, Kollam issued notice to respondent no.3 under Section 49(2) of the Kerala Revenue Recovery Act for payment of arrears of sales tax amounting to Rs.1,19,86,461/-. He also indicated that 41.80 acres of land in revenue survey no. 680/2 will be sold for realization of sales
G tax dues. The borrowers challenged the notice by filing writ petitions in the High Court, which were dismissed on 13.10.2005 and it was held that the State authorities were free to take action under the Kerala Act. Thereafter, the bank filed Writ Petition No.7464/2006, questioning the notice issued by

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the Tehsildar under Kerala Revenue Recovery Act. The learned Single Judge dismissed the writ petition by observing that sale was being conducted under the Revenue Recovery Act pursuant to the judgment of the Court. Writ Appeal No.538/2006 was dismissed by the Division Bench by placing reliance upon the judgment in *South Indian Bank Limited vs. State of Kerala* [2006 (1) KLT 65] in which the following view was expressed:

> "Right of the State to have priority in the matter of recovery of sales tax from the defaulters over the equitable mortgages created by them in favour of Banks and Financial Institutions is no more *res integra*. Dealing with the provisions parallel to Section 26B of the Kerala General Sales Tax Act by the various Sales Tax Laws of other States, Supreme Court has already recognized the statutory first charge in respect of sales tax arrears. Reference may be made to the decisions of the Apex Court in *State Bank of Bikaner & Jaipur v. National Iron & Steel Rolling Corporation and Ors.* (1995) 96 STC 612), Delhi Auto and *General Finance Pvt. Ltd. v. Tax Recovery Officer and Ors.* (1999) 114 STC 273), *Dattatreya Shanker Mote v. Anand Chintaman Datar, Dena Bank v. Bhikhabhai Prabhudas Prakash Co.* and various other decisions. We may refer to the latest decision of the Apex Court in State of *M.P. v. State Bank of Indore,* wherein the court examined the charge created under Section 33C of the M.P. General Sales Tax Act, 1958 and held that Section 33C creates a statutory first charge that prevails over any charge that may be in existence. The Court held that the charge thereby created in favour of the State in respect of the sales tax dues of the second respondent prevailed over the charge created in favour of the Bank. Judicial pronouncements settled the law once for all stating that State has got priority in the matter of recovery of debts due and the specific statutory charge created under the Sales Tax Act notwithstanding the equitable mortgages

created by the defaulters in favour of the Banks prior to the liability in favour of the State. A Division Bench of this Court in *Sherry Jacob v. Canara Bank,* held that revenue recovery authorities shall have the liberty to proceed against the property of the company under the Revenue Recovery Act on the strength of the first charge created over the property by virtue of Section 26B of the Kerala General Sales Tax Act. The Court held that the statutory first charge would prevail over any charge or right in favour of a mortgage or secured creditors and would get precedence over an existing mortgage right.

We are in this case concerned with the question as to whether Section 26B of the K.G.S.T. Act would take away the efficacy of a decree passed by the civil court prior to the introduction of said section. We are of the view till the decree is executed through executing court title of the mortgaged property remains with the mortgagor. Decree passed by the civil court is the formal expression of an adjudication which conclusively determines the rights of parties, but unless and until the decree is executed the Bank would not procure the property and the State's overriding rights would have precedence over that of the Bank. When a first charge created by the operation of law over any property, that charge will have precedence over an existing mortgage and the decree obtained by the bank against the mortgagor will not affect the State since State was not a party to the suit. Decree has only conclusively determined the rights between the mortgagor and mortgagee which would not affect the statutory rights of the State. The expression "rights of parties" used in Section 2(2) means rights of parties to the suit. State which has got a statutory first charge under Section 26B of the K.G.S.T. Act would prevail over the rights created in favour of the Bank by an unexecuted decree. We therefore hold that the decree obtained by the Bank will not have any precedence over the first charge created in favour of the

State under Section 26B of the K.G.S.T. Act." A

In our opinion, the High Court has rightly held that the first charge created by Section 26B of the Kerala Act will have primacy over the bank's dues.

62. *C.A. No.4174/2006 –Ahmad Koya, Kollam v. The District Collector, Kolam & others* – In 1974, respondent no.7, Thomas Stephen and Company, Kollam took loan from Canara Bank. The company mortgaged two of its properties by deposit of title deeds as a continuing collateral security. On 24.8.1992, the bank filed suit for recovery of its dues. On creation of bench of the Tribunal at Cochin, the suit was transferred to the Tribunal, which passed decree dated 17.2.2000 for a sum of Rs.41,25,451.64 with interest at the rate of 15% per annum from 24.8.1992. On 24.8.2000, the bank obtained recovery certificate against the company. In the meanwhile, Tehsildar (Revenue Recovery) issued notice dated 18.7.2000 under Section 46 of the Kerala Revenue Recovery Act and attached the property of the company in lieu of the dues of sales tax. He then issued notice dated 13.2.2001 under Section 49 of the Kerala Revenue Recovery Act for sale of the property. The bank filed Writ Petition (OP No.8845 of 2001) for quashing the sale notice. By an interim order, the High Court stayed all proceedings pursuant to the sale notice issued by the Tehsildar. Thereafter, the bank initiated proceedings for execution of decree dated 17.2.2000. As a sequel to this, the mortgaged properties were put to sale. In the auction held on 31.1.2003, the petitioner gave bid of Rs.60,60,010/- for the first property admeasuring 40 cents with building thereon. The second property was not put to auction apparently because the bid given by the appellant satisfied the bank's claim. On 14.2.2003, the petitioner deposited the bid amount. He was in possession of the auctioned property excluding the area of 8.50 cents which was in the possession of the 8th respondent, Sherry Jacob as licensee. At that stage, the State Government filed Writ Petition No.26523 of 2003 for quashing the sale proceedings and also B C D E F G H

A for issue of a direction to the auction purchaser to hand over the possession of the property to the revenue officer for conducting fresh auction for realization of the arrears of sales tax. The appellant also filed Writ Petition No.27302 of 2003 for restraining the revenue officer from taking action against the B auctioned property. During the pendency of the writ petition, the company was wound up. By an order dated 10.11.2004, the Division Bench of the High Court disposed of Writ Petition Nos.26523 of 2003 and 27302 of 2003 along with Writ Appeal Nos.1165 of 2003 and 1230 of 2003 filed by the company and C licensee against dismissal of the writ petitions filed by them challenging the sale conducted by the recovery officer of the Tribunal. The Division Bench referred to Section 26B of the Kerala Act, judgments of this Court in *State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation and* D *others* (supra) and *State of M.P. v. State Bank of Indore* (supra) and held that the sale conducted by the recovery officer of the Tribunal is illegal because no notice was given to the revenue officers despite the fact that the property which was subjected to auction had already been attached. The Division Bench further held that the State was entitled to enforce the first E charge on the property of the company by conducting fresh auction. The Review Petition filed by the appellant was dismissed by another Division Bench by recording the following observations:-

F "We have already found that the various provisions of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 would not affect the statutory charge of the State Government. Therefore the contention raised on the basis of the Second Schedule to the Income Tax Act, 1961 need G not be examined. Since we have already found that State Government stands outside the purview of the DRT Act and that the State need not stand in the queue for claiming priority, the contention of the counsel for the review Petitioners that the sale effected by State is vitiated cannot H be sustained.

We therefore find no reason to accept the contention raised by senior counsel. We also find no substance in the arguments raised by the counsel for the Canara Bank. Contentions raised by the counsel are only to disturb the substantial right of the State which has already been recognized by the Division Bench holding that they have got first charge and the State can adopt its own procedure for enforcing the statutory charge. Procedural provision pointed out by the counsel have no relevance while the State is enforcing the statutory charge. Regarding the contention raised by senior counsel Sri N.N. Sugunapalan we are of the view, if any amount is due towards employees provident fund those matters could be taken up before the State Government. The power under Section 11(2) would not annul the statutory charge of the State. Under such circumstance review petitions would stand dismissed."

Ms. Indu Malhotra, learned counsel for the appellant argued that decree passed by the Tribunal on 17.2.2000 was prior to the notice for attachment issued by Tehsildar under Section 36 of the Kerala Revenue Recovery Act and as the sale notice issued by him was stayed by the High Court on 15.3.2001, the bank did not commit any illegality by auctioning the first property of the company. She further argued that State can recover its dues by auctioning the second property of the company and the High Court was not justified in nullifying the auction conducted by the recovery officer of the Tribunal. Learned counsel appearing for the bank argued that since the State was not a party before the Tribunal, it was not necessary to give notice to the Tehsildar.

In our view, the High Court did not commit any illegality by nullifying the auction conducted by the recovery officer of the Tribunal, who, as per admitted factual matrix of the case, did not give notice to the revenue officer despite the fact that the property had been attached under Section 36 of the Kerala Revenue Recovery Act and the bank had challenged the notice

A issued under Section 49(2) of that Act in Writ Petition No.8845 of 2001 and succeeded in persuading the High Court to stay that notice.

63. *C.A. No.4909 of 2006 – Central Bank of India v. The Deputy Tehsildar and others* – The petitioner-bank extended financial facilities to the private respondents, who mortgaged immovable properties for securing repayment. In 1994, the bank filed suits for recovery of its dues. On establishment of the bench of the Tribunal at Ernakulam, all the suits were transferred to the Tribunal which passed decree dated 31.3.2000 in T.A. No.1032/1997, 25.7.2001 in T.A. No.1009/1997 and 9.8.2001 in T.A. No.1015/1997 The bank also issued recovery certificate dated 1.12.2003. However, before the bank could execute the decrees, Tehsildar (Revenue Recovery), Kollam, initiated proceedings under the Kerala Revenue Recovery Act for sale of the mortgaged properties which was attached for recovery of the arrears of sales tax. The petitioner challenged the sale notices issued by Tehsildar in Writ Petition No.13425 of 2004. The learned Single Judge by relying on the judgment of this Court in *Dena Bank v. Bhikabhai Prabhudas Parekh & Co.* (supra) and of the Division Bench of the High Court in *Sherry Jacob v. Canara Bank* [2004 (30) KLT 1089] dismissed the writ petition. The Division Bench dismissed the writ appeal.

In our opinion, the High Court rightly held that the Tehsildar was entitled to give effect to the primacy of statutory first charge created on the property of the dealer under Section 26B of the Kerala Act.

64. *C.A. No.1288 of 2007 – UCO Bank v. State of Kerala & others* –Respondent No.4, M/s. International Trade Links took loan from the appellant-bank but failed to repay the same. The appellant issued notice under Section 13(2) of the Securitisation Act and approached Tehsildar (Revenue Recovery) Kanayannur for rendering assistance to take

possession of the mortgaged property. The latter declined the appellant's request on the ground that action has already been initiated under the Kerala Revenue Recovery Act for recovery of sales tax under the Kerala Act. Thereupon, the appellant filed Writ Petition No.4198 of 2005 for issue of a direction to the District Collector, Ernakulam and Tehsildar, Kanayannur to take vacant possession of the mortgaged property. It also prayed that Section 26A and 26B of the Kerala Act be declared unconstitutional and void being inconsistent with the provisions of the Securitisation Act. By an order dated 7.2.2005, the learned Single Judge directed the Tehsildar to sell mortgaged property and to permit the bank to coordinate in the sale. That order was modified on 22.9.2005 and the bank was allowed to sell the property subject to certain conditions. The bank applied for modification of order dated 22.9.2005 and prayed that it may be permitted to retain the money realized from sale of the mortgaged property. The learned Single Judge did not entertain the appellant's prayer but directed that if the sale price is lower than the one mentioned by the government pleader then the sale shall be confirmed only after getting further order from the court. Liberty was also given to the borrower/guarantor to pay the arrears. Writ appeal filed by the appellant-bank against the interim order was disposed of by the Division Bench with the following observations:-

> "Since the revenue authorities have already attached the property this court will not be justified in directing respondents 2 and 3 to hand over possession of the property to the Bank. All the same it is entirely for the State and its officers to decide whether possession should be handed over to the Bank for taking further proceedings under the Securitisation Act. We leave it to the State to take a decision in this matter in accordance with law. Needless to say, since State has got prior charge it is open to the State to proceed in accordance with law. Let a decision be taken by the district Collector within one month from the date of receipt of a copy of this judgment.

A The appeal and the writ petition are disposed of as above. I.A. No.14420 of 2005 would stand dismissed."

Since we have already expressed the view that in terms of Section 26B of the Kerala Act, the State has got prior charge over the property of the dealer and the facts of the case show that the revenue authorities had already attached the property, there is no valid ground to interfere with the order passed by the Division Bench.

65. *C.A. No. of 2009 [arising out of S.L.P. (C) No.24767 of 2005] – The South Indian Bank Ltd., Trichur -1 v. State of Kerala & others* – In the year 1984, the appellant-bank granted loan to respondent nos.3 to 5, who mortgaged their immovable properties as security for repayment. After 8 years, the bank filed O.S. No.720 of 1992 for recovery of amount of loan with interest. The suit was decreed on 30.1.1995 for a sum of Rs.3,51,36,973/-. After lapse of three years, the bank filed O.A. No.1081 of 1998 for recovery of the amount in terms of decree dated 30.1.1995. On 26.7.2000, the Tribunal issued recovery certificate in favour of bank. In the meanwhile, Tehsildar, Ottapalam issued notice under Section 49(2) of the Kerala Revenue Recovery Act on 2.6.1999 for sale of the mortgaged properties for recovery of sales tax dues amounting to Rs.85,45,276/-. The appellant challenged the proposed sale in Writ Petition (O.P. No.17701 of 1999) and prayed that the State and its functionaries may be restrained from selling the property. The learned Single Judge, after noticing the judgment of this Court in *State of M.P. v. State Bank of Indore* [(2002) 10 KTR 366 (SC)] held that even if there is first charge in favour of the bank, the same will not adversely affect the statutory first charge of the State. Accordingly, he refused to interfere with the proposed sale of the mortgaged properties but gave liberty to the bank to proceed to execute the decree passed in its favour in accordance with law. Writ appeal filed by the bank was dismissed by the Division Bench making observations which have been extracted hereinabove.

66. We are in complete agreement with the Division Bench that statutory first charge created in favour of the State under Section 26B of the Kerala Act has primacy over the right of the bank to recover its dues. A

67. In the result, the appeals are dismissed. However, it is made clear that this judgment shall not preclude the banks from realising their dues by taking recourse to other proceedings, as may be permissible under law. The appellant in Civil Appeal No.4174 of 2006 shall be free to avail appropriate remedy for refund of the amount deposited by him in furtherance of the auction conducted by the recovery officer. B C

D.G. Appeal dismissed.