Supreme Court of India Mardia Chemicals Ltd. Etc. Etc vs U.O.I. & Ors. Etc. Etc on 8 April, 2004 Author: B Kumar Bench: Cji., Brijesh Kumar, Arun Kumar. CASE NO.: Transfer Case (civil) 92-95 of 2002

PETITIONER: Mardia Chemicals Ltd. Etc. Etc.

RESPONDENT: U.O.I. & Ors. Etc. Etc.

DATE OF JUDGMENT: 08/04/2004

BENCH: CJI., Brijesh Kumar & Arun Kumar.

JUDGMENT: JUDGMENT WITH WRIT PETITION (CIVIL) NO.140 OF 2003 M/s.Ashok Mfg.Co.Pvt.Ltd. & Ors. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.649 OF 2002 Major Mahajan Mandal & Ors. Versus U.O.I. WRIT PETITION (CIVIL) NO.673 OF 2002 Supreme Rubber Industries Versus U.O.I. & Anr. TRANSFER CASE (CIVIL) NO. 10 OF 2003 Modern Terry Towels Ltd. & Ors. Versus State of Rajasthan & Ors. WRIT PETITION (CIVIL) NO.322 OF 2003 Sohanlal Rara Versus U.O.I. & Anr. TRANSFER CASE (CIVIL) NO. 46 OF 2003 J.K.Udaipur Udyog Ltd. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.643 OF 2002 Shree Synthetics Ld. & Anr Versus U.O.I. & Ors. TRANSFER CASE (CIVIL) NO. 12 OF 2003 Sobhag Textiles Ltd. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.48 OF 2003 M/s.REL Industries .Ltd. Versus U.O.I. & Ors. CIVIL APPEAL NO. OF 2004 (Arising out of SLP (C) No.5013 of 2003) M/s.Oriental Motors & Anr. Versus Punjab & Sindh Bank & Anr. WRIT PETITION (CIVIL) NO.176 OF 2003 M/s.Mahendra Commercial Ltd. & Anr. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.190 OF 2003 H.R.Brothers & Ors. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.219 OF 2003 M/s.Tirthankar Agro & Ors. Versus U.O.I. & Anr. CIVIL APPEAL NO. OF 2004 (Arising out of SLP (C) No.9658 of 2003) Citisteel Corporation & Ors. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.147 OF 2003 M/s.Punjab Breeders Ltd.. Versus U.O.I. & Ors. TRANSFER PETITION (CIVIL) NO. 326 OF 2003 Bank of Rajasthan Ltd. Versus Naresh Kumar Nevatia & Ors. WRIT PETITION (CIVIL) NO.279 OF 2003 Euro India Biotech Ltd. & Ors. Versus U.O.I. & Ors. WRIT PETITION (CIVIL) NO.231 OF 2003 Pradeep Sohawala Versus U.O.I. & Ors. CIVIL APPEAL NO. OF 2004 (Arising out of SLP (C) No.11089 of 2003) M/s.Rudra Informatics & Ors. Versus Prudential Co-op.Bank Ltd.& Anr. WRIT PETITION (CIVIL) NO.292 OF 2003 Patheja Brothers Forgings & Stampings&Anr. Versus U.O.I. & Anr. CIVIL APPEAL NO. OF 2004 (Arising out of SLP (C) No.11267 of 2003) M/s.Haji Abdul Hameed & Ors. Versus Central Bank of India & Ors. CIVIL APPEAL NO. OF 2004 (Arising out of SLP (C) No.11268 of 2003) M/s.Etawah Sales Corporation & Ors. Versus Central Bank of India & Ors. TRANSFER PETITION (CIVIL) NO. 403 OF 2003 Bank of Rajasthan Versus R.K.Garg & Sons (HUF) WRIT PETITION (CIVIL) NO.379 OF 2003 M/s.Verma Cards & Posters Pvt.Ltd. & Ors. Versus U.O.I. & Anr. CIVIL APPEAL NO. OF 2004 (Arising out of SLP (C) No.15566 of 2003) N.C.Jain Versus Bank of Baroda & Ors. TRANSFER CASE (CIVIL)

NO. 11 OF 2003 Soni Tourism Pvt. Ltd. & Ors. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.366 OF 2003 G.V.Venkateshiah Versus State Bank of India & Ors. WRIT PETITION (CIVIL) NO.541 OF 2002 M/s.Amulet International Pvt.Ltd. & Ors. Versus U.O.I. & Anr. CIVIL APPEAL NO. OF 2004 (Arising out of SLP (C) No.17465 of 2003) M/s.Deep Chand Sushil Kumar & Ors. Versus Central Bank of India & Anr. WRIT PETITION (CIVIL) NO.477 OF 2003 M/s.Rama Steel Industries & Ors. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.496 OF 2003 M/s.Pahadewali Ispat Pvt.Ltd. & Anr. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.499 OF 2003 M/s.KPJ Tradevest Pvt.Ltd. & Anr. Versus U.O.I. & Ors. TRANSFER PETITION (CIVIL) NO. 756 OF 2003 M/s.Vaishno Cold Storage & Ors. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.545 OF 2003 M/s.Madhumilan Syntex Ltd. & Anr. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.557 OF 2003 J.K.Jain & Ors. Versus U.O.I. & Anr. CIVIL APPEAL NO. OF 2004 (Arising out of SLP (C) No..... of 2003(CC 10728) M/s.Suneeta Wool & Readymade Emporium Versus Allahabad Bank, Jhansi CIVIL APPEAL NO. OF 2004 (Arising out of SLP (C) No.6723 of 2003) Pushpinder Kaur & Anr. Versus Punjab & Sindh Bank & Anr. WRIT PETITION (CIVIL) NO.590 OF 2003 M/s.Nabe International & Ors. Versus U.O.I. & Anr. WRIT PETITION (CIVIL) NO.13 OF 2004 Kanti Devi & Anr. Versus Canara Bank & Ors. AND WRIT PETITION (CIVIL) NO.546 OF 2003 M/s.Akal Springs Ltd. Versus U.O.I. & Anr. BRIJESH KUMAR, J. 1. Leave granted in Special Leave Petition (Civil) Nos.5013/2003, 9658/2003, 11089/2003, 11267/2003, 11268/2003, 15566/2003, 17465/2003 and special leave petition @ CC 10728 and SLP(C) No.6723/2003. 2. By means of the above noted bunch of cases some of those having been transferred to this court, the validity of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) (for short 'the Act') has been challenged. Some writ petitions were filed in different High Courts on promulgation of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (Second Ordinance), 2002. However, the Act 54 of 2002 was enacted and enforced, vires of which is in question, more particularly, the provisions as contained in Sections 13, 15, 17 and 34 of the Act. Besides others, we may, for the sake of convenience, refer to the averments made and documents filed in Transferred Case Nos.92-95 of 2002 - M/s.Mardia Chemicals Ltd. Etc. Etc. Vs. Union of India & Ors. Etc.Etc. 3. It appears that a notice dated July 24, 2002 was issued to the petitioner - Mardia Chemicals Ltd. by the Industrial Development Bank of India (for short 'the IDBI') under Section 13 of the Ordinance, then in force, requiring it to pay the amount of arrears indicated in the notice within 60 days, failing which the IDBI as a secured creditor would be entitled to enforce the security interest without intervention of the court or Tribunal, taking recourse to all or any of the measures contained in sub-section (4) of Section 13 namely, by taking over possession and/or management of the secured assets. The petitioner was also required not to transfer by way of sale, lease or otherwise any of the secured assets. Similar notices were issued by other financial institutions and banks under the provisions of Section 13 of the Ordinance/Act

to different parties who filed petitions in different High Courts. 4. The main contention challenging the vires of certain provisions of the Act is that the banks and the financial institutions have been vested with arbitrary powers, without any guidelines for its exercise and also without providing any appropriate and adequate mechanism to decide the disputes relating to the correctness of the demand, its validity and the actual amount of dues, sought to be recovered from the borrowers. The offending provisions as contained under the Act, are such that, it all has been made one sided affair while enforcing drastic measures of sale of the property or taking over the management or the possession of the secured assets without affording any opportunity to the borrower. Before further detailing the grounds of attack, we may peruse some of the relevant provisions of the Act. 5. The term "borrower" has been defined in clause (f) of Section 2, which provides as under : "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;" 6. "Financial Assistance" has been defined in clause (k), which reads as under: "financial assistance" means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution;" 7. Similarly, the term "default" is defined in clause (j), as quoted below : "default" means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor in accordance with the directions or guidelines issued by the Reserve Bank" 8. "Non Performing Asset" has been defined in clause(o) of Section 2 which means : "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset, in accordance with the directions or under guidelines relating to asset classifications issued by the Reserve Bank". 9."Reconstruction company" has been defined in clause(v) of Section 2 which means : "Reconstruction company" means a company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of asset reconstruction; 10. "Secured asset" has been defined in clause(zc) of Section 2 which means : "Secured Asset" means the property on which security interest is created." 11. "Secured creditor" has been defined in clause(zd) of Section 2 which means : "Secured Creditor" means "any bank or financial institution or any consortium or group of banks or financial institutions and includes - (i) debenture trustee appointed by any bank or financial institution; or (ii) securitization company or reconstruction company; 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;" 12. "Secured Debt" has been defined in clause(ze) of Section 2 which means : "Secured Debt"

means a debt which is secured by any security interest." 13. “Security interest” has been defined in clause(zf) of Section 2 which means : “Security Interest” means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31." 14. Section 13, which is relevant for our present purpose, provides: “Enforcement of security interest.- (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). (3) The notice referred to in sub-section (2) shall given details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:- (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset; (b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realize the secured asset; (c) appoint any person (hereafter referred to as the manager) to manage the secured assets the possession of which has been taken over by the secured creditor; (d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt. (5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower. (6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset. (7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the

dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests. (8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset. (9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors: Provided that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of section 529 A of the Companies Act, 1956 (1 of 1956). Xxx xxx xxx (10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower. (11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub- section (4) in relation to the secured assets under this Act. Xxx xxx xxx (13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor." 15. Mr.Kapil Sibal, learned senior counsel appearing for the petitioners in the Transferred Case - M/s.Mardia Chemicals Ltd. submits that there was no occasion to enact such a draconian legislation to find a short-cut to realize the dues without their ascertainment but which the secured creditor considered to be the dues and declare the same as non-performing assets (NPAs). Out of the total NPAs which are considered to be about one lac crores, about half of it is due against priority sector like agriculture etc. The dues between 10 lacs to one crore constitute only 13.90% of the total dues. By providing statistics on the point it is sought to be demonstrated that most of the dues are against those borrowers whose borrowing ranges between Rs.25000 to Rs.10 lacs. Besides the above, it is submitted, that there is already a special enactment providing for recovery of dues of banks and financial institutions. Therefore, it was not necessary to enact yet another legislation containing drastic steps and procedure depriving the debtors of any fair opportunity to defend themselves from the onslaught of the harsh steps as provided under the Act. 16. It is further submitted that no provision has been made to take into account the lenders liability, though at one time it was considered necessary to have an enactment relating to lenders liability and a bill was also intended to be introduced, as it was considered that it is

necessary for the lenders as well to conduct themselves responsibly towards the borrowers. It is submitted that despite such a statement, as indicated above, on the floor of the House, neither any such law has been enacted so far nor any care has been taken to introduce such safeguards in the Act to protect the borrowers against their vulnerability to arbitrary or irresponsible action on the part of the lenders. On a comparative basis, in relation to other countries, it is submitted that the percentage of NPA of as against the GDP is only 6% in India which is much less as compared to China, Malasia, Thailand, Japan, South Korea and other countries. Therefore, it is evident that the resort has been taken to a drastic legislation, under mis- apprehension that other ways and means have failed to recover the dues from the borrowers. 17. Referring to Section 13 of the Act it is submitted on behalf of the petitioners that a security interest can be enforced by the secured creditor straightaway without intervention of the court just on default in repayment of an instalment and non-compliance of a notice of 60 days in that regard, declaring the loan as non-performing asset. Under sub-section 4 of Section 13 the secured creditor is entitled to take possession of the secured assets and may transfer the same by way of lease, assignment or sale as provided under clause (a) or under clause (b) to take over the management of the secured assets including the right to transfer any secured assets or to appoint any person as provided in clause (c) to manage the secured assets taken over by the creditor. Under clause (d) by means of a notice any person who has acquired any of the secured assets from the borrower or who has to pay to the borrower any amount which may cover the secured debt, can be asked to pay it to the secured creditor. All that is provided is that if all the dues with costs and charges and expenses incurred by the creditor is tendered before the date fixed for sale of the assets no further steps shall be taken for sale of the property. 18. It is submitted that the mechanism provided for recovery of the debt under Section 13 indicated above does not provide for any adjudicatory forum to resolve any dispute which may arise in relation to the liability of the borrower to be treated as a defaulter or to see as to whether there has been any violation or lapse on the part of the creditor or in regard to the correctness of the amount sought to be recovered and the interest levied thereupon. On the other hand, Section 34 bars the jurisdiction of the civil court to entertain any suit in respect of any matter which a Debt Recovery Tribunal or the appellate Tribunal is empowered to determine. It also provides that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under Act or under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. Section 35 gives an overriding effect to the provisions of the Act over the provisions contained under any other law. The submission, therefore, is that before any action is taken under Section 13, there is no forum or adjudicatory mechanism to resolve any dispute which may arise in respect of the alleged dues or the NPA. 19. It is further submitted that the provision of appeal as contained in Section 17 of the Act is also illusory since an appeal may be preferred within the specified time from the date on which measures under sub-section 4 of Section 13 have been taken, is to say that the appeal would be maintainable after the

possession of the property or the management of the secured assets has been taken over or the property has been sold. Further, an appeal is not entertainable unless 75% of the amount claimed in the notice is deposited by the borrower with the Debt Recovery Tribunal. It would be a matter in the discretion of the Debt Recovery Tribunal to waive the condition of pre deposit or to reduce the amount, for reasons to be recorded therefor. It is submitted that a remedy which is available, after the damage is done and on fulfillment of such an onerous condition as deposit of 75% of the demand, is illusory and a mere farce. It is no real remedy available to a borrower before he is subjected to harsh steps as provided under sub-section (4) of Section 13. It is further submitted that after the possession of the secured assets or its management has been taken over by the secured creditor or the property is leased out or sold to any other person, it would not be possible to raise and deposit 75% of the amount claimed by the secured creditor. It is also submitted that once the secured assets are taken over there is hardly any occasion for deposit of 75% of the claim since it is already secured and the management and the possession of the secured assets moves into the hands of the creditor. The position thus is that the borrower is gagged into a helpless position where he cannot ventilate his grievance against the drastic steps taken against him. The doors of the civil court are closed for him and no adjudicatory mechanism is provided before steps are taken under sub-section (4) of Section 13. Such a law, it is submitted, is arbitrary and suffers from the vice of unreasonableness. 20. In so far it relates to Section 19 of the Act which provides, in case it is found that possession of the secured assets was wrongfully taken by the secured creditor he may be directed to return the secured assets to the borrower who may also be entitled to such compensation as may be determined by the debt recovery Tribunal or the appellate Tribunal, it is submitted that it is hardly a consolation after harsh steps as provided under sub-section 4 of section 13 have been taken. 21. Shri Ashok Desai, learned counsel appearing in one of the matters namely, the case of M/s.Modern Terry Towel Ltd. leaving aside the questions of fact, submits that for exercise of power under Section 13, certain enquiries would be necessary as to whether a person to whom notice is given is under a liability to pay as also the question of extent of the liability etc. Further the questions pertaining to law of limitation and bar under consortium agreements, claim of set off/counter claim, creditors defaults as bailee or its failure to disburse the credit in time, the chargeability of penal interest or compound interest or non-appropriation of amount already paid and so on and so forth, all these questions need to be decided. Bar of Section 22 of the Sick Industrial Companies Act (for short 'SICA) may have to be considered. But there is no adjudicatory body provided for dealing with such disputes. Relying on a decision of this Court reported in 2002(5) SCC p.685, Indian National Congress (I) Vs. Institute of Social Welfare and others, observations made by one of us (Chief Justice V.N.Khare) have been relied upon as quoted below:- "Thus, where there is a lis or two contesting parties making rival claims and the statutory authority under the statutory provision is required to decide such a dispute, in the absence of any other attributes of a quasi- judicial authority, such a statutory authority is quasi-judicial authority. But there are

cases where there is no lis or two contending parties before a statutory authority yet such a statutory authority has been held to be quasi-judicial and decision rendered by it as a quasi-judicial decision when such a statutory authority is required to act judicially. In R v. Dublic Corpn. It was held thus :"In this connection the term judicial does not necessarily mean acts of a Judge or legal tribunal sitting for the determination of matters of law, but for purpose of this question, a judicial act seems to be an act done by competent authority upon consideration of facts and circumstances and imposing liability or affecting the rights. And if there be a body empowered by law to enquire into facts, making estimates to impose a rate on a district, it would seem to me that the acts of such a body involving such consequences would be judicial acts." "Applying the aforesaid principle, we are of the view that the presence of a lis or contest between the contending parties before a statutory authority, in the absence of any other attributes of a quasi-judicial authority is sufficient to hold that such a statutory authority is quasi-judicial authority. However, in the absence of a lis before a statutory authority, the authority would be quasi- judicial authority if it is required to act judicially." It is submitted that power to decide a lis is a judicial or quasi- judicial power and not purely an administrative power. Therefore a suitable forum has to be provided to decide all such disputes at an appropriate stage. In that connection reliance has also been placed on a case reported in 1992 Suppl.(2) SCC p.651, Kihoto Hollohan v. Zachillhu & Ors. and Associated Cement Companies Ltd. v. P.N.Sharma (1965(2) SCR p.366 at pages 386-87). It is submitted any power which is exercised by a party to enforce security by way of sale etc. without any determination of disputed questions, as in the existing law, under Section 13 of the Act, is unconstitutional. It is further submitted that legislature has vested the beneficiary to exercise the power without any determination of disputed questions excluding the judicial remedies till the power stands exercised. It renders the Act procedurally and substantively unfair, unreasonable and arbitrary. Power of judicial determination, it is submitted, is manifestation of sovereign power to determine the legal rights which cannot be vested in private bodies as foreign banks, cooperative banks or non-banking financial institutions etc. Stress has also been given upon the condition of deposit of 75% of claim before entertainment of the appeal. 22. It is next submitted that power under Section 69 of the Transfer of Property Act is hedged with various restrictions to prevent abuse of power including mortgagor's right to have recourse to court both before and after the sale. In this connection, he has referred to decisions of the Madras High Court reported in AIR 1955 Madras P. 135, V.Narasimhachariar vs. Egmore Benefit Society, and also AIR 1955 Madras 343, V.P.Padmavati vs. P.S.Swaminathan Iyer. It is submitted that English mortgage is in the nature of conveyance or absolute transfer of mortgage property with provision of retransfer upon discharge of mortgage and referred to AIR 1969 Mysore p.280, Bank of Maharashtra Ltd., Puna Vs. Official Liquidator, High Court Buildings. It is submitted that the scope of Section 13 of the Act is fundamentally different from the scope of power under Section 69 of the Transfer of Property Act. 23. Shri Dholakia, learned senior counsel appearing on behalf of the guarantors of the principal borrower,

refers to Section 2(f) of the Act to indicate that the definition of the word 'borrower' covers even the guarantor. He then refers to Section 135 of the Contract Act to show that in certain circumstances a guarantor is discharged of his obligation. The petitioner received a notice under Section 13(2) of the Act. The submission is in view of the bar of Section 34 to file a suit in the Civil Court, it is not possible for him to approach the Court to show and establish that he is a discharged guarantor, hence notice under Section 13(2) is bad and refers to 1997(5) SCC p.536 at page 735 Mafatlal Industries Ltd. and Ors. Vs. Union of India and Ors. He next referred to Section 31 of the Act. It is submitted that the word 'security' has not been defined under Section 2 of the Act. Then refers to Section 2(t) of the Act which defines the word 'property' which means a movable, immovable, or any right to receive payment, receivable intangible assets etc. It is submitted that the Act not to apply to the legal liens. Further refers to Laws of Halsbury's, 4th Edition, Vol.28, pages 510-511 and Section 48 of the Transfer of Property Act. It is submitted that if property is subject to several charge as first charge, second charge and third charge and so on property in relation to only one of them would be NPA and not in relation to other creditors having charge over the property. It is submitted that it is not clear in such a situation how the Act will be workable. 24. He also refers to Section 44 of the Transfer of Property Act which deals with the case of transfer by one coowner and the difficulty to work out the provisions of the Act in such cases. 25. As against the above submissions, the case of the respondents is that financial institutions are badly effected by non-recovery of dues and despite the existing laws like, the Recovery of Debts due to Banks and Financial Institutions Act, much could not be achieved, hence it was necessary to take further legislative steps to accelerate recovery of the heavy amount of dues. It is submitted that after availing the facility of financial assistance quite often the borrowers hardly show interest in repayment of loan which keep on accumulating as a result of which it becomes difficult for the financial institutions to continue the financial assistance to deserving parties due to heavy blockade of money stuck up with the erring borrowers. It is not good for a financial institution to have heavy NPA. It has also been indicated that since after enforcement of the Act there has been marked improvement in the recovery and quite substantial amount has since been recovered. 26. Shri Soli J.Sorabjee, learned Attorney General, appearing for the Union of India submitted that the Act was enacted to curb the menace of growing non-performing assets (NPAs). It affects the banks and financial institutions which is ultimately against the public interest. Due to non-recovery of the dues the banks also run out of the financial resources to further carry on the financial activity and to meet the need and requirement of its other depositors and clients. The figures of NPA which have been given border around one lac crores. After coming into force of the Recovery of Debts due to Banks and Financial Institutions Act and establishment of Debt Recovery Tribunals the success in recovery has not been very encouraging. Therefore, need was felt for a faster procedure empowering the secured creditors to recover their dues and for securitisation of financial assets so as to generate maximum monetary liquidity. It has been felt that after coming into force of the Act there

is a marked difference in realization of dues and more borrowers are coming forward to pay up the defaulted amount and clear the dues. It is submitted that in case a defaulter wants to raise any objection it may be raised in reply to the notice which would obviously be considered by the secured creditor before it would further proceed to take recourse to sub-section 4 of Section 13 of the Act. It is further submitted that there will be ample time for a borrower to approach the Debt Recovery Tribunal to seek relief before sale of the secured assets. The remedy as provided under Section 17 of the Act it is adequate and the condition of deposit of 75% of the claim before the appeal could be entertained is not an unusual condition and it is to be found in other statutes also. It is then submitted that proviso to Section 17 very clearly provides that on an application moved in that behalf the condition of deposit of the amount can be waived or the amount can be reduced. Therefore, it would not be correct to say that condition of pre-deposit is harsh as it can be relaxed in deserving cases. The bar of jurisdiction of the Civil Court was thought to be necessary to avoid lengthy legal process in realizing the amount due. It is then submitted that normally there should be a presumption in favour of validity of a legislation more so in regard to the laws relating to economic and financial matters and a few instances here and there of any harsh results would not be a valid consideration to invalidate the law. 27. Shri Harish N.Salve, learned senior counsel appearing for the ICICI submits that the purpose of enacting the Act would be self-evident from the statement of objects and reasons for the enactment which reads as under: "The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas." 28. It is submitted that the question of enactment of the Act was under consideration for long and first Narasimham Committee and then Andhyarujina Committee were constituted by the central government for introducing reforms in the banking sector necessary for recovery of the outstanding dues of the financial institutions. The practice of securitisation of debts is in vogue all over the world. That is to say a measure of replenishing the funds by recourse to the secondary market. There are organizations who undertake exercise of securitisation. Such organizations take over the financial assets and in turn issue securities. 29. It is submitted that the funding of the

debts is feasible only where there exists an efficacious and expeditious machinery for realization of debts for investors in such securities. It is submitted that in England a mortgagee under a legal mortgage has a right to take possession, to sell, and even appoint a receiver in relation to mortgaged properties without recourse to a court of law. It is also submitted that provisions as contained under Section 9 of the Act are also valid. The securitisation is done in accordance with the guidelines framed by the Reserve Bank of India. In so far the provisions contained under Section 15 of the Act and the challenge made to it, it is submitted that it is referable to Section 9 and not to Section 13(4) (a) of the Act. 30. Shri Andhyarujina, learned senior counsel appearing for the Life Insurance Corporation of India stressed upon the background in which the impugned legislation was enacted pressed by circumstances, namely, over growing non- performing assets crippling the viability of financing by banking sector and financial institutions. It ultimately effects the process of industrialization and growth of national economy. It was difficult to get quick relief from the normal procedure of laws. The recovery through Debt Recovery Tribunals was also insignificant. Based on the recommendations of the Narasimham Committee, an expert committee recommended the legal framework concerning banking system. It is submitted that the provisions as contained in Chapter III of the Act are in keeping with provisions as contained under Section 69 of the Transfer of Property Act regarding sale of security interest without intervention of the court like Section 29 of the State Financial Corporation Act, 1951 and Section 176 of the Contract Act. It is submitted that the relationship between secured creditor and the borrower is a contractual relationship and no question of adjudication arises at the stage of Section 13(2) of the Act. 31. Shri A.M. Singhvi has also made similar submissions in support of validity of the Act. 32. As indicated earlier, arguments on the same lines were advanced by some of the counsels and others adopted the same. 33. Taking an overall view of the rival contentions of the parties, we feel the main questions which broadly fall for consideration by us are : i) Whether it is open to challenge the statute on the ground that it was not necessary to enact it in the prevailing background particularly when another statute was already in operation? ii) Whether provisions as contained under Section 13 and 17 of the Act provide adequate and efficacious mechanism to consider and decide the objections/disputes raised by a borrower against the recovery, particularly in view of bar to approach the civil court under Section 34 of the Act? iii) Whether the remedy available under Section 17 of the Act is illusory for the reason it is available only after the action is taken under Section 13(4) of the Act and the appeal would be entertainable only on deposit of 75% of the claim raised in the notice of demand? iv) Whether the terms or existing rights under the contract entered into by two private parties could be amended by the provisions of law providing certain powers in one sided manner in favour of one of the parties to the contract? v) Whether provision for sale of the properties without intervention of the court under Section 13 of the Act is akin to the English mortgage and its effect on the scope of the bar of the jurisdiction of the civil court? vi) Whether the provisions under Sections 13 and 17(2) of the Act are unconstitutional on the basis of the parameters laid down in different

decisions of this Court? vii) Whether the principle of lender's liability has been absolutely ignored while enacting the Act and its effect? 34. Some facts which need be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the governments in creating Debt Recovery Tribunals and appointing Presiding Officers, for a long time. Even after leaving that margin, it is to be noted that things in the concerned spheres are desired to move faster. In the present day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of the NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field namely the Recovery of Debts due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another expert committee was constituted then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved. 35. As referred to above, the Narasimham Committee was constituted in 1991 relating to the Financial System prevailing in the country. It considered wide ranging issues relevant to the economy, banking and financing etc. Under Chapter V of the Report under the heading 'Capital Adequacy, Accounting Policies and other Related Matters' it was opined that a proper system of income recognition and provisioning is fundamental to the preservation of the strength and stability of banking system. It was also observed that the assets are required to be classified, it also takes note of the fact that the Reserve Bank of India had classified the advances of a bank, one category of which was bad debts/doubtful debts. It then mentions that according to the international practice, an asset is treated as non-performing when the interest is overdue for at least two quarters. Income of interest is considered as such, only when it is received and not on the accrual basis. The Committee suggested that the same should be followed by the banks and finan-

cial institutions in India and an advance is to be shown as non-performing assets where the interest remains due for more than 180 days. It was further suggested that the Reserve Bank of India should prescribe clear and objective definitions in respect of advances which may have to be treated as doubtful, standard or sub-standard, depending upon different situations. Apart from recommending to set up of special Tribunals to deal with the recovery of dues of the advances made by the banks the committee observed that impact of such steps would be felt by the banks only over a period of time, in the meanwhile, the Committee also suggested for reconstruction of assets saying "the Committee has looked at the mechanism employed under similar circumstances in certain other countries and recommends the setting up of, if necessary by special legislation, a separate institution by the Government of India to be known as 'Assets Reconstruction Fund (ARF) with the express purpose of taking over such assets from banks and financial institutions and subsequently following up on the recovery of dues owed to them from the primary borrowers." While recommending for setting up of special Tribunals, the Committee observed : "Banks and financial institutions at present face considerable difficulties in recovery of dues from the clients and enforcement of security charged to them due to the delay in the legal processes. A significant portion of the funds of banks and financial institutions is thus blocked in unproductive assets, the values of which keep deteriorating with the passage of time. Banks also incur substantial amounts of expenditure by way of legal charges which add to their overheads. The question of speeding up the process of recovery was examined in great detail by a committee set up by the Government under the Chairmanship of the late Shri Tiwari. The Tiwari Committee recommended, inter alia, the setting up of Special Tribunals which could expedite the recovery of process. . . ." The Committee also suggested some legislative measures to meet the situation. 36. In its Second Report, the Narasimham Committee observed that the NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed : "8.1 A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries. . . . . ." One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the asset without intervention of the court and for reconstruction of the assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting the attention and the matter was considered in depth by the committees specially constituted consisting of the experts in the field. In the prevalent situation where the amount of dues are huge and hope of early recovery is less, it cannot

be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the report of the Narasimham Committee, yet another committee was constituted headed by Mr.Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of debts due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances the financial climate world over, if it was thought as a matter of policy, to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor it is a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy. 37. Next we come to the question as to whether it is on whims and fancies of the financial institutions to classify the assets as non-performing assets, as canvassed before us. We find it not to be so. As a matter of fact a policy has been laid down by the Reserve Bank of India providing guidelines in the matter for declaring an asset to be a non-performing asset known as "RBI's prudential norms on income recognition, asset classification and provisioning - pertaining to advances" through a Circular dated August 30, 2001. It is mentioned in the said Circular as follows : "1.1 In line with the international practices and as per the recommendations made by the Committee on the Financial System (Chairman Shri M.Narasimham), the Reserve Bank of India has introduced, in a phased manner, prudential norms for income recognition, asset classification and provisioning for the advances portfolio of the banks so as to move towards greater consistency and transparency in the published accounts." 2.1 Non-performing Assets: "2.1.1 An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank. A 'non- performing asset' (NPA) was defined as a credit facility in respect of which the interest and/or instalment of principal has remained 'past due' for a specified period of time. The specified period was reduced in a phased manner as under: Year ending March 31 Specified period 1993 four quarters 1994 three quarters 1995 onwards two quarters 2.1.2 An amount due under any credit facility is treated as"past due" when it has not been paid within 30 days from the due date. Due to the improvements in the payment and settlement systems, recovery climate, upgradation of technology in the banking system, etc., it was decided to dispense with 'past due' concept, with effect from March 31, 2001. Accordingly, as from that date, a Non- performing Asset (NPA) shall be an advance where (i) interest and/or installment of principal remain overdue for a period of more than 180 days in respect of a Term Loan, (ii) the account remains 'out of order' for a period of more than 180 days, in respect of an Overdraft/Cash Credit (OD/CC), (iii) the bill remains overdue for a period of more than 180 days in the case of bills purchased and discounted, (iv) interest and/or installment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes, and (v) any amount to be received remains overdue for a period of more than 180 days in respect of other accounts. 4.2.2 Banks should establish appropriate internal systems

to eliminate the tendency to delay or postpone the identification of NPAs, especially in respect of high value accounts. The banks may fix a minimum cut off point to decide what would constitute a high value account depending upon their respective business levels. The cut off point should be valid for the entire accounting year. Responsibility and validation levels for ensuring proper asset classification may be fixed by the banks. The system should ensure that doubts in asset classification due to any reason are settled through specified internal channels within one month from the date on which the account would have been classified as NPA as per extant guidelines." From what is quoted above, it is quite evident that guidelines as laid down by the Reserve Bank of India which are in more details but not necessary to be reproduced here, laying down the terms and conditions and circumstances in which the debt is to be classified as non-performing asset as early as possible. Therefore, we find no substance in the submission made on behalf of the petitioners that there are no guidelines for treating the debt as a non-performing asset. 38. We may now consider the main enforcing provision which is pivotal to the whole controversy namely, Section 13 in Chapter III of the Act. It provides that a secured creditor may enforce any security interest without intervention of the court or Tribunal irrespective of Section 69 or Section 69A of the Transfer of Property Act where according to sub-section (2) of Section 13, the borrower is a defaulter in repayment of the secured debt or any installment of repayment and further the debt standing against him has been classified as a non- performing asset by the secured creditor. Sub-section (2) of Section 13 further provides that before taking any steps in direction of realizing the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in sub-section (4) of Section 13. It may also be noted that as per sub-section (3) of Section 13 a notice given to the borrower must contain the details of the amounts payable and the secured assets against which the secured creditor proposes to proceed in the event of non- compliance with the notice given under sub-section (2) of Section 13. 39. Sub-section (4) provides for four measures which can be taken by the secured creditor in case of non- compliance with the notice served upon the borrower. Under clause (a) of sub-section (4) the secured creditor may take possession of the secured assets including the right to transfer the secured assets by way of lease, assignment or sale; may take over the management of the secured assets under clause (b) including right to transfer; under clause (c) of sub-section (4) a manager may be appointed to manage the secured assets which have been taken possession of by the secured creditor and may require any person who has acquired any secured assets from the borrower or from whom any money is due to the borrower to pay the same to him as it may be sufficient to pay the secured debtor as provided under Clause (d) of Section 3(4) of the Act. Sub-section (8) of Section 13 however, provides that if all the dues of the secured creditor including all costs, charges and expenses etc. as may be incurred are tendered to the secured creditor before sale or transfer no further steps be taken in that direction. 40. Now coming to Section 17, it provides for filing of an appeal

to the Debt Recovery Tribunal within 45 days of any action taken against the borrower under sub-section (4) of Section 13 of the Act. It reads as under : "17. Right to appeal .- (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken. (2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-section (2) of section 13 : Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section. (3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder." It is thus clear that an appeal under sub-section (1) of Section 17 would lie only after some measure has been taken under sub-section (4) of Section 13 and not before the stage of taking of any such measure. According to sub-section (2), the borrower has to deposit 75% of the amount claimed by the secured creditor before his appeal can be entertained. 41. So far jurisdiction of Civil Court is concerned we find that there is a bar to it as provided under Section 34 of the Act quoted below:- "34. Civil Court not to have jurisdiction - No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)." 42. Mainly it is to be considered as to whether there is absolute bar of any remedy to the borrower, before an action is taken under sub-section (4) of Section 13 of the Act in view of non-obstante clause under sub-section (1) of Section 13 and the bar of the jurisdiction of the civil court under Section 34 of the Act. Sub-section (1) of Section 13 begins with "Notwithstanding anything contained" under Section 69 of the Transfer of Property Act any secured interest can be enforced without intervention of the court or Tribunal. Section 69 of the Transfer of Property Act provides as follows : "69. Power of sale when valid.-(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of the payment of mortgage-money, without the intervention of the Court, in the following cases and in no others, namely - (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette; (b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the

mortgagee is the Government; (c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by mortgage- deed, and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf. (2) No such power shall be exercised unless and until - (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or (b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due. (3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power. (4) . . . . . .
(5) . . . . . Xxx xxx xxx" It is clear that mortgaged property cannot be sold without intervention of the court except in three conditions as enumerated in clauses (a), (b) and (c) of sub-section (1) of Section 69. Clause (a) relates to English mortgage in which a mortgaged property is permitted to be sold without intervention of the court but in the stricto senso clause (a) would not be applicable to the present case as it contains many conditions which obviously are not fulfilled in case in hand. It is however, submitted that the provision for enforcing secured debt was made on the lines of the principle governing English mortgage. It is perhaps sought to be canvassed that if that kind of step namely enforcing the secured debt without intervention of the court is permissible in a case of English mortgage such a provision may legitimately be enacted in respect of mortgages like English mortgages. We find much has been argued on the point as to whether the transactions involved in the cases before us amount to English mortgage or not though none of agreements have been placed before us. Distinction between the two have also been tried to be shown and it has been submitted that English mortgage is in fact transfer of the property absolutely to the mortgagee with a term of retransfer. Section 58(e) pertaining to English mortgage is quoted below : "58. 'Mortgage', 'mortgagor', 'mortgagee', 'mortgage-money' and 'mortgage-deed' defined.- xxx xxx xxx (d) English mortgage - Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage. Xxx xxx xxx" It is thus pointed out that in English mortgage, absolute transfer of the property already takes place. Hence the question of intervention of the court may not arise. It has a condition of retransfer. It is submitted that by no means it can be said that the transactions in question are like those as English mortgage. On the basis of the above provision it is further submitted

that if the condition of retransfer is not invoked the mortgagee is possessed of all rights absolutely in the property. There are different kinds of mortgages as enumerated in section 58 of the Transfer of Property Act. We feel that it would not be necessary to further go into the matter as to whether the agreements in the cases before us amount to English mortgage or not since the non-obstante clause under Section 13(1) of the Act provides that notwithstanding anything contained in Section 69 a secured interest can be enforced without intervention of the court. That is to say it overrides the provision as contained under Section 69 where it is said that in no cases, other than those as enumerated in clauses (a), (b) and (c), a mortgage shall be enforced without intervention of the court. Once the said condition, as noted above, in section 69 of the Transfer of Property Act, the general law on the subject, has been overridden by the special enactment namely the Securitisation Act, it would not make much of a difference as to whether the transactions in question are akin to or amount to English mortgage or not, since irrespective of the kind of the mortgage the secured interest is liable to be enforced without intervention of the court as per the provision contained under Section 13 of the Act. Needless to refer Section 35 of the Act, which provides as under : "35. The provisions of this Act to override other laws.- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law." 43. It may, however, be worthwhile to mention here as to why and in what circumstances it had been thought necessary to provide a non-obstante clause in sub-section (1) of Section 13 of the Act. In a nutshell, the position as prevailed in 1882 when the Transfer of Property Act was enacted has undergone a sea-change. What was conceived correct in the situation then prevailing may not be so in the present day situation. Functions of different institutions including the banking and financial institutions have changed and new functions have been introduced for financing the industries etc. New economic and fiscal environment is around more than 100 years later after the enactment of the Transfer of Property Act. In this connection it has been pointed out on behalf of the respondents that Rajamannar Committee was appointed by Government of India which submitted its report in 1977 indicating the effect of the changed situation and the relevance of the provisions of the Transfer of Property Act in context thereof. Mr.Salve has drawn our attention to the Rajamannar Committee report as quoted in the Narasimham Committee Report 1998, which reads as under : "The Rajamannar Committee appointed by the Government of India gave its report in 1977 pointing out the development of the law of mortgages and explaining how it had become completely anachronistic in the latter part of the 20th century where mortgages had become a very important instrument to facilitate development of commercial credit. The Rajamannar Committee's recommendations, that were extracted in the Narasimham Report (1998) stated".... thus a distinction was made in the original schemes as regards mortgages to which Europeans were parties mortgages where the properties were situated in the presidency towns, and mortgages where the mortgages were of native origin and mortgages where the property was situate in the mofussil. This distinction was based on the fact that

in the mofussil, it was the money lenders with their unscrupulous methods, who were, by and large, the persons lending against mortgage of immovable property ..... evidently, the situation that prevailed at the time of the enactment of the Transfer of Property Act 1882, justify the legislative action of the then Government of India in limiting the right of sale without the intervention of court ....economic conditions have vastly changed since the enactment of the Transfer of Property Act in 1882. The role of the unscrupulous money lenders dominating in the field of credit is no longer valid „, with our reliance on institutionalization of credit, the banks another financing institutions are the major moneylenders of credit today. In their dealings with their mortgagors, it is anachronistic to assume that they will adopt the unscrupulous moneylenders. (Paragraph 1.2.19). In fact in extending credit, the necessity for suitable safeguards to banks and other financing institutions is now rightly stressed. It is understandable that the legal framework is essentially conceived to deal with unscrupulous moneylenders is no longer appropriate to deal with credit given by banks and other financing institutions...". 44. As a matter of fact, the Narasimham Committee also advocates for a legal framework which may clearly define the rights and liabilities of the parties to the contract and provisions for speedy resolution of disputes, which is a sine qua non for efficient trade and commerce, especially for financial intermediation. Even the guidelines of the Reserve Bank of India in relation to classifying the NPA's while stressing the need of expeditious steps in taking a decision for classifying and identification of NPA's says, a system be evolved which should ensure that the doubts in asset classification are settled through specified internal channels within the time specified in the guidelines. It is thus clear that while recommending speedier steps for recovery of the debts it is envisaged by all concerned that within the legal framework, such provisions may be contained which may curtail the delays. Nonetheless dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved. 45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non- compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in

reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub- section (4) of Section 13 of the Act. 46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to notice under Section 13(2) of the Act more particularly for the reason that normally in the event of non- compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13 (1) of the Act the creditor is empowered to enforce the security himself without intervention of the Court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets etc. 47. This will also be in keeping with the concept of right to know and lender's liability of fairness to keep the borrower informed particularly the developments immediately before taking measures under sub-section (4) of Section 13 of the Act. It will also cater the cause of transparency and not secrecy and shall be conducive in building an atmosphere of confidence and healthy commercial practice. Such a duty, in the circumstances of the case and the provisions is inherent under Section 13(2) of the Act. 48. The next safeguard available to a secured borrower within the framework of the Act is to approach the Debt Recovery Tribunal under Section 17 of the Act. Such a right accrues only after measures are taken under sub-section (1) of Section 13 of the Act. 49. On behalf of one of the respondents Shri Andhyarujina submitted that as a matter of fact Section 13 of the Act leaves more scope and provides wider protection to

the borrower as compared to in the case of English mortgage and in connection with the above submission it has been pointed out that in case of an English mortgage there is no scope of intervention of the court unless a case is made out before the court that action of the mortgagee is fraudulent or it is a case of the like nature. Otherwise as provided under sub-section (3) of Section 69 a mortgagor shall only be entitled to the damages for the wrongful or irregular sale of the property. Whereas, it is submitted, under the Securitisation rules it is provided that before putting the property on sale the authorized officer has to obtain the valuation of immovable property, a reserved price is to be fixed and a notice of 30 days before sale is to be served on the borrower. In this connection, Rule 9, the relevant rule, of the Security Interest (Enforcement) Rules, 2002 is quoted :"9. Time of sale, issues of sale certificate and delivery of possession, etc.- (1) No sale of immovable property under these rules shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or notice of sale has been served to the borrower. (2) The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorized officer and shall be subject to confirmation by the secured creditor: xxx xxx xxx

(3) to 10) xxx xxx xxx" Therefore, during this period which would be in all more than 60 days it would be open for a borrower to approach the Debt Recovery Tribunal and file a petition for any appropriate relief and if a case is so made out, he can even get a relief of stay, in exercise of ancillary power which vest in the Tri bunal as per decisions referred and reported in 1969 (2) SCR p.65, ITO vs. Mohd.Kunhi and 1999 (6) SCC p.755, Allahabad Bank, Calcutta Vs. Radha Krishna Maity & Ors. Again referring to Section 19 of the Act it is pointed out that in case in the end the Tri bunal finds that the secured assets have been wrongfully transferred or taken possession of an order for return of such assets can be passed and the borrower in that even shall also be entitled for compensation.

50. It has also been submitted that an appeal is entertainable before the Debt Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debt Recovery Tribunal or the appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr. Salve one of the counsel for respondents that there would be no bar to approach the civil court. Therefore, it cannot be said no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debt Recovery Tribunal or appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under

this Act". That is to say the prohibition covers even matters which can be taken cognizance of by the Debt Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debt Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13.

51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or their claim may be so absurd and untenable which may not require any probe, whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely V.Narasimhachariar (supra) p.135 at p.141 and 144, a judgment of the learned single Judge where it is observed as follows in para 22: "The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the Court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: 'Adams v. Scott, (1859) 7 WR (Eng.) 213 (Z49). I need not point out that this restraint on the exercise of the power of sale will be exercised by Courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Rashbehary Ghose Law of Mortgages, Vol.II, Fourth Edn., page 784).
52. The other decision on which reliance has been placed is A.Batcha Saheb Vs. Nariman K.Irani & Anr., AIR 1955 Madras DB p.491 more particularly on paragraph 8.
53. We also find it appropriate to mention at this stage that in reply to submission made by Shri Dholakia on behalf of the guarantors that even though a guarantor may stand discharged as envisaged under Sections 133 and 135 of the Indian Contracts Act eg., where any variance in terms of the contract has been made without his consent, then too guarantor may be proceeded against and he will have no right to raise an objection, before measures have been taken against him under Section 13(4) of the Act

nor he could approach the civil court. It is submitted by the respondent in such cases civil court may have jurisdiction to entertain the case as character as a guarantor itself is denied.

54. In so far the argument advanced on behalf of the petitioners that by virtue of the provisions contained under sub-section (4) of Section 13 the borrowers lose their right of redemption of the mortgage. In reply it is submitted that rather such a right is preserved under sub-section (8) of Section 13 of the Act. Where a borrower tenders to the creditor the amount due with costs and expenses incurred, no further steps for sale of the property are to take place. In this connection, a reference has also been made by the learned Attorney General to a decision reported in 1977(3) SCC p.247, Naraindas Kavsondas Vs. S.A.Katam which provides that a mortgagor can exercise his right of redemption any time until the final sale of the property by execution of a conveyance. Sri Sibal, however, submits that it is the amount due according to the secured creditor which shall have to be deposited to redeem the property. Maybe so, some difference regarding the amount due may be there but it cannot be said that right of redemption of property is completely lost. In cases where no such dispute is there, the right can be exercised and in other cases the question of difference in amount may be kept open and got decided before sale of property.

55. We may then turn to the arguments raised on behalf of the petitioners that the remedy before the Debt Recovery Tribunal under Section 17 of the Act, is illusory burdened with onerous and oppressive condition of deposit of 75% of the amount of the demand notice before an appeal can be entertained by the Tribunal. We feel that it would be difficult to brush aside the challenge made to the condition of such a deposit. Sub-section (2) of Section 17 itself says that no appeal shall be entertainable unless the borrower has deposited the aforesaid sum of amount claimed. Much stress has been given in reply to the proviso to sub-section (2) of Section 17, according to which the Tribunal has power to waive or reduce the amount. While waiving the condition of deposit the amount or reducing it, the Tribunal is required to record reasons for the same. It is submitted for the respondents that in an appropriate case, the DRT which is presided over by a Member of a Higher Judicial Service, would exercise its discretion and may waive or reduce the amount required to be deposited in deserving cases. It is, therefore, not an absolute condition which must in all cases and all circumstances be fulfilled irrespective of the special features of a particular case.

56. The contention of the petitioners is that in the first place such an oppressive provision should not have been made at all. It works as a deterrent or as a disabling provision impeding access to a forum which is meant for redressal of the grievance of a borrower. It is submitted where the possession of the secured assets has already been taken over or the management of the secured assets of the borrower including the right to transfer the same, in that event it would not at all be necessary to burden the bor-

rower doubly with deposit of 75% of the demand amount. In a situation where the possession of the secured assets have already been taken over or its management, it is highly unreasonable further to ask for 75% of the amount claimed before entertaining the grievance of the borrower.

57. Secondly, it is submitted that, it would not be possible for a borrower to raise funds to make deposit of the huge amount of 75% of the demand, once he is deprived of the possession/management of the property namely, the secured assets. Therefore, the condition of deposit is a condition of impossibility which renders the remedy made available before the DRT as nugatory and illusory. The learned Attorney General refutes the aforesaid contention. It is further submitted that such a condition of pre-deposit has been held to be valid by this Court earlier and a reference has been made to a decisions reported in 1975 (2) SCC p.175 at p.202, Anant Mills Co.Ltd. Vs. State of Gujarat to submit that such a provision is made to regulate the exercise of the right of an appeal conferred upon a person. The purpose is that right of appeal may not be abused by any recalcitrant party and there may not be any difficulty in enforcing the order appealed against if ultimately it is dismissed and there may be speedy recovery of the amount of tax due to the corporation.
58. In another decision relied upon reported in 1980 (Supp.) SCC p.574, Seth Nandlal Vs. State of Haryana there was no provision for a waiver or reduction of amount of pre- deposit, it is submitted, even that the provision was held to be valid as the purpose was to prevent frivolous appeals and revisions which impedes the implementation of the ceiling policy. Referring to yet another decision reported in 1988(4) SCC p.402, Vijay Prakash D.Mehta and Anr. Vs. Collector of Customs (Preventive) Bombay, it is submitted that right to appeal is neither an absolute right nor an ingredient of natural justice which principles are to be followed in judicial and quasi-judicial proceedings. A right of appeal is a statutory right and it can be circumscribed by the conditions. We also find that there are further observations to the effect that the condition is for the purpose to act in torrorem to make the people comply with the provisions of the law. 1993 (1) SCC p.22, Shyam Kishore & Ors. Vs. Municipal Corporation of Delhi, has been referred to submit that a similar provision was upheld without there being any provision for waiver of the condition. The submission is that such a provision as that of pre-deposit before maintaining an appeal is not unknown to law and there are several other statutes containing similar provisions. Emphasis is on the provision of waiver or reduction of the amount required to be paid which, it is submitted, strikes a balance between the right of a person to appeal and the right of the person appealed against for speedy recovery of his dues.
59. We may like to observe that proceedings under Section 17 of the Act, in fact are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a Forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing

a suit in civil court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act in the present case. We may refer to a decision of this Court reported in (1974) 2 SCC p. 393 Smt. Ganga Bai Vs. Vijay Kumar and Ors. where in respect of original and appellate proceedings a distinction has been drawn as follows:- ".....There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature and unless one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on basis of one sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one- sidedly in favour of the party, who, so far has alone been the party to decide the amount and the fact of default and classifying the dues as NPAs without participation/association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the concerned authority. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory.

61. In the case of Seth Nandlal (supra), while considering the question of validity of pre-deposit before availing the right of appeal the Court held "....right of appeal is a creature of the statute and while granting the right the legislature can impose conditions for the exercise of such right so long as the conditions are not so onerous as to amount to unreasonable restrictions rendering the right almost illusory. ...." (emphasis supplied). While making said observation this Court referred to the decision in the case of Anant Mills Co. Ltd. (supra). In both the above noted decisions this Court had negated the plea raised against pre-deposit but in the case of Seth Nandlal (supra) it was found that the condition was not so oner-

ous since the amount sought to be deposited was meager and that too was confined to the landholding tax payable in respect of the disputed area i.e. the area or part thereof which is declared surplus by the Prescribed Authority (emphasis supplied) after leaving the permissible area to the appellant. In the above circumstances it was found that even in the absence of a provision conferring discretion on the appellate authority to waive or reduce the amount of pre- deposit, it was considered to be valid, for the two reasons indicated above. The facts of the case in hand are just otherwise.

62. As indicated earlier, the position of the appeal under Section 17 of the Act is like that of a suit in the court of the first instance under the Code of Civil Procedure. No doubt in suits also it is permissible, in given facts and circumstances and under the provisions of the law to attach the property before a decree is passed or to appoint a receiver and to make a provision by way of interim measure in respect of the property in suit. But for obtaining such orders a case for the same is to be made out in accordance with the relevant provisions under the law. There is no such provision under the Act.
63. Yet another justification which has been sought to be given for the requirement of deposit is that the secured assets which may be taken possession of or sold may fall short of the dues therefore such a deposit may be necessary. We find no merit in this submission too. In such an eventuality the recourse may have to be taken to sub-section 10 of Section 13 where a petition may have to be filed before the Tribunal for the purpose of making up of the short-fall.
64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii)there is no determination of the amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75% of the amount claimed by no means would be a meager amount (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.
65. Shri Salve, learned senior counsel, appearing on behalf of the respondents, submits that so far it relates to the provision as contained under Section 9 of the Act, it is for the purposes of assets reconstruction. The steps as provided to be taken for the purpose, are different from those provided in Chapter III relating to enforcement of security interest contained in Section 13 of the Act. Reconstruction companies are separately registered for the purpose according to the guidelines of the Reserve Bank of India. It is for the purpose of proper management of the business of the borrower.

It is aimed at continuance of the business of the company by resorting to the measure as provided under Section 9 of the Act. It is submitted that the apprehensions as expressed that the defaulting party may set up an asset reconstruction company is misconceived nor there is any substance in the submission that company in default may constitute such a company to defeat the interest of the creditor. A reconstruction company is required to be registered and the Reserve Bank of India is the authority to issue such a certificate. In the guidelines framed by the Reserve Bank of India enough safeguards have been provided to see that the persons setting up such a company are not directly or indirectly in the management of the asset reconstruction of the borrower. What is envisaged under Section 9 is, the taking over of the management of the business of the borrower company and the provisions as contained under Section 15 of the Act are referable to Section 9 and not to Section 13 of the Act. He has further submitted that the restrictions against legal remedy is relating to measures taken under Section 13 of the Act and not under Section 9 of the Act for reconstruction of the assets of a borrowing company. A reconstruction company by the method of reconstruction of the debt, manages the affair in a manner so as to revive the company and liquidate the debts to whomsoever they may be due.

66. On behalf of the petitioners one of the contentions which has been forcefully raised is that existing rights of private parties under a contract cannot be interfered with, more particularly putting one party to an advantageous position over the other. For example, in the present case, in a matter of private contract between the borrower and the financing bank or institution through impugned legislation rights of the borrowers have been curtailed and enforcement of secured assets has been provided for without intervention of the court and above all depriving them the remedy available under the law by approaching to the civil court. Such a law, it is submitted, is not envisaged in any civilized society governed by rule of law. As discussed earlier as well, it may be observed that though the transaction may have a character of a private contract yet the question of great importance behind such transactions as a whole having far reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions more particularly when financing is through banks and financial institutions utilizing the money of the people in general namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact in the socio-economic drive of the country. The two aspects are inter- twined which are difficult to be separated. There have been many instances where existing rights of the individuals have been affected by legislative measures taken

in public interest. Certain decisions which have been relied on behalf of the respondents, on the point are 1951 SCR p.292, Ramaswamy Aiyengar Vs. Kailasa Thevar. In that case by enacting the Madras Agriculturalist's Relief Act, relief was given to the debtors who were agriculturists as a class, by sealing down their debts. The validity of the Act was upheld though it affected the individual interest of creditors. In Dahya Lala Vs. Rasul Mohd.Abdul Rahim, 1963(3) SCR p.1, the tenants under the Provisions of the Bombay Tenancy Act, 1939 were given protection against eviction and they were granted the status of protected tenant, who had cultivated the land personally six years prior to the prescribed date. It was found that the legislation was with the object of improving the economic condition of the peasants and for ensuring full and efficient use of land for agricultural purpose. By a statutory provision special benefit was conferred upon the tenants in Madras city where they had put up a building for residential or non-residential purposes and were saved from eviction, it did though affect the existing rights of the landlords. See also 1963 (Supp.)1 SCR p.282, Swami Motor Transports Pvt. Ltd. Vs. Shri Sankraswamigal Mutt and Raval & co. Vs. K.G.Ramachandran, 1974 (1) SCC p.424. Similarly it is also to be found that in the case reported in 2001(5) SCC p.546 Kanshi Ram Vs. Lachhman the law granting relief to the debtors protecting their property was upheld. Also see 1978(2) SCC 1, Pathumma Vs. State of Kerala, 1977(2) SCC p.670 Fatehchand Himmatlal Vs. State of Maharashtra, 1962(1) SCR p.852, Ramdhandas Vs. State of Punjab.

67. It is well known that in different states Rent Control legislations were enacted providing safeguards to the sitting tenants as against the existing rights of the landlords, which before coming into force of such law were governed by contract between the private parties. Therefore, it is clear that it has always been held to be lawful, whenever it was necessary in the public interest to legislate irrespective of the fact that it may affect some individuals enjoying certain rights. In the present we find that case the unrealized dues of banking companies and financial institutions utilizing public money for advances were mounting and it was considered imperative in view of recommendations of experts committees to have such law which may provide speedier remedy before any major fiscal set back occurs and for improvement of general financial flow of money necessary for the economy of the country that the impugned Act was enacted. Undoubtedly such a legislation would be in the public interest and the individual interest shall be subservient to it. Even if a few borrowers are affected here and there, that would not impinge upon the validity of the Act which otherwise serves the larger interest.

68. The main thrust of the petitioners as indicated in the earlier part of this judgment to challenge the validity of the impugned enactment is that no adjudicatory mechanism is available to the borrower to ventilate his grievance through an independent adjudicatory authority. Access to the justice, it is submitted, is hall-mark of our system. Section 34 of the Act

bars the jurisdiction of the civil courts to entertain a suit in matters of recovery of loans. The remedy of appeal available under the Act as contained in Section 17 can be availed only after measures have already been taken by the secured creditor under sub-section (4) of Section 13 of the Act which includes sale of the secured assets, taking over its management and all transferable rights thereto. Virtually it is no remedy at all also in view of the onerous condition of deposit of 75% of the claim of the secured creditor. Before filing an appeal under Section 17 of the Act, decision is to be taken in respect of all matters by the bank or financial institution itself which can hardly be said to be an independent agency rather they are a party to the transaction having unilateral power to initiate action under sub-section (4) of Section 13 of the Act. So far remedy under Article 226 of the Constitution of India is concerned, the submission is that it may not always be available since the dispute may be only between two private parties, the banking companies, co- operative Banks or financial institutions, foreign banks, some of them may not be authorities within the meaning of Article 12 of the Constitution of India against whom a writ petition could be maintainable. Thus the position that emerges is that a borrower is virtually left with no remedy. Where access to the court is prohibited and no proper adjudicatory mechanism is provided such a law is unconstitutional and cannot survive. In support of the aforesaid contentions besides others, reliance has particularly been placed upon a case reported in (1997) 3 SCC p.261, L.Chandrakumar vs. Union of India & Ors. and 2003(6) SCC 675, Surya Dev Rai vs. Ram Chander Rai & Ors.. A reference has also been made to the decision of Kihoto Hollohan (supra). In the case of L.Chandra Kumar (supra) it is held, some adjudicatory process through an independent agency is essential for determining the rights of the parties more particularly when the consequences which flow from the offending Act defeat the civil rights of a party.

69. On behalf of respondents time and again stress has been given on the contention that in a contractual matter between the two private parties they are supposed to act in terms of the contract and no question of compliance with the principles of natural justice arises nor the question of judicial review of such actions need to be provided for. However, at the very outset, it may be pointed that the contract between the parties as in the present cases, is no more as private as sought to be asserted on behalf of the respondents. If that was so in that event parties would be at liberty to seek redressal of their grievances on account of breach of contract or otherwise taking recourse to the normal process of lawas available, by approaching the ordinary civil courts. But we find that a contract which has been entered into between the two private parties, in some respects has been superseded by the statutory provisions or it may be said that such contracts are now governed by the statutory provisions relating to recovery of debts and bar of jurisdiction of the civil court to entertain any dispute in respect of such matters. Hence, it cannot be pleaded that the petitioners cannot complaint of the conduct of the banking companies and

financial institutions for whatever goes in between the two is absolutely a matter of contract between private parties, therefore, no adjudication may be necessary.

70. At this stage we may also take note of the arguments raised on behalf of the petitioners that in the present day world concept of lender's liability has also developed which cannot be ignored. We have already referred to certain facts in relation to this point that at one stage a statement was made at the floor of the House that it was necessary to legislate on lender's liability. No such Bill though seems to have been introduced. Certain decisions pertaining to the liability of the lenders have been cited on behalf of the petitioners and a few others by the learned counsel for the respondents. Learned counsel for the petitioners emphatically submitted that the Act is loaded against the borrowers and no provision regarding the liability of the lenders has been made in the Act. Given below are some of the cases on the point cited by the parties: KMC Co. Vs. Irving Trust Co., 757 F2d752 (6th Cir.1985), Palisades Properties, Inc. Vs. Brunetti, 44 NJ 117, 207 A2d 522, 531 (1965).

71. Arguments have been advanced as to how far principles of lender's liability are applicable. Whatever be the position, however, it cannot be denied that the financial institutions namely, the lenders owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties and the financing companies/institutions are not free to ignore performance of their part of the obligation as a party to the contract. They cannot be free from it. Irrespective of the fact as to whatever may have been held in decisions of some American courts, in view of the facts and circumstances and the terms of the contract and other details relating to those matter, that may or may not strictly apply, nonetheless even in absence of any such decisions or legislation, it is incumbent upon such financial institutions to act fairly and in good faith complying with their part of obligations under the contract. This is also the basic principle of concept of lender's liability. It cannot be a one-sided affair shutting out all possible and reasonable remedies to the other party, namely borrowers and assume all drastic powers for speedier recovery of NPAs. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The borrowers cannot be left remediless in case they have been wronged against or subjected to unfair treatment violating the terms and conditions of the contract. They can always plead in defence deficiencies on the part of the banks and financial institutions.

72. Shri Soli J.Sorabjee, learned Attorney General submits that basically there is a presumption in favour of the constitutionality of an enactment and unless it is found that a provision enacted results in palpably arbitrary consequences, courts refrain from declaring the law invalid as legislated by the legislature. In support of this contention, he has relied upon a decision of this Court reported in (1981) 4 SCC p.675, R.K.Garg V. Union of India. He has particularly drawn our attention to the following passage : "The first rule is that there is always a presumption in favour of the

constitutionality of a statute .... This rule is based on the assumption, judicially recognized and accepted, that the legislature understands and correctly appreciates the needs of its own people, its laws are directed to problems made manifest by experience ... Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method ... There may be crudities and inequities in complicated experimental economic legislation but on that account alone it cannot be struck down as invalid. The courts cannot ..... be converted into tribunals for relief from such crudities and inequities..... The Court must therefore adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. ....The Court must defer to legislative judgment in matters relating to social and economic policies and must not interference, unless the exercise of legislative judgment appears to be palpably arbitrary" (emphasis supplied).

73. The following observations have also been referred as made in Bhavesh D.Parish & Ors. v. Union of India & Anr., 2000 (5) SCC 471 at 486 : ".....it is necessary that while dealing with economic legislations, this Court, while not jettisoning its jurisdiction to curb arbitrary action or unconstitutional legislation, should interfere only in those few cases where the view reflected in the legislation is not possible to be taken at all" (emphasis supplied)

74. A reference has also been made for similar observations to the cases reported in 1980 (4) SCC p.507 at 513-514, Srinivas Enterprises v. Union of India and 1967 (1) SCR p.15 at p.36, Jalan Trading V. Union of India. While referring to the observations made in a case reported in 1962 (3) SCR p.786 at p.829-30, the Collector of Customs, Madras V. Nathella Samapathu Chetty, it is submitted that the intent of the Parliament shall not be defeated merely for the reason that it may operate a bit harshly on a small section of public where it may be necessary to make such provisions of achieving the desired objectives to ensure that the nefarious activities of smuggling etc. had to be necessarily curbed. In Fatehchand Himmatlal (supra) where debts of the agriculturists were wiped of, this Court observed : "Every cause claims its martyr and if the law, necessitated by practical considerations, makes generalizations which hurt a few, it cannot be helped by the Court. Otherwise, the enforcement of the Debt Relief Act will turn into an enquiry into scrupulous and unscrupulous creditors, frustrating through endless litigation, the instant relief to the indebted which is the promise of the legislature." [See p.689 para 44] Yet in another decision referred to reported in 1961 (3) SCR p.135, Kishanchand Arora Vs. Commissioner of Police, it has been held that absence of appeal does not necessarily render the legislation unreasonable. Provision for appeal is not an absolute necessity. For same propositions a reference has also been made to Chinta Lingam & Ors. v. Government of India & Ors., 1970 (3) SCC 768 at 772, where it has been observed that when the power has to

be exercised by one of the highest officers the fact that no appeal has been provided is not material. In respect of appellate provision once again our attention has been drawn to the observations made by this Court in 1979 (4) SCC 573 at p.582-83, paras 15 & 16, Organo Chemical Industries & Anr. Vs. Union of India & Ors., to the effect that an appeal is a desirable corrective but not an indispensable imperative. It is, however, further observed in this decision that it may all depend upon the nature of the subject matter, other available correctives and the possible harm flowing from the wrong orders.

75. In relation to the argument on behalf of the petitioners that they are entitled to be heard before a notice under sub-section (2) of Section 13 is issued failing which there is denial of principles of natural justice, a reference has been made to certain decisions to submit that in every case, it is not necessary to make a provision for providing a hearing. For example, in the case of a licensing statute, see 1961(3) SCR p.135, Kishan Chand Arora (supra). The other decisions referred to are : 1963 (2) SCR p.353 Lachhman Das V. State of Punjab, 1977 (2) SCC 256 at 262, Chairman, Board of Mining Examination v. Ramjee and 2002(3) SCC 496 at 504 para 7, Haryana Financial Corporation V. Jagdamba Oil Mills to submit that concept of natural justice is not a straight jacket formula. It, on the other hand, depends upon the facts of the case, nature of the enquiry, the rules under which the Tribunal is acting and what is to be seen that no one should be hit below the belt. Relationship between the creditor and the debtor, it is submitted, is essentially in the realm of a contract.

76. In regard to the submission made by the parties as indicated in preceding paragraphs, we would like to make it clear that issue of a notice to the debtor by the creditor does not attract the application of principles of natural justice. It is always open to tell the debtor what he owes to repay. No hearing can be demanded from the creditor at this stage. So far the provision of appeal is concerned, we have already discussed in the earlier part of the judgment that proceedings under Section 17 of the Act have been wrongly described as appeal before the Debt Recovery Tribunal. It is in fact a forum where proceedings are originally initiated in case of any grievance against the creditor in respect of any measure taken under sub-section (4) of Section 13 of the Act. Hence, the decisions on the point as to whether provision for an appeal is essential or not are not of any assistance in the facts of the present case.

77. It is also true that till the stage of making of the demand and notice under Section 13(2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of court with a bar to approach the court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated. So as to demonstrate that the reply of the borrower to the notice under Section 13(2) of the Act has been considered applying mind to it. The reasons howsoever brief that may be for not accepting the objections,

if raised in the reply, must be communicated to the borrower. True, presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest, but while resorting to such legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery.

78. It was sought to be argued that fairness cannot be a one way street. The plea of absence of natural justice lies ill in the mouth of chronic defaulters who have not paid the principal amounts admittedly due to the banks. The said argument pre-supposes admission of the liability by the borrowers and all of them to be chronic defaulters. It would only be pre-judging an issue. We hope it was not meant to be said that all those who defaulted according to the banks and financial institutions must be condemned unheard who might not deserve any hearing to place their side of the case, unless they must go through the crushing pre-conditions of deposit of 75% of the amount demanded over and above their secured assets already having been taken possession of. We feel this can well be one example of hitting below the belt.
79. Some submissions have been made pointing out that in certain circumstances it would not be clear as to in what manner the provisions of the Act would be workable. We feel the objections pointed out are not such which render the statute invalid or unconstitutional. Such problems about working of any particular provision of the Act in any particular factual situation, may be considered as and when it may arise. We, therefore, do not think it necessary to go into those questions.
80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows :-
81. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.
82. As already discussed earlier, on measures having been taken under sub-

section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debt Recovery Tribunal.

83. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition at it may deem fit and proper to impose.
84. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.
85. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.
86. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debt Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest.
87. We, therefore, subject to what is provided in paragraph 80 above, uphold the validity of the Act and its provisions except that of sub-section (2) of Section 17 of the Act, which is declared ultra vires of Article 14 of the Constitution of India.
88. Before we part with the case, we would like to observe that where a secured creditor has taken action under Section 13(4) of the Act, in such cases it would be open to borrowers to file appeals under Section 17 of the Act within the limitation as prescribed therefor, to be counted with effect from today.
89. The transfer cases, appeals and the petitions thus stand partly allowed limited to the extent indicated above. For the rest of the reliefs, they stand dismissed. Costs easy.