IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL No.8393 OF 2010
(Arising out of S.L.P.(C) No. 2240 of 2009)

ICICI Bank Limited ...
Appellant(s)

versus

Official Liquidator of
APS Star Industries Ltd. & Ors. ...
Respondent(s)

with

Civil Appeal Nos.8394-8406 of 2010 (@ SLP(C) Nos. 2241-2253/09),
Civil Appeal Nos.8407-8425 of 2010 (@ SLP(C) Nos. 2254-2272/09),
Civil Appeal No.8426 of 2010 (@ SLP(C) No. 25151/09),
Civil Appeal No.8427 of 2010 (@ SLP(C) No. 20617/09).

J U D G M E N T

S. H. KAPADIA, CJI

Leave granted.

2. The short question which we are required to decide in this batch of cases is – Whether inter se transfer of Non Performing Assets ("NPA" for short) by banks is illegal under Banking Regulation Act, 1949 ("BR Act, 1949" for short) as held by the Gujarat High Court in the impugned judgment? According to the impugned judgment(s), assignment of debts by banks inter

se is not an activity which is permissible under the said BR Act, 1949 and consequently all executed contracts of assignment of debts were illegal. According to the impugned judgment(s), the assignee banks were not entitled to substitution in place of original lender (assignor) in proceedings relatable to companies in liquidation pending in the Company Court.

Facts in Civil Appeal @ S.L.P. (C) No. 2240 of 2009:

3. On 31.3.2006 a Deed of Assignment was executed between Kotak Mahindra Bank Ltd. as assignee (Applicant) on one hand and ICICI Bank Ltd. as assignor. The recitals in the Deed show that ICICI Bank, in the course of its business, had granted various credit facilities to various borrowers (clients). These facilities are evidenced by various Financial Instruments executed by the borrowers and/or their respective guarantors/pledgers. In the recitals, it has been stipulated that ICICI Bank Ltd. as assignor was the absolute and beneficial owner of Financial Instruments and receivables thereunder. An aggregate of Rs. 52.45 crores being the principal amount outstanding under the trade credit facilities was due and payable by the borrowers to ICICI Bank Ltd. (assignee). The assignor had agreed to sell and assign to the assignee, Kotak Mahindra Bank Ltd., all debts together with interest on "as is where is" basis.

Kotak Mahindra Bank Ltd., in turn, agreed to acquire the said debts on "as is where is" basis. In consideration of Kotak Mahindra Bank Ltd. paying the purchase price to ICICI Bank Ltd. for purchase of the debts, the assignor agreed to assign absolutely unto the assignee on "as is where is" basis, without the assignee having any recourse to the assignor. Consequently, Kotak Mahindra Bank Ltd., assignee, became the full and absolute legal owner of the debts and as such the only person legally entitled to receive the repayments of debts. We quote hereinbelow the relevant provision of the Deed:

> **"2.2** On and from the date of the Agreement the Assignee and the Assignor hereby agree, undertake and confirm that notwithstanding (i) the costs, charges, expense, taxes and duties to be paid or incurred by the Assignee towards the realization of the Debt; and (ii) any settlement or compromise or restructuring of the Debt or the status of the Debt or creditworthiness of the Clients, the amounts to be paid by the Assignee towards Purchase Consideration in terms of the Agreement shall remain irrevocable and unconditional obligation of the Assignee hereof:
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> 2.2.1 The Assignee shall have the sole and absolute right of collecting all amounts representing the Debts in such manner as the Assignee may in its absolute discretion determines;
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> 2.2.2 The Assignor shall not be subject to any duties and/ or obligations in respect of the Financial Instruments;
>
> 2.2.3 The Assignee shall have all the rights and obligations under the Financial Instruments as if they were executed by the Clients in favour of the

Assignee."

4. One of the borrowers of ICICI Bank Ltd. at the relevant time was M/s A.P.S. Star Industries Ltd., a company which subsequently went under liquidation. By way of Company Application in the pending winding up proceedings before the Company Court, Kotak Mahindra Bank Ltd. moved Company Application for being substituted in place of original secured creditor, ICICI Bank Ltd. This was pursuant to the Deed of Assignment dated 31.3.2006. The Company Application for substitution was moved at a stage of provisional/final winding up proceedings. Before the Company Court, Kotak Mahindra Bank Ltd. submitted that, as per BR Act, 1949 read with the Guidelines of Reserve Bank of India dated 13.7.2005, sale and purchase of debts, including the rights in immovable properties being secured creditors, can be sold by loaners and purchased by banks/financial institutions as assignees. According to Kotak Mahindra Bank Ltd., since proceedings for winding up were pending before the Company Court at various stages including the stage for disposal of properties of the companies in liquidation, they had approached the Company Court to be substituted in place of the original secured creditor, ICICI Bank Ltd. Before the Company Court, the secured creditor, ICICI Bank

Ltd. admitted the execution of the Deed of Assignment dated 31.3.2006. They supported the substitution of Kotak Mahindra Bank Ltd. in the said application, however, such substitution was objected by the borrowers, who contended that the deed of assignment had not lawfully conveyed rights to the assignee to step into the shoes of ICICI Bank Ltd. (secured creditor). They raised various contentions including absence of proper conveyance and payment of stamp duty which aspects were not gone into by the impugned judgment of the Division Bench before us. The Company Court came to the conclusion that the impugned Deed was not presented in terms of Section 21 and also that the impugned Deed did not meet the requirement of the said section. However, the Company Court clarified that these were its prima facie observations. On the acquisition of rights by Kotak Mahindra Bank Ltd., the Company Court, however, held that the claimed rights were not acquired by the assignee, Kotak Mahindra Bank Ltd., through the process known in law and therefore they cannot be permitted to be substituted in place of ICICI Bank Ltd. as secured creditor of the company in liquidation. Aggrieved by the said decision of the Company Court, the assignee, Kotak Mahindra Bank Ltd. carried the matter in appeal to the Division Bench of the Gujarat High Court as can be seen from the impugned order. A number of questions of law were

framed, e.g., whether the Company Court was justified in holding that a separate documentation of assignment of each loan transaction was required to be registered; whether the Company Court was justified in concluding that the Deed was not registered as per the provisions of Section 60 of the Registration Act, 1908 as also the question as to whether the Company Court was right in holding that rights were not acquired by the assignee, Kotak Mahindra Bank Ltd., through the process known to law and therefore they cannot be allowed to be substituted in place of the secured creditor of the company in liquidation, namely, ICICI Bank Ltd.

5. At this stage, it may be noted that by the impugned judgment, the High Court upheld the order of the Company Court only on the ground that assignment of debts by banks is not an activity which is permissible under the BR Act, 1949 and consequently the impugned Deed(s) was illegal and the assignee bank(s) was not entitled to substitution in place of ICICI Bank Ltd. (assignor). The Division Bench has not examined the other questions referred to above.

Submissions:

6. Shri Harish N. Salve, learned senior counsel, appearing

on behalf of the appellants submitted that the Division Bench of the High Court erred in holding that in assigning debts with underlying security the assignor banks were trading in debts which was not permissible under the BR Act, 1949 because the assignor bank had never purchased debts, it had advanced loans against security which was a part of its banking business. That, it was only when the account became NPA that the assignor bank decided to dispose of the debt(s) which was its asset along with the underlying security. Similarly, the assignee bank, Kotak Mahindra Bank Ltd., which acquired the debt along with the underlying security also did not sell the debt or the underlying security acquired as per RBI Guidelines. On the contrary, the assignee bank seeks to enforce recovery. Therefore, according to the learned counsel, neither the assignor bank nor the assignee bank ever traded in the debts as wrongly held by the impugned judgment. According to the learned senior counsel, there is a fundamental error in the approach of the High Court in the matter of interpretation of BR Act, 1949. That, "banking company" as defined in Section 5(c) read with Section 5(d) is, in the first instance, a company incorporated under the Companies Act, 1956. That, such companies are juridical entities which are entitled to assign their debts. That, unsecured debts are assignable as actionable claims under Transfer of Property Act,

1882 ("TP Act" for short) whereas secured debts such as mortgages were transferable by way of conveyance. Reliance in this connection was placed on the definition of the words "actionable claims" read with Sections 5, 6 and 8 of the TP Act. According to the learned counsel, it is clear from Section 2 of the BR Act, 1949 that the provisions of that Act are in addition to and not in derogation of the Companies Act, 1956 or any other law for the time being in force. Therefore, according to the learned counsel, in order to take away the effect of the TP Act, there should be something in the BR Act, 1949 in the form of express provision so as to exclude the provisions of the TP Act and in the absence of express prohibition the provisions of the TP Act stand excluded. Therefore, according to the learned counsel, there is no merit in the contention advanced on behalf of the borrowers that assignment of debts is ultra vires Section 5 read with Section 6 of the BR Act, 1949. According to the learned counsel, Section 5(b) of the BR Act, 1949 refers to the core activity of a bank, however, according to the learned counsel, Section 5(b) is not exhaustive, the said sub-section does not specify the range of activities that can be carried on by a bank for coordination of the banking business. According to the learned counsel, assignment is not limited to only NPAs but to debts in general. According to the learned counsel, as per Section 6(1)(a) of the BR Act, 1949

lending or advancing of money is indisputably a core activity of the bank. However, realization of such loans is an integral part of the core activity. In the alternative, it was submitted that, in any event, an activity of assignment of debt would fall within five of the clauses in Section 6(1) of the BR Act, 1949, namely, clause (a), clause (c), clause (g), clause (l) and clause (n). According to the learned counsel, only prohibition under the BR Act, 1949 so far as the business of a bank is concerned is contained in Sections 8 and 9 and neither of the said provisions limits or prohibits assignment of debts. According to the learned counsel, there is one more error in the impugned judgment. According to the High Court, Parliament had enacted Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("SARFAESI Act" for short) because the BR Act, 1949 did not permit banks to assign debts; that the SARFAESI Act is an exclusive Act for assignment of debts and that the said SARFAESI Act permitted banks to assign debts not inter se but only to certain specified entities like Asset Management Companies ("AMC" for short)/ Asset Reconstruction Companies. According to the learned counsel, the High Court had failed to appreciate the object of the SARFAESI Act. It has failed to appreciate the provisions of that Act. According to the learned counsel, the concept of securitization is an economic and

commercial concept; that, "asset construction" has been defined under Section 2(b) as acquisition by any securitization company or reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realization of such financial assistance; that, the expression "financial assistance" was limited to loans and advances given by banks or financial institutions; that Section 5 of the SARFAESI Act recognizes securitization as acquisition of any financial assets; that, securitization is a matter of contract and Section 5 of the SARFAESI Act makes a special machinery where financial assets of banks are acquired. According to the learned counsel, this concept of securitization is a totally new concept as far as India is concerned and consequently the SARFAESI Act has no relevance as far as the issue in hand is concerned. Coming to the RBI Guidelines, learned counsel submitted that RBI is a regulator which has considered assignment of NPA not merely as part of the business of banking but also something which is conducive to the banking business; that, the RBI directives and guidelines have a statutory flavour and consequently if one goes through the said Guidelines they clearly indicate that banking is not confined only to the core activities enumerated in Section 5(b) of the BR Act, 1949.

7. One of the arguments advanced before us on behalf of the borrowers was that before the High Court, Union of India had taken a position contra to the stand taken by RBI that trading in debts was not permissible under BR Act, 1949. In this connection, learned counsel appearing for the appellants submitted that Union of India, Ministry of Banking was never a party to the proceedings before the Company Court; that, in the winding up proceedings the BIFR was a party along with the Commissioner of Central Excise as claimant. Before the Company Court, the learned ASG appeared on behalf of BIFR and Central Excise Department; that, no affidavit was filed by the Union of India commenting on the RBI guidelines. In the circumstances, learned counsel for the appellants submitted that position taken on behalf of the Union of India before the Company Court was not relevant. Learned counsel further pointed out that RBI appeared before the Company Court and supported the case of the appellants herein by placing reliance on their Guidelines. For the aforestated reasons, learned counsel submitted that the impugned judgment is erroneous and is liable to be set aside.

8. In reply, Shri T.R. Andhyarujina, learned senior counsel appearing for the borrower, inter alia submitted that the assignment of financial instruments in possession of ICICI Bank

Ltd. to Kotak Mahindra Bank Ltd., transfers not only the right of recovering debt but also transfers the obligations under the financial instruments "as if the said financial instruments were executed by the clients of ICICI Bank in favour of the assignee". That, the assignment of a debt can never carry with it the assignment of the obligations of the assignor. Unless there is a novation of the contract by all parties, there cannot be a transfer of the obligations of the assignor. In this connection, Shri Andhyarujina relied upon Section 130 of the TP Act, 1882. Therefore, according to the learned counsel, such an assignment cannot be legally sustained without novation of original contract executed by the assignor and the debtor. Consequently, such assignment cannot under any circumstances come within the permissible mode of business under Section 6(1) of the BR Act, 1949. According to the learned counsel, there is no merit in the argument of the appellant that the words in Section 6 of the BR Act, 1949 "in addition to the business of banking" itself give to the ICICI Bank (assignor) the right to carry on all kinds of activities including the authority to assign debts owed to them irrespective of the enumerated items in Section 6(1)(a) to (o). According to the learned counsel for the borrower, the "business of banking" is found in the definition of "banking" and "banking company" in Sections 5(b) and (c) and restricts "banking

business" only to accepting for the purpose of lending or investment of deposits of money. In other words, according to the learned counsel, the business of banking is restricted by the BR Act, 1949 only to hard core, traditional concept of banking. That, there cannot be an activity of assigning debts by accepting deposits under Sections 5(b) and 5(c). Learned counsel further submitted that securitization involves assignment of debts under the said SARFAESI Act. In this connection, learned counsel placed reliance on Section 5 of that Act which inter alia states that securitization company or reconstruction company may "acquire" financial assets of a bank by entering into an agreement for the transfer of the financial assets. Such acquisition can only be if the originator assigns his debt to the securitization company. According to the learned counsel, the Parliament has now prescribed the only legal way of transferring financial assets under the SARFAESI Act which would include debts due to a bank (NPA or otherwise), by transfer to any securitization company or reconstruction company. Therefore, according to the learned counsel, there is no other legal way of transferring financial assets including dues due to bank except under the SARFAESI Act, which has no application in the present case as the said Act allows such transfers only in favour of specified companies namely, securitization company or reconstruction

company and not in favour of banks or any other financial institutions. As regards NPA Norms of RBI, learned senior counsel submitted that RBI has not issued directives under Section 35A; that the relevant circular is by way of guidelines and is entitled "RBI Prudential Norms on Income Recognition Asset Classification and Provisioning Pertaining to Advances" dated 30th August, 2001. Lastly, learned counsel submitted that assignment of debt by ICICI Bank is not a mode of recovery. According to the learned counsel, assignment of debt and recovery of debt are two different concepts. When there is recovery, the debt is totally extinguished whereas in the case of assignment the debt is not extinguished, the debt remains, the debtor remains, only the creditor changes. That, the assignee Bank cannot be said to be recovering debt when it in fact assigns the debt because both the debtor and the debt continue to exist and they are not extinguished. In the written submissions submitted on behalf of the borrower, one additional point is taken. According to the borrower, in the present batch of cases all rights and liabilities have crystallized on the date of the winding up order and, therefore, assignment of debt by a bank cannot be permitted after the company is ordered to be wound up as that would amount to violating the provisions of the Companies Act, 1956. For the afore-stated reasons, the learned

counsel submitted that no interference is called for with the impugned judgment(s) and the appeals preferred by the assignor deserve to be dismissed.

9. **Issues:**

(i) Whether the Gujarat High Court was right in holding that assignment of debts by banks inter se is not an activity permissible under the BR Act, 1949 and consequently all executed contracts of assignment of debts were illegal?

(ii) Whether the High Court was right in holding that the assignee bank (s) was not entitled to substitution in place of the original lendor (assignor) in proceedings relating to companies in liquidation pending in the Company Court?

10. **Reasons and Findings:**

(i) On the issue concerning assignment of debts by bank inter se

Before dealing with Issue No. (i), we need to quote hereinbelow relevant provisions of BR Act, 1949:

> **"2 - Application of other laws not barred**
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> The provisions of this Act shall be in addition to, and not, save as hereinafter expressly provided, in derogation of the Companies Act, 1956 (1 of 1956), and any other law for the time being in force.
>
> **5 - Interpretation**
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> In this Act, unless there is anything repugnant in the

subject or context, -

(b) "banking" means the accepting, for the purpose of lending or investment, of deposits of money from the public, repayable on demand or otherwise, and withdrawal by cheque, draft, order or otherwise;

(c) "banking company" means any company which transacts the business of banking in India;

Explanation.--Any company which is engaged in the manufacture of goods or carries on any trade and which accepts deposits of money from the public merely for the purpose of financing its business as such manufacturer or trader shall not be deemed to transact the business of banking within the meaning of this clause;

(ca) "banking policy" means any policy which is specified from time to time by the Reserve Bank in the interest of the banking system or in the interest of monetary stability or sound economic growth, having due regard to the interests of the depositors, the volume of deposits and other resources of the bank and the need for equitable allocation and the efficient use of these deposits and resources;

(d) "company" means any company as defined in section 3 of the Companies Act, 1956 (1 of 1956); and includes a foreign company within the meaning of section 591 of that Act;

(1) "Reserve Bank" means the Reserve Bank of India constituted under section 3 of the Reserve Bank of India Act, 1934 (2 of 1934);

6 - Forms of business in which banking companies may engage

(1) In addition to the business of banking, a banking company may engage in any one or more of the following forms of business, namely:-

(a) the borrowing, raising, or taking up of money; the lending or advancing of money either upon or without security; the drawing, making, accepting, discounting, buying, selling, collecting and dealing in bills of exchange, hoondees, promissory notes, coupons, drafts, bills of lading, railway receipts, warrants, debentures, certificates, scrips and other instruments and securities whether transferable or negotiable or not; the granting and issuing of letters of credit, traveller's cheques and circular notes; the buying, selling and dealing in bullion and specie; the buying and selling of foreign exchange including foreign bank notes; the acquiring, holding, issuing on commission, underwriting and dealing in stock, funds, shares, debentures, debenture stock, bonds, obligations, securities and investments of all kinds; the purchasing and selling of bonds, scrips or other forms of securities on behalf of constituents or others, the negotiating of loans and advances; the receiving of all kinds of bonds, scrips or valuables on deposit or for safe custody or otherwise; the providing of safe deposit vaults; the collecting and transmitting of money and securities;

(f) managing, selling and realising any property which may come into the possession of the company in satisfaction or part satisfaction of any of its claims;

(g) acquiring and holding and generally dealing with any property or any right, title or interest in any such property which may form the security or part of the security for any loans or advances or which may be connected with any such security;

(l) selling, improving, managing, developing, exchanging, leasing, mortgaging, disposing of or turning into account or otherwise dealing with all or any part of the property and rights of the company;

(n) doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company;

(o) any other form of business which the Central

Government may, by notification in the Official Gazette, specify as a form of business in which it is lawful for a banking company to engage.

(2) No banking company shall engage in any form of business other than those referred to in sub-section (1).

8 - Prohibition of trading

Notwithstanding anything contained in section 6 or in any contract, no banking company shall directly or indirectly deal in the buying or selling or bartering of goods, except in connection with the realisation of security given to or held by it, or engage in any trade, or buy, sell or barter goods for others otherwise than in connection with bills of exchange received for collection or negotiation or with such of its business as is referred to in clause (i) of sub-section (1) of section 6:

9 - Disposal of non-banking assets

Notwithstanding anything contained in section 6, no banking company shall hold any immovable property howsoever acquired, except such as is required for its own use, for any period exceeding seven years from the acquisition thereof or from the commencement of this Act, whichever is later or any extension of such period as in this section provided, and such property shall be disposed of within such period or extended period, as the case may be:

Provided that the banking company may, within the period of seven years as aforesaid deal or trade in any such property for the purpose of facilitating the disposal thereof:

Provided further that the Reserve Bank may in any particular case extend the aforesaid period of seven years by such period not exceeding five years where it is satisfied that such extension would be in the interests of the depositors of the banking company.

12. Regulation of paid-up capital, subscribed capital and authorised capital and voting rights of

shareholders

(1) No banking company shall carry on business in India, unless it satisfies the following conditions, namely:-

(i) that the subscribed capital of the company is not less than one-half of the authorised capital, and the paid-up capital is not less than one-half of the subscribed capital and that, if the capital is increased, it complies with the conditions prescribed in this clause within such period not exceeding two years as the Reserve Bank may allow;

(ii) that the capital of the company consists of ordinary shares only or of ordinary shares or equity shares and such preferential shares as may have been issued prior to the 1st day of July, 1944:

Provided that nothing contained in this sub-section shall apply to any banking company incorporated before the 15th day of January, 1937.

(2) No person holding shares in a banking company shall, in respect of any shares held by him, exercise voting rights on poll in excess of ten per cent of the total voting rights of all the shareholders of the banking company.

17. Reserve Fund

(1) Every banking company incorporated in India shall create a reserve fund and shall, out of the balance of profit of each year as disclosed in the profit and loss account prepared under section 29 and before any dividend is declared, transfer to the reserve fund a sum equivalent to not less than twenty per cent of such profit.

(1A) Notwithstanding anything contained in sub-section(1), the Central Government may, on the

recommendation of the Reserve Bank and having regard to the adequacy of the paid-up capital and reserves of a banking company in relation to its deposit liabilities, declare by order in writing that the provisions of sub-section (1) shall not apply to the banking company for such period as may be specified in the order:

Provided that no such order shall be made unless, at the time it is made, the amount in the reserve fund under sub-section (1), together with the amount in the share premium account is not less than the paid-up capital of the banking company.

18. Cash reserve

(1) Every banking company, not being a scheduled bank, shall maintain in India by way of cash reserve with itself or by way of balance in a current account with the Reserve Bank, or by way of net balance in current accounts or in one or more of the aforesaid ways, a sum equivalent to at least three per cent of the total of its demand and time liabilities in India as on the last Friday of the second preceding fortnight and shall submit to the Reserve Bank before the twentieth day of every month a return showing the amount so held on alternate Fridays during a month with particulars of its demand and time liabilities in India on such Fridays or if any such Friday is a public holiday under the Negotiable Instruments Act, 1881 (26 of 1881), at the close of business on the preceding working day.

Explanation.--In this section, and in section 24,-

(a) "liabilities in India" shall not include-

(i) the paid-up capital or the reserves or any credit balance in the profit and loss account of the banking company;

(ii) any advance taken from the Reserve Bank or from

the Development Bank or from the Exim Bank or from the Reconstruction Bank or from the National Housing Bank or from the National Bank or from the Small Industries Bank by the banking company;

(iii) in the case of a Regional Rural Bank, also any loan taken by such bank from its Sponsor Bank;

(b) "fortnight" shall mean the period from Saturday to the second following Friday, both days inclusive;

(c) "net balance in current accounts" shall, in relation to a banking company, mean the excess, if any, of the aggregate of the credit balances in current account maintained by that banking company with State Bank of India or a subsidiary bank or a corresponding new bank over the aggregate of the credit balances in current account held by the said banks with such banking company;

(d) for the purposes of computation of liabilities, the aggregate of the liabilities of a banking company to the State Bank of India, a subsidiary bank, a corresponding new bank, a regional rural bank, another banking company, a co-operative bank or any other financial institution notified by the Central Government in this behalf, shall be reduced by the aggregate of the liabilities of all such banks and institutions to the banking company;

(e) the expression "co-operative bank" shall have the meaning assigned to it in clause (cci) of section 56.

(2) The Reserve Bank may, for the purposes of this section and section 24, specify from time to time, with reference to any transaction or class of transactions, that such transaction or transactions shall be regarded as liability in India of a banking company and, if any question arises as to whether any transaction or class of transactions shall be regarded for the purposes of this section and section 24 as liability in India of a banking company, the decision of the Reserve Bank

thereon shall be final.

20. Restrictions on loans and advances

(1) Notwithstanding anything to the contrary contained in section 77 of the Companies Act, 1956 (1 of 1956), no banking company shall,-

(a) grant any loans or advances on the security of its own shares, or-

(b) enter into any commitment for granting any loan or advance to or on behalf of-

(i) any of its directors,

(ii) any firm in which any of its directors is interested as partner, manager, employee or guarantor, or

(iii) any company [not being a subsidiary of the banking company or a company registered under section 25 of the Companies Act, 1956 (1 of 1956), or a Government company of which or the subsidiary or the holding company of which any of the directors of the banking company is a director, managing agent, manager, employee or guarantor or in which he holds substantial interest, or

(iv) any individual in respect of whom any of its directors is a partner or guarantor.

(2) Where any loan or advance granted by a banking company is such that a commitment for granting it could not have been made if clause (b) of sub-section (1) had been in force on the date on which the loan or advance was made, or is granted by a banking company after the commencement of section 5 of the Banking Laws (Amendment) Act, 1968(58 of 1968), but in pursuance of a commitment entered into before such commencement, steps shall be taken to recover the

amounts due to the banking company on account of the loan, or advance together with interest, if any, due thereon within the period stipulated at the time of the grant of the loan or advance, or where no such period has been stipulated, before the expiry of one year from the commencement of the said section 5:

Provided that the Reserve Bank may, in any case, on an application in writing made to it by the banking company in this behalf, extend the period for the recovery of the loan or advance until such date, not being a date beyond the period of three years from the commencement of the said section 5, and subject to such terms and conditions, as the Reserve Bank may deem fit:

Provided further that this sub-section shall not apply if and when the director concerned vacates the office of the director of the banking company, whether by death, retirement, resignation or otherwise.

(3) No loan or advance, referred to in sub-section (2), or any part thereof shall be remitted without the previous approval of the Reserve Bank, and any remission without such approval shall be void and of no effect.

(4) Where any loan or advance referred to in sub-section (2), payable by any person, has not been repaid to the banking company within the period specified in that subsection, then, such person shall, if he is a director of such banking company on the date of the expiry of the said period, be deemed to have vacated his office as such on the said date.

Explanation.--In this section-

(a) "loans or advance" shall not include any transaction which the Reserve Bank may, having regard to the nature of the transaction, the period within which, and the manner and circumstances in which, any amount due on account of the transaction is likely to be realised, the interest of the depositors and other

relevant considerations, specify by general or special order as not being a loan or advance for the purpose of this section;

(b) "director" include a member of any board or committee in India constituted by a banking company for the purpose of managing, or for the purpose of advising it in regard to the management of, all or any of its affairs.

(5) If any question arises whether any transaction is a loan or advance for the purposes of this section, it shall be referred to the Reserve Bank, whose decision thereon shall be final.

21 - Power of Reserve Bank to control advances by banking companies

(1) Where the Reserve Bank is satisfied that it is necessary or expedient in the public interest or in the interests of depositors or banking policy so to do, it may determine the policy in relation to advances to be followed by banking companies generally or by any banking company in particular, and when the policy has been so determined, all banking companies or the banking company concerned, as the case may be, shall be bound to follow the policy as so determined.

(2) Without prejudice to the generality of the power vested in the Reserve Bank under sub-section (1) the Reserve Bank may give directions to banking companies, either generally or to any banking company or group of banking companies in particular, as to-

(a) the purposes for which advances may or may not be made,

(b) the margins to be maintained in respect of secured advances,

(c) the maximum amount of advances or other financial accommodation which, having regard to the paid-up

capital, reserves and deposits of a banking company and other relevant considerations, may be made by that banking company to any one company, firm, association of persons or individual,

(d) the maximum amount up to which, having regard to the considerations referred to in clause (c),guarantees may be given by a banking company on behalf of any one company, firm, association of persons or individual, and

(e) the rate of interest and other terms and conditions on which advances or other financial accommodation may be made or guarantees may be given.

3) Every banking company shall be bound to comply with any directions given to it under this section.

22 - Licensing of banking companies

(1) Save as hereinafter provided, no company shall carry on banking business in India unless it holds a licence issued in that behalf by the Reserve Bank and any such licence may be issued subject of such conditions as the Reserve Bank may think fit to impose.

23. Restrictions on opening of new, and transfer of existing, places of business

(1) Without obtaining the prior permission of the Reserve Bank-

(a) no banking company shall open a new place of business in India or change otherwise than within the same city, town or village, the location of an existing place of business situated in India; and

(b) no banking company incorporated in India shall open a new place of business outside India or change,

otherwise than within the same city, town or village in any country or area outside India, the location of an existing place of business situated in that country or area:

24 - Maintenance of a percentage of assets

(2A) A scheduled bank, in addition to the average daily balance which it is, or may be, required to maintain under section 42 of the Reserve Bank of India Act, 1934 (2 of 1934) and every other banking company, in addition to the cash reserve which it is required to maintain under section 18, shall maintain in India, assets, the value of which shall not be less than such percentage not exceeding forty per cent, of the total of its demand and time liabilities in India as on the last Friday of the second preceding fortnight as the Reserve Bank may, by notification in the Official Gazette, specify from time to time and such assets shall be maintained, in such form and manner, as may be specified in such notification.

35A. Power of the Reserve Bank to give directions

(1) Where the Reserve Bank is satisfied that-

(a) in the public interest; or

(aa) in the interest of banking policy; or

(b) to prevent the affairs of any banking company being conducted in a manner detrimental to the interests of the depositors or in a manner prejudicial to the interests of the banking company; or

(c) to secure the proper management of any banking company generally, it is necessary to issue directions to banking companies generally or to any banking company in particular, it may, from time to time, issue such directions as it deems fit, and the banking companies or the banking company, as the case may be, shall be bound to comply with such directions.

(2) The Reserve Bank may, on representation made to it or on its own motion, modify or cancel any direction issued under sub-section (1), and in so modifying or cancelling any direction may impose such conditions as it thinks fit, subject to which the modification or cancellation shall have effect.

36 - Further powers and functions of Reserve Bank

(1) The Reserve Bank may-

(a) caution or prohibit banking companies or any banking company in particular against entering into any particular transaction or class of transactions, and generally give advice to any banking company;

(b) on a request by the companies concerned and subject to the provision of section 44A, assist, as intermediary or otherwise, in proposals for the amalgamation of such banking companies;

(c) give assistance to any banking company by means of the grant of a loan or advance to it under clause(3) of sub-section (1) of section 18 of the Reserve Bank of India Act, 1934 (2of 1934);

(d) at any time, if it is satisfied that in the public interest or in the interest of banking policy or for preventing the affairs of the banking company being conducted in a manner detrimental to the interests of the banking company or its depositors it is necessary so to do, by order in writing and on such terms and conditions as may be specified therein-

(i) require the banking company to call a meeting of its directors for the purpose of considering any matter relating to or arising out of the affairs of the banking company; or require an officer of the banking company to discuss any such matter with an officer of the Reserve Bank;

(ii) depute one or more of its officers to which the proceedings at any meeting of the Board of directors of

the banking company or of any committee or of any other body constituted by it; require the banking company to give an opportunity to the officers so deputed to be heard at such meetings and also require such officers to send a report of such proceedings to the Reserve Bank;

(iii) require the Board of directors of the banking company or any committee or any other body constituted by it to give in writing to any officer specified by the Reserve Bank in this behalf at his usual address all notices of, and other communications relating to, any meeting of the Board, committee or other body constituted by it;

(iv) appoint one or more of its officers to observe the manner in which the affairs of the banking company or of its offices or branches are being conducted and make a report thereon;

(v) require the banking company to make, within such time as may be specified in the order, such changes in the management as the Reserve Bank may consider necessary.

39. Reserve Bank to be official liquidator.-

(1) Notwithstanding anything contained in section 38A of this Act or in section 448 or section 449 of the Companies Act, 1956(1 of 1956), where in any proceeding for the winding up by the High Court of a banking company, an application is made by the Reserve Bank in this behalf, the Reserve Bank, the State Bank of India or any other bank notified by the Central Government in this behalf or any individual, as stated in such application shall be appointed as the official liquidator of the banking company in such proceeding and the liquidator, if any, functioning in such proceeding shall vacate office upon such appointment.

(2) Subject to such directions as may be made by the High Court, the remuneration of the official liquidator appointed under this section, the cost and expenses of this establishment and the cost and expenses of the winding up shall be met out of the assets of the banking company which is being wound up, and notwithstanding anything to the contrary contained in any other law for the time being in force, no fees shall be payable to the Central Government, out of the assets of the banking company.

46 - Penalties

(4) If any other provision of this Act is contravened or if any default is made in-

(i) complying with any requirement of this Act or of any order, rule or direction made or condition imposed thereunder, or

(ii) carrying out the terms of, or the obligations under, a scheme sanctioned under sub-section (7) of section 45, by any person, such person shall be punishable with fine which may extend to fifty thousand rupees or twice the amount involved in such contravention or default where such amount is quantifiable, whichever is more, and where a contravention or default is a continuing one, with a further fine which may extend to two thousand and five hundred rupees for every day, during which the contravention or default continues.

47A. Power of Reserve Bank to impose penalty

(1) Notwithstanding anything contained in section 46, if a contravention or default of the nature referred to in sub-section (3) or sub-section (4) of section 46, as the case may be, is made by a banking company, then, the Reserve Bank may impose on such banking company-

(a) where the contravention is of the nature referred to in sub-section (3) of section 46, a penalty not exceeding twice the amount of the deposits in respect of which such contravention was made;

(b) where the contravention or default is of the nature referred to in sub-section (4) of section 46, a penalty not exceeding five lakh rupees or twice the amount involved in such contravention or default where such amount is quantifiable, whichever is more, and where such the contravention or default is a continuing one, a further penalty which may extend to twenty-five thousand rupees for every day, after the first, during which the contravention of default continues.

51. Application of certain provisions to the State Bank of India and other notified banks

(1) Without prejudice to the provisions of the State Bank of India Act, 1955 (23 of 1955) or any other enactment, the provisions of sections 10, 13 to 15, 17, 19 to 21A, 23 to 28, 29 excluding sub-section (3) sub-section (1B), (1C) and (2) of sections 30,31, 34, 35, 35A, 36 excluding clause(a) of sub-section(1), 45Y to 45ZF, 46 to48 50, 52 and 53 shall also apply; so far as may be, to and in relation to the State Bank of India or any corresponding new bank or a Regional Rural Bank or any subsidiary bank as they apply to and in relation to banking companies:

Provided that-

(a) nothing contained in clause (c) of sub-section (1) of section 10 shall apply to the chairman of the State Bank of India or to a managing director of any subsidiary bank insofar as the said clause precludes him from being a director of, or holding an office in, any institution approved by the Reserve Bank;

(b) nothing contained in sub-clause (iii) of clause (b) of sub-section (1) of section 20 shall apply to any bank referred to in sub-section (1), insofar as the said sub-clause (iii) of clause (b) precludes that bank from entering into any commitment for granting any loan or advance to or on behalf of a company (not being a Government company) in which not less than forty per cent of the paid-up capital is held (whether singly or taken together) by the Central Government or the

Reserve Bank or a corporation owned by that bank; and

(c) nothing contained in section 46 or in section 47A shall apply to, -

(i) an officer of the Central Government or the Reserve Bank, nominated or appointed as director of the State Bank of India or any corresponding new bank or a Regional Rural Bank or any subsidiary bank or a banking company; or

(ii) an officer of the State Bank of India or a corresponding new bank or a Regional Rural Bank or a subsidiary bank nominated or appointed as director of any of the said banks (not being the bank of which he is an officer) or of a banking company.;

(2) References to a banking company in any rule or direction relating to any provision of this Act referred to in sub-section (1) shall, except where such rule or direction provides otherwise, be construed as referring also to the State Bank of India, a corresponding new bank, a Regional Rural Bank and a subsidiary bank."

11. For the purpose of deciding Issue No. (i), we are also required to quote relevant portion of RBI Guidelines dated 13th July, 2005, which reads as under:

"**Guidelines on purchase/ sale of Non Performing Financial Assets**

Scope

1. These guidelines would be applicable to banks, FIs and NBFCs purchasing/ selling non performing financial assets, from/ to other banks/FIs/NBFCs (excluding securitisation companies/ reconstruction companies).

2. A financial asset, including assets under

multiple/consortium banking arrangements, would be eligible for purchase/sale in terms of these guidelines if it is a non-performing asset/non performing investment in the books of the selling bank.

3. The reference to 'bank' in the guidelines would include financial institutions and NBFCs."

Brief analysis of the BR Act, 1949

12. The BR Act, 1949 provides for the comprehensive definition of "banking" so as to bring within its scope all institutions which receive deposits for lending or investment and to give RBI a control over banking companies. It is an Act to consolidate and amend the law relating to banking. Section 2 clarifies that the 1949 Act shall be in addition to and not in derogation of the Companies Act, 1956 and any other law for the time being in force save as therein expressly provided. Section 5(1)(a) is the interpretation section. It defines "banking" to mean "accepting deposits for lending". This is principal business of a bank. Section 5(1)(c) defines banking company as any company which transacts the business of banking. Thus, a banking company has to be a company in the first instance. Section 5(1)(ca) defines "banking policy" to mean any policy which is specified from time to time by RBI in the interest of banking system or in the interest of monetary stability or economic growth having due regard to the interest of the depositors and efficient

use of these deposits. Part II deals with "business of banking companies". Section 6(1) in Part II says that in addition to the business of banking, a banking company may engage in any one or more of the forms of business enumerated in clauses (a) to (o). It covers borrowing, lending, advancing of money; acquiring and holding and dealing with property (security) or right, title and interest therein; selling, improving leasing or turning into account or otherwise dealing with such security; doing all such other things as are incidental or conducive to the promotion or advancement of the business of the company and any other form of business which the Central Government may notify. Thus, Section 6(1) has a general provision and the provision which enumerates topics/fields in which the banks can carry on their business. Section 8 begins with non-obstante clause. It says that no banking company shall deal in the buying or selling of goods except in connection with the realization of security. Section 9 also begins with a non-obstante clause. It deals with restrictions on disposal of non-banking assets. Both Sections 8 and 9 are prohibitions and restrictions under the Act which are covered by the expression "save as except provided" in Section 2 of the Act. As stated earlier, BR Act, 1949 is in addition to the Companies Act, 1956 or any other law for the time being in force and its provisions shall not be treated to be in derogation of any

other laws save and except to the extent of any activity which is prohibited or restricted (See: Section 2). Section 12 says that no banking company shall carry on business unless it satisfies certain conditions. Section 17 refers to creation of Reserve Fund. Section 18 refers to creation of Cash Reserve. Section 20 refers to restrictions on loans and advances. Section 21 deals with the power of RBI to control advances by banking companies. Section 21 empowers RBI to frame policies in relation to advances to be followed by banking companies. It further says that once such policy is made all banking companies shall be bound to follow them. Section 21(1) is once again a general provision empowering RBI to determine policy in relation to advances whereas Section 21(2) empowers RBI to give directions to banking companies as to items mentioned there i.e. in Section 21(2). Under Section 21(3) every banking company is bound to comply with directions given by RBI at the peril of penalty being levied for non-compliance. Section 35A says that where RBI is satisfied that in the interest of Banking Policy it is necessary to issue directions to banking companies it may do so from time to time and the banking companies shall be bound to comply with such directions. Thus, in exercise of the powers conferred by Sections 21 and 35A of the said Act, RBI can issue directions having statutory force of law. Section 36 deals with further powers and

functions of RBI. Under Section 39 it is the RBI who shall be the Official Liquidator in any proceedings concerning winding up of a banking company.

13. The above analysis of the various provisions of the 1949 Act shows that RBI is empowered to regulate the business of the banking companies. That, RBI is empowered to control management of banking companies in certain situations. It is empowered to lay down conditions on which the banking companies will operate. It is empowered to regulate paid-up capital, reserve fund, cash fund and above all to lay down policies in the matter of advances to be made by the banking companies, allocation of resources etc. While laying down such policies under the said Act, RBI can lay down parameters enabling banking companies to expand its business. For example, RBI's permission is required to be obtained if a banking company seeks to deal in "derivatives". It is a business which will not fall in clauses (a) to (o) of Section 6(1)(a) and yet RBI can lay down guidelines and directions enabling banking companies to deal in derivatives like futures and options. The point we are trying to make is that apart from the principal business of accepting deposits and lending the said 1949 Act leaves ample scope for the banking companies to venture into new businesses subject to such businesses being subject to the control of the Regulator, viz.

RBI. In other words, the 1949 Act allows banking companies to undertake activities and businesses as long as they do not attract prohibitions and restrictions like those contained in Sections 8 and 9. In this connection we need to emphasize that Section 6(1)(n) enables a banking company to do all things as are incidental or conducive to promotion or advancement of the business of the company. Section 6(1) enables banking companies to carry on different types of businesses. Under Section 6(1), these different types of businesses are in addition to business of banking, viz., core banking. The importance of the words "in addition to" in Section 6(1) is that even if different businesses under clauses (a) to (o) are shut down, the company would still be a banking company as long as it is in the core banking of accepting deposits and lending so that its main income is from the spread or what is called as "interest income". Thus, we may broadly categorise the functions of the banking company into two parts, viz., core banking of accepting deposits and lending and miscellaneous functions and services. Section 6 of the BR Act, 1949 provides for the form of business in which banking companies may engage. Thus, RBI is empowered to enact a policy which would enable banking companies to engage in activities in addition to core banking and in the process it defines as to what constitutes "banking business". The BR Act,

1949 basically seeks to regulate banking business. In the cases in hand we are not concerned with the definition of banking but with what constitutes "banking business". Thus, the said BR Act, 1949 is an open-ended Act. It empowers RBI (regulator and policy framer in matter of advances and capital adequacy norms) to develop a healthy secondary market, by allowing banks inter se to deal in NPAs in order to clean the balance sheets of the banks which guideline/policy falls under Section 6(1)(a) r/w Section 6(1)(n). Therefore, it cannot be said that assignment of debts/NPAs is not an activity permissible under the BR Act, 1949. Thus, accepting deposits and lending by itself is not enough to constitute the "business of banking". The dependence of commerce on banking is so great that in modern money economy the cessation even for a day of the banking activities would completely paralyse the economic life of the nation. Thus, the BR Act, 1949 mandates a statutory comprehensive and formal structure of banking regulation and supervision in India.

14. The test to be applied is – whether trading in NPAs has the characteristics of a bona fide banking business. That test is satisfied in this case. The guidelines issued by RBI dated 13.7.2005 itself authorizes banks to deal *inter se* in NPAs. These guidelines have been issued by the Regulator in exercise of the powers conferred by Sections 21 and 35A of the Act. They have a

statutory force of law. They have allowed banks to engage in trading in NPAs with the purpose of cleaning the balance sheets so that they could raise the capital adequacy ratio. All this comes within the ambit of Section 21 which enables RBI to frame the policy in relation to Advances to be followed by the banking companies and which empowers RBI to give directions to banking companies under Section 21(2). These guidelines and directions following them have a statutory force. When a delegate is empowered by the Parliament to enact a Policy and to issue directions which have a statutory force and when the delegatee (RBI) issues such guidelines (Policy) having statutory force, such guidelines have got to be read as supplement to the provisions of the BR Act, 1949. The "banking policy" is enunciated by RBI. Such policy cannot be said to be ultra vires the Act. The idea behind empowering RBI to determine the Policy in relation to Advances is to enable banking companies to expand their business of banking and in that sense such guidelines also define – as to what constitutes banking business.

Trading in NPA - a misnomer

15. At the outset one needs to know what is NPA? When a borrower who is under liability to pay to secured creditors, makes default in repayment of secured debt or any installment thereof, the account of borrower is classified as Non-Performing Asset

(NPA). Such NPAs cannot be used for any productive purpose. Continuous growth in NPAs threatens the repayment capacity of the banks. They have an adverse impact on the financial strength of the banks which in the present era of globalization are required to conform to International Standards. Thus, NPA means an asset or account receivable of a borrower, which has been classified by banks or financial institutions in terms of RBI Guidelines as sub-standard, doubtful etc. These guidelines are issued to improve quality of assets of the banks. The 2005 guidelines of RBI are not to eliminate NPAs but to restructure. The BR Act, 1949 vide Section 21 empowers RBI in the interest of the Banking Policy to lay down guidelines in relation to advances to be followed by banking companies. The 2005 guidelines have been issued as "a restructuring measure" in order to avoid setbacks in the banking system. NPAs do not generate interest. 85% of the Indian Banks' income comes from interest. Thus, NPAs adversely impact profits of the banks and hence, as a matter of Banking Policy, RBI as Regulator seeks through its guidelines under Section 21 r/w Section 35A to manage these NPAs and not to eliminate. The said guidelines deal with restructuring of the banking system which is one of the objects behind giving authority to RBI to frame "banking policy". One more aspect needs to be kept in mind. In this batch of cases we

are dealing with assets in the hands of banks. NPAs are "Account Receivables". The impugned guidelines show that RBI considers inter se NPA assignment between banks to be a tool for resolving the issue of NPAs and in the interest of banking policy under Section 21 of the BR Act, 1949. The object is to minimize the problem of credit risk. The corporate debt restructuring is one of the methods for reducing NPAs. Thus, such restructuring as a matter of banking policy cannot be treated as "trading". One has to keep in mind the object behind enactment of BR Act, 1949. Thus, the said Guidelines fall under Section 21 of the 1949 Act. These Guidelines are a part of Credit Appraisal Mechanism. Thus, in our view the impugned Guidelines are not ultra *vires* the BR Act, 1949. Dealing in NPAs as part of the Credit Appraisal Mechanism and as a part of Restructuring Mechanism falls within Section 21 r/w Section 35A of the Act. Hence, it cannot be said that "transfer of debts/NPAs" *inter se* between banks is an activity which is impermissible under the 1949 Act. The BR Act, 1949 is an Act enacted to consolidate and amend the law relating to banking. Thus, while interpreting the Act one needs to keep in mind not only the framework of the banking law as it stood in 1949 but also the growth and the new concepts that have emerged in the course of time. (see: Principles of Statutory Interpretation by G.P. Singh, 11th edition at page

328.)

16. Thus, in our view on reading the provisions of the BR Act, 1949 with the Guidelines of RBI issued from time to time in relation to Advances and Re-structuring/Management of NPAs we are of the view that the BR Act, 1949 is a complete Code on banking and that dealing in NPAs inter se by the banks needs to be looked in the larger framework of "Re-structuring of banking System". Thus, we need not go into the provisions of the said TP Act. In fact, it is the case of the borrower(s) that provisions of the said TP Act has no application. (See Written Submissions filed on 31.8.2010).

Invocation of Section 130 of TP Act, 1882

17. In the alternative, since the borrower(s) has relied on Section 130 of the said TP Act, one needs to analyse the contentions raised in that regard. According to the borrower(s) assignment of Financial Instruments in possession of ICICI Bank Ltd. to Kotak Mahindra Bank Ltd. transfers not merely the right to recover the debt but also transfers the obligations under the Financial Instruments "as if they were executed by the clients of ICICI Bank in favour of the assignee", i.e., Kotak Mahindra Bank Ltd. According to the borrower(s), an assignment of a debt can never carry with it the assignment of the obligations of the assignor unless there is a novation of the contract by all parties.

Therefore, according to the borrower(s), the impugned Deed of Assignment is legally unsustainable without novation of original contract between ICICI Bank Ltd. (assignor) and the borrower(s) (assignee). We find no merit in the above arguments.

18. As stated above, an outstanding in the account of a borrower(s) (customer) is a debt due and payable by the borrower(s) to the bank. Secondly, the bank is the owner of such debt. Such debt is an asset in the hands of the bank as a secured creditor or mortgagee or hypothecatee. The bank can always transfer its asset. Such transfer in no manner affects any right or interest of the borrower(s) (customer). Further, there is no prohibition in the BR Act, 1949 in the bank transferring its assets inter se. Even in the matter of assigning debts, it cannot be said that the banks are trading in debts, as held by the High Court(s). The assignor bank has never purchased the debt(s). It has advanced loans against security as part of its banking business. The account of a client in the books of the bank becomes Non Performing Asset when the client fails to repay. In assigning the debts with underlying security, the bank is only transferring its asset and is not acquiring any rights of its client(s). The bank transfers its asset for a particular agreed price and is no longer entitled to recover anything from the borrower(s). The moment ICICI Bank Ltd. transfers the debt with underlying

security, the borrower(s) ceases to be the borrower(s) of the ICICI Bank Ltd. and becomes the borrower(s) of Kotak Mahindra Bank Ltd. (assignee). At this stage, we wish to once again emphasize that debts are assets of the assignor bank. The High Court(s) has erred in not appreciating that the assignor bank is only transferring its rights under a contract and its own asset, namely, the debt as also the mortgagee's rights in the mortgaged properties without in any manner affecting the rights of the borrower(s)/mortgagor(s) in the contract or in the assets. None of the clauses of the impugned Deed of Assignment transfers any obligations of the assignor towards the assignee. In the case of **Khardah Company Ltd. v. Raymon & Co. (India) Private Ltd.** reported in (1963) 3 S.C.R. 183 the Supreme Court has held that the law on the subject of assignment of a contract is well settled. An assignment of a contract might result by transfer either of the rights or by transfer of obligations thereunder. There is a well recognized distinction between the two classes of assignments. As a rule, obligations under a contract cannot be assigned except with the consent of the promisee, and when such consent is given, it is really a novation resulting in substitution of liabilities. That, rights under a contract are always assignable unless the contract is personal in its nature or unless the rights are incapable of assignment, either under the law or under an

agreement between the parties. A benefit under the contract can always be assigned. That, there is, in law, a clear distinction between assignment of rights under a contract by a party who has performed his obligation thereunder and an assignment of a claim for compensation which one party has against the other for breach of contract.

19. In the case of **Camdex International Ltd. v. Bank of Zambia** reported in (1998) Q.B. 22 (CA) the following observation which is relevant to the present case needs to be quoted:

> "The assignment of a debt will not be contrary to public policy solely on the grounds that the assignee has purchased the debt for a considerably discounted price or because that price is only payable after a period of credit. Nor will the assignment be contrary to public policy simply because the assignee may make a profit on the transaction at the end of the day. If there was no prospect of a profit, Hobhouse LJ observed, commercial entities would never purchase debts."

20. Similarly, the following proposition in *Chitty on Contracts,* 27th edn. (1994) at para 19.027 is relevant to be noted.

> "It is also well established that a claim to a simple debt is assignable even if the debtor has refused to pay. The practice of assigning or 'selling' debts to debt collecting agencies and credit factors could hardly be carried on if the law were otherwise. "

21. In view of the above exposition of law, we find that under the impugned Deed of Assignment only the Account Receivables in the books of ICICI Bank Ltd. has been transferred to Kotak

Mahindra Bank Ltd. The obligations of ICICI Bank Ltd. towards its borrower(s) (customer) under the loan agreement secured by deed of hypothecation/mortgage have not been assigned by ICICI Bank Ltd. to the assignee bank, namely, Kotak Mahindra Bank Ltd. Hence, it cannot be said that the impugned Deed of Assignment is unsustainable in law. The obligations referred to in the impugned Deed of Assignment are the obligations, if any, of ICICI Bank Ltd. towards Kotak Mahindra Bank Ltd. (assignee) in the matter of transfer of NPAs. For example, when an Account Receivable is treated as NPA and assigned to the assignee bank, the parties have to follow certain Guidelines issued by RBI. If there is a breach of the Guidelines or statutory directions issued by RBI by Assignor in regard to transfer of NPA then the assignee bank can enforce such obligations vis-à-vis the assignor bank. It is these obligations which are referred to in the impugned Deed of Assignment. That, an Account Receivable becomes an NPA only because of the default committed by the borrower(s) who fails to repay. Lastly, it may be mentioned that the said SARFAESI Act, 2002 was enacted enabling specified SPVs to buy the NPAs from banks. However, from that it does not follow that banks inter se cannot transfer their own assets. Hence the said SARFAESI Act, 2002 has no relevance in this case.

22. Before concluding, we may state that NPAs are created on

account of the breaches committed by the borrower. He violates his obligation to repay the debts. One fails to appreciate the opportunity he seeks to participate in the "Transfer of Account Receivable" from one bank to the other.

Conclusion:

23. As stated above, by the impugned judgment, the Division Bench of the Gujarat High Court upheld the order of the Company Court only on one ground, namely, assignment of debts by the banks *inter se* is an activity which is impermissible under the Banking Regulation Act, 1949. However, the Division Bench did not go into other issues which arose for determination before the Company Court, including applicability of the provisions of the Registration Act, 1908.

24. In the circumstances, we set aside the impugned judgment(s) on the question of assignment of debts as an activity permissible under the Banking Regulation Act, 1949. However, we remit these matters to the Division Bench of the High Court(s) for consideration of other issues raised in this batch of cases. Subject to above, the impugned judgment(s) is set aside and the civil appeals are allowed with no order as to costs.

.....CJI
(S. H. Kapadia)

.....J.
(Swatanter Kumar)

New Delhi;
September 30, 2010.