

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH AT NAGPUR

CIVIL REVISION APPLICATION NO.29/2011

APPLICANT :- Bank of Baroda,
Khamgaon Branch,
Through its Branch Manager,
Nandura Road, LIC Building,
Khamgaon – 444 303, Distt. Buldhana.

(ORI. DEFT. NO.2)

...VERSUS...

NON-APPLICANTS :- 1. Gopal Shriram Panda
Aged about 40 years,
Occupation – Business, R/o Khamgaon,
Tq. Khamgaon, Distt. Buldhana

(Original Plaintiff)

2. Sau. Geeta Balkishan Chandak,
Aged about 50 years, Occ.- Household
work, R/o Friends Apartments, Civil
Lines, Khamgaon, Distt. Buldhana.

&/OR

C/o Neha B. Chandak, Flat No.A/3,
Shriniwas Apartment, Near Kanya
School, 584, Narayan Peth, Pune.

(ORI. DEFT. NO.1)

WITH

CIVIL REVISION APPLICATION NO.30/2011

APPLICANT :- Bank of Baroda,
Khamgaon Branch,

Through its Branch Manager,
Nandura Road, LIC Building,
Khamgaon – 444 303, Distt. Buldhana.

(ORI. DEFT. NO. 12)

...VERSUS...

NON-APPLICANTS :- 1. Smt. Usha Wd/o Ramanlal Chandak,
aged about 45 yrs., Occ. Household
Work, R/o Amar Bag. Raman Sadan,
Talav Road, Khamgaon, Distt.
Buldhana

(Original Plaintiff)

2. Balkisan Bansilal Chandak
Aged about 52 years, Occ. : Business,
R/o Friends Apartment, Shiv Line,
Khamgaon, Tq. Khamgaon, Distt. Buldhana,

(Original Defendant No.1)

3. Smt. Geetadevi Balkisan Chandak,
Aged about 48 yrs., Occ. Household Work
R/o Friends Apartment, Shiv Line,
Khamgaon, Tq. Khamgaon, Distt.
Buldhana

&/OR

C/o Neha B. Chandak,
Flat No.A/3, Shriniwas Apartment,
Near Kanya School, 584, Narayan Peth,
Pune

(Original Defendant No.2)

4. Vipul Ramanlal Chandak
Aged about 34 years,
Occ. Education, R/o Main Road,

Khamgaon, Distt. Buldhana

(Original Defendant No.3)

5. Sachin Ramanlal Chandak
Aged about 22 years, Occ. Education,
R/o Main Road, Khamgaon,
Distt. Buldhana.

(Non-applicant No.4 & 5 being legal
heirs – Raman Bansilal Chandak)

(Original Defendant No.4)

6. Satish Bansilal Chandak
Aged about 45 years,
Occ. Business, R/o Main Road,
Khamgaon, Distt. Buldhana

(Original Defendant No.5)

7. Sau. Kiran W/o Satish Chandak,
Aged about 42 yrs., Occ. Household Work,
R/o Main Road, Khamgaon, Distt. Buldhana.

(Original Defendant No.6)

8. Sau. Godawari Champalal Mantri,
Aged about 58 yrs., Occ. Household Work,
R/o Kela Nagar, Khamgaon, Distt. Buldhana.

(Original Defendant No.7)

9. Smt. Sushila Manaklall Rathil
Aged about 55 years, Occ : Household Work
R/o Ghatpuri Road, Khamgaon,
Tq. Khamgaon, Distt. Buldhana.

(Original Defendant No.8)

10. Sau. Pushpa Manaklall Tiwari,
Aged about 52 years,
Occ. Household Work,
R/o Vidhyut Colony, Malkapur,
Tq. Malkapur, Distt. Buldhana.

(Original Defendant No.9)

11. Ashish Kisan Purwar,
Aged about 23 years, Occ. Business,
R/o Main Road, Khamgaon, Distt.
Buldhana.

(Original Defendant No.10)

12. Sau. Geeta Shrikisan Purwar
Aged about 46 years, Occ. Business
& Household work, r/o Main Road,
Khamgaon, Tq. Khamgaon, Distt.
Buldhana.

(Original Defendant No.11)

WITH

MISC. CIVIL APPLICATION NO.1003/2010

IN

CIVIL REVISION APPLICATION 92/2009 (D)

APPLICANT :-
(Original
Applicant)

Smt. Manjusha Arvind Pande,
Aged about 48 years, Occu : Service,
R/o Flat No.302, 3rd Floor, Sudhakar,
Apartment, Near Bhosala Ved Shala,
Ayachit Mandir Road, Nagpur.

...VERSUS...

NON-APPLICANTS:- 1. Nirman Associates,
(Original Through its Proprietor,

Non-Applicant
No.1 & 2)

Shri Dhanneshwar Sitaram Borikar
Aged major (about 48 years)
Occu : Builder and Developer,
Having its Regd. Office at Ground Floor,
Room No.4 & 5 in Sudhakar Apartment,
Near Bhosla Ved Shala, Mahal, Nagpur,
R/o 39, Dattatraya Nagar, Sai Nirman
Apartment, Nagpur.

2. Shikshak Sahakari Bank,
Gandhi Sagar, Nagpur,
Through its Recovery Officer,
Gandhi Sagar, Nagpur.

WITH

CIVIL REVISION APPLICATION NO.53/2014

APPLICANT :- Bank of Baroda through its Authorised Officer,
ORI. DEFT. having its Branch Office at Gandhibag Branch,
NO.2 Haldiram Building, Jallapura, Nagpur – 440002.

...VERSUS...

NON-APPLICANTS :- 1. Vivek s/o Padmanabhan Damodaran,
Aged about 43 years, Occ. Agriculturist,
Resident of 5th Floor, Flat No.504,
Sterling Apartment, Raj Nagar,
Nagpur – 440 013.

(ORIGINAL PLAINTIFF)

2. Damodaran Engineering Construction
Company Pvt. Ltd., through its
Authorised Signatory having office at
34, Clark Town, Nagpur – 440004.

(ORIGINAL DEFENDANT NO.1)

3. M/s. C-1 India Pvt. Ltd., through its Authorised Signatory, having its office at C-104, Sector 2, Noida-201301 (UP)

(ORIGINAL DEFENDANT NO.3)

WITH

WRIT PETITION NO.3511/2010

- PETITIONERS :-**
(Petitioners
below)
(Ori. Plaintiffs)
1. Nathuji S/o Namdeo Rokade,
Aged about 73 years, Occ. : Agriculturist.
 2. Jagannath S/o Namdeo Rokade,
Aged about 62 years, Occ. : Agriculturist.

Both R/o New Mangalwari, Nagpur,
Tah. & Dist. Nagpur.

The Petitioner No.1 & 2 through their
Power of Attorney Dhananjay s/o Ratjekar
Duragkar, Aged about 40 years,
Occ. Service, R/o Vrindhavan Apartment,
273, Laxmi Nagar, Nagpur, Tah. & Dist.
Nagpur.

...VERSUS...

- RESPONDENTS :-**
(Respondents
below)
(Ori. Defendants)
1. M/S. Hindustan Builders, a partnership
firm having office at HB-Towers, 181,
North Bazar Road, Dharampeth Extension,
Nagpur, Tah. & Dist. Nagpur
through its Partner and constituted attorney
Arun S/o Balwantrao Chaudhari
Aged about : 49 years, Occ. : Business,
R/o 'Dwaraka' Friends Co-operative
Housing Society's Layout, Deendayal Nagar,
Nagpur, Tah. & Dist. Nagpur.

2. Punjab National Bank, a body corporate constituted under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 having Head Office at 7, Bhikaji Cama Place, Africa Avenue, New Delhi, Tah. & Dist. Nagpur. Through the Branch Manager, Main Branch, Punjab National Bank, Central Avenue, Nagpur, Tah. & Dist. Nagpur.
3. Shikshak Sahakari Bank Ltd. an Urban Co-operative Bank registered under the Maharashtra Co-operative Society Act, 1960 vide Registration No.NGP/BNK/255/76, having its Head Office at Gandhi Sagar, Mahal, Nagpur, Tah. & Dist. Nagpur Through its Authorised Officer, Shikshak Sahakari Bank Ltd; Gandhi Sagar, Mahal, Nagpur, Tah. & Dist. Nagpur.

(Deleted As per Court's order dt. 30/7/10)

WITH
CIVIL REVISION APPLICATION NO.10/2012

APPLICANT :- Union Bank of India,
a Banking Company incorporated under the Banking Companies (Acquisition and Transfer of Undertakings) Act-V of 1970, having its Head Office at 239, Vidhan Bhuvan Marg, Nariman Point, Mumbai and a Branch Amongst other places at Station Road, near Tower, Akola, represented by its Branch Manager Shri Mahadeo s/o Viththalrao Raut.

On R.A.

...VERSUS...

- RESPONDENTS** :-
1. Yashowardhan s/o Nandkishore Kothari
aged about 19 years, Occu- Student,
R/o Shri Bhagwat – Krupa, Gorakashan
Road, Akola.
 2. Santoshkumar s/o Navalkishorji Kothari,
aged about 42 years, Occu – business,
R/o Shri Bnagwat Krupa, Gorakashan Road,
Akola.

WITH

SECOND APPEAL NO.502/2016

APPELLANT :- Mrs. Rashmi Rajkishor Agarwal
ORIG. aged about 38 years, Occ. Service, through
PLAINTIFF power of attorney holder Shri Hariom
Ratanlal Choudhary, aged about 58 years,
Occ. Business, Garima, Plot No.2,
Ghatate layout, Nagpur.

...VERSUS...

- RESPONDENTS** :-
1. Motilal s/o Shivshankar Agarwal
aged about 71 years, Occ. Business.
 2. Smt. Ashadevi w/o Motilal Agarwal
aged about 65 years, occ. Business.
 3. Shri Rohit s/o Motilal Agarwal,
aged about 41 years, occ. Business.
 4. Shri Sameer s/o Motilal Agarwal,
aged about 39 years, occ. Business.
 5. Shri Motilal s/o Shivshankar Agarwal,
HUF, aged about 71 years, through Karta

Respondent nos.1 to 5 residents of
Plot No.1, Ghatate layout, Civil Lines,
Nagpur.

6. State Bank of India, through its
Manager, Hingna Industrial Area Branch,
Nagpur.

WITH

APPEAL AGAINST ORDER NO.33/2011

APPELLANT :- Bank of Baroda,
Khamgaon Branch,
Through its Branch Manager,
Nandura Road, LIC Building,
Khamgaon – 444 303, Distt. Buldhana

(ORI. DEFT. NO.12)

...VERSUS...

RESPONDENTS :- 1. Smt. Usha Wd/o Ramanlal Chandak,
aged about 45 yrs., Occ. Household
Work, R/o Amar Bag, Raman Sadan,
Talav Road, Khamgaon, Distt.
Buldhana.

(Original Plaintiff)

2. Balkisan Bansilal Chandak
Aged about 52 years, Occ. : Business,
R/o Friends Apartment, Shiv Line,
Khamgaon, Tq. Khamgaon, Distt. Buldhana.

(Original Defendant No.1)

3. Smt. Geetadevi Balkisan Chandak,
Aged about 48 yrs., Occ. Household Work,

R/o Friends Apartment, Shiv Line,
Khamgaon, Tq. Khamgaon, Distt.
Buldhana

&/OR

C/o Neha B. Chandak,
Flat No.A/3, Shriniwas Apartment,
Near Kanya School, 584, Narayan Peth,
Pune.

(Original Defendant No.2)

4. Vipul Ramanlal Chandak
Aged about 34 years,
Occ. Education, R/o Main Road,
Khamgaon, Distt. Buldhana.

(Original Defendant No.3)

5. Sachin Ramanlal Chandak
Aged about 22 years, Occ. Education,
R/o Main Road, Khamgaon,
Distt. Buldhana.

(Non-applicant No.4 & 5 being legal
heirs – Raman Bansilal Chandak)

(Original Defendant No.4)

6. Satish Bansilal Chandak
Aged about 45 years,
Occ. Business, R/o Main Road,
Khamgaon, Distt. Buldhana.

(Original Defendant No.5)

7. Sau. Kiran W/o Satish Chandak,
Aged about 42 yrs., Occ. Household Work,

R/o Main Road, Khamgaon, Distt. Buldhana.

(Original Defendant No.6)

8. Sau. Godawari Champalal Mantri,
Aged about 58 yrs., Occ. Household Work,
R/o Kela Nagar, Khamgaon, Distt. Buldhana.

(Original Defendant No.7)

Smt. Godawari Champalal Mantri,
Aged about 58 years, Occ. Household Work,
R/o Sai Prastha Complex, Jalamb Naka,
Khamgaon – 444 303, Distt. Buldhana.

(Correct address furnished as per
Court's order dtd. 11-8-2011)

(Amendment carried out as per Court's order
dt. 11/8/11)

9. Smt. Sushila Manaklall Rath
Aged about 55 years, Occ : Household Work
R/o Ghatpuri Road, Khamgaon,
Tq. Khamgaon, Distt. Buldhana.

(Original Defendant No.8)

10. Sau. Pushpa Manaklall Tiwari,
Aged about 52 years,
Occ. Household Work,
R/o Vidhyut Colony, Malkapur,
Tq. Malkapur, Distt. Buldhana.

(Original Defendant No.9)

11. Ashish Kisan Purwar,
Aged about 23 years, Occ. Business,
R/o Main Road, Khamgaon, Distt.

12

Buldhana.

(Original Defendant No.10)

12. Sau. Geeta Shrikisan Purwar
Aged about 46 years, Occ. Business
& Household work, R/o Main Road,
Khamgaon, Tq. Khamgaon, Distt.
Buldhana.

(Original Defendant No.11)

Office Notes, Office Memoranda of Coram,
appearances, Court's orders or directions
and Registrar's orders

Court's or Judge's orders

Mr. C.S. Samudra, Advocate for applicant in CRA Nos.53/2014, 30/2011, 29/2011 & A.O. No.33/2011 Mr. A.H. Lohiya, Advocate & Mr. S.O. Tapdiya, Advocates for respondent no.2 in CRA No.53/2014 and for petitioner in Writ Petition No.3511/2010 Mr. R.H. Agrawal, Advocate for respondent no.1 in W.P. No.3511/2010 Mr. A.A. Bade, Advocate for respondent no.2 in W.P. No.3511/2010 Mr. A.M. Ghare, Advocate for respondent no.3 in W.P. No.3511/2010 Mr. R.S. Sundaram, Advocate for appellant in S.A. No.502/2016 Mr. S.N. Kumar, Advocate for respondent no.6 in S.A. No.502/2016 Mr. M.R. Joharapurkar, Advocate for applicant in MCA No.1003/2010 Mr. N.G. Jetha, Advocate for respondent no.2 in MCA No.1003/2010 Mr. S.P. Deshpande, Advocate for respondent no.1 in CRA No.53/2014

**CORAM : SUNIL B. SHUKRE AND
AVINASH G. GHAROTE, JJ.**

Order reserved on : 05/01/2021

Order pronounced on : 25/03/2021

O R D E R : (PER : AVINASH G. GHAROTE, J.)

1. A reference is made, for answering the following question :-

“Whether the jurisdiction of a Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Section 17 of the Securitisation Act, in relation to enforcement of security interest of a secured creditor, is barred by Section 34 of the Securitisation Act ?

2. The above question was framed, noticing the apparent discord between the judgment of the Division Bench of this Court in *State Bank of India Vs. Jigishaben B. Sanghavi and others, 2011 (2) Mh.L.J. 342 : 2010 SCC OnLine Bom 1868* and *State Bank of India Vs. Shri Sagar s/o Pramod Deshmukh and others, 2011 (3) Mh.L.J. 71.*

2.1. In *Jigishaben* (supra) the Court was considering a situation, where the immovable property, a residential flat, was mortgaged with the Bank as a security interest, by the Karta of the HUF. On default, the application before the Debts Recovery Tribunal (for short “the DRT” hereinafter) for recovery was allowed on 17/10/2003 and in the recovery proceedings, the flat was attached and a sale proclamation was issued. On 11/12/2004, a notice under

Section 13 (4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, “the SARFAESI Act” hereinafter) was issued against which, a writ was instituted before the Gujarat High Court, which came to be dismissed on 31/3/2005, appeal against which, was also dismissed by a Division Bench on 5/4/2005. A suit came to be instituted on 5/4/2005, by the respondents claiming to be the members of the HUF, thereby having a right and interest in the property, seeking reliefs that the action on part of the Bank was illegal, malafide, there was no legal and valid mortgage nor any security interest was created in favour of the Bank, vis-a-vis the rights of the plaintiffs, who were members of the HUF. On an application filed under Order VII Rule 11 (d) of C.P.C., for rejection of the plaint, in view of the bar under Section 34 of the SARFAESI Act, the same was rejected, against which an appeal came to be filed before the High Court. The High Court in the above background held that the bar under Section 34 applies in respect of a matter which can be determined under the SARFAESI Act by the DRT or the Appellate Tribunal and once it is held that the matter is of a description, which the Tribunal or the Appellate Tribunal is empowered to determine by or under the provisions of the Act, the

jurisdiction of the Civil Court to entertain a suit in respect of that matter, would be barred. It also held that the powers of the DRT under Section 17 were of width and amplitude and if the Tribunal comes to the conclusion that any of the measures referred to in Section 13 (4) have not been taken by the secured creditor, in accordance with the Act and Rules, the Tribunal may require the restoration of the management of the business of the borrower or restoration of the possession to the borrower and this power of the Tribunal includes a power to direct the restoration of the *status quo ante* in order to provide relief to the borrower (or to any person sic.) against an action which is not in accordance with law. The High Court found, relying upon ***United Bank of India Vs. Satyawati Tondon and others, (2010) 8 SCC 110*** and ***M/s. Trade Well, a Proprietorship Firm, Mumbai Vs. Indian Bank and another, 2007 (3) AIR Bom. R. 656 (DB)*** that the expression “any person” used in Section 17 (1) was of wide import and took within its fold not only the borrower but also guarantor or any other person, who may be affected by the action taken under Section 13 (4) or Section 14. It also found that once a measure is adopted under Section 13 (4), a statutory remedy provided is not only available to the borrower, but to any person

aggrieved by the taking of a measure and while enquiring into an appeal under Section 17, the Tribunal is empowered to determine whether the action which is taken by the secured creditor is in accordance with the provisions of the Act and the Rules made thereunder and if the Tribunal comes to the conclusion that the action was invalid it was vested with wide powers to restore the position. On the facts of the matter, it was found that the averments made in the plaint, when construed in their entirety, revealed that the grievance which the plaintiffs had in the suit was in respect of the validity of the mortgage, which was executed by the second defendant as Karta of the HUF and of the tenability of the action adopted by the Bank under the SARFAESI Act, so as to meet the interest of the HUF claimed in the residential flat, for which, the recourse under Section 17 was sufficient and the suit therefore was barred by Section 34 of the SARFAESI Act. It was also held, that a borrower or third party cannot be permitted to defeat or to render nugatory the provisions of the Act merely by a stray reference to allegation of fraud or, as in the case under consideration, therein, by an averment of “a systematic fraud”.

2.2. In *Sagar Pramod Deshmukh* (supra) the plaintiffs had filed a suit for declaration, partition, separate possession and permanent injunction in respect of the suit property, in which the Bank as well as the father of the plaintiffs, who had mortgaged the property, with the Bank were joined as defendants. The State Bank of India was joined as defendant for the reason that it had issued a notice under Section 13 (2) of the SARFAESI Act in respect of the suit property. A claim was made that the suit property was the ancestral joint Hindu property and the plaintiffs were coparceners of it, having one fourth undivided share each therein, which was purchased from and out of the income from the ancestral property, including the income from the agricultural fields and other immovable properties. The creation of the mortgage was not for the benefit of the family but for the purpose of satisfying the vices and since the father was not the absolute owner of the entire property, he had no authority to mortgage the same with the Bank. Several other grounds were raised. The Bank filed an application under Order VII Rule 11 of C.P.C., for rejection of the plaint on the ground that the suit as framed was barred by Section 34 of the SARFAESI Act, which came to be rejected against which rejection a Civil Revision Application came to be filed

in the High Court. After considering the jurisdiction of the Civil Court under Section 9 of C.P.C., and that of the DRT under the provisions of the DRT Act and SARFAESI Act, it was held as under :-

“33. In view of above, the sum and substance of the decision is that :

(i) The jurisdiction of the Civil Court to entertain, try and decide any suit or proceeding in respect of the property, which is the subject matter of security interest created in favour of a secured creditor, is barred only to the extent of the matters, which the Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under the Act to determine. (Para 18)

(ii) The jurisdiction of the Civil Court in respect of the matters, which do not fall within the jurisdiction of the Debts Recovery Tribunal or its Appellate Tribunal under Sections 17 and 18 of the said Act, is not ousted or barred under the provision of Section 34 of the said Act and the Civil Court continues to exercise such jurisdiction. (Para 18)

(iii) In order to decide the question as to whether the jurisdiction of the Civil Court under Section 9 of the Civil Procedure Code is ousted or not, the real test would be to find out whether the Debts Recovery Tribunal under Section 17, is empowered to hold an enquiry on a particular question and to grant relief in respect thereof. The extent of jurisdiction of the Debts Recovery Tribunal under Section 17 shall decide the extent of exclusion of

jurisdiction of Civil Court to decide the dispute in respect of the suit property. (Para 18)

(iv) The jurisdiction of the Civil Court to entertain, try and decide a civil suit challenging the action of the defendant no.3-Bank to take possession of the suit property and to sell the same to recover its debts by enforcing security interest in the suit property in accordance with the provisions of Section 13 of the said Act, is completely barred by Section 34 of the said Act. (Paras 19, 20 and 23)

(v) The jurisdiction of the Civil Court to entertain, try and decide the suit for partition and separate possession of the property in respect of which security interest is created in favour of secured creditor, is not barred under Section 34 of the Act. (Para 21)

(vi) The jurisdiction of Civil Court to entertain, try and decide the Civil Suit claiming relief of declaration that the action of the secured creditor to take possession of the property and to sell the same, is fraudulent and void, as has been held by the Apex Court in Mardia Chemical's case, is not barred by Section 34 of the said Act. (Para 23)

(vii) The jurisdiction of the Civil Court to entertain, try and decide Civil Suit simpliciter for permanent injunction to permanently restrain the defendant No.3-Bank from taking possession of the suit property and selling the same or to create any third-party interest without any substantive relief of declaration that the creation of security interest in favour of a secured creditor was fraudulent and void ab initio, is completely barred under the second part of Section 34 and hence consequentially, the jurisdiction of

Civil Court to pass an order of temporary injunction in such suit, restraining the defendant No.3-Bank from alienating the suit property or creating any third-party interest therein, is also barred. (Para 25)

(viii) Once it is held that the jurisdiction of Civil Court is not ousted under Section 34, to grant substantive relief of declaration that creation of security interest in favour of a secured creditor, was fraudulent and void, its jurisdiction to grant consequential relief of permanent injunction and the relief of temporary injunction in such suit, is not ousted. (Para 26)

(ix) Once it is held that the jurisdiction of the Civil Court to entertain, try and decide the civil suit for partition and separate possession of the suit property is not barred by Section 34 of the said Act, then it follows that the jurisdiction of the Civil Court to grant permanent and temporary injunction restraining the defendants from dealing with the suit property or creating third party interest therein is also not ousted by Section 34 of the said Act.

(x) It is open for the plaintiffs or any other person having any right, title, share or interest in the suit property to lodge their/his objection under Section 17 of the said Act before the Debts Recovery Tribunal, which is competent to deal with it in accordance with law and to pass such orders as are necessary to protect the interest of the plaintiffs/such person vis-a-vis the suit property and also to balance the equities. (Para 30)

(xi) The question as to what shall be the effect of a decree

passed in the suit for partition and separate possession of the suit property or for declaration that the action of secured creditor is fraudulent and void ab initio by the Civil Court, on the enforcement of security interest by the defendant No.3-Bank, i.e. the secured creditor, can be determined only after culmination of both the proceedings and not before. (Para 30)."

3. For deciding the above question, it is necessary to determine the nature, scope and ambit of the jurisdiction of the DRT under section 17 of the Recovery of Debts and Bankruptcy Act, 1993 (for short "the DRT Act, 1993" hereinafter) read with the provisions of Sections 13 and 17 of the SARFAESI Act and the nature of claims and proceedings it is entitled to entertain and decide, in juxtaposition, to the jurisdiction of the Civil Court under Section 9 of C.P.C.

4. We have heard learned Counsels Mr. Chaitanya S. Samudra, Mr. S.N. Kumar, Dr. R.S. Sundaram, Mr. Lohiya, Mr. Sanjeev Deshpande, Mr. Narendra Jetha and Mr. M.R. Joharapurkar for the respective parties.

5. Learned Counsels Dr. R.S. Sundaram, Mr. J.M. Gandhi, Mr. Sanjeev Deshpande and Mr. A.H. Lohiya have argued that the jurisdiction of the Civil Court is not fully barred. The summary of their submissions is as under :-

5.1. Dr. R.S. Sundaram, learned Counsel for the appellant in Second Appeal No.502/2016 at the outset, places reliance upon the principles laid down in *Dhulabhai etc. Vs. State of Madhya Pradesh and another, AIR 1969 SC 78*, to construe exclusion of jurisdiction. He further invites our attention, to the language of Section 34 of the SARFAESI Act and submits that Section 13 (4) thereof, empowers the secured creditor to take various measures for recovering the debt as due and payable to it. According to him, the jurisdiction of the DRT is restricted to determination of any dispute or grievance, only in respect of the measures undertaken under Section 13 (4) and not otherwise. Thus, he contends that the jurisdiction of the DRT is restricted to entertaining of disputes relating to recovery of debts due to the Banks. According to him, the DRT does not have any jurisdiction to decide or determine any subject matter of a civil nature by any means. He places reliance upon the following

judgments :-

(A) Mardia Chemicals Vs. Union of India, 2004 (2) Mh.L.J. 1090, para 51.

(B) Nahar Industrial Enterprises Limited Vs. Hong Kong and Shanghai Banking Corporation, 2009 (8) SCC 646, which delineates the distinction between Civil Courts and Tribunals and goes on to hold that the DRT cannot be treated as a Civil Court as it is constituted with a specific purpose and limited jurisdiction. The DRT cannot pass a decree nor can any declaratory relief be sought from it.

(C) Padma Ashok Bhatt Vs. Orbit Corporation Ltd. and others, 2017 (6) Mh.L.J. 102 (paras 3, 13 to 15 and 17) and Robust Hotels Pvt. Ltd. and others Vs. EIH Ltd. and others, 2017 (3) Mh.L.J. 1, para 32, where it has been held that bar under Section 34 of the SARFAESI Act must correlate to the conditions as stipulated under the Section and if are not so found then the jurisdiction of the Civil Court cannot be ousted.

(D) Margret Almeida and others Vs. Bombay Catholic Co-operative Housing Society Ltd. and others, 2012 (5) Mh.L.J. 4 (paras 16, 18 and 19), which holds that the jurisdiction of the Civil Court is unlimited, subject only to limitations imposed by law either expressly or by necessary implication.

(E) Shrimant Cha. Udyan Raje Vs. Shrimant Cha. Vijaysinraje, 2015 (5) Mh. L.J. 350 (paras 16 and 24) which holds that the provisions of law ousting jurisdiction of Civil Courts need to be strictly construed.

(F) *Sadanand Properties Pvt. Ltd. and Ors. Vs. Punjab National Bank and Ors., MANU/DE/0334/2015 (paras 26, 28, 39 and 45)*, which holds that a civil suit seeking declaration that documents are null and void is maintainable and injunction can be granted.

(G) *Rajanala Kumari Vs. State of Telengana, Manu/AP/0283 (para 49)* holding that a suit for declaration would lie as the SARFAESI Act does not provide any efficacious remedy for the questions raised in the civil suit.

(H) *Abhishek Bose Vs. IDBI, Manu/WB/0895/2015 (para 41)* which after considering *Jagdish Singh Vs. Heeralal and others (2014) 1 SCC 479* holds that a suit for declaration is maintainable.

(I) *Indian Bank Vs. ABS Marine Products (P) Ltd., (2006) 5 SCC 72* holding that the suit for damages against the Bank for non-release of sanctioned loan was maintainable.

(J) *Swaraj Infrastructure Private Limited Vs. Kotak Mahindra Bank Limited, (2019) 3 SCC 620*, holding that a winding up petition by the borrower under the Companies Act is maintainable.

(K) *Centurion Bank Ltd. Vs. India Lead Limited, 1999 SCC OnLine Bom 895* holding that a suit seeking declaration regarding a hire purchase agreement was maintainable and there was no ouster of jurisdiction.

(L) *Madhav Prasad Aggarwal and another Vs. Axis Bank Limited and another, (2019) 7 SCC 158*, holding that a civil suit claiming civil remedies was maintainable

and there was no ouster.

(M) Satya Pal Anand Vs. State of Madhya Pradesh and others, (2016) 10 SCC 767, holding that only civil court is competent to cancel the registration of a document after registration and no other authority or Tribunal had jurisdiction.

Dr. R.S. Sundaram, learned Counsel submits that the contrary position, regarding bar of jurisdiction of the Civil Court as laid down in *Jigishaben* (supra) is due to non consideration of the judgment in *Nahar Industrial Enterprises* (supra) and therefore does not lay down the correct law. He further submits that in *Jagdish Singh Vs. Heeralal and others, (2014) 1 SCC 479*, the Court has held that in the facts and circumstances of that case, since the rights of the parties were not crystalized, hence, the DRT could decide the issue. The issue of maintainability of a civil suit was not decided. The judgment was in light of the peculiar facts of the case and *Nahar Industrial Enterprises* (supra) was though referred but not discussed, since the facts of the case did not warrant so (para 25). He further submits that in *Authorised Officer, State Bank of India Vs. Allwyn Alloys Private Limited and others, (2018) 8 SCC 120*, the Apex Court did not decide any issue but referred the matter back to

the writ Court to decide the matter in accordance with law. According to the learned Counsel, the ratio laid down in ***Sree Anandhakumar Mills Limited Vs. Indian Overseas Bank and others, (2019) 14 SCC 788***, is not applicable since it is based upon ***Jagdish Singh*** (supra). Dr. Sundaram, learned Counsel therefore submits that the jurisdiction of the Civil Court cannot be held to be ousted in all matters, in view of the provisions of Section 34 of the SARFAESI Act.

5.2. Mr. J.M. Gandhi, learned Counsel also relied upon ***Mardia Chemicals*** (supra) to submit that the jurisdiction of the Civil Court to limited extent as indicated in para 51 thereof where a case of fraud is made out, is available to a litigant. He submits relying upon para 47 therein that the obligation to maintain a transparency in its affairs, is mandatory upon the lender and any violation thereof, could not be addressed in proceedings before the DRT and where pleadings are sufficient to demonstrate any fraud or improper conduct, contrary to the guidelines by the RBI or the provisions of the Statute the Civil Court would have jurisdiction. Relying upon ***Alpana Gupta Through Power of Attorney Holder Vs. APG Towers Private Limited and***

another, (2019) 15 SCC 46; Saleem Bhai and others Vs. State of Maharashtra and others, (2003) 1 SCC 557; Kuldeep Pathania Vs. Bikram, AIR 2017 SC 593; Urvashiben Vs. Krishnakant, (2019) 13 SCC 372; Pawan Kumar Vs. Babulal and others, (2019) 4 SCC 367; Kamala Vs. K.T. Eshwara Sa, AIR 2008 SC 3174 and India Bank Vs. ABS Marine Products (P) Ltd., (2006) 5 SCC 72 he submits that the principles upon which objections to the jurisdiction of the Civil Court are to be dealt with have already been laid out, which indicate that the pleadings in the plaint are germane for the purpose of deciding the jurisdiction of the Civil Court and if the plain reading of the plaint discloses prima facie case of fraud or any violation of the statutory provisions, then the provisions of Section 34 of the SARFAESI Act do not bar the jurisdiction of the Civil Court. He submits that sufficiency of pleadings is a factual aspect and has to be considered on case to case basis. The further contention is that if in a suit, any action initiated by the secured creditor under the SARFAESI Act is questioned, then to that extent the jurisdiction of the Civil Court would be barred, but if that is not so, then the Civil Court would have jurisdiction to entertain and try the suit. As an example, he submits that the conduct of the secured creditor is fraudulent, improper and

contrary to the terms of the contract, the borrower has been victimized and subjected to loss, a suit for such an action would be beyond the purview of the DRT and therefore, would be amenable to the jurisdiction of the Civil Court, for which reliance is placed on ***Robust Hotels*** (supra) and ***Margret*** (supra).

Learned Counsel Mr. Gandhi, further submits that the reliance on ***Jagdish Singh*** (supra) ***Satyawati Tondon*** (supra) and ***Shri Anandkumar Mills*** (supra) to contend that the jurisdiction of the Civil Court is barred, is incorrect, for the reason that in ***Satyawati Tondon*** (supra) there were no pleadings about misconduct and illegalities of the Bank; in ***Jagdish Singh*** (supra) according to him, the subject matter was different and even otherwise the Court had in para 5 observed that it was necessary to frame issue pertaining to objection as to jurisdiction of the Civil Court which would indicate that an enquiry into the facts of the case to determine jurisdiction was necessary. He submits that the judgment in ***Jigishaben*** (supra) does not consider the true and correct import of ***Mardia Chemicals*** (supra). He submits that the question under reference needs to be answered in negative and it be held that the Civil Court would have jurisdiction within the exceptions as laid down in ***Mardia Chemicals*** (supra),

which is a judgment by larger bench of the Hon'ble Apex Court.

5.3. Mr. Sanjeev Deshpande, learned Counsel for the respondent no.1 in C.R.A. No.53/2014 supports the view canvassed by Dr. Sundaram, learned Counsel. He submits that the bar under Section 34 of the SARFAESI Act, is not an omnipotent bar but is restricted to matters to be decided by the DRT under the jurisdiction as conferred upon it. By inviting our attention to Chapter III of the SARFAESI Act he submits, that limited power and jurisdiction has been conferred upon the DRT. Specifically advertng to Section 31 of the SARFAESI Act he submits that the categories of cases to which the Act is not applicable is also specifically stated. He submits that a combined reading of Sections 35 and 37 of the SARFAESI Act, indicates that rights available under other enactments for the time being in force are recognized and therefore, there must be a remedy in respect of such actions, otherwise the civil rights recognized and available to a person, would be rendered illusory in absence of any remedy, therefore, the applicability of the other enactments where a right is available cannot be nullified. Citing the example of right of a daughter in ancestral or coparcenary property, which is recognized

under the Hindu Succession Act, he submits that any mortgage of the property, by bye-passing the right of the daughter could only be challenged before the Civil Court and not before the DRT, which did not have the power to record evidence or for that matter, to pass a decree for partition and separate possession in this regard, binding upon the persons who were not parties to the mortgage. He submits, that the jurisdiction of the DRT under the SARFAESI Act is limited to measures under Section 13 (4) and their enforcement or violation, and therefore cannot travel beyond it. He submits, that even otherwise the DRT has been held not to be a “Court”, in *Nahar Industrial Enterprises* (supra) and therefore is legally incompetent to pass a decree, enforceable in law. He therefore submits that the DRT by virtue of the provisions of the SARFAESI Act, does not exclude the jurisdiction of the Civil Court.

5.4. Mr. A.H. Lohiya, learned Counsel for the respondent no.2 in C.R.A. No.53/2014 and petitioner in W.P No.3511/2010 also supports the stand taken by learned Counsels Dr. Sundaram and Mr. Sanjeev Deshpande. He submits that the DRT is a Special Forum which empowers it to decide matters as contemplated by the

provisions of the SARFAESI Act, which is a special enactment, due to which, the jurisdiction of the DRT, ought to be held to be limited to the actions or matters contemplated by the SARFAESI Act. He submits that any exclusion of jurisdiction has to be strictly construed and as legislature in its wisdom has conferred a limited jurisdiction upon the DRT in respect of matters under the SARFAESI Act, relating to provisions as contained in Section 13 therein, the same cannot be expanded to include matters, which are not directly covered under Section 13, by implication or otherwise. He submits that all adjudication in respect of civil rights, even if they arise in respect of a security interest, would be amenable to the jurisdiction of the Civil Court as it is the Civil Court alone, which would have the jurisdiction to decide such rights. By inviting our attention to language of Section 35 of the SARFAESI Act, he submits that the overriding effect of the SARFAESI Act, is only to the extent where there is any inconsistency in such other law and not otherwise. Placing reliance upon *Shivabassappa I. Kankanwadi and another Vs. Mapusa Urban Co-operative Bank of Goa Ltd. Goa and others, 2016 (3) ABR 501*, (para 14), he submits that Section 37 of the SARFAESI Act also does not bar the application of other laws as it states that the provisions

of the SARFAESI Act, and the Rules made thereunder shall be in addition to and not in derogation of the Statutes named therein or any other law for the time being in force, which would naturally indicate that the provisions of the SARFAESI Act, were not in derogation to the civil rights of the parties, which could only be decided in the Forum created for adjudication of such rights, namely, the Civil Court. Placing reliance upon *Mardia Chemicals* (supra) he submits that the Hon'ble Court itself has held that a case in which a fraud is involved, would require adjudication, which could not be done by the DRT and therefore it would be the Civil Court, which would have jurisdiction. Citing the instances of a claim for foreclosure of accounts under Section 67 of the Transfer of Property Act; claim for redemption of mortgage under Section 60 of the Transfer of Property Act; claim for cancellation of registered instruments, like power of attorney, gift-deed, sale-deed, registration partition-deed, under Section 31 of the Specific Relief Act; a claim for declaratory relief under Section 34 of Specific Relief Act; claim for damages under law of torts and Contract Act; discharge of guarantee under the Indian Contract Act; novation of contract/discharge of surety; violation of any action or rights prior to

invocation of Section 13 (2) or 13 (4) of the SARFAESI Act; claim for seeking implementation of the RBI guidelines for restructuring of accounts; specific performance, he submits are all instances which may though relate to a security interest, as defined under the SARFAESI Act are claims which cannot be adjudicated by the DRT. Reliance is also placed upon *Cofex Exports Limited Vs. Canara Bank, AIR 1997 Delhi 355* (para 36) to contend that a Tribunal is not a Court and therefore, is not empowered to grant a relief which a Court can. Learned Counsel also relies upon *Madhav Prasad Aggarwal* (supra) in support of his submissions. He submits that *Jagdish Singh* (supra) does not lay down that the DRT is competent to pass declaratory relief or a decree for ownership, partition or separate possession of joint Hindu family property or ancestral property.

By relying upon *Sundeep Kumar Bafna Vs. State of Maharashtra and another, (2014) 16 SCC 623 : AIR 2014 SC 1745* (para 15) he submits that in case of a conflict between two Benches of coordinate strength the earlier must prevail, unless the former is held to be *per incuriam* and contends that *Jagdish Singh* (supra) in so far as it does not consider *Mardia Chemicals* (supra) as well as

Nahar Industrial Enterprises (supra), cannot be said to be good law. He further submits that *Jagdish Singh* (supra) is confined in regards measures under Section 13 (4) of the SARFAESI Act and not beyond that. Further reliance is placed on *Allwyn Alloys Private Limited* (supra) to contend that any and every dispute between a borrower and a secured creditor is not within the competence of the DRT to decide exercising jurisdiction under the SARFAESI Act. He submits that any provision, which creates a bar has to be construed strictly. In regard to the expression “secured assets of the borrower”, he submits that the expression means that the assets must belong to the borrower, absolutely without any right or claim of any third party therein of any nature, which care has to be exercised by the Bank before accepting any property as a security interest. In so far as the allegation of fraud is concerned, reliance is placed upon *Mardia Chemicals* (supra) to contend that jurisdiction of Civil Court is not barred.

6. Learned Counsels Mr. Chaitanya S. Samudra and Mr. S.N. Kumar have argued that the jurisdiction of the Civil Court is fully barred. Learned Counsels Mr. Jetha and Mr. Joharapurkar,

have supported them. The summary of their submissions is as under :-

6.1. Mr. C.S. Samudra, learned Counsel for the Bank of Baroda in C.R.A. No.29/2011 submits that the bar under Section 34 is absolute, in so far as matters under the SARFAESI Act are concerned, for which the DRT is empowered to have jurisdiction. He places reliance upon the language of Section 34 of the SARFAESI Act, which is express and specific. Further relying upon Section 35 of the SARFAESI Act, he submits that an overriding effect has been given to the provisions of the SARFAESI Act over any other law inconsistent with the provisions as contained in the SARFAESI Act. He further submits that Section 26-E, which has now been brought into force from 2016 also gives priority to the debts of a secured creditor over all other debts, and a combined reading of the above provisions, in the background as to why the SARFAESI Act has been brought would indicate the exclusion of the jurisdiction of the Civil Court in all matters, which are governed by the SARFAESI Act, in respect of which, the DRT is empowered to exercise jurisdiction. He therefore submits that *Jagdish Singh* (supra), *Sree Anandhakumar*

Mills Limited (supra) and *Jigishaben* (supra) lay down the correct position.

6.2. Mr. S.N. Kumar, learned Counsel for the assignee-Omkara Assets Reconstruction Private Limited in Second Appeal No.502/2016 submits that the Civil Court has no jurisdiction at all. He invites our attention to the language of Section 34 of the SARFAESI Act to submit that there is an express bar created by the Statute. He further submits that Section 35 gives an overriding effect to the provisions of the SARFAESI Act over any other law, notwithstanding anything inconsistent contained therein. Relying upon paras 34, 50 and 59 of the judgment in *Mardia Chemicals* (supra) he submits that the purpose of the enactment would be defeated if the Civil Court is held to have jurisdiction. He submits that argument of this nature was considered by the Hon'ble Apex Court in para 50, taking which into consideration it was held that the prohibition as contained in Section 34 would cover not only the action under the DRT Act but also under Section 13 (4) of the SARFAESI Act and the bar of Civil Court applies to all such matters. Relying upon *Jagdish Singh* (supra) (para 17) he contends that the

expression “any person”, has been held to mean not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13 (4) of the SARFAESI Act and para 22 wherein the expressions “measures” and “in respect of any matter” are construed in a wider sense and the jurisdiction of the Civil Court is completely barred so far as the “measure” taken under Section 13 (4) of the SARFAESI Act. Reference is also made to the judgment of the Hon'ble Apex Court in the case of ***Satyawati Tondon*** (supra). ***Sree Anandhakumar Mills Limited*** (supra) is also relied upon in support of the above submission. He further contends this Court in ***Jigishaben*** (supra) has categorically held that the powers under Section 17 of the SARFAESI Act are powers of width and amplitude and therefore would encompass a power to determine even the validity of the mortgage executed in favour of the secured creditor, even though raised by a person who was non-signatory to such mortgage. He submits, that the DRT has the power and jurisdiction, in case so found, to declare the mortgage as illegal on ground of incompetency. Further relying upon ***Indian Bank, Asset Recovery Management Branch Vs. B. Venkataraman, 2014 (6) CTC 751*** (paras 41 to 49) by the Madras High Court, learned Counsel

contends that the DRT can adjudicate and declare rights of parties in respect of secured asset which has undergone measures by the Bank. He further submits that if the Civil Court is allowed to adjudicate matters wherein secured creditor has taken measures against the mortgaged property, the very purpose of enacting the SARFAESI Act would be frustrated for which reliance is placed upon *V. Thulasi Vs. Indian Overseas Bank, III (2011) BC 556* (paras 8 to 10). In respect of *Nahar Industrial Enterprises* (supra), Mr. S.N. Kumar, learned Counsel submits that the Hon'ble Apex Court therein was considering the question whether the High Court/Supreme Court has power to transfer suit pending in a Civil Court situated in one State to DRT situated in an other State and the observations made therein are in that context and therefore, would not constitute a binding precedent for all matters. He therefore submits that the view taken in *Jigishaben* (supra) is correct.

7. It is always necessary that the plea or question to be determined, at the first instance has to be tested on first principles, based on the language of the relevant provisions as contained in the Statute, without being influenced by the judicial pronouncements,

the effect and applicability of which have to be considered later on.

JURISDICTION

8. 'Jurisdiction', has been defined to mean the power and authority of a Court or Tribunal, to entertain, hear and decide matters, over which it has been granted domain, to do so.

8.1. In *Commissioner of Income Tax, Chandigarh Vs. Pearl Mech. Engg. & Foundry Works (P) Ltd.*, (2004) 4 SCC 597 it has been held that the word “jurisdiction” implies the Court or Tribunal with judicial power to hear and determine a cause, and such Tribunal cannot exist except by authority of law. Jurisdiction always emanates directly and immediately from the law; it is a power which nobody on whom the law has not conferred it can exercise. In other words, “jurisdiction” has reference to the power of the Court or Tribunal over the subject-matter, over the res or property in contest, and to the authority of the court to render the judgment or decree it assumes to make.

8.2. In *Harpal Singh Vs. State of Punjab*, (2007) 13 SCC 387, the word 'jurisdiction', has been considered thus :-

“10. At this stage it will be useful to refer to the dictionary meaning of the word “jurisdiction”:

Black's Law Dictionary:

“A court's power to decide a case or issue a decree.”

Words and Phrases — Legally defined, Third Edition (p. 497):

“By ‘jurisdiction’ is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by similar means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction extends.”

Law Lexicon by P. Ramanatha Aiyar, 2nd Edn., Reprint 2000:

“An authority or power, which a man hath to do justice in causes of complaint brought before him. (Tomlin's Law Dictionary) The power to hear and determine the particular case involved; the power of a court or a Judge to entertain an action, petition, or other proceeding; the legal power of hearing and determining controversies. As

applied to a particular claim or controversy, jurisdiction is the power to hear and determine that controversy.”

Jurisdiction, therefore, means the authority or power to entertain, hear and decide a case and to do justice in the case and determine the controversy. In absence of jurisdiction the court has no power to hear and decide the matter and the order passed by it would be a nullity”.

8.3. In ***Nusli Neville Wadia Vs. Ivory Properties and others***, (2020) 6 SCC 557 the word 'jurisdiction', has been held to mean as under :-

“20. Jurisdiction is the power to decide and not merely the power to decide correctly. Jurisdiction is the authority of law to act officially. It is an authority of law to act officially in a particular matter in hand. It is the power to take cognizance and decide the cases. It is the power to decide rightly or wrongly. It is the power to hear and determine. Same is the foundation of judicial proceedings. It does not depend upon the correctness of the decision made. It is the power to decide justiciable controversy and includes questions of law as well as facts on merits. Jurisdiction is the right to hear and determine. It does not depend upon whether a decision is right or wrong. Jurisdiction means power to entertain a suit, consider merits, and render binding decisions, and “merits” means

the various elements which enter into or qualify plaintiff's right to the relief sought. If the law confers a power to render a judgment or decree, then the court has jurisdiction. The court must have control over the subject-matter, which comes within classification limits of law under which the court is established and functions.

21. *The word "jurisdiction" is derived from Latin words "juris" and "dico", meaning "I speak by the law" and does not relate to rights of parties as between each other but to the power of the court. Jurisdiction relates to a class of cases to which a particular case belongs. Jurisdiction is the authority by which a judicial officer takes cognizance and decides the cases. It only presupposes the existence of a duly constituted court having control over subject-matter which comes within classification limits of the law under which court has been established. It should have control over the parties' litigant, control over the parties' territory, it may also relate to pecuniary as well as the nature of the class of cases. Jurisdiction is generally understood as the authority to decide, render a judgment, inquire into the facts, to apply the law, and to pronounce a judgment. When there is the want of general power to act, the court has no jurisdiction. When the court has the power to inquire into the facts, apply the law, render binding judgment, and enforce it, the court has jurisdiction. Judgment within a jurisdiction has to be immune from collateral attack on the ground of nullity. It has co-relation with the constitutional and statutory power of tribunal or court to hear and*

determine. It means the power or capacity fundamentally to entertain, hear, and determine.”

(emphasis supplied)

Thus the jurisdiction, either of the Civil Court or of the DRT, would mean the power and authority to entertain, hear and decide the matters, as permissible within the statutory limits conferring jurisdiction upon them. The language of the Statute, therefore assumes significance, while determining the jurisdiction of a Court or Tribunal. The language of the provision conferring or creating jurisdiction, would then define the parameters of jurisdiction which a Court or Tribunal is entitled to exercise. Similarly the language of the provision, ousting jurisdiction, would also be of significance in determining the nature, scope and ambit of the jurisdiction conferred upon the Court or Tribunal, as it would indicate, what can be done and what cannot be done by the Court or Tribunal, and in cases as to what can be done by the Court or Tribunal, the jurisdiction of the other would stand excluded, to that extent.

9. Section 9 of the Code of Civil Procedure delineates the jurisdiction of the Civil Court. Section 9 of C.P.C., is reproduced as

under :-

“ 9. Courts to try all civil suits unless barred .-The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.

Explanation [I].-A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.

Explanation II .-For the purposes of this section, it is immaterial whether or not any fees are attached to the office referred to in Explanation I or whether or not such office is attached to a particular place.”

9.1. A bare perusal of Section 9 of C.P.C. would indicate that there are no fetters put upon the competence and powers of the Civil Court, to entertain and try all suits and claims of a civil nature. This is succinctly elucidated by the Hon'ble Apex Court in ***Abdul Gafur and another Vs. State of Uttarakhand and others, (2008) 10 SCC 97***, [considering *Ganga Bai Vs. Vijay Kumar (1974) 2 SCC 393*] in the following words :-

“16. Section 9 of the Code provides that the civil court shall have jurisdiction to try all suits of a civil nature excepting the suits of which their cognizance is either expressly or impliedly barred. To put it differently, as per Section 9 of the Code, in all types of civil disputes, the civil courts have inherent jurisdiction unless a part of that jurisdiction is carved out from such jurisdiction, expressly or by necessary implication by any statutory provision and conferred on other tribunal or authority. Thus, the law confers on every person an inherent right to bring a suit of civil nature of one's choice, at one's peril, howsoever frivolous the claim may be, unless it is barred by a statute.”

(emphasis supplied)

10. Before we proceed ahead, it is necessary to consider, what is meant by “suits of a civil nature”. Generally speaking, rights accrued under the Personal Law governing a person, for example, under the Hindu Succession Act, 1956 - which governs the rights of succession, in respect of immovable and movable properties, ancestral, joint or coparcenary by framing Rules of succession therein; rights under contracts by volition of parties, under the Indian Contract Act – the enforcement and defences created therein; rights under the Transfer of Property Act; rights available under the

Specific Relief Act; are generally considered to be civil rights. So also, rights conferred and available, by various Statutes, upon a citizen, or those available under law of torts relating to damages are also rights of a civil nature. All of these rights, are enforceable before the Civil Court, by way of filing of suits for enforcement of these rights.

11. Section 9 of C.P.C., when it postulates that the Courts shall, subject to the provisions therein contained have jurisdiction to try all suits of a civil nature, would mean that the Courts have the power and authority to entertain all claims by way of suits, for enforcement of the rights available to a citizen, under various Statutes, unless they are expressly or impliedly barred.

12. The jurisdiction of the Civil Court therefore is of the widest amplitude and scope, rather is plenary and omnipotent. The only fetter put, is where a Statute, expressly or impliedly bars the jurisdiction of the Civil Court. Even in such cases where it is shown that the action under the Statute is not within the four corners of the Statute then the remedy would lie before the Civil Court and not

under the Statute. Even in case where it is shown that a right is created under Statute, which bars the jurisdiction of the Civil Court, however, the Statute does not create any remedy to address the violation of the right, it would be open to invoke the jurisdiction of the Civil Court. Thus, the restriction or fetter put upon the powers of the Civil Court to entertain and try a lis has to be tested upon the language of the Statute, prohibiting the jurisdiction of the Civil Court and also the rights created under the Statute and the remedy provided for the same. It will also have to be tested whether the Statute has an effective mechanism, to address the violation claimed under the Statute and to provide an effective remedy/relief, for the rights of third parties, violation of which is claimed. The principles for exclusion of the jurisdiction of the Civil Court, have been laid down by the Constitution Bench of the Hon'ble Apex Court in the case of *Dhulabhai etc. Vs. State of Madhya Pradesh and another*, **AIR 1969 SC 78**, based upon which the exclusion of jurisdiction of the Civil Courts or any Tribunal is to be determined. These are :-

“(1) Where the statute gives a finality to the orders of the special tribunals the civil courts’ jurisdiction must be held to be excluded if there is adequate remedy to do what the civil court would normally do in a suit. Such provision,

however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court. Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory

remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected, a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is a relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

(emphasis supplied)

The principles laid down in *Dhulabhai (supra)* have been followed consistently and are still extant.

12.1. In *State of Tamil Nadu Vs. Ramalinga Samigal Madam, (1985) 4 SCC 10*, the Hon'ble Apex Court, dilating upon the principles stated in *Dhulabhai (supra)*, elucidated the position as under :-

“13. Secondly, the principle indicated in the second proposition enunciated in Dhulabhai case requires that the statute, when it creates a special right or liability and provides for its determination, should also lay down that all questions about the said right or liability shall be determined by the Tribunal or authority constituted by it, suggesting thereby that if there is no such provision it will be difficult to infer ouster of the Civil Court's jurisdiction to adjudicate all other questions pertaining to such right or liability.

14. Thirdly, having regard to the principle stated by this Court while enunciating the first proposition in Dhulabhai case it is clear that even where the statute has given finality to the orders of the special tribunal the Civil Court's jurisdiction can be regarded as having been excluded if there is adequate remedy to do what the Civil Court would normally do in a suit. In other words, even where finality is accorded to the orders passed by the special tribunal one will have to see whether such special tribunal has powers to grant reliefs which Civil Court would normally grant in a suit and if the answer is in the negative it would be difficult to imply or infer exclusion of Civil Court's jurisdiction.”

(emphasis supplied)

12.2. In ***Sardara Singh (Dead) by Lrs. and another Vs. Sardara Singh (Dead) and others***, (1990) 4 SCC 90 while considering the bar under section 158(2) of the Punjab Land

Revenue Act, 1887, to the jurisdiction of the Civil Court, it was held as under :-

“4. ----- This is not a case of the land owner seeking to set aside the sale under Section 91 of the Act, since it was not necessary for him to apply for setting aside the sale as there existed no sale. It was, therefore, open to the land owner to approach the civil court to protect his possession as the same was threatened. Such a suit, therefore, does not attract the provisions of Section 158(2) on which reliance is placed. ---”

12.3. In *Ram Prasad (Dead) by Lrs. and others Vs. Assistant Director of Consolidation and others*, 1994 Supp (2) SCC 228, while considering the bar of jurisdiction of the Civil Court under section 242 of the U.P. Tenancy Act, 1939, it was held as under :

“7. The question then is whether the suit of the appellants was not maintainable, as contended by Shri Satish Chandra. No doubt Section 242 prohibits the jurisdiction of the civil courts only in respect of the rights given and claims arising under the Tenancy Act. But the relief claimed in the suit was one for a declaration that the decree granted under Section 59 was vitiated by fraud and collusion. Admittedly, such a relief, when cannot be given by revenue courts, the suit undoubtedly becomes maintainable under Section 9 of CPC.”

12.4. In *State of A.P. Vs. Manjeti Laxmi Kantha Rao (Dead) by Lrs. and others, (2000) 3 SCC 689* while considering the scope and ambit of Section 9 of C.P.C. the Hon'ble Apex Court stated as under :-

“5. The normal rule of law is that civil courts have jurisdiction to try all suits of civil nature except those of which cognisance by them is either expressly or impliedly excluded as provided under Section 9 of the Code of Civil Procedure but such exclusion is not readily inferred and the presumption to be drawn must be in favour of the existence rather than exclusion of jurisdiction of the civil courts to try a civil suit. The test adopted in examining such a question is (i) whether the legislative intent to exclude arises explicitly or by necessary implication, and (ii) whether the statute in question provides for adequate and satisfactory alternative remedy to a party aggrieved by an order made under it.”

(emphasis supplied)

12.5. In *Ramesh Gobindram (Dead) through Lrs. Vs. Sugra Humayun Mirza Wakf, (2010) 8 SCC 726* while considering the relative jurisdictions under Section 9 of C.P. C. and Section 83 of the Wakf Act, establishing Tribunals it was held as under :

“31. It is clear from sub-section (1) of Section 83 above that the State Government is empowered to establish as

many Tribunals as it may deem fit for the determination of any dispute, question or other matter relating to a wakf or wakf property under the Act and define the local limits of their jurisdiction. Sub-section (2) of Section 83 permits any mutawalli or other person interested in a wakf or any person aggrieved of an order made under the Act or the Rules framed thereunder to approach the Tribunal for determination of any dispute, question or other matter relating to the wakf. What is important is that the Tribunal can be approached only if the person doing so is a mutawalli or a person interested in a wakf or aggrieved by an order made under the Act or the Rules. The remaining provisions of Section 83 provide for the procedure that the Tribunal shall follow and the manner in which the decision of a Tribunal shall be executed. No appeal is, however, maintainable against any such order although the High Court may call for the records and decide about the correctness, legality or propriety of any determination made by the Tribunal.

32. There is, in our view, nothing in Section 83 to suggest that it pushes the exclusion of the jurisdiction of the civil courts extends (sic) beyond what has been provided for in Section 6(5), Section 7 and Section 85 of the Act. It simply empowers the Government to constitute a Tribunal or Tribunals for determination of any dispute, question of other matter relating to a wakf or wakf property which does not ipso facto mean that the jurisdiction of the civil courts stands completely excluded by reasons of such establishment.

34. The crucial question that shall have to be answered in every case where a plea regarding exclusion of the jurisdiction of the civil court is raised is whether the Tribunal is under the Act or the Rules required to deal with the matter sought to be brought before a civil court. If it is not, the jurisdiction of the civil court is not excluded. But if the Tribunal is required to decide the matter the jurisdiction of the civil court would stand excluded.”

(emphasis supplied)

12.6. In *Shrimant Chhatrapati Udyanraje Pratapsinhmaharaj Bhosale and another Vs. Shrimant Chhatrapati Vijaysinhraje Shahumaharaj Bhosale and others*, 2015 (5) Mh. L.J. 350, while construing the bar of jurisdiction of the Civil Court as raised therein, after considering the judicial precedents in that regard, it was held as under :-

“24. Accordingly, in the facts and circumstances of the present case, it cannot be said that the suit as instituted cannot be tried by the Civil Courts or that the jurisdiction of the Civil Courts to try such suit is either impliedly or expressly barred under the enactments referred or for that matter the provisions contained in Article 363(1) of the Constitution of India. It is settled position in law that a litigant having a grievance of a civil nature has, independent of any statute, a right to institute a suit in

some Courts or the other unless its cognizance is either barred expressly or impliedly. The exclusion of such a right, cannot be easily inferred because there is a strong presumption that Civil Courts have jurisdiction to decide all questions of civil nature, therefore, if at all there has to be an inference, the same should be in favour of the jurisdiction of the Court rather than at its exclusion. AIR 2002 SC 2308 = (2002) 5 SCC 510, ITI Ltd. v. Siemens Public Communications Network Ltd. Even the provision of law ousting the jurisdiction of the Civil Courts, is required to be strictly construed. The onus lies on the party, seeking to oust the jurisdiction, to establish his right to do so. AIR 1966 SC 1718, Abdul Waheed Khan v. Bhawani and ors. The expression "civil nature" is wider than the expression 'civil proceedings'. Accordingly, provisions contained in section 9 of the Civil Procedure Code would be available in a case where the dispute has a characteristic of affecting ones rights, which are not only civil but of civil nature. AIR 1995 SC 2001, Most. Rev. P.M.A. Metropolitan and ors. etc. etc. vs. Moran Mar Marthoma and anr. etc. etc. Further, the jurisdiction of the Civil Court is not ousted, unless the entire suit, as brought, is barred. The mere fact that a portion of the claim is excluded from the jurisdiction of the Civil Courts is not a bar to the trial, particularly of the remaining portion of the same suit which is not so excluded. AIR 2003 SC 1043 = (2003) 2 SCC 412, State of Karnataka v. Vishwabharathi House Building Co-op. Society and ors. Where a jurisdiction which is vested in the Court is attempted to be ousted, there must be a clear provision or

clear intentment by the legislature. If there is any doubt about the ouster of a jurisdiction of an existing Courts, the Courts will lean to an interpretation which would maintain the existing jurisdiction. AIR 1968 SC 271 *The Pabbojan Tea Co. Ltd. Etc. vs. Deputy Commissioner, Lakhimpur and ors.*”

(emphasis supplied)

12.7. In *Satya Pal Anand Vs. State of Madhya Pradesh and others, (2016) 10 SCC 767*, while considering the powers of the Sub-Registrar under the provisions of the Registration Act, 1908, to cancel the registration of a document, after its registration, in view of the scheme of the Registration Act, it was held that such a power did not vest in the Registrar or for that matter the Inspector General of Stamps, and it was the Civil Court, which could consider and decide such a plea.

12.8. The Hon'ble Apex Court, while considering the contours of the jurisdiction of the Civil Court under Section 9 of C.P.C. in juxtaposition to the jurisdiction of the Cooperative Court under Section 91 and the bar under Section 163 of the Maharashtra Cooperative Societies Act, 1961, in *Margret Almeida and others Vs. Bombay Catholic Cooperative Housing Society Limited and others,*

(2012) 5 SCC 642 has held that the jurisdiction of the Civil Courts to adjudicate civil disputes is unlimited, subject only to the limitations imposed by law either expressly or by necessary implications. In view of the language of Section 91 and the bar under Section 163 of the the Maharashtra Cooperative Societies Act, 1961, it further held that to confer exclusive jurisdiction on the Cooperative Court there must be satisfaction of two requirements, namely, that of the subject matter as well as the parties to the dispute, both of which should be those specified under the section, in the following words :-

“19. We shall now examine the issue of maintainability of the suits. As rightly contended by the learned counsel for the appellants the civil court's jurisdiction to adjudicate civil disputes is unlimited, subject only to the limitations imposed by law either expressly or by necessary implications. The law in this regard is well settled and needs no elaboration. Therefore, it becomes necessary for us to examine whether there is anything in the language of Section 91 or Section 163 which expressly excludes the jurisdiction of the civil courts in the context of the suits in question.

23. *A dispute arising out of a decision of the society to alienate the property of the society, in our opinion, is not expressly covered under Section 163 of the Act. It is to be*

examined whether it is a matter which is required to be resolved by the Cooperative Court by virtue of the provisions under Section 91 of the Act, in view of the conclusion of the High Court that “the entire subject-matter of the civil suit could have been the subject-matter of dispute filed under Section 91”.

27. *It can be seen from the scheme of Section 91, to confer exclusive jurisdiction on the Cooperative Court, the dispute must satisfy two requirements. It was held so in Marine Times Publications (P) Ltd. v. Shriram Transport & Finance Co. Ltd. at para 11: (SCC p. 474)*

“11. Before a dispute can be referred to a Cooperative Court under the provisions of Section 91(1) of the said Act it is not only essential that the dispute should be of a kind described in sub-section (1) of Section 91 but it is also essential that the parties to the said dispute must belong to any of the categories specified in clauses (a) to (e) of sub-section (1) of the said section.”

Both the subject-matter as well as the parties to the dispute must be those specified under the section. In other words, if either of the abovementioned two requirements is not satisfied then the dispute cannot be adjudicated by the Cooperative Court. If one of the parties to the dispute is not an enumerated person, the question whether the subject-matter of the dispute is one which falls exclusively within the jurisdiction of the Cooperative Court need not be examined. Similarly, if it is found in a given case that the subject-matter of the dispute is not covered by Section 91, an enquiry into the question whether the parties to the

dispute fall under any of the categories enumerated under Section 91 would become irrelevant.

37. It is argued by Shri C.A. Sundaram, learned Senior Counsel for the respondents that the scheme and language of Section 94(3)(a) makes it beyond doubt that the Cooperative Court's jurisdiction to adjudicate the dispute is not confined only to the disputes between the various classes of persons enumerated under Section 91 alone but extends to others also if such a third party (even in a case where he happens to be a non-member) acquires some interest in the property of either the society or the members or any other person enumerated in Section 91.

38. We find it difficult to accept the submissions of Shri Sundaram for the reason that if really the legislature intended that the Cooperative Court should have jurisdiction in all the disputes irrespective of the nature of the dispute arising between the various classes of persons enumerated in Section 91 and non-member third parties who acquire any interest in the property of such enumerated persons, the legislature could have clearly indicated the same in Section 91 itself."

(emphasis supplied)

12.9. In ***A. Ayyasamy Vs. A. Paramasivam and others (2016)*** 10 SCC 386, the Hon'ble Apex Court, while considering the provisions of Sections 5, 8 and 35 of the Arbitration and Conciliation

Act, 1996 and the limitations therein has recognised and reiterated that certain disputes were not amenable to arbitration, in the following words :-

“35. Ordinarily every civil or commercial dispute whether based on contract or otherwise which is capable of being decided by a civil court is in principle capable of being adjudicated upon and resolved by arbitration “subject to the dispute being governed by the arbitration agreement” unless the jurisdiction of the Arbitral Tribunal is excluded either expressly or by necessary implication. In Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd., this Court held that (at SCC p. 546, para 35) adjudication of certain categories of proceedings is reserved by the legislature exclusively for public fora as a matter of public policy. Certain other categories of cases, though not exclusively reserved for adjudication by courts and tribunals may by necessary implication stand excluded from the purview of private fora. This Court set down certain examples of non-arbitrable disputes such as: (SCC pp. 546-47, para 36)

(i) disputes relating to rights and liabilities which give rise to or arise out of criminal offences;

(ii) matrimonial disputes relating to divorce, judicial separation, restitution of conjugal rights and child custody;

(iii) matters of guardianship;

(iv) insolvency and winding up;

(v) testamentary matters, such as the grant of probate, letters of administration and succession certificates; and

(vi) eviction or tenancy matters governed by special statutes where a tenant enjoys special protection against eviction and specific courts are conferred with the exclusive jurisdiction to deal with the dispute.

This Court held that this class of actions operates in rem, which is a right exercisable against the world at large as contrasted with a right in personam which is an interest protected against specified individuals. All disputes relating to rights in personam are considered to be amenable to arbitration while rights in rem are required to be adjudicated by courts and public tribunals. The enforcement of a mortgage has been held to be a right in rem for which proceedings in arbitration would not be maintainable. In Vimal Kishor Shah v. Jayesh Dinesh Shah, this Court added a seventh category of cases to the six non-arbitrable categories set out in Booz Allen, namely, disputes relating to trusts, trustees and beneficiaries arising out of a trust deed and the Trust Act.”

(emphasis supplied)

This would indicate that even where a special Forum/Tribunal (in this case the Arbitral Tribunal), has been created, to entertain and decide disputes, upon which jurisdiction is

conferred though by agreement, still there are certain matters, which cannot be decided by such Forums/Tribunal as the power or authority to decide, is not all encompassing, rather has been construed to be limited to the purpose of creating the Forum/Tribunal. Not all cases where fraud is alleged, would make the jurisdiction of the Civil Court available. The allegations of fraud should fall within the parameters as laid down in *Mardia Chemicals* (supra) and *A. Ayyasamy* (supra), only then the Civil Court will get jurisdiction to decide a suit based upon fraud.

12.10. In *Aruna Oswal Vs. Pankaj Oswal and others*, (2020) 8 SCC 79 while considering the question as to whether applications under Sections 241 and 242 of the Companies Act, were maintainable, before the National Company Law Tribunal, it was held as under :-

“6.6. The main dispute raised as to the inheritance of the estate of the deceased is a civil dispute and could not be said to be an act of oppression and mismanagement. Such a dispute could not be adjudicated in a company petition filed during the civil suit's pendency. Thus, the company petition deserves to be dismissed.”

indicating that even when there is no bar, if the Tribunal by the very nature of the plea as raised before it, is incapable of deciding the same, it would be the Civil Court, which would have jurisdiction.

12.11. In *Bajarang Shyamsunder Agarwal Vs. Central Bank of India and another*, (2019) 9 SCC 94, while considering the protection available to a tenant/lessee in respect of tenancy/leasehold rights under the General Law, i.e. the Transfer of Property Act and the Rents Act [prior to insertion of Section 17 (4-A) w.e.f. 1/9/2016 in the SARFAESI Act] vis-a-vis, an action under Section 13 (4) of the SARFAESI Act, in light of the language of Section 35 of the SARFAESI Act, it was held as under :-

“24. In our view, the objective of the SARFAESI Act, coupled with the TP Act and the Rent Act are required to be reconciled herein in the following manner:

24.1. If a valid tenancy under law is in existence even prior to the creation of the mortgage, the tenant's possession cannot be disturbed by the secured creditor by taking possession of the property. The lease has to be determined in accordance with Section 111 of the TP Act for determination of leases. As the existence of a prior existing lease inevitably affects the risk undertaken by the bank while providing the loan, it is expected of banks/creditors to

have conducted a standard due diligence in this regard. Where the bank has proceeded to accept such a property as mortgage, it will be presumed that it has consented to the risk that comes as a consequence of the existing tenancy. In such a situation, the rights of a rightful tenant cannot be compromised under the SARFAESI Act proceedings.

24.2. If a tenancy under law comes into existence after the creation of a mortgage, but prior to the issuance of notice under Section 13(2) of the SARFAESI Act, it has to satisfy the conditions of Section 65-A of the TP Act.

24.3. *In any case, if any of the tenants claim that he is entitled to possession of a secured asset for a term of more than a year, it has to be supported by the execution of a registered instrument. In the absence of a registered instrument, if the tenant relies on an unregistered instrument or an oral agreement accompanied by delivery of possession, the tenant is not entitled to possession of the secured asset for more than the period prescribed under Section 107 of the TP Act.”*

The above thus indicates that in spite of the overriding effect given to the provisions of the SARFAESI Act by way of Section 35, the same was held not to override the statutory rights under the Rent Control Act on the premise that the *non obstante* clause under Section 35 of the SARFAESI Act only applies to laws operating in the same field and rights available under various other

Statutes, would continue to hold the field and be enforceable, even though they may be in respect of the security interest created in favour of the Bank or Financial Institutes. It is trite to note that the position as to existing tenancy/leasehold right and the protection granted to it, before creation of a security interest has been statutorily recognized by insertion of Section 17 (4-A) w.e.f. 1/9/2016, to the SARFAESI Act.

12.12. Thus a perusal of the principles as laid down in the above judgments, would make it clear that the presumption, would always be in favour of the Civil Court having jurisdiction and exclusion has to be express or implied. Considering that the jurisdiction of the Civil Court is plenary in nature as indicated from the language of Section 9 of C.P.C., it also cannot be disputed that if the legislature intends to oust the jurisdiction of Civil Courts, it must say so expressly or by necessary implication. It also cannot be disputed that when the legislature intends to confer jurisdiction upon a Tribunal, it has to expressly define the parameters of such jurisdiction, which is to be exercised by a Tribunal. Thus there cannot be an unfettered jurisdiction upon any Tribunal, and

jurisdiction of a Tribunal is always controlled by the purpose for which it has been created and the provision/section conferring jurisdiction upon the Tribunal and the provision/section excluding jurisdiction of other fora's. It would also be apparent that even cases, where there was an express bar of jurisdiction, when the action alleged, was found not to be within the four corners of the Statute under which it was taken, the Civil Court has been held to have jurisdiction.

**PURPOSE AND OBJECT FOR ENACTMENT OF THE DRT ACT, 1993
AND SARFAESI ACT**

13.0. In *Mardia Chemicals* (supra), the purpose of enactment of SARFAESI Act, has been spelt out in the following words. :-

“34. Some facts which need to 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 Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned 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 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.”

13.1. In ***Central Bank of India v. State of Kerala and others***, (2009) 4 SCC 94, it was held that if the provisions of the DRT Act and the SARFAESI Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial

institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors.

13.2. In *Transcore v. Union of India and another*, (2008) 1 SCC 125, the purpose behind enacting the SARFAESI Act was explained as under :-

“14. There is one more reason for enacting the NPA Act, 2002. When the civil courts failed to expeditiously decide suits filed by the banks/FIs, Parliament enacted the DRT Act, 1993. However, DRT did not provide for assignment of debts to securitisation companies. The secured assets also could not be liquidated in time. In order to empower banks or FIs to liquidate the assets and the secured interest, the NPA Act was enacted in 2002. The enactment of the NPA Act is, therefore, not in derogation of the DRT Act. The NPA Act removes the fetters which were in existence on the rights of the secured creditors. The NPA Act is inspired by the provisions of the State Financial Corporations Act, 1951 (“the SFC Act”), in particular Sections 29 and 31 thereof. The NPA Act proceeds on the basis that the liability of the borrower to repay has crystallised; that the debt has become due and that on account of delay the account of the borrower has become substandard and non-performing.

The object of the DRT Act as well as the NPA Act is recovery of debt by non-adjudicatory process. These two enactments provide for cumulative remedies to the secured creditors. By removing all fetters on the rights of the secured creditor, he is given a right to choose one or more of the cumulative remedies. The object behind Section 13 of the NPA Act and Section 17 r/w Section 19 of the DRT Act is the same, namely, recovery of debt. Conceptually, there is no inherent or implied inconsistency between the two remedies. Therefore, as stated above, the object behind the enactment of the NPA Act is to accelerate the process of recovery of debt and to remove deficiencies/obstacles in the way of realisation of debt under the DRT Act by the enactment of the NPA Act, 2002.”

66. We have already analysed the scheme of both the Acts. Basically, the NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section 13 of the NPA Act is recovery by non-adjudicatory process. A secured asset under the NPA Act is an asset in which interest is created by the borrower in favour of the bank/FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of

the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of the NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceed on the basis that security interest in the bank/FI needs to be enforced expeditiously without the intervention of the court/tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, the NPA Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor.”

(emphasis supplied)

13.3. In *Hindon Forge Private Limited and another Vs. State of Uttar Pradesh through District Magistrate, Ghaziabad and another, (2019) 2 SCC 198*, it was stated, that the object of the Act, therefore, is also to enable the borrower to approach a quasi-judicial forum in case the secured creditor, while taking any of the measures under Section 13(4), does not follow the provisions of the Act in so doing.

13.4. Thus, it is apparent that the purpose of enacting the DRT as well as the SARFAESI Act is to provide a legal framework,

without the intervention of the Courts, to enable the Banks and Financial Institutions to realise long term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. It is also trite that where a right is created by Statute, which also prescribes the manner in which that right may be enforced, the party complaining of any infringement of such right can only seek remedy as as provided by that Statute.

NATURE, SCOPE, AMBIT AND PARAMETERS OF JURISDICTION OF DRT IN VIEW OF SECTIONS 17 & 18 OF DRT ACT 1993 AND SECTIONS 13 & 17 OF SARFAESI ACT AND THE BAR U/S 34 OF SARFAESI ACT.

14. It is in the above background, that for the purpose of appreciation of Section 34 of the SARFAESI Act, providing for exclusion of jurisdiction of the Civil Court, it is first necessary to understand what are the powers available to a secured creditor, under the SARFAESI Act. In this regard, Section 13 of the SARFAESI Act being material is reproduced as under :-

“13. Enforcement of security interest.— (1)
Notwithstanding anything contained in section 69 or section 69-A 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 subsection (4).

[Provided that—

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.]

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

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

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

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

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

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

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

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

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

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

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

[(5-A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the

secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

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

(5-C) The provisions of section 9 of the Banking Regulation Act, 1949 shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5A).J”

The expression “*in accordance with the provisions of this Act*”, as occurring in Section 13 (1) is an expression which controls the applicability of the actions, as are permissible under the provisions of the SARFAESI Act, and is material while interpreting the scope and ambit of the bar as contained in Section 34 of the SARFAESI Act, as we shall see later on.

Sub Sections 5-A to 9, 12 & 13 are matters of procedure on implementation of the measures as contemplated by Section 13 (2) and (4) and restrictions imposed upon the borrower regarding transfer in respect of the property in which security interest has been

created, and not being germane to the discussion of the question under consideration are not reproduced.

“(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.”

14.1. A perusal of Section 13 indicates that under the SARFAESI Act, a secured creditor, has the following rights against the borrower, to enforce the security interest, without the intervention of the Court or Tribunal, namely :-

a.	<i>In case of non-payment of the installments for the period as provided by the guidelines issued by the Reserve Bank of India in this regard from time to time, to declare the account as a Non Performing Asset (for short “NPA” hereinafter), subject to the provisos (i) and (ii) to Section 13 (2). [Section 13 (2)].</i>
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b.	<i>On declaring the account as NPA the secured creditor may require the borrower, by notice in writing, to discharge in full his liabilities to the secured creditor, within 60 days from the date of notice. [Section 13 (2)].</i>
	<i>Upon non compliance with the notice under Section 13 (2), for realizing the secured asset, and rejection of the objection, if any, received, subject to exceptions as contained in Section 13 (4), to exercise the measures as provided for in Section 13 (4), of :-</i>
c.	<i>taking possession of the secured assets, including the right to transfer by way of lease, assignment or sale [Section 13 (4) (a)], for which the aid of Section 14 can be taken; and to manage the same . [Section 13 (4) (c)]</i>
d.	<i>take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale [Section 13 (4) (b)], for which the aid of Section 15 can be taken.</i>
e.	<i>Where the dues are not fully satisfied, to approach the DRT or Competent Court, as the case may be, for recovery of the balance from the borrower. [Sec.13(10)]</i>
f.	<i>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. [Sec.13(11)]</i>
g.	<i>If any person has acquired any of the secured assets, and from whom any money is due or become due to the borrower, to require him, pay to the secured creditor, so much of it, as is sufficient to pay the secured debt.</i> <i>[Sec.13 (4) (d)]</i>
	<i>and from the sale proceeds of the security interest to :-</i> <i>[Section 13 (7)]</i>

<i>h.</i>	<i>appropriate the claim for all costs, charges and expenses incurred by the secured creditor including expenses incidental thereto.</i>
<i>i.</i>	<i>appropriate the amount due and payable by the borrower ;</i>
<i>j.</i>	<i>to hold any residue in trust for payment to the person entitled to in accordance with his rights and interest.</i>

14.2. All the above measures, are for the purpose of recovery of the amount due and payable by the borrower, for which the secured creditor, has a right to enforce the security interest, under Chapter -III of the SARFAESI Act. Thus, the entire gamut of rights available to the secured creditor for enforcement of the security interest is contained in Chapter -III, Sections 13 to 15 thereof. The Security Interest (Enforcements) Rules, 2002 (for short, “the S.I. Rules, 2002”, hereinafter) in turn provide the manner, procedure and parameters by and within which, the rights under Section 13, for enforcement of the security interest are enforceable. It is material to note that Section 13, is restricted to enforcement of security interest as defined in Section 2 (zf) of the the SARFAESI Act, which reads as under :-

“2 (zf) “security interest” means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and

includes—

(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset;]”

14.3. In the above backdrop, it is necessary to appreciate the parameters of conferment of jurisdiction upon the DRT, for enforcement of the measures as available to the secured creditor under the SARFAESI Act. These are contained in Section 17 of the DRT Act, 1993, the relevant portion for the purpose of this reference are as under :-

“Section 17. Jurisdiction, powers and authority of Tribunals.- (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.”

(emphasis supplied)

14.4. The language of Section 17 (1) of the DRT Act is clear and specific. It says that the Tribunal shall have jurisdiction, power and authority to entertain and decide applications from the Banks and Financial Institutions for recovery of debts due to such Banks and Financial Institutions. A perusal of the DRT Act, 1993, would indicate that none of its provisions create any rights and the same is procedural in nature, prescribing for the jurisdiction and procedure for exercise of such jurisdiction. Rights, in fact are created by the provisions of the SARFAESI Act, under Section 13, for the enforcement of which the Banks/Financial Institutions have to approach the Tribunal under Section 17 of the DRT Act, 1993.

14.5. The expression “from the Banks and Financial Institutions for recovery of debts due to such Banks and Financial

Institutions”, further indicates that it is only the Banks and Financial Institutions who have a right to approach the DRT under Section 17 of the DRT Act, and that too, for the purpose of recovery of debts due to such Banks and Financial Institutions. “Recovery of debts due” would mean the enforcement of the security interest as defined in Section 2 (zf) of the SARFAESI Act. Thus, none other than the Banks and Financial Institutions have any right to approach the DRT by invoking its jurisdiction under Section 17 of the DRT Act, 1993, as Section 17 (1) restricts such approach only to the Banks and Financial Institutions and that too for recovery of debts due.

14.6. It is further material to note that Section 17 (1) of the DRT Act, 1993, falls under Chapter III titled ‘jurisdiction, powers and Authority of Tribunals’, which contains Sections 17, 17-A and 18, of which only Section 17 (1) confers powers upon the DRT (we are here not concerned with the powers of the Appellate Tribunal or of the Tribunal under the Insolvency and Bankruptcy Code 2016) to entertain and decide applications for recovery of debts due to Banks and Financial Institutions. There is no other provision in the DRT Act, 1993, which confers any jurisdiction or power upon the DRT. Thus

Chapter III and specifically Section 17 (1) is the sole repository of the powers and jurisdiction of the Tribunal. What is worthy of notice is that Section 17 (1) does not confer any power upon the Tribunal to entertain any other claim, other than one for recovery of debts due to the Banks and Financial Institutions, such as a set off or counter- claim.

14.7. It is further necessary to note that Chapter IV under the heading ‘Procedure of Tribunals’ which contains Sections 19 to 24 of the DRT Act, prescribes the procedure of the Tribunal and deals with how the application under Section 17 (1) has to be made; the procedure of filing of an application, the cause of action; territorial jurisdiction; the joinder of Financial Institutions if the recovery is against the same person; the accompaniments to the application, the particulars of the debt secured by the security interest, estimated value of securities; estimated value of assets and in case these are not sufficient to satisfy the debt claimed, state and disclose the particulars of other properties or assets owned by the borrower; the manner and time within which the summons is to be served to the borrower; the time within which any written statement including set off and

counter-claim is to be filed by the borrower; fixing the date of hearing for admission or denial of documents; the manner in which the pleadings are to be verified; the filing of the affidavits by the witness; matters relating to obtaining of interim relief; attachment of the security interest; appointment of receiver; removal of any person from possession or custody of the property; committing the property to the possession, custody or management of the receiver; appointment of a Commissioner for preparation of the inventories of the properties; adjudication of the claims and counter-claims and issuance of recovery certificate.

14.8. The difference between Chapter III and Chapter IV is that, while Chapter III confers jurisdiction and powers, Chapter IV prescribes the mode and manner in which such jurisdiction and powers are to be exercised. It is under Sections 19 (5) (i), 19 (6) 19 (8) and 19(9) in Chapter IV of the DRT Act, 1993 that the mention of a set off and counter-claim is to be found. The setting thus assumes significance, in as much as the right to claim a set off and counter-claim is not created under Section 17 (1) which is in Chapter III providing for the jurisdiction and powers of the Tribunal, but in

Sections 19 (5) (i), 19 (6), 19 (8) and 19 (9) which prescribe the procedure of the Tribunal.

14.9. It is trite that when a Tribunal is created by a Statute, jurisdiction has to be conferred specifically and not presumed. When it is Section 17 (1) of the DRT Act which confers jurisdiction upon the DRT to entertain and decide the applications of the Banks and Financial Institutions for recovery of debts due to them, then the jurisdiction to entertain a set off and counter-claim by the borrowers also ought to have been included therein, and not in the procedure under Chapter IV.

14.10. It is further trite that jurisdiction of a Tribunal, is not plenary or omnipotent as is the case under Section 9 of C.P.C., of the Civil Courts, but is regulated and controlled, by the provision conferring the same upon the Tribunal, which in the present case is Section 17 (1) of the DRT Act, 1993, read with Section 13 of the SARFAESI Act. The Tribunal, therefore has to act within the parameters of such jurisdiction as conferred. The exclusion of jurisdiction of the Civil Court, has not to be readily inferred, but is

equally controlled by the parameters of exclusion. For this purpose, it is necessary to look into the language of Section 18 of the DRT Act, 1993, which reads as under :-

“Section 18. Bar of jurisdiction.- On and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme court, and a High Court exercising jurisdiction under articles 226 and 227 of the constitution) in relation to the matters specified in section 17.

Provided that any proceedings in relation to the recovery of debts due to any multi-State co-operative bank pending before the date of commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2012 under the Multi-State Co-operative Societies Act, 2002 (39 of 2002) shall be continued and nothing contained in this section shall, after such commencement, apply to such proceedings.”

(emphasis supplied)

14.11. The language of Section 18 is clear and specific. What is prevented to be entertained by the Courts, are claims and proceedings “in relation to the matters specified in Section 17”, which would indicate matters under Section 13 of the SARFAESI Act. The expression “*in relation to*” has been held to be of wider significance

[*Godavaris Misra Vs. Nandakisore Das, Speaker, Orissa Legislative Assembly, AIR 1953 Orissa 111*]; the widest amplitude [*Thysssini Stahlunion GMBTT Vs. Steel Authority of India (1999) 10 SCC 378*]; used in the expansive sense [*M/s Doypack Systems Pvt. Ltd. Vs. Union of India and others, (1988) 2 SCC 299*] and may at times also include all things incidental and ancillary thereto. However, in the instant matter the expression “*in relation to*” has been suffixed with “*the matters specified in Section 17*” making the expression as “*in relation to the matters specified in Section 17*”. The suffix “*the matters specified in Section 17*” in fact in our considered opinion, restricts and controls the expression “*in relation to*”, and lays down the parameters within which the provision has to operate, namely to those as specified in sec.17 of the DRT Act, 1993.

14.12. In *Indian Banks’ Association, Bombay and others Vs. Devkala Consultancy Service and others, (2004) 11 SCC 1* the expression “in relation to matters specified in section 35-A” of the Banking Regulation Act, was construed in a narrower and restrictive sense, limiting the expression to what was specified in the section, which would support what we have said.

14.13. Thus the expression, *“in relation to the matters specified in Section 17”* in reference to Section 17 would have no other meaning than what is contained or specified in Section 17 of the DRT Act, which would include the applications by the Banks or Financial Institutions for recovery of its debts and in cases, set-off and counter-claims of such nature which the DRT is able in its jurisdiction to determine, which again would relate to the measures as taken by the Banks and Financial Institutions under Section 13 of the SARFAESI Act.

14.14. This is further substantiated by the language of Section 34 of SARFAESI Act, which reads as under :-

“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).”

(emphasis supplied)

The expression “in respect of” has also been held to be an expression of wider connotation [*Tolaram Relumal and another Vs. The State of Bombay, AIR 1954 SC 496*], however due to the suffix “any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine” its scope is restricted to the permissibility of what can be determined by the DRT or the Appellate Tribunal, which in turn again leads us to Section 17(1) of the DRT Act, 1993 read with Section 13 of the SARFAESI Act.

14.15. Thus, what is prohibited by Section 34 of the SARFAESI Act is any suit or proceeding, in respect of any matter which the DRT is empowered by or under the SARFAESI Act to determine, which would relate to matters under Section 13 of the SARFAESI Act.

14.16. It further needs to be seen what powers are available to a third person, including a borrower against the measures under Section 13 (4) of the SARFAESI Act. These are contained in Section 17 of the SARFAESI Act, which is reproduced as under :-

“17. Application against measures to recover secured debts.-

(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 authorised officer under this Chapter, [may make an application alongwith such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

*[**Explanation.** For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]*

[(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction-

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of

section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.]

[(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order;-

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.]

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of

section 13 to recover his secured debt.

[(4A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act, 1882; or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

(emphasis supplied)

Sub Sections 5 to 7 not being germane to the present discussion are not reproduced.

Thus, under Section 17 of the SARFAESI Act what the DRT is entitled to examine and decide, is as to whether the measures under Section 13 (4) of the SARFAESI Act, as taken by the secured creditor, in respect of the security interest, are or are not, in accordance with the provisions of the SARFAESI Act and the Rules made thereunder, as is reflected from the expression “in accordance with the provisions of this Act and the Rules made thereunder” as occurring in Section 17 (2) (3) of the SARFAESI Act. The expression “*in accordance with the provisions of this Act*” finds place in Section 13(1) of the SARFAESI Act, too. The word “accordance”, means in conformity or agreement. The expression “in accordance with” would in our considered opinion, mean in conformity with; within the parameters as laid down; to limit the scope of the action within the law framed and applicable and not beyond that.

14.17. In *Re Barber, Ex. P Stanford (1886) 17 QBD 259* while interpreting the expression “in accordance with the form”, it was held as under :-

“We have to determine with legal meaning ought to be attached to the words “in accordance with the form”... A bill of sale is surely in accordance with the prescribed form

if it is substantially in accordance with it, if it does not depart from the prescribed form in any material respect. But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect, either greater or smaller, than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect... Whatever form the bill of sale takes, the form adopted by it in order to be valid must produce, not merely the like effect, but the same effect – that is to say, the legal effect, the whole legal effect, and nothing but the legal effect which it would produce if cast in the exact mould of the schedule.”

14.18. In ***Mahesh Chandra and another Vs. Tara Chand Modi, AIR 1958 Allahabad 374 (Full Bench)***, the majority view of the expression “in accordance” was held to mean “in conformity” or “as provided for”.

14.19. In the instant case, the expression “*in accordance with*” is suffixed with the expression “*the provisions of this Act and the Rules made thereunder*”, which leave no room for any doubt that it is only to ensure that any examination by the DRT under the jurisdiction as

conferred upon it, under Section 17 of the DRT Act, 1993 and under Section 17 of the SARFAESI Act, is limited to whether the action as taken by the secured creditor is within the parameters and in conformity with the provisions of the SARFAESI Act.

14.20. In case the DRT comes to the conclusion that the measures are not in accordance with the provisions of the SARFAESI Act and Rules made thereunder, it has power to declare such measures as invalid and restore possession of the secured assets or management thereof to the borrower or such other aggrieved person who has made an application under Section 17 (1) of the SARFAESI Act. The DRT, also has jurisdiction under Section 17 (4-A) to determine any claims regarding tenancy or leasehold rights upon the secured assets in the manner and within the parameters as laid down therein. Section 17 of the SARFAESI Act does not empower the DRT to consider and determine any independent rights claimed by the person aggrieved vis-a-vis the security interest. Thus, the jurisdiction, as contemplated by Section 17 of the SARFAESI Act, to determine the rights of a person, who is not a borrower, is only limited to the extent of considering as to whether the action of the secured creditor under

Section 13 (4) of the SARFAESI Act, was or was not in accordance with the provisions of the SARFAESI Act and Rules made thereunder, and not otherwise, meaning thereby, that any independent right(s) claimed by an aggrieved person, vis-a-vis the security interest, cannot be determined by the DRT under Section 17 of the SARFAESI Act. This would also indicate the recognition of the rights of third parties and the inability of the DRT to deal with and decide such rights.

14.21. The legislative intent in recognising and protecting the rights emanating and protected from/in other statutes, is clearly discernible from the provisions of Section 17 (4-A) of the SARFAESI Act, as inserted by Section 14 of Act 44 of 2016 w.e.f. 1/9/2016, whereby the tenancies or leasehold rights in properties which were taken as security interest under Section 3(zf) of the SARFAESI Act, by the secured creditor, were recognised and protected, while taking possession of the security interest under section 14 of the SARFAESI Act, by providing a forum and mechanism, to ascertain and determine the legality and validity of the tenancy or leasehold rights depending upon whether such tenancy or leasehold rights had expired or stood determined [Sec.17 (4-A) (a)] or were contrary to the terms of the

mortgage [Sec.17 (4-A) (c)] or Section 65-A of the Transfer of Property Act [Sec.17 (4-A) (b)] or were created after issuance of notice of default and demand by the Bank under Section 13(3) of the SARFAESI Act [Sec.17 (4-A) (d)], which was obviously so in view of the protection granted to tenancies and leasehold rights in the various Rent Acts, in the Country, from eviction, unless the requirements as laid down in the respective Rent Acts were satisfied. It is material to note that in *Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Limited and others, (2014) 6 SCC 1*, it was held that even if the DRT comes to the conclusion, that any of the measures referred to in Sub Section 4 of Section 13 of the SARFAESI Act taken by the secured creditor were not in accordance within the provisions of the Act, in respect of a claim raised by a tenant/lessee, on account of the lease being made prior to the creation of the mortgage and was in accordance with the requirements of Section 65-A of the Transfer of Property Act and thus was valid and binding, the DRT did not have any power to restore possession of the secured asset/leased property to the lessee, and therefore, there was no remedy available to the lessee, under Section 17 of the SARFAESI Act to protect his lawful possession under a valid

lease. It is in pursuance to this judgment, that an amendment has been made to Section 17 of the SARFAESI Act by inserting Section 17 (4-A) w.e.f. 1/9/2016, whereby power to decide the nature of the tenancy/leasehold rights and to pass orders thereupon with the provisions of the SARFAESI Act have been included in Section 17, whereby the DRT now has jurisdiction to decide the nature of the tenancy, vis-a-vis the parameters as laid down in Section 17 (4-A) and pass appropriate orders, in respect of tenancies/leasehold rights, which are protected under the various Rent Acts. This would clearly indicate that the provisions of the DRT Act, 1993 or the SARFAESI Act, do not recognize the Civil Law rights, including rights created and protected under various Statutes nor do they provide a remedy to address them, before the DRT, which was the reason for the amendment.

14.22. In *Bank of Maharashtra Vs. Pandurang Keshav Gorwardkar and others*, (2013) 7 SCC 754, while considering the question whether Section 19 (19) of the DRT Act, 1993, clothes DRT with jurisdiction to determine the workmen's claim against the debtor – company, the same was answered in the negative, in the following

words :-

“63.1. In the first place, the 1993 Act has provided for special machinery for speedy recovery of dues of banks and financial institutions in specific matters. It is with this objective that it provides for establishment of DRT with the jurisdiction, power and authority for adjudication of claims of the banks and financial institutions. The 1993 Act also provides for the modes of recovery of the amount so adjudicated by the DRTs. The 1993 Act has not brought within its sweep, the adjudication of claims of persons other than banks and financial institutions. The DRT has not been given powers to adjudicate the dues of workmen of the debtor company. Section 17 or Section 19 of the 1993 Act cannot be read in a manner that allows such exercise to be undertaken by the DRT. DRT does not possess necessary statutory powers to address all disputes that may arise in adjudicating workmen’s claims in winding-up proceedings. The adjudication of workmen’s claims against the debtor company is a substantive matter and DRT has neither competence nor machinery for that. Certain incidental and ancillary powers given to DRT do not encompass power to adjudicate upon or decide dues of the workmen of the debtor company.

63.2. Secondly, Section 19 (19) of the 1993 Act is a provision of distribution mechanism and not an independent adjudicatory provision. This provision follows adjudication of claims made by a bank or financial institution. It comes into play where a certificate of

recovery is issued against a company registered under the Companies Act which is in winding up. Where the debtor company is not in liquidation, Section 19 (19) does not come into operation at all. Following Tiwari Committee Report and the Narasimham Committee Report, the present Section 19 (19) was incorporated in the 1993 Act for protection of pari passu charge of secured creditors, including workmen's dues at the time of distribution of the sale proceeds of such company. The participation of workmen along with secured creditors under Section 19 (19) is, to a limited extent, in the distribution of the sale proceeds by DRT and not for determination of their claims against the debtor company by DRT. Once the company is in winding up, the only competent authority to determine the workmen's dues and quantify workmen's portion is the liquidator. The liquidator has the responsibility and competence to determine the workmen's dues where the debtor company is in liquidation.

63.3. *Thirdly, the expression, "the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of Section 529-A of the Companies Act" occurring in Section 19 (19) does not empower DRT to itself examine, determine and decide upon workmen's claim under Section 529-A. The above expression means that where the debtor company is in winding up, the sale proceeds of such company realised under the 1993 Act are to be distributed among its secured creditors by following Section 529-A of the Companies Act. Mention of Section*

529-A in Section 19 (19) is neither a legislation by reference nor a legislation by incorporation. What it requires is that DRT must follow the mandate of Section 529-A by making distribution in equal proportion to the secured creditors and workmen of the debtor company in winding up.”

14.23. This is further indicated by the language of Section 17 of the SARFAESI Act, which restricts and limits the power of the DRT to examine the actions as taken by the secured creditor, only to be in accordance with the SARFAESI Act and the Rules as made thereunder and not otherwise. If the intention of the legislature was to confer absolute and unfettered jurisdiction upon the DRT, vis-a-vis the 'security interest', it would have laid down that all questions about any right or liability, of any nature whatsoever, which may arise in respect of the 'security interest', even if raised by a stranger to the 'security interest', which may be in respect of any civil rights as may be claimed therein, as available to any person, whether under a Statute or under the Civil Law, shall be determined by the Tribunal or authority constituted by it and provided the machinery to address, decide and enforce such right and not limited to examining such claim, to the limited extent as indicated above, of the action of the

secured creditor, being in accordance with the provisions of the Act and Rules made thereunder. [*Ramalinga Samigal Madam* (supra) explaining the second principle in *Dhulabhai* (supra)].

14.24. This is also indicated from Section 31 of the SARFAESI Act, which bars the application of the SARFAESI Act, to the following :-

(a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 (9 of 1872) or the Sale of Goods Act, 1930 (3 of 1930) or any other law for the time being in force;

(b) a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872 (9 of 1872);

(c) creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934 (24 of 1934);

(d) creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958);

(e) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930 (3 of 1930);

(f) any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act) or sale under the first proviso to sub-section (1) of section 60 of the Code of Civil Procedure, 1908 (5 of 1908);

(g) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;

(h) any security interest created in agricultural land;

(i) any case in which the amount due is less than twenty per cent of the principal amount and interest thereon.

14.25. The above view is also supported by Section 1 (4) of the DRT Act, 1993, which makes the provisions of the DRT Act, 1993, inapplicable to debts due to any Banks or Financial Institutions, of value less than rupees ten lakhs, would indicate that in such cases, it would be the Civil Court which would have jurisdiction, to entertain and try claims even from the Banks and Financial Institutions, which are of a value less than what is stated therein.

14.26. The jurisdiction of the Tribunal under Section 17 (1) of the DRT Act, 1993, is thus restricted to matters in relation to those

under Section 13 and 17 of the SARFAESI Act, which is the clear intent as discernible from a plain reading of the language of Section 17 (1) and 18 of the DRT Act read with Section 34 of the SARFAESI Act.

**JUDICIAL PRECEDENTS AS TO NATURE AND EXTENT OF THE BAR
UNDER SECTION 34 SARFAESI ACT**

15. The Constitution Bench of the Hon'ble Apex Court, in *Mardia Chemicals* (supra) while considering the challenge to the constitutional validity of the SARFAESI Act, has also held that Section 34 of the SARFAESI Act bars the jurisdiction of the Civil Court, to the extent the DRT or the Appellate Tribunal, is empowered to determine any action/measure taken by the secured creditor, which clearly relates to an action under Section 13 (4) of the SARFAESI Act and challenge thereto under Section 17 of the SARFAESI Act, before the DRT. Even in respect of such action/measure, the Hon'ble Apex Court, held that the jurisdiction of the Civil Court to a limited extent was available, in case the action of the secured creditor was alleged to be fraudulent or the claim was so absurd or untenable which may not require any probe whatsoever or precisely to the extent the scope

is permissible to bring in action in the Civil Court in the case of English mortgages. The questions as framed therein, in light of which the scope of the bar of jurisdiction was considered are also relevant.

The relevant paragraphs are reproduced as under :-

“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 Sections 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 a 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?

36. ----- *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 and 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 is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy.*

50. *It has also been submitted that an appeal is entertainable before the Debts 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 Debts 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 the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that 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 Debts Recovery Tribunal or an 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 Debts 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 Debts 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 his 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.*

53. We also find it appropriate to mention at this stage that in reply to the 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 Contract Act e.g. 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 could he approach the civil court. It is submitted by the respondent that in such cases a civil court may have jurisdiction to entertain the case as character as a guarantor itself is denied. ”

(emphasis supplied)

Thus, the Constitution Bench of the Hon'ble Apex Court, in ***Mardia Chemicals*** (supra) recognized, that the bar of jurisdiction of the Civil Court under Section 34 of the SARFAESI Act, was in respect of matters which the DRT or an Appellate Tribunal is empowered to determine in respect of any action taken or to be taken in pursuance of any power conferred under the SARFAESI Act, for recovery, and any disputes/objections raised by a borrower against such recovery (question no.1) and not otherwise. The position was also conceded that in cases when a guarantor may stand discharged as envisaged under Sections 133 and 135 of the Indian Contract Act e.g. where any

variance in terms of the contract has been made without his consent, then in such cases a Civil Court may have jurisdiction to entertain the case as character as a guarantor itself is denied.

15.1. In *Indian Bank Vs. ABS Marine Products (P) Ltd., (2006) 5 SCC 72*, the Hon'ble Apex Court while considering the bar of jurisdiction, in light of the introduction of Sections 19 (6) to 19 (11) in the SARFAESI Act, providing for a borrower to raise a claim for set off or counter-claim, held that introduction of this provision, would not bar the jurisdiction of the Civil Court, to entertain a claim for damages by the borrower against the Bank. The relevant portion is reproduced as under :-

“15. It is evident from Sections 17 and 18 of the Debts Recovery Act that civil court's jurisdiction is barred only in regard to applications by a bank or a financial institution for recovery of its debts. The jurisdiction of civil courts is not barred in regard to any suit filed by a borrower or any other person against a bank for any relief. It is not disputed that the Calcutta High Court had jurisdiction to entertain and dispose of CS No. 7 of 1995 filed by the borrower when it was filed and continues to have jurisdiction to entertain and dispose of the said suit. There is no provision in the Act for transfer of suits and proceedings, except Section 31 which

relates to suit/proceeding by a bank or financial institution for recovery of a debt. It is evident from Section 31 that only those cases and proceedings (for recovery of debts due to banks and financial institutions) which were pending before any court immediately before the date of establishment of a tribunal under the Debts Recovery Act stood transferred, to the Tribunal. In this case, there is no dispute that the Debts Recovery Tribunal, Calcutta, was established long prior to the Company filing CS No. 7 of 1995 against the Bank. The said suit having been filed long after the date when the Tribunal was established and not being a suit or proceeding instituted by a bank or financial institution for recovery of a debt, did not attract Section 31.

16. As far as sub-sections (6) to (11) of Section 19 are concerned, they are merely enabling provisions. The Debts Recovery Act, as it originally stood, did not contain any provision enabling a defendant in an application filed by the bank/financial institution to claim any set-off or make any counterclaim against the bank/financial institution. On that among other grounds, the Act was held to be unconstitutional (see Delhi High Court Bar Assn. v. Union of India [AIR 1995 Del 323]). During the pendency of appeal against the said decision, before this Court, the Act was amended by Act 1 of 2000 to remove the lacuna by providing for set-off and counterclaims by defendants in the applications filed by banks/financial institutions before the Tribunal. The provisions of the Act as amended were upheld by this Court in Union of India v. Delhi High Court Bar Assn. [(2002) 4 SCC 275] The effect of sub-sections (6) to (11) of

Section 19 of the amended Act is that any defendant in a suit or proceeding initiated by a bank or financial institution can: (a) claim set-off against the demand of a bank/financial institution, any ascertained sum of money legally recoverable by him from such bank/financial institution; and (b) set-up by way of counterclaim against the claim of a bank/financial institution, any right or claim in respect of a cause of action accruing to such defendant against the bank/financial institution, either before or after filing of the application, but before the defendant has delivered his defence or before the time for delivering the defence has expired, whether such a counterclaim is in the nature of a claim for damages or not. What is significant is that Sections 17 and 18 have not been amended. Jurisdiction has not been conferred on the Tribunal, even after amendment, to try independent suits or proceedings initiated by borrowers or others against banks/financial institutions, nor the jurisdiction of civil courts barred in regard to such suits or proceedings. The only change that has been made is to enable the defendants to claim set-off or make a counterclaim as provided in sub-sections (6) to (8) of Section 19 in applications already filed by the banks or financial institutions for recovery of the amounts due to them. In other words, what is provided and permitted is a cross-action by a defendant in a pending application by the bank/financial institution, the intention being to have the claim of the bank/financial institution made in its application and the counterclaim or claim for set-off of the defendant, as a single unified proceeding, to be disposed of

by a common order.

17. Making a counterclaim in the bank's application before the Tribunal is not the only remedy, but an option available to the defendant borrower. He can also file a separate suit or proceeding before a civil court or other appropriate forum in respect of his claim against the bank and pursue the same. Even the bank, in whose application the counterclaim is made, has the option to apply to the Tribunal to exclude the counterclaim of the defendant while considering its application. When such application is made by the bank, the Tribunal may either refuse to exclude the counterclaim and proceed to consider the bank's application and the counterclaim together; or exclude the counterclaim as prayed, and proceed only with the bank's application, in which event the counterclaim becomes an independent claim against a bank/financial institution. The defendant will then have to approach the civil court in respect of such excluded counterclaim as the Tribunal does not have jurisdiction to try any independent claim against a bank/financial institution. A defendant in an application, having an independent claim against the bank, cannot be compelled to make his claim against the bank only by way of a counterclaim. Nor can his claim by way of independent suit in a court having jurisdiction, be transferred to a tribunal against his wishes."

(emphasis supplied)

15.2. The bar of jurisdiction under Section 34 of the SARFAESI Act came up for consideration before the Hon'ble Supreme Court in

*Robust Hotels Private Limited and others Vs. EIH Limited and others,
(2017) 1 SCC 622.*

“33. A perusal of Section 34 indicates that there is express bar of jurisdiction of the civil court to the following effect:

“(i) Any suit or proceeding in respect of any matter in which the Debts Recovery Tribunal or Appellate Tribunal is empowered by or under this Act to determine.

(ii) Further, 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.”

Thus the bar of jurisdiction of civil court has to correlate to the abovementioned conditions. For the purposes of this case, we are of the view that this Court need not express any opinion as to whether suits filed by EIH were barred by Section 34 or not, since the issues are yet to be decided on merits and the appeal by Robust Hotels has been filed only against an interim order.”

(emphasis supplied)

15.3. The following observations of a learned Single Judge of this Court in ***Centurion Bank Ltd.*** (supra), relied upon by Dr. Sundaram, learned Counsel are of some assistance, though the Court was considering the position, when the amendment for a claim for

damages by way of a counter-claim, was not extant :-

“9. ----- . In many legislations, the Legislature when it wants to oust the jurisdiction of the civil court on any issue frames the language of the section in such a manner that if any issue arises which has to be decided by the alternative forum then that forum alone and not the civil court can exercise jurisdiction. In a case where an issue arises before a civil court, which has to be decided by the special forum, the Legislature provides that such an issue is to be referred to the special forum for its decision. The decision or finding then has to be remitted to the civil court. This is for the purpose of excluding the jurisdiction of the civil court vested in the civil court under section 9 of the Code of Civil Procedure, 1908. Section 9 of the Civil Procedure Code, 1908, sets out that the court shall have jurisdiction to try all suits of civil nature except suits of which their cognizance is either expressly or impliedly barred. By virtue of this section a civil court is conferred with jurisdiction to decide all matters unless those matters are excluded by another special enactment either expressly or impliedly. Admittedly under the Debt Recovery Act, recovery of a debt is barred. Does that mean that the civil court would cease to have jurisdiction in respect of the entire suit or only in respect of the issue pertaining to debt. The normal rule of construction is that the jurisdiction of the civil court is not excluded unless it is specifically excluded or it follows by necessary implication. Under the Debt Recovery Act there is

no total ouster of jurisdiction of the civil court. The ouster is by virtue of section 18, which sets out that no court or other authority can try matters for recovery of debts. In so far as the reliefs which do not pertain to debts on a plain reading of section 17 of the Debt Recovery Act, are concerned, there can be no doubt that the civil court will still retain jurisdiction.”

(emphasis supplied)

15.4. Even in respect of the jurisdiction as conferred upon the DRT, vis-a-vis that on other statutes, it has been held that the jurisdiction of the DRT, would be limited to the recovery of debts for the Banks and Financial Institutions, and would not extend any further, as held in ***Swaraj Infrastructure Private Limited Vs. Kotak Mahindra Bank Limited, (2019) 3 SCC 620***, while considering the position regarding Section 34 of the DRT Act, 1993, vis-a-vis the provisions of the Companies Act, regarding winding up, as under :-

“16. *It is important to note that the aforesaid statement of the law was made in the context of non-requirement of leave of the Company Court to initiate, continue with, and execute orders passed under the Recovery of Debts Act. What is important to note is that the Companies Act, 1956 is overridden to the extent of the inconsistency between the Companies Act, 1956 and the Recovery of Debts Act only*

qua recovery of debts due to banks and financial institutions.

17. It is settled law that a winding-up proceeding initiated under Sections 433(e) and 434 of the Companies Act, 1956 is not a means of seeking to enforce payment of a debt. This Court, in Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami [Amalgamated Commercial Traders (P) Ltd. v. A.C.K. Krishnaswami, (1965) 35 Comp Cas 456 (SC)] (“Amalgamated Commercial Traders”), has held:

“13. It is well settled that a winding-up petition is not a legitimate means of seeking to enforce payment of the debt which is bona fide disputed by the company. A petition presented ostensibly for a winding-up order but really to exercise pressure will be dismissed, and under circumstances may be stigmatised as a scandalous abuse of the process of the court.”

This statement of the law has subsequently been followed in several judgments, one of which is IBA Health (India) (P) Ltd. v. Info-Drive Systems Sdn. Bhd. [IBA Health (India) (P) Ltd. v. Info-Drive Systems Sdn. Bhd., (2010) 10 SCC 553] (at para 21).

19. It is true that this Court has stated that a winding-up petition is a form of equitable execution of a debt, but this is qualified by stating that a winding-up order is not a normal alternative to the ordinary procedure for realisation of debts due to a creditor. We are of the view that both the judgments contained in Amalgamated Commercial Traders [Amalgamated Commercial Traders (P) Ltd. v. A.C.K.

Krishnaswami, (1965) 35 Comp Cas 456 (SC)] as well as in Harinagar Sugar Mills [Harinagar Sugar Mills Co. Ltd. v. M.W. Pradhan, (1966) 3 SCR 948 : AIR 1966 SC 1707] , recognise the fact that a winding-up proceeding is not a proceeding that can be referred to as a proceeding for realisation of debts and would, therefore, not be covered by the language of Section 17 read with Section 18 of the Recovery of Debts Act. When it comes to a winding-up proceeding under the Companies Act, 1956, since such a proceeding is not “for recovery of debts” due to banks, the bar contained in Section 18 read with Section 34 of the Recovery of Debts Act would not apply to winding-up proceedings under the Companies Act, 1956.

indicating thereby that in respect of any proceedings 'not for recovery of debt', the jurisdiction of the DRT would not be available.

DEBT RECOVERY TRIBUNAL WHETHER A COURT

16. Then again it needs to be considered as to whether the DRT, is a Court, so as to enable it, to adjudicate upon the rights of third parties vis-a-vis the security interest created in favour of the secured creditor. The question as to whether the DRT, is a Civil Court came up for consideration of the Hon'ble Apex Court, in ***Nahar Industrial Enterprises Limited Vs. Hong Kong and Shanghai Banking***

Corporation, (2009) 8 SCC 646 in which it has been held as under :-

“85. If the Tribunal was to be treated to be a civil court, the debtor or even a third party must have an independent right to approach it without having to wait for the bank or financial institution to approach it first. The continuance of its counterclaim is entirely dependent on the continuance of the applications filed by the bank. Before it no declaratory relief can be sought for by the debtor. It is true that claim for damages would be maintainable but the same have been provided by way of extending the right of counterclaim.

86. The Debts Recovery Tribunal cannot pass a decree. It can issue only recovery certificates. [See Sections 19(2) and 19(22) of the Act.] The power of the Tribunal to grant interim order is attenuated with circumspection. [See Dataware Design Labs (P) Ltd. v. SBI [(2005) 127 Comp Cas 176 (Ker)] , Comp Cas at p. 184.] Concededly in the proceeding before the Debts Recovery Tribunal detailed examination, cross-examinations, provisions of the Evidence Act as also application of other provisions of the Code of Civil Procedure like interrogatories, discoveries of documents and admission need not be gone into. Taking recourse to such proceedings would be an exception. Entire focus of the proceedings before the Debts Recovery Tribunal centres round the legally recoverable dues of the bank.

87. Should we adopt the principle of purposive interpretation so as to hold that the DRT would be a civil court?

88. We have noticed hereinbefore that civil courts are created under different Acts. They have their own hierarchy. They necessarily are subordinate to the High Court. The appeals from their judgment will lie before a superior court. The High Court is entitled to exercise its power of revision as also superintendence over the said courts. For the aforementioned purpose, we must bear in mind the distinction between two types of courts viz. civil courts and the courts trying disputes of civil nature. Only because a court or a tribunal is entitled to determine an issue involving civil nature, the same by itself would not lead to the conclusion that it is a civil court. For the said purpose, as noticed hereinbefore, a legal fiction is required to be created before it would have all attributes of a civil court.

89. The Tribunal could have been treated to be a civil court provided it could pass a decree and it had all the attributes of a civil court including undertaking of a full fledged trial in terms of the provisions of the Code of Civil Procedure and/or the Evidence Act. It is now trite law that jurisdiction of a court must be determined having regard to the purpose and object of the Act. If Parliament, keeping in view the purpose and object thereof thought it fit to create separate Tribunal so as to enable the banks and the financial institutions to recover the debts expeditiously wherefor the provisions contained in the Code of Civil Procedure as also the Evidence Act need not necessarily be resorted to, in our opinion, by taking recourse to the doctrine of purposive construction, another jurisdiction cannot be conferred upon it so as to enable this Court to transfer the case from the

civil court to a tribunal.

93. *The principles of purposive construction, therefore, in our opinion, are not attracted in the instant case. Had Parliament intended to make the Tribunals civil courts, a legal fiction could have been raised. There are statutes like the Andhra Pradesh Land Grabbing Act where such a legal fiction has been raised. [See V. Laxminarasamma v. A. Yadaiah [(2009) 5 SCC 478 : (2009) 2 SCC (Cri) 711 : (2009) 3 Scale 685] .] Whereas the doctrine of purposive construction is a salutary principle, the same cannot be extended to a case which would lead to an anomaly. It can inter alia be resorted to only when difficulty or doubt arises on account of ambiguity. It is to be preferred when object and purpose of the Act is required to be promoted.*

96. *The Tribunal was constituted with a specific purpose as is evident from its Statement of Objects. The Preamble of the Act also is a pointer to that too. We have also noticed the scheme of the Act. It has a limited jurisdiction. Under the Act, as it originally stood, it did not even have any power to entertain a claim of setoff or counterclaim. No independent proceedings can be initiated before it by a debtor.*

97. *A debtor under the common law of contract as also in terms of the loan agreement may have an independent right. No forum has been created for endorsement of that right. Jurisdiction of a civil court as noticed hereinbefore is barred only in respect of the matters which strictly come within the purview of Section 17 thereof and not beyond the same. The civil court, therefore, will continue to have jurisdiction.*

98. Even in respect of set off or counterclaim, having regard to the provisions of sub-sections (6) to (11) of Section 19 of the Act, it is evident:

(a) That the proceedings must be initiated by the bank.

(b) Some species of the remedy as provided therein would be available therefor.

(c) In terms of sub-section (11) of Section 19, the bank or the financial institution is at liberty to send a borrower out of the forum.

(d) In terms of the provisions of the Act, thus, the claim of the borrower is excluded and not included.

(e) In the event the bank withdraws his claim the counterclaim would not survive which may be contrasted with Rule 6 of Order 8 of the Code.

(f) Sub-section (9) of Section 19 of the Act in relation thereto has a limited application.

(g) The claim petition by the bank or the financial institution must relate to a lending/borrowing transaction between a bank or the financial institution and the borrower.

(h) The banks or the financial institutions, thus, have a primacy in respect of the proceedings before the Tribunal.

(i) An order of injunction, attachment or appointment of a receiver can be initiated only at the instance of the bank or the financial institution. We, however, do not mean to suggest that a Tribunal having a plenary power, even otherwise would not be entitled to pass an order of injunction or an interim order, although ordinarily expressly it had no statutory power in relation thereto.

(j) It can issue a certificate only for recovery of its dues. It cannot pass a decree.

(k) Although an appeal can be filed against the judgment of the Tribunal, pre-deposit to the extent of 75% of the demand is imperative in character.

(l) Even cross-examination of the witnesses need not be found to be necessary.

(m) Subject to compliance with the principle of natural justice it may evolve its own procedure.

(n) It is not bound by the procedure laid down under the Code. It may however be noticed in this regard that just because the Tribunal is not bound by the Code, it does not mean that it would not have jurisdiction to exercise powers of a court as contained in the Code. "Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice." (See Industrial Credit and Investment Corpn. of India Ltd. v. Grapco Industries Ltd. [(1999) 4 SCC 710])

The Tribunal, therefore, would not be a civil court."

Thus in clear, specific and emphatic words, the Hon'ble Apex Court has held that the DRT is not a Civil Court, which would mean that it has no power or jurisdiction, to entertain and decide the pleas as to common law rights and remedies as available to a litigant, under the plenary jurisdiction of the Civil Court.

16.1. The position that the DRT was a Tribunal and not a Court, was also stated in ***Cofex Exports Ltd. Vs. Canara Bank, 1997 SCC OnLine Del 515*** by a Division Bench of the Delhi High Court, when the DRT Act, 1993, was not amended to include a set off and counter claim, as under :-

“36. A few features of significance may be noted. The Debt Recovery Tribunal is a tribunal and not a Court. The proceedings before it are initiated on an application and hence are not suits. Only bank or a financial institution has the locus to invoke the jurisdiction of the Tribunal. The Tribunal does not pass a decree. It issues a certificate to the recovery officer for recovery of the amount of debt specified therein. Its procedure is not prescribed nor detailed; the principles of natural justice alone have to be followed. The procedure is summary. Ordinarily the Tribunal shall spend a term of six months merely between the date of the application and decision thereon. The definition of debt shows that the jurisdiction of the Tribunal is attracted on the allegation of debt being due made in the application and is not dependent on its being so found.

38. For reasons more than one, we are of the opinion that a set-off or a counter claim cannot be entertained by a Debt Recovery Tribunal. A Debt Recovery Tribunal is a tribunal and not a court. It is a creature of statute vested with a special jurisdiction to try only applications by bank or financial institutions to recover any debt from any person. It

does not exercise any 'common law jurisdiction'. It is only a bank or a financial institution or a consortium of the two which can enter the Tribunal for enforcement of its claim for recovery. Any one other than those cannot be entertained invoking jurisdiction of the Tribunal for enforcement of its claim as a claimant. What cannot be done directly can also not be allowed to be done indirectly. If claim by a person other than bank or financial institution is not entertainable before Tribunal it does not become entertainable merely because it is set out in the written statement or preferred by way of set-off or counter claim. An obligation to comply with the principles of natural justice obliges the Tribunal to entertain such pleas (e.g. denial, payment, adjustment) as would have the effect of abating, mitigating or extinguishing the claim itself, denying the Tribunal an opportunity of issuing a certificate while disposing of the application. The Tribunal is not a civil court; it has been vested with the powers of the civil court in respect of limited matters only such as summoning and enforcing attendance of witnesses, requiring discovery and production of documents, proceeding ex parte and setting aside ex parte orders etc. (see clauses (a) to (h) to sub section (2) of S. 22 of the Act). It has not been conferred with jurisdiction to entertain counter-claim or plea of set-off by reference to the provisions of Order 8 of the CPC. Entertaining a counter-claim or a cross suit or a plea of set-off would not only be without jurisdiction but also an exercise in futility inasmuch as the Tribunal would not adjudicate thereupon nor pass a decree in favour of the defendant against the plaintiff. The

law creating Tribunal and conferring jurisdiction on it has not provided for set-off or counter claim being entertained by it just as the CPC does it for civil courts. If a counter claim was to be tried by Tribunal it may have to go into disputes arising between the parties though not 'filling the same character'. There may be disputes which by no stretch of imagination can be tried by Tribunal. Claims preferred by bank or financial institutions are capable of being disposed of by summary enquiry while claims preferred by other persons would not be capable of being so disposed of. The principle of convenience and the mechanics of litigation before Tribunal (as set out in the Act) - both exclude set-off or counter claim being placed before the Tribunal. If set-off, counter claims and cross suits were allowed to be raised before the Tribunal the very object behind its creation will be lost."

17. The concession as given in ***Mardia Chemicals*** (supra) in para 53 thereof, that in cases when a guarantor may stand discharged as envisaged under Sections 133 and 135 of the Indian Contract Act e.g. where any variance in terms of the contract has been made without his consent then in such cases a Civil Court may have jurisdiction to entertain the case as character as a guarantor itself is denied, or a plea is raised that the guarantor stood discharged due to any of the contingencies as enumerated in the Contract Act, needs to

be also borne in mind, apart from which when fraud and misrepresentation are alleged, it would be the Civil Court which would have jurisdiction, as such a plea, cannot be entertained and decided by the DRT in its jurisdiction under Section 17 of the SARFAESI Act read with Section 17 of the DRT Act. Of course, not every pleading of fraud, would bring the matter out of the jurisdiction of the DRT. It is only if the fraud or misrepresentation, as alleged, is prima facie apparent on the face of it, that the Civil Court will, in such a matter have jurisdiction. The Hon'ble Apex Court in the case of **A. Ayyasamy** (supra), has delineated the nature of pleadings necessary to constitute a prima facie case of fraud, and have held that not every allegation of fraud will take the matter out of the jurisdiction of the Forum, where it is being litigated. The fraud alleged must be not only apparent on the face of the record but must also be all pervading.

18. ***Sadanand Properties Pvt. Ltd. and Others Vs. Punjab National Bank and Ors, 2015 SCC OnLine Del 7179***, upon which reliance has been placed by learned Counsel Dr. Sundaram, was found to be a case prima facie disclosing a case of fraud and it was held that

the Civil Court had jurisdiction to entertain and decide the suit, for declaration and permanent injunction for declaring the documents relating to the suit property as null and void, being vitiated by fraud.

18.1. In *Rajanala Kusuma Kumari Vs. State of Telengana, 2018 SCC OnLine Hyd 33*, relied upon by learned Counsel Dr. Sundaram, in the background of the position of receipt of notices under the provisions of the SARFAESI Act, by the Andhra Pradesh State Financial Corporation (APSFC), the petitioners gave a reply stating that they had never mortgaged their properties, nor had availed any loan, nor were guarantors and were complete strangers to the transaction, which was claimed by the APSFC, however, symbolic possession was taken and at the time of taking physical possession, petitions were filed before the Court, in which having regard to the power under Section 17(1) of the DRT Act, 1993 and the action under Section 13(4) of the SARFAESI Act, after considering the judicial pronouncements it was held as under :-

“25. We are not persuaded to agree. The argument of the learned counsel, though seemingly plausible and attractive at first glance, is inherently specious. The remedy provided

under Section 17(1) before the Tribunal is with regard to testing of the measures taken by a secured creditor under Section 13(4) of the SARFAESI Act. Section 13(4), as already noted supra, states to the effect that if the borrower fails to discharge his liability in full within the time specified in Section 13(2), the secured creditor may take recourse to one or more of the measures thereunder to recover his secured debt, namely, take possession of the secured asset of the borrower, including the right to transfer by way of lease, assignment or sale for realizing the secured asset or take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale. The underlined terms are defined under Section 2(1) of the SARFAESI Act, as already referred to supra. Therefore, the measures taken by a secured creditor under Section 13(4) presuppose satisfaction of these definitions.

26. However, in the event a person does not even fall within the ambit of a borrower as defined under Section 2(1)(f) or if a particular property does not qualify to be categorized as a secured asset under Section 2(1)(zc), owing to a defect in the security interest allegedly created therein, the very foundation of the measures, purportedly initiated by such secured creditor under Section 13(4), is rendered shaky. When such fundamental lacunae, striking at the very root, are alleged against the so-called measures initiated by the secured creditor under Section 13(4), the question that arises is whether the person aggrieved, who alleges such essential defects, should also be relegated to

the statutory remedy of filing a securitization application before the Tribunal under Section 17(1) of the SARFAESI Act. We think not.

27. Be it noted that, in essence, testing of the measures taken under Section 13(4) of the SARFAESI Act would not be the issue for consideration, in such a situation, as the very applicability of such measures would be under attack. Such an issue would not fit squarely into the language used in Section 17(1) of the SARFAESI Act. In consequence, a securitization application thereunder would not be the right remedy. -----”

After considering the dictum of the Hon'ble Apex in **Mardia Chemicals** (supra), it was held thus :-

“28. The above observations confirm that it is only the testing of the measures, taken or yet to be taken, under Section 13(4) of the SARFAESI Act that can be taken before the Tribunal under Section 17(1) thereof. We therefore stand strengthened in our conviction that Section 17(1) is not the remedy in a situation where the applicability of the measures is itself open to doubt.”

(emphasis supplied)

18.2. In **Abhishek Bose and Ors. Vs. IDBI Bank Ltd. and Ors.**

MANU/WB/0895/2015 relied upon by learned Counsel

Dr. Sundaram, a suit was filed for declaration that deed of mortgage

executed by Plaintiffs in favour of Defendant Nos. 1 and 2 as also personal guarantee were null and void, on the ground that though personal guarantee and mortgage deed were executed by Plaintiffs in consideration of Defendant banks disbursing additional working capital to proforma Defendant, no fresh funds were disbursed by Defendant banks to proforma Defendant. Considering that the Personal guarantee and mortgage deed would have become effective only upon disbursement of fresh/additional working capital by Defendants to proforma Defendant, in absence of which no effect could be given to said documents, the suit was held to be maintainable and the bar u/s 34 SARFAESI Act, was held not to be attracted. The relevant portion is reproduced as under :-

“48. The plaintiffs have claimed a declaration that the deed of mortgage dated 31st May, 2013 and the personal guarantee dated 1st February, 2013 are null and void and for delivery up and cancellation of the said documents and perpetual injunction restraining the defendants from claiming any right under the said documents. In my view, it is not within the power or competence of the DRT or the Appellate Tribunal to decide whether or not the plaintiffs are entitled to such reliefs. In other words, the subject matter of the suit is not one which the DRT is competent to

adjudicate upon. Hence, prima facie, I am of the view that the suit is maintainable. Jurisdiction of a civil court has been ousted only in respect of matters which come within the purview and ambit of Section 17 of the DRT Act. The tribunal is a creature of statute and its powers are circumscribed by statute. It cannot transgress beyond the four corners of the statute. It does not have the power or jurisdiction to decide any and all kinds of disputes between a debtor and a creditor bank or financial institution.”

18.3. In *Madhav Prasad Aggarwal* (supra) relied upon by learned Counsels Dr. Sundaram and Mr. Lohiya, the issue regarding the scope and ambit of Section 34 of the SARFAESI, Act, was not decided and what was decided was that the plaint could not be rejected *qua* one of the defendants, but could only be rejected as a whole, relying on *Sejal Glass Limited Vs. Navilan Merchants Private Limited, (2018) 11 SCC 780*. This judgment is of no assistance to us, in the issue under consideration.

18.4. *Arasa Kumar v. Nallammal, II (2005) BC 127 : (2004) 3 MLJ 252*, has explained the law in the following words :-

“30. Section 9, Civil Procedure Code and bar of jurisdiction created under relevant sections in respect of the Co-

operative Societies Act, Arbitration and Conciliation Act, 1996 and also section 29 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 and under Rule 40 of the Income Tax (Certificate Proceedings) Rules, 1962 and also the bar under the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 were all considered by this Court and the Apex Court as referred supra and now, it is manifestly clear that the power under section 34 of the Securitisation and Reconstruction of Financial Assets and Enforcement of security Interest Act is not absolute and the same is subject to certain restrictions, they are:

- (1) that the parties, who filed the suit, must be party to the liabilities created in favour of the secured creditor,*
- (2) the disputes between the parties could be resolved under the provisions of the Act itself,*
- (3) that if the claim made by the parties is outside the jurisdiction of the Debts Recovery Tribunal or the appellate tribunal or any action taken or to be taken under this Act and also under the Recovery of Debt due to Banks and Financial Institutions Act, 1993 and the dispute raised by the parties cannot be adjudicated by any of the tribunal or authority, created under the act or under any other Act, the right of the parties to approach the Civil Court for appropriate relief cannot be deprived and taken away.”*

(emphasis supplied)

Thus, what is manifest is that the DRT must be found to have the same power and authority to decide the objection/claim

raised and in the same manner, which the Civil Court could have decided. If that not be so, then the jurisdiction of the Civil Court cannot be said to have been ousted. We find that the above statement of law, well defines the position.

18.5. In *Padma Ashok Bhatt Vs. Orbit Corporation Ltd. and others*, 2017 SCC OnLine Bom 7740 : 2017 (6) Mh.L.J. 102 while considering the plea for rejection of plaint, a learned Single Judge of this Court, held as under :-

“13. Keeping this principle in mind, let us now consider the merits of the arguments of Ms. Iyer concerning the bar under section 34 of the SARFAESI Act, which prohibits civil Courts from entertaining any suit or proceeding in respect of any matter which the debt recovery tribunal or appellate tribunal constituted under the SARFAESI Act is empowered by or under that Act to determine and also from granting an injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under that Act or under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. The question, therefore, which we have to consider here, in the light of what is discussed above, is, whether the DRT is empowered to determine the subject matter of the suit as a whole as against Axis Bank.

The answer is clearly in the negative. Ms. Iyer argues that the plaintiffs prayer for a declaration that there is no legally enforceable charge or mortgage in favour of Axis Bank in respect of the suit building is a matter, which can be determined by the DRT. Indeed it can be. But then, the alternative prayer that Axis Bank be jointly and severally ordered along with Orbit to comply with all its obligations under MOFA on the footing that by virtue of transfer of property created in its favour by Orbit, it is in the position of a promoter vis-a-vis the flat purchasers, is clearly out of bounds for the DRT. The DRT cannot be said to be competent to determine a prayer such as this or direct, on the basis of such determination, specific performance of a contract for sale of property. If it cannot, there is no question of rejecting that part of the claim against Axis Bank under Order 7, Rule 11(d).

15. Ms. Iyer argues that section 17 of the SARFAESI Act gives right to any person, that is to say, any person other than the borrower, to also approach the DRT in an application under section 17. Learned Counsel relies on the judgment of the Supreme Court in the case of Jagdish Singh v. Heeralal, 2014 (3) Mh.L.J. (S.C.) 588 : (2014) 1 SCC 479 in this behalf. No doubt, any person can approach the DRT under section 17 if he is aggrieved by any order under section 13(4) of the SARFAESI Act but the point to be considered still is, if any particular relief claimed/to be claimed by such person can be granted by DRT. If not, there is no question of relegating him to any application under section 17. His remedy before the civil Court in respect of

that relief is clearly not barred by the provisions of section 34 of the SARFAESI Act read with section 17 of that Act.

16. Besides, as held by the Supreme Court in the case of Mardia Chemicals Ltd. v. Union of India, 2004 (2) Mh.L.J. (S.C.) 1090 : (2004) 4 SCC 311, there is a well known exception to the bar of jurisdiction of the civil Court in respect of an action of a secured creditor under the SARFAESI Act. If the action of the secured creditor is alleged to be fraudulent, it is certainly permissible to bring the matter before the civil Court. Ms. Iyer, however, refers to the judgment of a Division Bench of our Court in the case of State Bank of India v. Jigishaben B. Sanghavi, 2011 (2) Mh.L.J. 342 : 2011 (3) Bom.C.R. 187 and relying on this case, submits that the pleadings in such a case must “clearly disclose” a fraud or irregularity on the basis of which the relief is sought. No doubt, this is the requirement of law, for without such requirement, it will be permissible for any person to approach the civil Court in a matter clearly covered by section 34 read with section 17 of the SARFAESI Act by simply alleging fraud as a matter of form and without indicating any substance for raising such plea. Noticing the facts of our case, however, there are sufficient averments in the plaint, which suggest that there is indeed a case to go to trial on fraud. -----”.

It is necessary to note that the Special Leave Petition filed against this judgment was withdrawn.

19. ***Shivabassappa Kankanwadi*** (supra) cited by learned Counsel Mr. A.H. Lohiya was a case where the issue was invocation of the powers of the High Court under Articles 226 and 227 of the Constitution were invoked for quashing the order passed by the Arbitrator in pursuance to a notice under Section 13 (2) and action under Section 13 (4) of the SARFAESI Act in light of the plea raised, that an alternative and efficacious remedy of filing an application under Section 17 of the SARFAESI Act was available to the petitioners who were signatories to the mortgaged deed, though a plea was raised by them that the same was executed by them under a misrepresentation and inducement. It is in light of this position that the Court found that since there was no proper security in favour of the Bank, the question of invoking the provisions of the SARFAESI Act to recover the purported claim from the petitioners was untenable in law and the jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India was available, as the very jurisdiction of the Bank to proceed under the SARFAESI Act itself was being challenged and it was held that wherever the Banks act without jurisdiction, there would be no bar for the exercise of powers under Articles 226 and 227 of the Constitution, even though

an alternate remedy may be available. In respect of the provisions of Section 35 and 37 of the SARFAESI Act, it was held as under :-

“14. A combined reading of Sections 35 and 37 of the SARFAESI Act would show that there is no inconsistency between the two provisions. The true import of these Sections is that in case there is anything inconsistent in the provisions of such Acts and under the provisions of the SARFAESI Act, the provisions of SARFAESI Act shall override the inconsistent provisions of these Acts. But to the extent the provisions of the named Acts are not inconsistent with the provisions of the Act, the provisions of those Acts shall have full application and can neither be ignored nor overridden nor bye-passed. For example, the banks being fully empowered to pursue their remedy or claim against the debtors by invoking the remedy under Section 84 of the Cooperative Societies Act 2002 can resort to such remedy which is by no standards less efficacious. It is open to the bank to take recourse to that remedy in spite of the pendency of the petition. But, the special nature of the provisions under the SARFAESI Act, do not confer any special benefit or exemption. The inherent nature of these provisions require them to abide by the provisions of such Act excepting the field of inconsistency. The term “in addition to” is synonymous with “also”, “moreover”, “likewise” or “besides”. The term cannot of course be construed as meaning “in lieu of” and is rather diametrically opposed to limitation or abatement or abridgment. The term “in addition to” signifies an

increase of or accession to and thus conveys the idea of protecting the reliefs already available under the named Acts. In the present case, there is no inconsistency between the Co-operative Societies Act, 2002 and the provisions of the SARFAESI Act. In such circumstances, once the respondent no.1 has exercised its power in terms of the Co-operative Societies Act, 2002 and the orders therein have attained finality, the question of proceeding to recover the alleged debt on the basis of the same security document which was found to be a fraud by the learned District Judge cannot be accepted.”

(emphasis supplied)

20. *Saleem Bhai and others Vs. State of Maharashtra and others, (2003) 1 SCC 557; Kamala and others Vs. K.T. Eshwara Sa and others, (2008) 12 SCC 661; Kuldeep Singh Pathania Vs. Bikram Singh Jaryal, (2017) 5 SCC 345; Pawan Kumar Vs. Babulal since deceased through legal representatives and others, (2019) 4 SCC 367; Urvashiben and another Vs. Krishnakant Manuprasad Trivedi, (2019) 13 SCC 372 and Alpana Gupta through power of attorney holder Vs. APG Towers Private Limited and another, (2019) 15 SCC 46, relied upon by learned Counsel Mr. Gandhi, all lay down the same proposition that for decision of a plea under Order VII Rule 11(d) of*

C.P.C. averments in plaint are germane, in respect of which there cannot be any dispute.

CONTRARY VIEWS

21. In *Allahabad Bank Vs. Canara Bank and another, (2000) 4 SCC 406 at page 420*, a specific question was framed as to whether the DRT had exclusive jurisdiction, in view of Sections 17 and 18 of the DRT Act, 1993, which was answered as under :-

“(i) Adjudication by Tribunal: does the Tribunal have exclusive jurisdiction

20. We shall refer to Sections 17 and 18 in Chapter III of the RDB Act which deal with adjudication of the debt:

“17. Jurisdiction, powers and authority of Tribunals.—(1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

18. Bar of jurisdiction.—On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Article 226 and 227 of the Constitution) in relation to the matters specified in Section 17.”

It is clear from Section 17 of the Act that the Tribunal is to decide the applications of the banks and financial institutions for recovery of debts due to them. We have already referred to the definition of “debt” in Section 2(g) as amended by Ordinance 1 of 2000. It includes “claims” by banks and financial institutions and includes the liability incurred and also liability under a decree or otherwise. In this context Section 31 of the Act is also relevant. That section deals with transfer of pending suits or proceedings to the Tribunal. In our view, the word “proceedings” in Section 31 includes “execution proceedings” pending before a civil court before the commencement of the Act. The suits and proceedings so pending on the date of the Act stand transferred to the Tribunal and have to be disposed of “in the same manner” as applications under Section 19.

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

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

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

25. Thus, the adjudication of liability and the recovery of the amount by execution of the certificate are respectively within the exclusive jurisdiction of the Tribunal and the Recovery Officer and no other court or authority much less the civil court or the Company Court can go into the said questions relating to the liability and the recovery except as provided in the Act.

The exclusive jurisdiction of the DRT, as conferred upon it by Sections 17 and 18 of the DRT Act, has been recognised, so far as the question of adjudication of the liability of the

borrower/guarantor to the Bank/Financial Institution is concerned. *Allahabad Bank* (supra) does not go to any extent beyond the above, which clearly indicates that within the parameters as confined by the language of Sections 17 and 18 the DRT has exclusive jurisdiction to adjudicate upon the recovery of the debt. The issue of civil rights available for enforcement under the Common Law forum of the Civil Courts, did not fall for consideration.

21.1. *Allwyn Alloys Pvt. Ltd.* (supra) was a case in which by a registered sale-deed, executed by the respondent nos.5 and 6, title to the flat in question, was transferred in favour of the respondent nos.2 to 4, which sale-deed later on claimed to be deposited by the respondent nos.2 to 4, with the Bank along with the share certificate and other documents for creating an equitable mortgage. A plea was raised by respondent nos.5 and 6 based upon an unregistered MOU dated 13/3/2011, which was found by the DRT, to be subsequently created, which also opined that the equitable mortgage, had been legitimately created and the relief claimed by the respondent nos.5 and 6 to restrain the Bank from proceeding with the auction of the subject flat stood rejected, which decision was maintained by the DRT

in appeal. The High Court in a writ petition, without formally setting aside the orders of the DRT and the DRAT, disposed of the writ petition with liberty to the respondent nos.5 and 6 to approach the Competent Forum for adjudication of their right, title and interest in the subject flat, which decision came to be challenged before the Apex Court, which accepted the plea advanced before it, held that Section 34 of the SARFAESI Act clearly bars filing of the civil suit, for no Civil Court can exercise jurisdiction to entertain any suit or proceeding in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. It further held that the title to the subject flat already stood transferred to the respondent nos.2 to 4 by a registered sale-deed who had deposited the same with the Bank creating equitable mortgage, as a security interest, which has been upheld concurrently by the DRT as well as the DRAT and therefore, the bar under Section 34 of the SARFAESI Act was clearly applicable. It is however pertinent to note, that in *Allwyn Alloys Pvt. Ltd.* (supra) the issue about the nature, scope and parameters of the bar of jurisdiction as contained in Section 34, vis-a-vis the language of Section 17 (1) of the SARFAESI Act read with Section 17 of the DRT Act, was not under consideration.

21.2. *Satyawati Tondon* (supra), was a case in which the fact of availing of a loan and the respondent no.1 standing as a guarantor for its repayment and further creating a security interest by deposit of title deeds of her property was not disputed. In fact, at one point of time, when there was default in repayment of the loan, the respondent no.1 who was a guarantor had deposited a sum of Rs.50,000/- and had also given an undertaking to pay the balance amount in installments which was not done, resultant to which notice under Section 13 (2) of the SARFAESI Act was issued and thereafter an application under Section 14 came to be allowed by the District Magistrate and action under Section 13 (4) was also taken at which stage, the respondent no.1/Satyawati Tondon filed writ petition claiming that the notice as issued by the Bank for recovery were *ex facie* illegal and liable to be quashed. The petition was defended by the Bank contending that the action was consistent with the provisions of the SARFAESI Act. The issue of availability of alternate plea under Section 17 of the SARFAESI Act was also raised. The High Court holding that before proceeding against the guarantor, the Bank should have proceeded against the borrower and exhausted all remedies only after which it could have proceeded

against the guarantor/respondent no.1 quashed the action on part of the Bank, which came to be challenged before the Apex Court, whose relevant observations in respect to the expression “any person” are reproduced as under :-

“42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression “any person” used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.”

The above would indicate, that “any person”, under Section 17(1) of the SARFAESI Act, has the remedy to approach the DRT under Section 17 of the DRT Act against any measure taken by the secured creditor under Section 13 of the SARFAESI Act and to that extent the jurisdiction of the Civil Court is barred. There cannot

be any dispute with this position. What has to be considered is whether the DRT under Section 17 of the DRT Act, 1993, in case any objection is raised under Section 17 (1) of the SARFAESI Act, by “any person” excluding a borrower and guarantor, claiming any independent right in the security interest, would have the power to determine the rights of such person and grant an executable relief to such person. The answer is obvious that the DRT does not have any such power or authority. No doubt, that in case such a right is claimed by “any person”, excluding the borrower and guarantor, by way of an objection under Section 17(1) of the SARFAESI Act, the DRT under its jurisdiction would be bound to examine such a claim. However, the examination of such a claim by the DRT, in view of the language of Section 17 (2) and (3) of the SARFAESI Act, would be restricted to consideration and examination of such objection, within the limitation as imposed upon it, i.e. to see whether the action under Section 13 by the secured creditor was in accordance with the provisions of Section 13 of the SARFAESI Act and the Rules as made thereunder. In *Satyawati Tondon* (supra) the scope and ambit of the examination by the DRT in case an objection or claim is made by “any person” under Section 17(1) of SARFAESI Act, in light of the

language of Section 17 (2) and (3) of SARFAESI Act, has not been considered and examined. Section 17 (2) of the SARFAESI Act, as reproduced earlier, by using the language “The Debts Recovery Tribunal shall consider whether any of the measures referred to in Sub Section (4) of Section 13 taken by the secured creditor for enforcement of the security are in accordance with the provisions of this Act and the rules made thereunder”, has limited the consideration and examination by the DRT, as indicated above.

21.3. In *Jagdish Vs. Heeralal* (supra), the appellant was an auction purchaser, who was not put in possession, acquired knowledge that civil suit for declaration of title, partition and permanent injunction was pending, in which a plea was raised, that the respondent nos.1 to 5 therein being the sons/grandsons of deceased Premji, constituted a HUF engaged in agriculture and the auctioned property was purchased in the names of the respondent nos.7 to 9 out of the funds of the HUF and the houses were also purchased in the names of the respondent nos.6 to 8, out of the same HUF funds and therefore a declaration that the properties were HUF properties and the respondents nos.1 to 5 had a right and

share therein was claimed. The Bank filed an application raising a preliminary objection under Section 9 of C.P.C. in the suit regarding the bar of jurisdiction as contained in Section 34 of the SARFAESI Act, which was upheld. However, in a challenge to the said order, accepting the preliminary objection, the High Court, in appeal, considering that the plaint raised a question of title on the basis of joint Hindu Family property, held that the Civil Court had jurisdiction, which in turn, came to be challenged before the Apex Court. The Apex Court, found that the lands in question, were purchased by the respondent nos.6 to 8 in their individual names, long after the death of the common ancestor Premji and that too by registered sale-deeds and no claim was ever made at any stage by any member of the HUF that the said properties were HUF properties and not the individual properties. It was further held that the respondent nos.7 to 9 had also purchased properties in their individual names vide sale-deed dated 14/9/1999 and the sixth respondent had also purchased in his individual name house no.42/1 on 31/3/1998 by registered sale-deed. The loan was advanced by the Bank on 17/2/2000 on the strength of the above documents, which stood in the names of the respondent nos.6 to 9.

It is in light of the above factual position, it was held that the expression “any person” used in Section 17 of the SARFAESI Act was of wide import and would include within its hold not only the borrower but also the guarantor or any other person, who may be affected by the action taken under Section 13 (4) of the SARFAESI Act including the persons/plaintiffs, who had filed the suit as mentioned above. The relevant paragraphs are quoted as under :-

“17. The expression ‘any person’ used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the Securitisation Act. Reference may be made to the Judgment of this Court in Satyavati Tondon’s case.

18. Therefore, the expression ‘any person’ referred to in Section 17 would take in the plaintiffs in the suit as well. Therefore, irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of Section 17 of the Securitisation Act, in case the bank (secured creditor) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest.

22. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various

measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing the secured assets. Any person aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression 'in respect of any matter' referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. Civil Court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well.

23. We are of the view that the civil court jurisdiction is completely barred, so far as the "measure" taken by a

secured creditor under sub- section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal. to determine as to whether there has been any illegality in the “measures” taken. The bank, in the instant case, has proceeded only against secured assets of the borrowers on which no rights of Respondent Nos.6 to 8 have been crystalised, before creating security interest in respect of the secured assets. In such circumstances, we are of the view that the High Court was in error in holding that only civil court has jurisdiction to examine as to whether the “measures” taken by the secured creditor under sub-section (4) of Section 13 of the Securitisation Act were legal or not. In such circumstances, the appeal is allowed and the judgment of the High Court is set aside. There shall be no order as to costs.”

(emphasis supplied)

It would thus be apparent what has been stated in respect of ***Satyawati Tondon*** (supra) regarding the bar under Section 34 of the SARFAESI Act, vis-a-vis the jurisdiction of the Civil Court, being in relation to the measure taken by the secured creditor under Section 13 (4) of the SARFAESI Act and not otherwise would equally be applicable to ***Jagdish Singh*** (supra). That apart, ***Jagdish Singh*** (supra), does not take into consideration ***Nahar Industrial Enterprises*** (supra) nor does it consider the issue of enforcement of

the civil right of 'any person', vis-a-vis the security interest and the scope and extent of jurisdiction of the Civil Court under Section 9 of C.P.C. The additional ground as available in *Jagdish Singh* (supra) was that no rights of the respondent nos.6 to 8 had been crystallized in the secured assets, before creating security interest in respect of the same, however, it is material to note that the Hon'ble Apex Court in *Atma Ram Mittal Vs. Ishwar Singh Punia*, (1988) 4 SCC 284, by relying on *Om Prakash Gupta Vs. Digvijendrapal Gupta* (1982) 2 SCC 61, has held that it is a well-settled principle that the rights of the parties crystallize to (*sic* on) the date of the institution of the suit, which in *Jagdish Singh* (supra) already stood instituted. The dictum in *Sundeep Kumar Bafna* (supra) may thus be attracted.

21.4. *Sree Anandhakumar Mills Limited* (supra), relies upon *Jagdish Singh* (supra) and reiterates that under the provisions of Section 17 and 18 of the SARFAESI Act, the respondent no.2, had an adequate and efficacious remedy, which was open for him to avail of. What has been stated in respect of *Satyawati Tondon* (supra) and *Jagdish Singh* (supra) stands equally applicable for *Sree Anandhakumar Mills Limited* (supra).

21.5. *V Thulasi* (supra) relied upon by learned Counsel Mr. S.N. Kumar was a case, in which admittedly the suit property, was mortgaged by the plaintiff with the Bank, thereby creating a security interest, and out of the loan, additional floor space was created, which was rented out to the original defendant nos.2 and 3, which rent amount was to be adjusted against the installments. The defendant nos.2 and 3 closed its business and its assets and liabilities were transferred to the first defendant, which was sanctioned a cash credit limit by the Bank for which also the plaintiff stood as guarantor and the suit property continued to be under the equitable mortgage with the Bank as security for the loan availed. The defendant nos.2 and 3 were declared as insolvents and the loan account of the plaintiff was declared as NPA, consequent to which a notice of demand was issued on 7/2/2006. At this stage, the plaintiff filed a suit alleging that the defendants had grossly misused the trust reposed on them and misused the documents executed by the plaintiff for the purpose of availing the loan of Rs.30,00,000/-. The reliefs claimed in the suit were to declare that the creation of guarantee in the plaintiff's name for the loan advanced to the defendant no.1 was null and void and for a permanent injunction

restraining the Bank from proceeding against the plaintiff or the plaintiff's scheduled property. An application under Order VII Rule 11 (d) of C.P.C., was filed by the Bank raising a preliminary objection of the bar under Section 34 of the SARFAESI Act and the effective remedy under Section 17 of the SARFAESI Act, which came to be allowed and the plaintiff was rejected. The High Court in appeal found that availing of the loan and creation of the equitable mortgage of the property by the plaintiff was not disputed. So also, the fact that the plaintiff stood guarantor for the loan availed by the defendant no.1 was also not disputed, in view of which, undisputed position, the Court held that the remedy of the plaintiff was under Section 17 of the SARFAESI Act and the bar under Section 34 was attracted. The Court further held relying on *T. Arivandandam Vs. T.V. Satyapal and another, (1977) 4 SCC 467* that clever drafting creating illusions of cause of action are not permitted in law, and the Court is obliged to see with the allegations of fraud and collusion made in the plaintiff are themselves a product of fraud and collusion between the borrower and his family members so as to escape liability and save the secured assets, somehow or the other. Thus, it is on the undisputed position of creation of a security interest, that *V. Thulasi* (supra) was decided.

21.6. ***Indian Bank, Asset Recovery Management Branch Vs. B. Venkataraman***, MANU/TN/2630/2014, upon which reliance is placed by learned Counsel Mr. Kumar was a case in which a suit was filed for a declaration that the equitable mortgage created on 27/5/1995 by the father of the plaintiffs was null and void and would not bind the 4/5th shares of the plaintiffs therein and a permanent injunction restraining the Bank from proceeding under the SARFAESI Act. Considering the reliefs claimed, an application under Order VII Rule 11 of C.P.C., based upon the bar under Section 34 of the SARFAESI Act read with Section 19 of the Recovery of Debts and Bankruptcy Act (RDB Act) came to be filed. It was undisputed, that the father of the plaintiffs as a guarantor, had created an equitable mortgage in favour of the Bank for loan availed by one G.K. Movie land who defaulted leading to a notice under Section 13 (2) and a further institution of proceedings before the DRT by way of an Original Application No.102 of 2004. On 5/3/2005, the Bank took possession of the property under Section 13 (4), the father of the plaintiffs died on 25/10/2007, resultantly, the plaintiffs were brought on record as his legal heirs. Original Application No.102/2004 was decided on 18/5/2009,

holding that the plaintiffs were liable to the extent of the asset/estate inherited by them from their father. After the final order dated 8/5/2009, the plaintiffs sold the property to the defendant no.2 by a sale-deed dated 14/8/2009, who had agreed to discharge the liability of the Bank, which they failed to do, as a result of which, by a public auction dated 15/5/2010, the property was sold to the defendant no.3. The suit in question was filed on 2/7/2010. Finding that the relief sought in the suit could not take it out of the clutches of Section 34 of the SARFAESI Act, an application for amendment claiming the relief of partition came to be filed. ***B. Venkataraman*** (supra) holds that measures under Section 13 of the SARFAESI Act taken by the Bank, could be only challenged before the DRT and not by way of a civil suit, though a suit for partition, strictly speaking can only be filed before the Civil Court, which can declare the rights and shares of the party by passing a preliminary decree under the provisions of the Code of Civil Procedure and later pass a final decree allotting the shares and further execution proceedings can be initiated in the Executing Court, for the parties to realize the fruits of the decree.

21.7. It is worthwhile to note that in *Satyawati Tondon* (supra), *Jagdish Singh* (supra), *V Thulasi* (supra) and *B. Venkataraman* (supra) there never was any dispute that loan was taken and immovable property was offered as security interest. In all these cases, it is the persons who had availed the loan, were signatories to the documents, had stood as guarantors, were the persons who had challenged the action under the SARFAESI Act initiated by the Bank, in proceedings before the Civil Court and the title documents in respect of the property which was given as 'security interest', stood in their name, whether as borrowers or guarantors. So also in all these judgments it has been categorically held that the bar under Section 34 of the SARFAESI Act, was in respect of the measures as taken under Section 13 of the SARFAESI Act read with Section 17 of the DRT Act, 1993, and not otherwise.

21.8. In *Jigishaben* (supra), the matter was considered in light of the plea as to whether the case as pleaded in the plaint, came within the ambit of the exception carved out by the Supreme Court in para 51 of *Mardia Chemicals* (supra) in which contextual background the Court held that a stray reference to an allegation of fraud in

paragraph 15 of the plaint is not sufficient to bring the case within the scope of the exception carved out in *Mardia Chemicals* (supra) which being a limited exception, like all exceptions, must also be strictly construed. It was also found that grievance as made therein (in the plaint) being in respect of validity of the mortgage (security interest) and of the tenability of the action adopted by the Bank under the SARFAESI Act, the remedy under Section 17 of the SARFAESI Act was clearly available. It is also to be noted that, the second defendant therein was admittedly the Karta of the HUF, who along with other members of the HUF had created an equitable mortgage of the property in question. As noted in para 4 therein challenges to the actions of the Bank under Section 13 (2) were already rejected by the learned Single Judge and thereafter in appeal by the Division Bench of the Gujarat High Court, on which date itself the suit came to be filed, which clearly indicated that, the validity of the mortgage created, already stood determined by the High Court of Gujarat in proceedings challenging action under Section 13 (2) of the SARFAESI Act. The validity of the mortgage of the property, already stood concluded in the earlier litigation before the Gujarat High Court and thus could not have been reopened. That apart, the Court was

not called upon to consider the comparative jurisdiction under Section 9 of C.P.C., of the Civil Court and under Section 17 (1) of the DRT Act, 1993, Sections 13 and 17 of the SARFAESI Act, of the DRT. However, in light of the factual position narrated therein, and in view of what we have stated above, what has been held in *Jigishaben* (supra) cannot be faulted with, as *Jigishaben* (supra) does not hold that the bar under Section 34 of the SARFAESI Act is an absolute bar altogether, rather, the Court was aware of the exceptions created by *Mardia Chemicals* (supra) and had categorically held that the pleadings in the plaint did not satisfy the exceptions.

22. The jurisdiction of the Civil Court is considered to be a panacea for all ills, where a litigant feeling aggrieved by any action, claim, demand, levy, inaction, violation, breach of/by any authority, private person, State or Central Government, local bodies, can approach for redressal of his grievance, and seek any relief to which he claims himself to be entitled to, be it in the nature of any declaration, injunction or otherwise for cancellation of any contract or its enforcement, damages and for that matter for any violation of any right conferred upon him by any statute or contractual

obligations. For every and any enforcement of any civil right, which a citizen feels is available to him under the common law, the remedy would lie before the Civil Court.

22.1. Thus any exclusion of such a right, has to be zealously guarded against and the exclusion clause has to be strictly construed, for the reason that the exclusion clause may at times be in conflict with the common law rights of a citizen and may result in denial of the remedy for a wrong caused to him, in the propagation of the exclusion principle.

22.2. At one point of time, there were only Civil Courts available for redressal of all grievances of any violation of a right being claimed by a citizen, apart from the remedies available under the writ jurisdiction of the High Courts. Then as rights and remedies for enforcement of such rights, in relation to specific issues were created by enactments, separate fora in the form of Tribunals came to be created for enforcement of such rights. The purpose was to provide speedy remedies. However this has happened to such an extent that today we are bogged down by special fora, which are in addition to

the existing set up of the Civil Courts for addressing the common law rights of the citizens. Perhaps in the zeal for providing speedy relief, by creating special fora, the common law rights are getting trampled upon, as such fora do not have either the power, authority or jurisdiction to consider and decide all issues arising out of a right created and remedy provided, for the reason that the remedy so provided is, restricted to a particular extent and nature of the right and does not address all factors and facets of violation and claims which may arise out of enforcement of such rights by a Special Forum.

22.3. A security interest may at times also involve the common law rights of a citizen, who is not a party to its creation. In such a circumstance, can it be said that merely because a security interest has been created and it has to be enforced in a particular Forum in a particular manner, the citizen whose common law right has been infringed, would have to approach the Forum which has no jurisdiction and wherewithal to decide and enforce such violation. The following could be considered as examples of this :-

(a) In *Vineeta Sharma Vs. Rakesh Sharma and others*, (2020) 9 SCC 1, the Hon'ble Apex Court, while considering the amendment to Section 6 of the Hindu Succession Act, 1956, whereby a daughter was recognised as a coparcener, has held that such recognition would give her right in the coparcenary property by her birth in the coparcenary and not from the date of death of her father or the amendment. In such a matter if the male members of the family have already created a security interest in such coparcenary properties in favour of the Bank and for non payment of dues, if the same are being sought to be taken possession of and sold by auction, under Section 13 of the SARFAESI Act, can the Special Forum, DRT herein, which is undertaking this exercise, on being approached by the daughter who now due to the amendment to the Hindu Succession Act, 1956, has a share therein which stands recognised retrospectively by the Apex Court, decide and determine the rights of such daughter and grant a preliminary decree delineating her share and take further action to separate her share ? If it cannot, then could it be said that the Civil Court does not have the jurisdiction to do so, in view of the bar created under Section 34 of the SARFAESI Act ? But if it is so held then the daughter in spite of having a right in the

property duly recognised by law, would be left remediless, as she cannot go to the Civil Court nor the Special Forum, the DRT, has any authority to determine the extent of her right and grant her the relief which she would be entitled to.

(b) Where the owner/borrower/guarantor has entered into an agreement of sale of the property and has accepted consideration resiles from the contract which is then put to enforcement by instituting a suit for specific performance, during the pendency of which if a security interest is created by the owner by offering the property as an equitable mortgage, and the property is then put to auction, can the Tribunal in such a case upon the plaintiff approaching it under Section 17, adjudicate the rights of the plaintiff vis-a-vis the security interest and release the property from further process under the SARFAESI Act ? If the security interest in spite of the notice of the pendency of the suit is put to auction for recovery of the dues of the Bank, how would the principle of *lis pendens* in Section 52 of the Transfer of Property Act, affect the situation ? This is more so, as by filing a suit, the right of the plaintiff, has become crystallized. What would happen to the suit for specific performance, which in such a circumstance, on account of loss of the subject

property, would be rendered futile ?

(c) Another case in point would be where two or more persons hold title to the security interest and one of them has a power of attorney of the other, for taking steps to get the property mutated and do all activities necessary in that regard including to get the property partitioned, without any authority, mortgages the entire property with the Bank under the power of attorney which is accepted by the Bank, which on failure to repay is sought to be auctioned by invoking the powers under Section 13 of the SARFAESI Act. Can the Special Forum on the plea of the other co-owner enter into an adjudication of the issue about the nature and scope of the power of attorney and grant a declaration that the security interest was not legal to the extent of the share of the other co-owner ?

(d) Where on a prima facie demonstrable case, the person who has created the security interest, was not having any legal right in the property in respect of which security interest is created.

(e) Where the Bank is aware from documents on record that the borrower/mortgagor is not having any absolute right in the property or is having a limited right, contrary to which the security interest is created in the whole of the property vis-a-vis the

borrower/mortgagor who is having only defined or undefined undivided share/interest in the property and the entire property is mortgaged.

(f) Where right of inheritance is claimed in the property, in respect of which a security interest is created.

(g) Since the claim of the Bank or Financial Institution, could only be for recovery of the debts due, in a suit for specific performance in respect of the security interest, the consideration, agreed could always be directed to be transferred to the Bank or the Financial Institution, as it would be the obligation of the Seller, under Section 55 of the Transfer of Property Act, to transfer a clear and marketable title, free of encumbrances and it cannot be said that the suit, since it involved the security interest, would be hit by the bar under Section 34, as the DRT cannot decide the claim for specific performance, which is within the domain of the Civil Court.

(h) In a suit for setting aside an alienation and partition of joint family properties, the plea of absence of legal necessity, in an alienation by a Karta of Hindu Joint Family, has consistently, if proved, been upheld by the Courts to upset the alienation. If such a suit involves the security interest, can it be said that it would be

affected by the bar under Section 34 of the SARFAESI Act or that the remedy would lie under Section 17 of the SARFAESI Act, when the DRT has no power to adjudicate upon the issue and pass an appropriate decree.

(i) Could the suits in which pleas under Sections 31 and 34 of the Specific Relief Act are involved, in respect of the property, which is the subject matter, which is also a security interest, be considered to be triable by the DRT under Section 17 of the SARFAESI Act ?

(j) In a case where the declaration of an account as a non-performing asset (NPA), is contrary to the guidelines as framed by the RBI, could the DRT grant a declaration to that effect and consequently set aside all subsequent actions, if it finds that the declaration as NPA was contrary to the guidelines ? or a civil suit would lie ?

(k) Rights as available under the Transfer of Property Act, of foreclosure of accounts under Section 67; claim for redemption of mortgage under Section 60.

(l) whether a security interest was validly created and when the applicability of the measures, itself is in doubt, can the DRT

determine this ?

These situations are indicative and point towards existence of Civil Court's jurisdiction, even in cases, where a security interest has been created. The above examples are not exhaustive and there may be other cases, where the security interest could also become the subject matter of a litigation involving rights available under the Civil Law, and therefore each case shall have to be tested on its own merits.

22.4. There are other matters, where it has already been recognised that the Special Forum/DRT would not have jurisdiction, which are as under :

(a) A plea by the guarantor of discharge under Sections 133 and 135 of the Contract Act. [para 53 in *Mardia Chemicals* (supra)].

(b) A plea of fraud, if such plea is covered by *Mardia Chemicals* (supra) as clarified by *A. Ayyasamy* (supra).

(c) In *J.P. Builders and another Vs. A. Ramadas Rao and another, (2011) 1 SCC 429*, while considering the question of specific performance of a contract, in which the Bank, was

also made a party, and the plea of marshalling under Section 56 of the Transfer of Property Act, was pressed into service, it was held as under :-

“68. We are also satisfied that merely because for recovery of the loan secured by banks, a special Act, namely, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 has been enacted it is not a bar for the civil court to apply to other relief such as Section 56 of the TP Act. We are also satisfied that by issuing such direction on the application of Section 56 of the TP Act, the Division Bench has not modified or eroded the order passed by DRT. On the other hand, it is an admitted fact that the Bank has accepted the impugned verdict of the High Court and did not challenge the same before this Court by filing an appeal. We are also satisfied that by granting such a relief, the Bank is not prejudiced in any way by bringing other properties to sale first to satisfy the mortgage debt payable by Defendants 1 and 2. In fact, the High Court was conscious and also observed that if sale proceeds of other items of properties are not sufficient to satisfy the debt payable to the Bank by Defendants 1 and 2, in that event, Bank can proceed against the suit properties. ”

(emphasis supplied)

These are some examples, which would indicate that Civil Rights accruing to the citizens under the various Statutes which are enforceable under the Common Law by the Civil Courts, are not capable of being adjudicated by the Special Forum as created under the DRT Act, 1993 and therefore it would be the Civil Court which would have jurisdiction, in such cases.

22.5. The SARFAESI Act proceeds on the basis that the liability of the borrower has crystallized and his account has been classified as non-performing, as it is the existence of these preconditions, which gives jurisdiction to the DRT. There is no provision in the SARFAESI Act which permits the DRT to go into the question as to whether the classification of the account of the borrower as NPA was correct or not, which being the position, once the objection raised in reply to the notice under Section 13(2) of the SARFAESI Act, is rejected, there is no going back. Thus the liability as on the date of initiating the action under Section 13(4) of the SAEFAESI Act, stands crystallized and it is not permissible even for the DRT to go into the background of such crystallization of rights, which then goes on to deal with the matter in a non-adjudicatory

process.

23. Keeping in mind the principles as laid down in *Dhulabhai* (supra), and what we have considered and discussed above, when we ask ourselves a question as to whether the DRT exercising jurisdiction under Sections 13 and 17 of the SARFAESI Act, has the power, nay jurisdiction to determine the Civil Law rights, which may be available to a person, in the security interest, in the same manner as a Civil Court could ? or in other words, can a person who claims a right of partition, specific performance, reliefs under Sections 31 and 34 of the Specific Relief Act, preemption, redemption, declaration in respect of a property which is a security interest, approach the DRT for claiming adjudication of his such claim ? and can the DRT grant him such relief ? In our considered opinion, the answer has to be in the negative for the reason that it is not permissible for the DRT to embark on an adjudication of the civil rights claimed vis-a-vis the security interest, in light of the clear, precise and specific language of Section 17 (1) and 18 of the DRT Act read with Sections 13, 17 and 34 of the SARFAESI Act, as already discussed above.

23.1. If the DRT is not a Court as held in *Nahar Industrial Enterprises Limited* (supra), which still holds the field, and the jurisdiction of the DRT is limited and is confined to the extent of examination of the actions of the secured creditor under Section 13 (4) and Section 17 of the SARFAESI Act, within the framework of Sections 17 and 19 of the DRT Act 1993, then the DRT is jurisdictionally incapable and incompetent to adjudicate and decide upon the rights of a civil nature, accruing in favour of citizens, even if such rights are found to be accruing or created by law or otherwise, in the security interest. The jurisdiction to adjudicate and decide such rights of a civil nature, would then continue to vest with the Civil Courts under Section 9 of the C.P.C., whose jurisdiction though otherwise is plenary, omnipotent and unlimited, is limited only by the exclusion clause/provision in various Statutes, which exclusion clause/provision has to be strictly construed.

24. The purpose of creation of the Special Statutes i.e. the SARFAESI Act and the DRT Act, 1993, was to facilitate creation of special machinery for speedy recovery of the debts, due to Banks and Financial Institutions, which had gained alarming proportions and

still are alarmingly high, and not to obviate or set at naught the civil rights as available to litigants by availing the Civil Law remedy.

25. A meaningful interpretation has to be put to the language of the bar as contained in Section 34 of the SARFAESI Act so that the object and purpose sought to be achieved by the Act is not rendered illusory and is fulfilled. However, at the same time, the civil rights, which may be available in respect of security interest, cannot be lost sight of, which also have to be protected and the common law remedy available for the enforcement cannot be rendered ineffective. No doubt, Section 34 by creating a bar of jurisdiction ensures the recovery of public money in a speedy manner, however, the bar has to be read and construed in light of the language it contains and not otherwise so as to impeach upon the rights of a civil nature as available, which are equally important for a citizen. In the zeal to ensure speedy recovery of money, the civil rights which a citizen has, cannot be permitted to be rendered redundant and balance between both the rights has to be maintained, which would only be possible on a case to case basis. The bar under Section 34 of the SARFAESI Act, therefore, in view of the discussion made above, in our

considered opinion, is not absolute, but is restricted to examination by the DRT of the actions of the secured creditor under Section 13 of the SARFAESI Act and the rights available under Section 17 of the SARFAESI Act, to be in accordance with the provisions of the SARFAESI Act and the Rules made thereunder, as indicated.

26. The propositions laid down in para 33 of *Sagar Pramod Deshmukh* (supra), in our considered opinion, correctly define the distinction between the jurisdiction of the Civil Court and that of the DRT vis-a-vis Section 9 of the C.P.C., as compared to Sections 17 (1) and 18 of the DRT Act read with Sections 13, 17 and 34 of the SARFAESI Act, though they may not be exhaustive.

27. In view of what we have discussed above, our considered opinion to the question as referred to is as under :-

Question :

“Whether the jurisdiction of a Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Section 17 of the Securitisation Act, in relation to enforcement of security interest of a secured creditor, is barred by Section 34 of the Securitisation Act ?

Answer :

The answer, looking to the nature of the question, in our view, is in parts :-

(A) *Jurisdiction of the Debts Recovery Tribunal, to decide all matters relating to Sections 13 and 17 of the SARFAESI Act, is exclusive.*

(B) *In all cases, where the title to the property, in respect of which a 'security interest', has been created in favour of the Bank or Financial Institution, stands in the name of the borrower and/or guarantor, and the borrower has availed the financial assistance, it would be only the DRT which would have exclusive jurisdiction to try such matters, to the total exclusion of the Civil Court. Any pleas as raised by the borrowers or guarantors, vis-a-vis the security interest, will have to be determined by the DRT.*

(C) *The jurisdiction of the Civil Court to decide all the matters of civil nature, excluding those to be tried by the Debts Recovery Tribunal under Sections 13 and 17 of the SARFAESI Act, in relation to enforcement of security interest of a secured creditor, is not barred by Section 34 of the SARFAESI Act.*

(D) *Where civil rights of persons other than the borrower(s) or guarantor (s) are involved, the Civil Court would have jurisdiction, that too, when it is prima facie apparent from the face of record that the relief claimed, is incapable of being decided by the DRT, under Section 17 of the DRT Act, 1993 read with Sections 13 and 17 of the*

SARFAESI Act.

*(E) Even in cases where the enforcement of a security interest involves issues as indicated in **Mardia Chemicals** (supra) of fraud as established within the parameters laid down in **A. Ayyasamy** (supra); a claim of discharge by a guarantor under Sections 133 and 135 of the Contract Act [**Mardia Chemicals** (supra)]; a claim of discharge by a guarantor under Sections 139, 142 and 143 of the Contract Act; Marshaling under Section 56 of the Transfer of property Act [**J.P. Builders** (supra)]; the Civil Court shall have jurisdiction.*

(F) Examples as indicated in para 22.3, are illustrative of the Civil Court's jurisdiction.

*(G) The principles laid down in para 33 (i) to (ix) of **Sagar Pramod Deshmukh** (supra) are in accordance with what we have discussed and held above.*

28. Having so answered the question, referred to us, we now direct the matter to be placed before the respective Benches, to be decided on merits, in light of the answer given.

29. We also hereby record our appreciation of the capable and effective assistance rendered to us, by all the learned Counsels who have addressed us, on the question referred to.

30. The law is therefore well settled that where any person is aggrieved by any notice or action pursuant thereto under the provisions of SARFAESI Act, the only remedy available to such person would be to approach the DRT by filing an appropriate application under the provisions of the Act.

(AVINASH G. GHAROTE, J.)

(SUNIL B. SHUKRE, J.)