* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Order reserved on: December 13, 2022**
Order pronounced on: December 19, 2022

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\+ O.M.P.(I) (COMM.) 359/2022 & I.A. 20831/2022 (Production of Document)
M/S FERMINA DEVELOPERS PRIVATE LIMITED
..... Petitioner

versus

INDIABULLS HOUSING FINANCE LIMITED
..... Respondent

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\+ O.M.P.(I) (COMM.) 362/2022
M/S VATIKA ONE INDIA NEXT PRIVATE LIMITED
..... Petitioner

versus

INDIABULLS COMMERCIAL CREDIT LIMITED
..... Respondent

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\+ O.M.P.(I) (COMM.) 363/2022
M/S VATIKA ONE INDIA NEXT PRIVATE LIMITED
..... Petitioner

versus

INDIABULLS COMMERCIAL CREDIT LIMITED
..... Respondent

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\+ O.M.P.(I) (COMM.) 364/2022
M/S VATIKA INXT 2 PRIVATE LIMITED
..... Petitioner

versus

INDIABULLS HOUSING FINANCE LIMITED
..... Respondent

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\+ O.M.P.(I) (COMM.) 365/2022 & I.A. 20876/2022 (Production of Document)

M/S VATIKA INXT 2 PRIVATE LIMITED ..... Petitioner

versus

INDIABULLS HOUSING FINANCE LIMITED

..... Respondent

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\+ O.M.P.(I) (COMM.) 366/2022 & I.A. 20878/2022 (Production of Document)

M/S MENDELL DEVELOPERS PRIVATE LIMITED

..... Petitioner

versus

INDIABULLS HOUSING FINANCE LIMITED

..... Respondent

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\+ O.M.P.(I) (COMM.) 367/2022

M/S VATIKA ONE INDIA NEXT PRIVATE LIMITED

..... Petitioner

versus

INDIABULLS HOUSING FINANCE LIMITED

..... Respondent

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\+ O.M.P.(I) (COMM.) 368/2022

M/S VATIKA ONE INDIA NEXT PRIVATE LIMITED

..... Petitioner

versus

INDIABULLS HOUSING FINANCE LIMITED

..... Respondent

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\+ O.M.P.(I) (COMM.) 369/2022 & I.A. 20882/2022 (Production of Document)

M/S FERMINA DEVELOPERS PRIVATE LIMITED

..... Petitioner

versus

INDIABULLS COMMERCIAL CREDIT LIMITED
..... Respondent

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\+ O.M.P.(I) (COMM.) 370/2022 & I.A. 20884/2022 (Production of Document)

M/S SAHAR LAND AND HOUSING PRAVATE LIMITED
..... Petitioner

versus

INDIABULLS HOUSING FINANCE LIMITED
..... Respondent

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\+ O.M.P.(I) (COMM.) 371/2022 & I.A. 20886/2022 (Production of Document)

M/S VATIKA LIMITED ..... Petitioner

versus

INDIABULLS HOUSING FINANCE LIMITED
..... Respondent

Through: Mr. Sandeep Sethi and Mr. Ashish Dholakia, Sr. Advs. with Ms. Padmaja Kaul, Mr. Yugank Goel, Ms. Tanya Manglik, Mr. Arpit Kumar, Mr. Kushagra Shah and Mr. Vansh Bhutani, Advs. for petitioners in all these matters.
Mr. Rajiv Nayar and Mr. Jayant Mehta, Sr. Advs. with Mr. Rishi Agrawala, Mr. Ankit Banati and Mr. Shravan Niranjan, Advs. for respondents in all these matters.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. These petitions under Section 9 of the **Arbitration and Conciliation Act, 1996** [1] assail the validity of recall notices dated 10

[1] The 1996 Act

November 2022 issued by the respondent. The petitioners seek a restraint against all coercive action that may be taken by the respondent pursuant to the aforenoted recall notices including and extending to the invocation of guarantees furnished by the petitioners and taking any steps for disposal of valuable securities which were furnished by the petitioners under the loan agreements.

2. Since the facts in all the petitions were common and the challenge was raised against identical recall notices, the Court for the purposes of brevity proposes to notice the facts as they exist on the record of O.M.P.(I) (COMM.) 368/2022 and on which arguments were addressed by learned senior counsels.

3. From the record it transpires that the said petitioner was extended credit facilities in the shape of a term loan of Rs. 25 crores in 2019. The rights and obligations of parties in connection therewith came to be embodied in a Loan Agreement dated 16 August 2019. For the purposes of securing repayment of the aforesaid loan, the petitioners also created securities which stood specified in Schedules I and III of the aforesaid Loan Agreement.

4. The petitioners assert that while initially and for several years they continued to service the loan regularly, on account of the Covid-19 pandemic, their businesses came to be adversely impacted. In view of the aforesaid, the petitioners appear to have applied for a **One Time Settlement**[2] with the respondent. The terms of the OTS which were ultimately agreed upon came to be recorded in a letter of 01

[2] OTS

September 2021[3] and which provided for the petitioners liquidating the entire loan by payment of an amount of Rs.10,69,04,446/- along with interest @ 11.62% per annum payable on a monthly basis on or before 31 January 2023. It would be pertinent to refer to the relevant parts of the said communication and the same is extracted hereinbelow: -

> "We state that as on September 30, 2021, an amount of INR 188248848/- (Indian Rupees Eighteen Crores Eighty Two Lakhs Forty Eight Thousand Eight Hundred Forty Eight only) (the "**Outstanding Amount**") is outstanding and payable to the Lender. However, as per discussions with the Borrower, we confirm that upon the receipt of INR 106904446/- (Indian Rupees Ten Crores Sixty Nine Lakhs Four Thousand four Hundred Forty Six only) (the "Said Amount") plus an interest of 11.62% per annum payable on a monthly basis ("p.a/p.m") on INR 106904446/- or the amount that remains outstanding out of the Said Amount with effect from October 1, 2021 till the date of actual payment of the Said Amount, on or before January 31, 2023 ("**Final Payment Date**"), the above referred Loan shall stand closed and the Lender will issue a no dues certificate to the Borrower. It is however clarified that in the event that the Borrower is able to make payment of only a part of the Said Amount by the Final Payment Date (excluding the interest costs as mentioned above) on or prior to January 31, 2023, then the same proportion of the Outstanding Amount as on September 30, 2021 shall stand repaid and the portion of the Outstanding Amount together with interest of 11.62% p.a/p.m and related amounts thereon shall remain payable and outstanding. The proportion of the Outstanding Amount payable (along with interest of 11.62% p.a/p.m) post January 31, 2023 in case of a part payment is illustrated numerically below:"

5. The petitioners assert that pursuant to the issuance of the OTS letter they continued to make *"regular periodical payments to the respondent as per the prevailing practice between the parties"*. They further assert that these payments were duly accepted by the

[3] OTS letter

respondent without any demur or protest. The petitioner also relies upon a certificate dated 05 December 2022 issued by an independent auditor and asserts that the details of payments which were made would establish that they ultimately paid much more than what was settled for under the OTS. Insofar as the petitioner in O.M.P.(I) (COMM.) 368/2022 is concerned, it is asserted that a total sum of Rs. 11,31,10,661/- came to be deposited by 29 November 2022. It was also submitted that the payment chart which stands appended along with the petition would indicate that the interest component was also cleared off within the period stipulated in the OTS letter. According to the petitioners, they were thus taken completely by surprise when the recall notice came to be issued on 10 November 2022. It is in the aforesaid backdrop that these petitions thereafter came to be instituted before this Court.

6. To complete the narration of facts, it may be additionally noted that prior to the institution of the present petitions on or about 06 December 2022, the respondent had issued notices referable to Section 13(2) of the **Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002**[4] against all the petitioners. Those notices are dated 30 November 2022. When the instant batch was taken up for consideration, a preliminary objection was taken by Mr. Nayar and Mr. Mehta, learned senior counsels appearing for the respondent, to the maintainability of the instant petitions with it being contended that since they had proceeded to initiate proceedings under SARFAESI, the instant petitions would not

[4] SARFAESI

be maintainable since the dispute would not be arbitrable. The aforesaid contention was based upon the following principles as enunciated by the Supreme Court in **Vidya Drolia vs. Durga Trading Corpn.**[5] while dealing with the issue of non-arbitrability of disputes: -

> **"50.** Sovereign functions of the State being inalienable and non-delegable are non-arbitrable as the State alone has the exclusive right and duty to perform such functions. [Ajar Raib, "Defining Contours of the Public Policy Exception — A New Test for Arbitrability", Indian Journal for Arbitration Law, Vol. 7 (2018) p. 161.] For example, it is generally accepted that monopoly rights can only be granted by the State. Correctness and validity of the State or sovereign functions cannot be made a direct subject-matter of a private adjudicatory process. Sovereign functions for the purpose of Arbitration Act would extend to exercise of executive power in different fields including commerce and economic, legislation in all forms, taxation, eminent domain and police powers which includes maintenance of law and order, internal security, grant of pardon, etc. as distinguished from commercial activities, economic adventures and welfare activities. [*Common Cause* v. *Union of India*, (1999) 6 SCC 667 : 1999 SCC (Cri) 119 and *Agricultural Produce Market Committee* v. *Ashok Harikuni*, (2000) 8 SCC 61.] Similarly, decisions and adjudicatory functions of the State that have public interest element like the legitimacy of marriage, citizenship, winding up of companies, grant of patents, etc. are non-arbitrable, unless the statute in relation to a regulatory or adjudicatory mechanism either expressly or by clear implication permits arbitration. In these matters the State enjoys monopoly in dispute resolution.
>
> **51.** Fourth principle of non-arbitrability is alluded to in the order of reference [*Vidya Drolia* v. *Durga Trading Corpn.*, (2019) 20 SCC 406] , which makes specific reference to *Vimal Kishor Shah* [*Vimal Kishor Shah* v. *Jayesh Dinesh Shah*, (2016) 8 SCC 788 : (2016) 4 SCC (Civ) 303], which decision quotes from *Dhulabhai* [*Dhulabhai* v. *State of M.P.*, (1968) 3 SCR 662 : AIR 1969 SC 78], a case which dealt with exclusion of jurisdiction of civil courts under Section 9 of the Civil Procedure Code. The second condition in *Dhulabhai* [*Dhulabhai* v. *State of M.P.*, (1968) 3 SCR 662 : AIR 1969 SC 78] reads as under : (AIR p. 89, para 32)

[5] (2021) 2 SCC 1

"*32*. … (*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."

52. The order of reference [*Vidya Drolia* v. *Durga Trading Corpn.*, (2019) 20 SCC 406] notes that *Dhulabhai* [*Dhulabhai* v. *State of M.P.*, (1968) 3 SCR 662 : AIR 1969 SC 78] refers to three categories mentioned in *Wolverhampton New Waterworks Co.* v. *Hawkesford* [*Wolverhampton New Waterworks Co.* v. *Hawkesford*, (1859) 6 CB (NS) 336 : 141 ER 486] to the following effect : (*Hawkesford case* [*Wolverhampton New Waterworks Co.* v. *Hawkesford*, (1859) 6 CB (NS) 336 : 141 ER 486] , ER p. 495)

"There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law; there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it."

53. *Dhulabhai case* [*Dhulabhai* v. *State of M.P.*, (1968) 3 SCR 662 : AIR 1969 SC 78] is not directly applicable as it relates to exclusion of jurisdiction of civil courts, albeit we respectfully agree with the order of reference [*Vidya Drolia* v. *Durga Trading Corpn.*, (2019) 20 SCC 406] that Condition 2 is apposite while examining the question of non-arbitrability. Implied legislative intention to

exclude arbitration can be seen if it appears that the statute creates a special right or a liability and provides for determination of the right and liability to be dealt with by the specified courts or the tribunals specially constituted in that behalf and further lays down that all questions about the said right and liability shall be determined by the court or tribunals so empowered and vested with exclusive jurisdiction. Therefore, mere creation of a specific forum as a substitute for civil court or specifying the civil court, may not be enough to accept the inference of implicit non-arbitrability. Conferment of jurisdiction on a specific court or creation of a public forum though eminently significant, may not be the decisive test to answer and decide whether arbitrability is impliedly barred.

54. Implicit non-arbitrability is established when by mandatory law the parties are quintessentially barred from contracting out and waiving the adjudication by the designated court or the specified public forum. There is no choice. The person who insists on the remedy must seek his remedy before the forum stated in the statute and before no other forum. In *Transcore* v. *Union of India* [*Transcore* v. *Union of India*, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] , this Court had examined the doctrine of election in the context whether an order under proviso to Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the DRT Act") is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the NPA Act"). For analysing the scope and remedies under the two Acts, it was held that the NPA Act is an additional remedy which is not inconsistent with the DRT Act, and reference was made to the doctrine of election in the following terms: (*Transcore case* [*Transcore* v. *Union of India*, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] , SCC p. 162, para 64)

> "*64*. In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to *American Jurisprudence*, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to *Snell's Principles of Equity* (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there

is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."

55. Doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available only if the law accepts existence of arbitration as an alternative remedy and freedom to choose is available. There should not be any inconsistency or repugnancy between the provisions of the mandatory law and arbitration as an alternative. Conversely, and in a given case when there is repugnancy and inconsistency, the right of choice and election to arbitrate is denied. This requires examining the "text of the statute, the legislative history, and "inherent conflict" between arbitration and the statute's underlying purpose" [Jennifer L. Peresie, "Reducing the Presumption of Arbitrability" 22 Yale Law & Policy Review, Vol. 22, Issue 2 (Spring 2004), pp. 453-462.] with reference to the nature and type of special rights conferred and power and authority given to the courts or public forum to effectuate and enforce these rights and the orders passed. When arbitration cannot enforce and apply such rights or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose arbitration in preference to the courts or public forum is either completely denied or could be curtailed. In essence, it is necessary to examine if the statute creates a special right or liability and provides for the determination of each right or liability by the specified court or the public forum so constituted, and whether the remedies beyond the ordinary domain of the civil courts are prescribed. When the answer is affirmative, arbitration in the absence of special reason is contraindicated. The dispute is non-arbitrable.

56. In *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.* [*M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805] and following this judgment in *Indiabulls Housing Finance Ltd.* v. *Deccan Chronicle Holdings Ltd.* [*Indiabulls Housing Finance Ltd.* v. *Deccan Chronicle Holdings Ltd.*, (2018) 14 SCC 783 : (2018) 4 SCC (Civ) 703], it has been held that even prior arbitration proceedings are not a bar to proceedings under the NPA Act. The NPA Act sets out an expeditious, procedural methodology enabling the financial institutions to take possession and sell secured properties for non-payment of the dues. Such powers, it is obvious, cannot be exercised through the arbitral proceedings.

57. In *Transcore* [*Transcore* v. *Union of India*, (2008) 1 SCC 125: (2008) 1 SCC (Civ) 116], on the powers of the Debt Recovery

Tribunal ("DRT") under the DRT Act, it was observed : (SCC p. 141, para 18)

> "*18.* On analysing the above provisions of the DRT Act, we find that the said Act is a complete code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other. The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the debt due is concerned. It covers secured as well as unsecured debts. However, it does not rule out the applicability of the provisions of the TP Act, in particular, Sections 69 and 69-A of that Act. Further, in cases where the debt is secured by a pledge of shares or immovable properties, with the passage of time and delay in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, the value of the assets in the hands of the bank/FI invariably depletes which, in turn, leads to asset-liability mismatch. These contingencies are not taken care of by the DRT Act and, therefore, Parliament had to enact the NPA Act, 2002."

58. Consistent with the above, observations in *Transcore* [*Transcore* v. *Union of India*, (2008) 1 SCC 125: (2008) 1 SCC (Civ) 116] on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the judgment of the Full Bench of the Delhi High Court in *HDFC Bank Ltd.* v. *Satpal Singh Bakshi* [*HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566], which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in *HDFC Bank Ltd.* [*HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] has been referred to in *M.D. Frozen Foods Exports (P) Ltd.* [*M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincorp Ltd.*, (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805], but not examined in light of the legal principles relating to non-arbitrability. The decision in *HDFC Bank Ltd.* [*HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case of the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of

> arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration."

7. Learned senior counsels appearing for the respondent contended that the SARFAESI constructs a comprehensive and self-contained code for determination of all questions and disputes which may arise from an action that may be taken by a financial institution for enforcement of a security interest. It was submitted that Sections 13, 17 and 18 of the SARFAESI create and put in place an adjudicatory mechanism by a statutory tribunal and thus the present petitions under Section 9 of the 1996 Act would not be maintainable.

8. Insofar as the facts relating to the issuance of the recall notice is concerned, both Mr. Nayar as well as Mr. Mehta, submitted that the terms of the OTS clearly mandated the petitioners depositing the sums indicated in the individual OTS letters along with interest on a monthly basis. It was pointed out that the petitioners failed to abide by that fundamental stipulation as contained in the OTS letter. It was submitted that as the certificate issued by the independent auditor in favour of the petitioner in O.M.P.(I) (COMM.) 368/2022 would itself bear out, the petitioner there failed to abide by the aforesaid condition which was fundamental to and constituted the bedrock of the OTS. According to learned senior counsels, since there was an admitted default, the respondent was constrained to issue recall notices.

9. Appearing for the petitioners both Mr. Sethi as well as Mr. Dholakia, learned senior counsels contended that the recall notices are wholly illegal and arbitrary since the facts as brought on the record by the petitioners would establish, the sum which was settled for under the OTS had been cleared and paid in full prior to the issuance of the notices in question. Learned senior counsels submitted that the action initiated by the respondent would clearly fall within the ambit of actions which were termed by the Supreme Court in **Mardia Chemicals Ltd. vs. Union of India**[6] as being fraudulent, absurd and untenable and in which case jurisdiction of the civil court could always be invoked and thus consequently it would be incorrect for the respondent to assert that the dispute would fall in the category of a non-arbitrable dispute.

10. In order to appreciate the issues which arise, it would be apposite to briefly notice the provisions of the **Recovery of Debts and Bankruptcy Act, 1993**[7] and SARFAESI in order to ascertain the extent to which they bar the jurisdiction of a civil court. The RDB Act confers jurisdiction and authority on tribunals constituted thereunder in terms of Section 17 of the RDB Act, which reads thus: -

> **"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 applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.
>
> (1A) Without prejudice to sub-section (1),-
> (a) the Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction,

[6] (2004) 4 SCC 311
[7] The RDB Act

> powers and authority to entertain and decide applications under Part III of Insolvency and Bankruptcy Code, 2016.
>
> (b) the Tribunal shall have circuit sittings in all district headquarters.
>
> (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.
>
> (2A) Without prejudice to sub-section (2), the Appellate Tribunal shall exercise, on and from the date to be appointed by the Central Government, the jurisdiction, powers and authority to entertain appeals against the order made by the Adjudicating Authority under Part III of the Insolvency and Bankruptcy Code, 2016."

11. The bar of jurisdiction which stands engrafted in terms of Section 18 of the RDB Act and ousts the jurisdiction of all courts reads thus: -

> **"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."

12. As would be evident from a reading of the aforesaid provisions, the jurisdiction of courts and authorities stands barred in relation to matters specified in Section 17 of the RDB Act. The jurisdiction of the tribunal as conferred by Section 17 of the RDB Act relates to applications that may be made by a bank or financial institutions to recover a secured debt from any person. While when the RDB Act

was initially promulgated, a defendant in an application made under Section 17 had no right to claim a set off or set up a counter claim, that lacuna stands addressed in light of the amendments which were introduced by virtue of the **Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Act, 2016**[8]. The RDB Act is conferred an overriding effect by virtue of Section 34 thereof. The said provision reads as under: -

> **"34. Act to have over-riding effect**. –
> (1) Save as provided under sub- section (2), the provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.
>
> (2) The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Industrial Finance Corporation Act, 1948 (15 of 1948), the State Financial Corporations Act, 1951 (63 of 1951), the Unit Trust of India Act, 1963 (52 of 1963), the Industrial Reconstruction Bank of India Act, 1984 (62 of 1984), the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986) and the Small Industries Development Bank of India Act, 1989 (39 of 1989)."

13. The provisions of Section 34 of the RDB Act have been interpreted to extend to matters which may fall for the determination of the tribunal under Sections 17 and 19 of the RDB Act. This aspect has been duly highlighted by the Supreme Court in its recent decision rendered in **Bank of Rajasthan Ltd. vs. VCK Shares & Stock Broking Services Ltd.**[9]**,** where it was held: -

> **"43.** We must note at the threshold itself that there are no restrictions on the power of a Civil Court under Section 9 of the Code unless expressly or impliedly excluded. This was also

[8] Act 44 of 2016

[9] 2022 SCC OnLine SC 1557

reiterated by a Constitution Bench of this Court in *Dhulabhai* v. *State of Madhya Pradesh*. Thus, it is in the conspectus of the aforesaid proposition that we will have to analyse the rival contentions of the parties set out above. Our line of thinking is also influenced by a Three-Judges Bench of this Court in *Dwarka Prasad Agarwal (D) By LRs* v. *Ramesh Chander Agarwal* where it was opined that Section 9 of the Code confers jurisdiction upon Civil Courts to determine all disputes of civil nature unless the same is barred under statute either expressly or by necessary implication and such a bar is not to be readily inferred. The provision seeking to bar jurisdiction of a Civil Court requires strict interpretation and the Court would normally lean in favour of construction which would uphold the jurisdiction of the Civil Court.

44. Now, if we turn to the objective of the RDB Act read with the scheme and provisions thereof; it is abundantly clear that a summary remedy is provided in respect of claims of banks and financial institutions so that recovery of the same may not be impeded by the elaborate procedure of the Code. The defendant has a right to defend the claim and file a counterclaim in view of sub-Sections (6) and (8) of Section 19 of the RDB Act. In case of pending proceedings to be transferred to the DRT, Section 31 of the RDB Act took care of the issue of mere transfer of the Bank's claim, albeit without transfer of the counterclaim. Thus, if the debtor desires to institute a counterclaim, that can be filed before the DRT and will be tried along with the case. However, it is subject to a caveat that the bank may move for segregation of that counterclaim to be relegated to a proceeding before a Civil Court under Section 19(11) of the RDB Act, though such determination is to take place along with the determination of the claim for recovery of debt.

45. We are thus of the view that there is no provision in the RDB Act by which the remedy of a civil suit by a defendant in a claim by the bank is ousted, but it is the matter of choice of that defendant. Such a defendant may file a counterclaim, or may be desirous of availing of the more strenuous procedure established under the Code, and that is a choice which he takes with the consequences thereof.

46. We may notice that the RDB Act was amended from time to time, including by amendments made under Act 1 of 2000, Act 30 of 2004, Act 1 of 2013 and Act 44 of 2016. The anomaly, *inter alia*, initially sought to be cured was on account of the non-availability of provisions on counterclaim and set-off. It is to get over such a scenario that amendment through Act 1 of 2000 was

> made by the Legislature itself to cure the problem. The Legislature did not, at any stage, make any further amendment for excluding the jurisdiction of the Civil Court in respect of a claim of a defendant in such a proceeding being filed along with the suit. The Legislature in its wisdom has also not considered it appropriate to bring any amendment to enhance the powers of the DRT in this respect."

14. In Para 56 of the report, the Supreme Court recorded its conclusions as under: -

> **"56.** In view of the discussion aforesaid, the questions framed above are to be answered as under:
>
> (c) Is the jurisdiction of a Civil Court to try a suit filed by a borrower against a Bank or Financial Institution ousted by virtue of the scheme of the RDB Act in relation to the proceedings for recovery of debt by a Bank or Financial Institution?
>
> The aforesaid question ought to be answered first and is answered in the negative.
>
> (a) Whether an independent suit filed by a borrower against a Bank or Financial Institution, which has applied for recovery of its loan against the plaintiff under the RDB Act, is liable to be transferred and tried along with the application under the RDB Act by the DRT?
>
> In the absence of any such power existing in the Civil Court, an independent suit filed by the borrower against the bank or financial institution cannot be transferred to be tried along with application under the RDB Act, as it is a matter of option of the defendant in the claim under the RDB Act. However, the proceedings under the RDB Act will not be impeded in any manner by filing of a separate suit before the Civil Court.
>
> (b) If the answer is in the affirmative, can such transfer be ordered by a court only with the consent of the plaintiff?
>
> Since there is no such power with the Civil Court, there is no question of transfer of the suit whether by consent or otherwise."

15. SARFAESI, on the other hand, relates to the enforcement of security interests that may be created and exist in favour of a secured creditor. Section 13 of the SARFAESI sets forth the procedure for

enforcement of such a security interest. The said provision is extracted hereinbelow: -

> **"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 sub-section (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.
>
> (3-A) 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 17-A.

(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 or the debt;

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

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

(5) Any payment made by any person referred to in clause (*d*) of sub-section (4) to the secured creditor shall give such person 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.

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

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

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

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

(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,—

(*i*) the secured assets shall not be transferred by way of lease, assignment or sale by the secured creditor; and

(*ii*) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.

(9) Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset

by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty percent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

PROVIDED that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956 (1 of 1956):

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

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

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

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

Explanation.—For the purposes of this sub-section,—

(*a*) “record date” means the date agreed upon by the secured creditors representing not less than sixty percent in value of the amount outstanding on such date;

(*b*) “amount outstanding” shall include principal, interest and any other dues payable by the borrower to the secured creditor

in respect of secured asset as per the books of account of the secured creditor.

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

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

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

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

16. Section 17 of the SARFAESI provides and confers a right on any person including a borrower to assail any measure that may be taken by a secured creditor under Section 13. That provision reads thus: -

"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 along with 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 measure 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 sub-section (1) of section 17.

(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 (4 of 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.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an

> application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.
>
> (7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

17. As would be evident from a reading of the aforesaid provisions, such an application stands placed for adjudication before the concerned **Debts Recovery Tribunal**[10]. Section 18 of SARFAESI makes provisions for an appeal before the **Appellate Tribunal**[11] to be preferred by any person aggrieved by an order made by the DRT under Section 17 of the SARFAESI.

18. The validity of the various provisions of SARFAESI fell for consideration before the Supreme Court in **Mardia Chemicals**. Dealing with the nature of the exercise liable to be undertaken under Section 13, the Supreme Court in paragraph 45 held thus: -

> **"45.** In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance with notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to

[10] DRT
[11] DRAT

ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act."

19. Proceeding then to deal with the nature of issues which may fall for determination either before the DRT or before the DRAT, their Lordships observed: -

> **"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. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as well appearing for the Union of India, namely, *V. Narasimhachariar* [AIR 1955 Mad 135], AIR at pp. 141 and 144, a judgment of the learned Single Judge where it is observed as follows in para 22: (AIR p. 143)

> "*22*. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale

> by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: *Adams* v. *Scott* [(1859) 7 WR 213, 249]. I need not point out that this restraint on the exercise of the power of sale will be exercised by courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See Ghose, Rashbehary: *Law of Mortgages*, Vol. II, 4th Edn., p. 784.)"

20. The Supreme Court thereafter proceeded to negative the contention that existing rights of parties under a private contract cannot be interfered with and observed thus: -

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

existing rights of the individuals have been affected by legislative measures taken in public interest. Certain decisions which have been relied on behalf of the respondents, on the point are *V. Ramaswami Aiyengar* v. *T.N.V. Kailasa Thevar* [1951 SCC 199 : AIR 1951 SC 189 : 1951 SCR 292] . In that case by enacting the Madras Agriculturalists' Relief Act, relief was given to the debtors who were agriculturists as a class, by scaling down their debts. The validity of the Act was upheld though it affected the individual interest of creditors. In *Dahya Lala* v. *Rasul Mohd. Abdul Rahim* [AIR 1964 SC 1320 : (1963) 3 SCR 1] , the tenants under the provisions of the Bombay Tenancy Act, 1939 were given protection against eviction and they were granted the status of protected tenant, who had cultivated the land personally six years prior to the prescribed date. It was found that the legislation was with the object of improving the economic condition of the peasants and for ensuring full and efficient use of land for agricultural purpose. By a statutory provision special benefit was conferred upon the tenants in Madras city where they had put up a building for residential or non-residential purposes and were saved from eviction, it did though affect the existing rights of the landlords. [See also *Swami Motor Transports (P) Ltd.* v. *Sri Sankaraswamigal Mutt* [AIR 1963 SC 864 : 1963 Supp (1) SCR 282] and *Raval& Co.* v. *K.G. Ramachandran* [(1974) 1 SCC 424].] Similarly, it is also to be found that in *Kanshi Ram* v. *Lachhman* [(2001) 5 SCC 546] the law granting relief to the debtors protecting their property was upheld. (Also see *Pathumma* v. *State of Kerala* [(1978) 2 SCC 1] , *Fatehchand Himmatlal* v. *State of Maharashtra* [(1977) 2 SCC 670] and *Ramdhandas* v. *State of Punjab* [AIR 1961 SC 1559 : (1962) 1 SCR 852] .)"

21. Proceeding further, the Supreme Court pertinently observed:-

"68. The main thrust of the petitioners as indicated in the earlier part of this judgment to challenge the validity of the impugned enactment is that no adjudicatory mechanism is available to the borrower to ventilate his grievance through an independent adjudicatory authority. Access to justice, it is submitted, is the hallmark of our system. Section 34 of the Act bars the jurisdiction of the civil courts to entertain a suit in matters of recovery of loans. The remedy of appeal available under the Act as contained in Section 17 can be availed only after measures have already been taken by the secured creditor under sub-section (4) of Section 13 of the Act which includes sale of the secured assets, taking over its management and all transferable rights thereto. Virtually it is no remedy at all also in view of the onerous

condition of deposit of 75% of the claim of the secured creditor. Before filing an appeal under Section 17 of the Act, decision is to be taken in respect of all matters by the bank or financial institution itself which can hardly be said to be an independent agency; rather they are a party to the transaction having unilateral power to initiate action under sub-section (4) of Section 13 of the Act. So far as remedy under Article 226 of the Constitution of India is concerned, the submission is that it may not always be available since the dispute may be only between two private parties, the banking companies, cooperative banks or financial institutions, foreign banks, some of them may not be authorities within the meaning of Article 12 of the Constitution of India against whom a writ petition could be maintainable. Thus the position that emerges is that a borrower is virtually left with no remedy. Where access to the court is prohibited and no proper adjudicatory mechanism is provided such a law is unconstitutional and cannot survive. In support of the aforesaid contentions besides others, reliance has particularly been placed upon the case *L. Chandra Kumar* v. *Union of India* [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] and *Surya Dev Rai* v. *Ram Chander Rai* [(2003) 6 SCC 675] . A reference has also been made to the decision of *KihotoHollohan* [1992 Supp (2) SCC 651] . In the case of *L. Chandra Kumar* [(1997) 3 SCC 261 : 1997 SCC (L&S) 577] it is held, some adjudicatory process through an independent agency is essential for determining the rights of the parties, more particularly when the consequences which flow from the offending Act defeat the civil rights of a party.

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

be pleaded that the petitioners cannot complain of the conduct of the banking companies and financial institutions for whatever goes on between the two is absolutely a matter of contract between private parties, therefore, no adjudication may be necessary."

22. Ultimately, the following conclusions came to be recorded: -

"80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debts Recovery Tribunal. The abovenoted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days' notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

4. In view of the discussion already held in this behalf, we find that the requirement of deposit of 75% of the amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

> 5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow cope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court."

23. As would be evident and manifest from the aforesaid principles that were laid down by the Supreme Court on an interpretation of the various provisions made in the SARFAESI, it was held that the rights of a debtor to assail actions that may be taken by a secured creditor stood duly protected under the provisions of the said enactment. In order to balance the rights of parties, the Supreme Court also read into the provisions of Section 13 of the SARFAESI, the obligation of the secured creditor to deal with the objections that may be raised and for the communication of reasons if they were to be ultimately rejected. Similar safeguards insofar as a debtor was concerned, were recognised to exist in light of the provisions contained in Sections 17 and 18 of the SARFAESI. The Section 17 remedy was recognised as a remedy of first resort and thus the requirement of pre-deposit was struck down.

24. The subtle distinction in the language of the non-obstante clauses engrafted in the RDB Act and the SARFAESI clearly manifests in light of the fact that while the exclusion of a civil court under the RDB Act is restricted to subjects which would fall within the ambit of Sections 17 and 19 of the RDB Act, the non-obstante clause under the SARFAESI extends in respect of any matter which the DRT or the DRAT is empowered by or under the aforesaid enactment to determine. However, not much may perhaps turn on the above since both statutes confer a right on a debtor to assail the action

of a bank or financial institution which seeks to effect recoveries or enforce a security interest as the case may be.

25. **Vidya Drolia** in unmistakable terms holds that non-arbitrability would be implicit if it be found that a law creates a specified forum or a designated court for adjudication of disputes. In the said decision, it was pertinently observed that the issue of non-arbitrability would have to be decided and answered upon due examination of a special statute which may create not just a special right or a liability but also provide for the determination of such a right or liability by that specified court and public forum alone.

26. In order to appreciate the issue of non-arbitrability as has been raised, it would be pertinent to step back and notice some of the significant decisions which have come to be rendered dealing with the interplay between the 1996 Act and the provisions of the RDB Act and the SARFAESI. The first decision which merits notice would be the decision of the Supreme Court in **Indian Bank vs. ABS Marine Products (P) Ltd.,** [12]. While dealing with the issue of the ouster of the jurisdiction of the civil court in relation to matters which may fall within the ambit of Sections 17 and 18 of the RDB Act, the Supreme Court held:-

> **"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

[12] (2006) 5 SCC 72

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."

27. In **M.D. Frozen Foods Exports (P) Ltd. vs. Hero Fincorp Ltd.,**[13] the principal question which arose for consideration was whether the arbitration proceedings as had been initiated by the creditor could have been pursued parallelly and along with proceedings initiated under the SARFAESI. Answering the aforesaid

[13] (2017) 16 SCC 741

question, the Supreme Court while noticing its earlier decision in **Transcore vs. Union of India**[14] held thus: -

> ***"Question (i)***
>
> **26.** A claim by a bank or a financial institution, before the specified laws came into force, would ordinarily have been filed in the civil court having the pecuniary jurisdiction. The setting up of the Debt Recovery Tribunal under the RDDB Act resulted in this specialised Tribunal entertaining such claims by the banks and financial institutions. In fact, suits from the civil jurisdiction were transferred to the Debt Recovery Tribunal. The Tribunal was, thus, an alternative to civil court recovery proceedings.
>
> **27.** On the SARFAESI Act being brought into force seeking to recover debts against security interest, a question was raised whether parallel proceedings could go on under the RDDB Act and the SARFAESI Act. This issue was clearly answered in favour of such simultaneous proceedings in *Transcore* v. *Union of India* [*Transcore* v. *Union of India*, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116]. A later judgment in *Mathew Varghese* v. *M. Amritha Kumar* [*Mathew Varghese* v. *M. Amritha Kumar*, (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254] also discussed this issue in the following terms: (*Mathew Varghese case* [*Mathew Varghese* v. *M. Amritha Kumar*, (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254] , SCC pp. 640-41, paras 45-46)
>
> "*45*. A close reading of Section 37 shows that the provisions of the SARFAESI Act or the Rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of the RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, the SARFAESI Act and the RDDB Act, would be complementary to each other. In this context reliance can be placed upon the decision in *Transcore* v. *Union of India* [*Transcore* v. *Union of India*, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] . In para 64 it is stated as under after referring to Section 37 of the SARFAESI Act: (SCC p. 162)
>
> '*64*. … According to *American Jurisprudence*, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the

[14] (2008) 1 SCC 125

doctrine of election does not apply. *In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply*. Even according to *Snell's Principles of Equity* (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. *In any event, there is no repugnancy nor inconsistency between the two remedies*, therefore, the doctrine of election has no application.'

46. A reading of Section 37 discloses that the application of the SARFAESI Act will be in addition to and not in derogation of the provisions of the RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB Act. We are also fortified by our above statement of law as the heading of the said section also makes the position clear that application of other laws is not barred. The effect of Section 37 would, therefore, be that in addition to the provisions contained under the SARFAESI Act, in respect of proceedings initiated under the said Act, it will be in order for a party to fall back upon the provisions of the other Acts mentioned in Section 37, namely, the Companies Act, 1956; the Securities Contracts (Regulation) Act, 1956; the Securities and Exchange Board of India Act, 1992; the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, or any other law for the time being in force."

(emphasis in original)

29. The aforesaid two Acts are, thus, complementary to each other and it is not a case of election of remedy.

30. The only twist in the present case is that, instead of the recovery process under the RDDB Act, we are concerned with an arbitration proceeding. It is trite to say that arbitration is an alternative to the civil proceedings. In fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both parties have incorporated such a clause, the answer was given in the affirmative. [*HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] That being the position, the appellants can hardly be permitted to contend that the initiation of arbitration proceedings would, in any manner, prejudice their rights to seek relief under the SARFAESI Act."

28. These decisions again fell for consideration before the Supreme Court in **Bank of Rajasthan.** In the said decision, the question which arose was whether a suit which had been instituted by the borrower and seeking a declaration in respect of the sale of pledged shares would be maintainable notwithstanding the provisions of the RDB Act. As would be evident from the parts of the decision extracted above, the principles laid down in **Indian Bank** and **Transcore** were reiterated and reaffirmed. While doing so the Supreme Court held as follows: -

> **"43.** We must note at the threshold itself that there are no restrictions on the power of a Civil Court under Section 9 of the Code unless expressly or impliedly excluded. This was also reiterated by a Constitution Bench of this Court in *Dhulabhai* v. *State of Madhya Pradesh*. Thus, it is in the conspectus of the aforesaid proposition that we will have to analyse the rival contentions of the parties set out above. Our line of thinking is also influenced by a Three-Judges Bench of this Court in *Dwarka Prasad Agarwal (D) By LRs* v. *Ramesh Chander Agarwal* where it was opined that Section 9 of the Code confers jurisdiction upon Civil Courts to determine all disputes of civil nature unless the same is barred under statute either expressly or by necessary implication and such a bar is not to be readily inferred. The provision seeking to bar jurisdiction of a Civil Court requires strict interpretation and the Court would normally lean in favour of construction which would uphold the jurisdiction of the Civil Court.
>
> **44.** Now, if we turn to the objective of the RDB Act read with the scheme and provisions thereof; it is abundantly clear that a summary remedy is provided in respect of claims of banks and financial institutions so that recovery of the same may not be impeded by the elaborate procedure of the Code. The defendant has a right to defend the claim and file a counterclaim in view of sub-Sections (6) and (8) of Section 19 of the RDB Act. In case of pending proceedings to be transferred to the DRT, Section 31 of the RDB Act took care of the issue of mere transfer of the Bank's claim, albeit without transfer of the counterclaim. Thus, if the debtor desires to institute a counterclaim, that can be filed before the DRT and will be tried along with the case. However, it

> is subject to a caveat that the bank may move for segregation of that counterclaim to be relegated to a proceeding before a Civil Court under Section 19(11) of the RDB Act, though such determination is to take place along with the determination of the claim for recovery of debt.
>
> **45.** We are thus of the view that there is no provision in the RDB Act by which the remedy of a civil suit by a defendant in a claim by the bank is ousted, but it is the matter of choice of that defendant. Such a defendant may file a counterclaim, or may be desirous of availing of the more strenuous procedure established under the Code, and that is a choice which he takes with the consequences thereof.
>
> **46.** We may notice that the RDB Act was amended from time to time, including by amendments made under Act 1 of 2000, Act 30 of 2004, Act 1 of 2013 and Act 44 of 2016. The anomaly, *inter alia*, initially sought to be cured was on account of the non-availability of provisions on counterclaim and set-off. It is to get over such a scenario that amendment through Act 1 of 2000 was made by the Legislature itself to cure the problem. The Legislature did not, at any stage, make any further amendment for excluding the jurisdiction of the Civil Court in respect of a claim of a defendant in such a proceeding being filed along with the suit. The Legislature in its wisdom has also not considered it appropriate to bring any amendment to enhance the powers of the DRT in this respect."

29. As would be evident from the principles laid down in the aforenoted decisions, the question of jurisdiction conferred on the civil court and its ouster was essentially examined on the anvil of whether the dispute which formed the subject matter of the civil suit could have been raised for consideration of the specialised tribunals constituted under the RDB Act or the SARFAESI. The Supreme Court noted that a borrower may have various claims against a bank or a financial institution. Those claims, as were noted by the Supreme Court, could not be understood to be restricted to a counter claim or a set off. It was thus observed that it could not be said that all claims relating to civil rights would stand excluded from the consideration of

a civil court and a party compelled to proceed only under the RDB Act or the SARFAESI. These principles appear to have been enunciated bearing in mind the nature of the dispute that could possibly be adjudicated and considered by authorities constituted under the aforenoted two enactments.

30. In **Vidya Drolia**, the Supreme Court noted that while the ouster of jurisdiction of the civil court cannot be readily inferred, it must also be borne in mind that the mere creation of a special forum under a particular statute would not be sufficient to accept a challenge based on implicit non-arbitrability. As was expounded in **Vidya Drolia,** implicit non-arbitrability would be established only in a situation where the law mandatorily bars parties from contracting out or waiving the adjudication of disputes by the designated court or specified forum. It was pertinently observed that non-arbitrability may also arise in case of an implicit prohibition imposed by the statute and which may warrant the adjudication of rights only by the specialised tribunal or authority created under the statute.

31. **Vidya Drolia** also assumes significance insofar as the questions raised in the present batch is concerned in light of the said decision having specifically overruled the judgment rendered by the Full Bench of this Court in **HDFC Bank Ltd. vs. Satpal Singh Bakshi**[15]**,** and which had proceeded to hold that matters covered under the RDB Act would also be arbitrable.

32. The Court notes that after the matter had been closed for judgment, a compilation of decisions was handed over on behalf of the

[15] 2012 SCC OnLine Del 4815

petitioners and it was prayed by learned counsels appearing on their behalf for the decisions included therein being taken into consideration. From the decisions which have been placed along with the said compilation, the Court notes that only the decision rendered by the Bombay High Court in **Bank of Baroda vs. Gopal Shriram Panda**[16] and **Diamond Entertainment Technologies Pvt. Ltd. vs. Religare Finvest Limited**[17], a judgment rendered by a learned Judge of this Court, would additionally merit notice and consideration. The Court has in any case noticed the judgments rendered by the Supreme Court in the matter of **Mardia Chemicals** and **M.D. Frozen Foods** in the preceding parts of this decision.

33. The decision of the Bombay High Court in **Bank of Baroda** dealt with an identical issue of whether the jurisdiction of the civil courts stands ousted in light of the provisions made in Sections 17 and 34 of SARFAESI. The issue itself had arisen in the context of a perceived conflict between the judgments rendered by two Division Benches of that Court in **State Bank of India vs. Jigishaben B. Sanghavi**[18] and **State Bank of India vs. Sagar**[19]. In **Sagar** the Division Bench had proceeded to record the following conclusions: -

> **"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

[16] 2021 SCC OnLine Bom 466
[17] 2022 SCC OnLine Del 3357
[18] 2010 SCC OnLine Bom 1868
[19] 2011 SCC OnLine Bom 184

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)"

34. In **Bank of Baroda**, the Bombay High Court firstly took note of the pertinent observations as were made by the Supreme Court in **A. Ayyasamy vs. A. Paramasivam**[20] which had dealt with the issue of civil and commercial disputes being tried by way of arbitration.

[20] (2016) 10 SCC 386

Dealing with the aforesaid decision, the Bombay High Court observed as follows: -

> "**12.9.** In *A. Ayyasamy* v. *A. Paramasivam* (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 nonarbitrable 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."

35. Dealing with the scope and ambit of Section 17 of the RDB Act, their Lordships held thus: -

> "**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."

36. Proceeding further to deal with the scope and ambit of Section 18 of the RDB Act, it was observed: -

> "**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* v. *Nandakisore Das, Speaker, Orissa Legislative Assembly*, AIR 1953 Ori 111]; the widest amplitude [*Thysssin Stahlunion GMBTT* v. *Steel Authority of India* (1999) 9 SCC 334]; used in the expansive sense [*Doypack Systems Pvt. Ltd.* v. *Union of India*, (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."

37. Taking note of the nature of disputes which could possibly fall outside the ambit of the RDB Act and thus be able to be tried by ordinary civil courts, it was observed: -

> **14.22**. In *Bank of Maharashtra* v. *Pandurang Keshav Gorwardkar*, (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 paripassu 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)]."

38. Their Lordships also noticed the important and significant principles which were laid down in **Allahabad Bank vs. Canara Bank**[21] by the Supreme Court and which had held that the provisions of Sections 17 and 18 of the RDB Act create and confer exclusive jurisdiction insofar as the question of adjudication of liability of the borrower is concerned. This is evident from paragraph 21 of the report which is extracted hereinbelow: -

> **"21.** In *Allahabad Bank* v. *Canara Bank*, (2000) 4 SCC 406, 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*

[21] (2000) 4 SCC 406

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."

39. Their Lordships also had the occasion to notice the decision of the Supreme Court in **United Bank of India vs. Satyavati Tondon**[22] which had taken cognizance of the expression *"any person"* being entitled to assail the action that may be taken by a secured creditor under Section 17 of the SARFAESI and held as follows: -

[22] (2010) 8 SCC 110

"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."

40. Their Lordships ultimately proceeded to record their conclusions in paragraph 27 of the report which is extracted hereinbelow:-

> **"27.** In view of what we have discussed above, our considered opinion to the question as referred to is as under: —
>
> **<u>Question</u>**:
>
> *"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."*

41. From the aforesaid conclusions, it is manifest that the High Court ultimately came to conclude and hold that insofar as matters which would squarely fall within the ambit of Sections 13 and 17 of the SARFAESI, the jurisdiction under the aforesaid enactment as conferred upon the DRT would be exclusive and absolute. It was held that pleas that may be raised by borrowers or guarantors in respect of a security interest would have to be determined by the aforesaid Tribunal alone. Turning then to the scope of jurisdiction of the civil court, it was pertinently observed that it would have the right to try only such matters of a civil nature which could be said to fall outside the ambit of Sections 13 and 17 of SARFAESI. Their Lordships recognised the jurisdiction of the civil court to try such claims provided it was apparent on the face of the record that the relief claimed is incapable of being decided by the DRT under Section 17 of the SARFAESI.

42. A learned Judge of our Court in **Diamond Entertainment** was called upon to consider whether in light of the action initiated under the SARFAESI, arbitration would be barred. Dealing with the aforesaid question, the learned Judge held as follows: -

> **"24. The second objection** taken is that the respondent has already invoked proceedings under the SARFAESI Act and the disputes being raised now are not arbitrable. The core question which thus arises is whether the adjudication of the disputes raised between the parties is barred before the Civil or an alternate forum once the proceedings under the SARFAESI Act has been commenced.

25. The SARFAESI Act was brought into force to address the concerns of recovery of large debts in NPAs. The very rationale was to provide an expeditious procedure where there was a security interest. The Full Bench of Orissa High Court in *Sarthak Builders Pvt. Ltd.* v. *Orissa Rural Dev. Corpn. Ltd.*, 2014 SCC OnLine Ori 75 made a reference to the Division Bench Judgment of Uttarakhand High Court in *Unique Engg. Works* v. *Union of India*, 2003 SCC OnLine Utt 107 to observe that the SARFAESI Act was enacted by the Parliament to remedy a situation and provide a measure against secured interest. The key feature of SARFAESI Act is really to provide a procedural remedy against security interest already created. Therefore, an existing borrower, who had been granted financial assistance, was covered under Section 2(1)(f) of the SARFAESI Act as the borrower. Not only this, the definition clauses dealing with debt securities, financial assistance, financial assets, etc., clearly convey the legislative intent that the SARFAESI Act applied to all existing agreements irrespective of the fact whether the lender was as notified "financial institution" on the date of the execution of the Agreement with the borrower or not.

29. This aspect was fully explained by the Supreme Court in *Transcore* v. *Union of India*, (2008) 1 SCC 125 wherein it was observed that the doctrine of election applies only if there is one remedy. However, the NPA Act is an additional remedy to the DRT Act, together they constitute one remedy and therefore, the doctrine of election does not apply. There is no repugnancy or inconsistency between the two remedies and therefore the doctrine of election does not apply.

30. In *M.D. Frozen Foods Exports Pvt. Ltd.* v. *Hero Fincrop Ltd.*, 2017 SCC OnLine Del 9190, a reference was made to the aforesaid judgments to conclude that the application under the SARFAESI Act is an addition to and not derogation to the provisions of RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB Act.

31. It is thus evident from the observations made in the aforesaid judgments that the SARFAESI Act and RDDB Act are complementary to each other and merely because proceedings in the SARFAESI Act have been initiated would not be a ground to oust the jurisdiction of the RDDB Act.

32. The other aspect which calls for some consideration is whether the jurisdiction of RDDB (which is alternate to the Civil Court) gets barred and whether the arbitration proceedings can be initiated. The Full Bench of Delhi High Court in *HDFC*

> *Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 was confronted with this very issue and it was observed that the jurisdiction of Civil Court is barred from matters covered by the RDDB Act in the sense that instead of the recovery being sought through the Civil Court, it has to be filed before the Debt Recovery Tribunal, implying thereby that the remedy of recovery still exists. It was further explained that once the remedy of recovery remains the parties still have the freedom to choose the forum alternate to and the regular Court or DRT as the case may be for adjudicating their inter se disputes. All disputes relating to the "Right in Personam" are arbitrable and therefore, the choice is given to the parties to choose the alternative forum. A claim of money by a Bank or financial institution cannot be treated as a right in *rem* and thus, taking it out of the realm of arbitrability."

43. It must, with due respect be observed, that the ultimate conclusions which came to be recorded by the learned Judge were based on the decision rendered by the Full Bench of the Court in **HDFC Bank.** Unfortunately, counsels who appeared before the Court appear to have failed to have brought to the Hon'ble Judge's attention that the decision of the Full Bench already stood overruled in **Vidya Drolia.**

44. Having noticed the precedents rendered on the subject of non-arbitrability and the extent of exclusion of the jurisdiction of the civil courts by virtue of the RDB Act and SARFAESI, the stage stands set for examining the objection which stands raised in this batch of petitions. As was noted in the preliminary parts of this decision, the objection taken by the respondent was that since notices had come to be issued under Section 13(2) of the SARFAESI, the challenge raised by the petitioners would fall in the category of non-arbitrable issues and thus incapable of either being considered in arbitration or open to be agitated under Section 9 of the 1996 Act. The submission

essentially was that it would not only be impermissible for the petitioners to raise the disputes which are addressed consequent to the issuance of the recall notice in arbitration, it would also not be open for them to invoke the remedies provided under the 1996 Act. The submission was that any challenge that the petitioners may choose to raise would have to be in accordance with the procedure prescribed under the SARFAESI.

45. The question of non-arbitrability which has come to be raised in the context of the respondent having invoked the powers conferred by Section 13 of the SARFAESI, would principally have to be tested bearing in mind the nature of the challenge, the objection that is urged and evaluating whether it would be one which would be capable of reference to arbitration. The Court would also consequently have to consider whether the nature of the challenge is one which is ordained by law to be agitated before a specially designated forum under statute. This would entail a discernment of the essence of the challenge and the dispute which is raised, the nature of the claim and whether the law contemplates and mandates the said objection being considered only by a special forum to the exclusion of the civil courts.

46. The Court while determining the question of non-arbitrability must firstly bear in mind that Section 9 of the **Code of Civil Procedure, 1908**[23] confers an all-pervading jurisdiction upon our civil courts to decide all "civil disputes" as generically understood in our jurisprudence. That fundamental precept must constitute the preface for the discussion that follows. It is equally well settled that the bar of

[23] CPC

the jurisdiction of the civil court must not be readily inferred or accepted. The Court also weighs in consideration that insofar as the present batch is concerned, it is faced with two statutes, namely the RDB Act and the SARFAESI, both of which incorporate specific ouster provisions. However, that in itself cannot be viewed as being either decisive or determinative of the question since the Courts would have to further determine the extent to which those provisions can be said to have ousted the jurisdiction which could otherwise be exercised by the civil courts. This would necessarily entail the Court examining and identifying the nature of the disputes and claims which could possibly be adjudicated by the special forum created under a legislation and whether that adjudicatory mechanism is founded on the intent to be to the exclusion of ordinary civil remedies.

47. Having laid out the broad precepts in the backdrop of which the question that stands raised in this batch would have to be answered, the Court proceeds further. It may, at the outset, be noted that RDB Act in terms of Section 19 principally created a special forum enabling banks and financial institutions to approach the DRTs for adjudication of their claims against borrowers. It was this significant facet of that enactment which appears to have weighed with the Supreme Court in **Indian Bank** to hold that the right of the borrower to approach the civil court for any other relief could not be said to be barred. The Supreme Court found that since the suit in that case had been instituted even prior to the enactment of the RDB Act and was not a suit or proceeding brought by a bank for recovery of debt, the civil court did and continued to have the jurisdiction to try the same.

Starting from **Indian Bank** and right upto **Bank of Rajasthan**, the Supreme Court has consistently reiterated and reaffirmed the aforesaid position. This is evident from the Supreme Court in **Bank of Rajasthan** again emphasising that the DRT constituted under the RDB Act has not been conferred the authority to try *"independent suits or proceedings initiated by the borrower…."*. The Supreme Court further noted that the borrower may have a right to sue and seek reliefs which may not be confined to a set off or a counter claim. In such a situation, their Lordships held that it would be wholly incorrect to declare that the authority of the civil courts to decide such suits stood either expressly or impliedly ousted.

48. Turning then to the provisions engrafted in the SARFAESI, undisputedly the process of enforcement commences from the initiation of action by a secured creditor under Section 13 of the SARFAESI for enforcement of a security interest. It is in connection with the proposed action of a secured creditor that a borrower stands conferred the right to raise objections and question or assail the steps proposed to be taken. SARFAESI, and as its provisions were judicially interpreted in **Mardia Chemicals**, then enables any person aggrieved by a measure taken by a secured creditor, the right of an appeal under Section 17 of the SARFAESI. The right of a person to appeal under Section 17 would inevitably have an indelible connect to the action that the secured creditor may have initiated or proposes to take under Section 13 of the SARFAESI. This could range from a borrower assailing the classification of an account as a non-performing asset, the assumption of a default having occurred to even

parties unconnected or disassociated with the lending agreement assailing the action that may be taken against a secured asset. The scope of Section 34 of the SARFAESI was lucidly explained in **Mardia Chemicals** to be restricted to those which could be taken or examined by the DRT under Section 17 thereof. The jurisdiction of the DRT under Section 17 of the SARFAESI and the consequential ouster of the jurisdiction of the civil courts was understood to extend to the determination of any action taken or proposed to be taken pursuant to a power conferred under the said enactment. It was while recognising that basic legislative shift in conferring primacy to the DRT over that of the all-pervasive authority of a civil court that the Supreme Court had observed that to a *"very limited extent"* the jurisdiction of the civil court may be recognised to still exist such as where the action of the secured creditor is assailed as being fraudulent or where the action is asserted to be based on a claim which is asserted to be evidently *"absurd"* or *"untenable"*.

49. The Court further finds that even in **Vidya Drolia**, the Supreme Court while recognising the window within which the jurisdiction of a civil court may be countenanced to exist, had while enunciating the principles of *"implicit non-arbitrability"* categorically held that the same would apply when by a mandatory law, parties stand restrained and barred from contracting out or waiving the adjudication by a designated court or a forum specially created by statute. It was also aptly stated that while arbitrability is a matter of national policy, a statute could on grounds of supervening public policy expressly or by implication, both restrict or prohibit arbitration being resorted to.

Vidya Drolia goes on to expound the proposition that where a statue creates a right or liability and creates a special forum for the determination of the above, the jurisdiction of the civil court which otherwise exists would be proscribed. In such a situation, it was held that the dispute would not be arbitrable.

50. This Court thus comes to conclude that the issue of arbitrability would essentially have to be answered bearing in mind the nature and substance of the dispute which stands raised and whether it can be said that all questions connected therewith are ordained by law to be adjudicated upon by a special court or forum. While fraud has been duly recognised as being one of the grounds which would always be open to be asserted before a civil court and thus consequentially be an arbitrable issue, additionally it may be open to a party to seek arbitration in respect of a claim or issue which cannot possibly be agitated before the specialised forum or which that body is not under the statute entitled or enabled to rule upon. It would essentially come down to the Court discerning the true essence of the dispute which stands raised in the facts of each particular case.

51. In any case and in light of the enunciation of the law in terms of the decisions which have been noticed above, the Court finds itself unable to hold that the provisions of the RDB Act or the SARFAESI can be read or understood as introducing an omnibus bar to arbitration and the trial of disputes in accordance with the procedure prescribed under the 1996 Act. The Court would in each case have to consider the nature of the dispute which stands raised and examine whether it is one which those two statutes mandate being tried only by the DRTs in

accordance with their respective provisions.

52. Having culled out the foundational principles which would govern, the Court then reverts to the facts of the present batch. As was noticed in the introductory parts of this judgment, the respondent had prior to the present petitions being taken up, invoked its powers conferred by Section 13 of the SARFAESI. The challenge which the petitioners mount is based on their assertion that they cannot possibly be held to be in default or having failed to abide by the terms of the OTS. The petitioners contend that they have not only paid the amount that was settled upon along with interest, the liability stands liquidated before the period prescribed under the OTS proposal. The respondent on the other hand asserts that the terms of the OTS required the petitioners to adhere to a monthly schedule of payment of the principal amount along with interest. According to the respondent, the OTS was conditional upon the petitioners strictly abiding by its terms and conditions. According to them, since they failed to adhere to the schedule as settled and agreed upon, the OTS disintegrates automatically leaving it open to the respondent to proceed further in accordance with law.

53. Having noticed the rival contentions, the Court notes that the dispute in essence is one which relates to whether a default has occurred and thus empowering the respondent to proceed further under Section 13 of the SARFAESI. The dispute would thus appear to pivot upon the question whether the terms of the OTS were scrupulously adhered to and whether a failure to abide by its terms has resulted in an event of default. The invocation of Section 13(2) of the

SARFAESI is dependent upon a borrower having defaulted in repayment of a secured debt or an instalment thereof. The petitioners question the very fact of a default having occurred and thus assail the initiation of action by the respondent. This would essentially merit an evaluation of the terms of the OTS, the payments made by the petitioners, accounting for the principal and interest payable thereunder and ultimately considering whether a default had occurred on the date when the notice under Section 13 of SARFAESI came to be issued.

54. As this Court examines the nature of the dispute which the petitioners raise, it finds that it would clearly fall within the scope and ambit of a Section 13 adjudication. All issues relating to default, accounting for the payments made and the amount which was envisaged to be paid under the OTS would clearly fall within the purview of Section 13 of SARFAESI. The petitioners stand conferred the right to assail the assertion of default and prefer objections to the notice that has come to be issued at the behest of the respondent. The respondent is obliged in law to consider those objections and communicate reasons if they be found to be untenable. The petitioners would thereafter have the right to assail any such order that the respondent may choose to pass by way of an appeal under Section 17 of the SARFAESI.

55. The dispute which stands raised in the present case thus stands confined to the question of an asserted default and the liability of the petitioners to pay further sums to the respondent. These and other allied issues would clearly fall within the scope of proceedings

contemplated by and under Section 13 of the SARFAESI. In the facts of the present case, the Court finds that the dispute that stands raised is essentially a question in relation to the determination of a debt. It is clearly linked to the question of adjudication of liability and thus liable to be exclusively tried by the DRT. This aspect was also duly highlighted by the Supreme Court in **Allahabad Bank**. The question of whether "any default in repayment of secured debt or any instalment thereof" is one which would squarely fall within the ambit of Section 13.

56. The Court further notes that such disputes are mandated by law to be adjudicated and ruled upon solely by the tribunal under Sections 17 and 18 of the SARFAESI. A challenge like the present is thus clearly one which relates to an action initiated under the aforenoted statute and thus mandated by law to be considered and adjudicated upon in accordance with the machinery provided in the statute itself.

57. On an overall conspectus of the aforesaid discussion, this Court comes to conclude that once an action under Section 13 of the SARFAESI had been initiated by a secured creditor, the rights and obligations of parties would have to necessarily be examined and decided in accordance with the procedure contemplated under Sections 13, 17 and 18 of the SARFAESI. Upon the issuance of such a notice, the dispute that may be raised by a debtor would fall outside the purview of a private adjudication which arbitration essentially represents. The limited window within which the issue of non-arbitrability would not come in the way would be where a party alleges and is able to establish that the action of the secured creditor is

either fraudulent or that the claim is wholly absurd and untenable. This limited window stands duly recognised and conferred a judicial imprimatur by **Mardia Chemicals** itself and as would be evident from paragraph 51 of the report which has been extracted hereinbefore. For the purposes of evaluating the above, the question which would have to be posed would be whether the action sought to be initiated by the debtor is one which pertains to the enforcement measure adopted by the creditor under SARFAESI or is one which seeks to raise an independent claim and pertains to the enforcement of a right that may otherwise be claimed in civil law. It is only if it were to fall within the latter categories that the issue would become arbitrable.

58. That leaves the Court to consider whether the petitioners have been able to establish that their case on facts would fall within the ambit of the exceptions which were recognised in **Mardia Chemicals**. Undisputedly, this is not a case where fraud is either alleged or asserted. The challenge essentially was that the petitioners have been held to be in default even after they had paid the entire sums due under the OTS and after the respondent had itself accepted those payments without demur or protest. It was asserted that all the petitioners had ultimately paid the entire sum settled upon under the OTS and thus the stand taken by the respondent is clearly absurd and untenable.

59. The Court notes that in order to characterise a default claimed by a creditor to fall within the exceptions carved out in **Mardia Chemicals**, the Court would have to be convinced on an ex facie examination of the facts of the case that the liability asserted to exist is

preposterous, patently erroneous and perhaps even bordering on the ludicrous. In order to arrive at such a conclusion, the Court would have to be convinced that the liability which is sought to be enforced cannot possibly be recognised in law to exist. That decision would necessarily have to be one which can be arrived at without the Court delving into or undertaking an accounting exercise or a detailed examination of the respective accounts that may be maintained by parties in their ordinary course of business. In fact, it is the trial of those issues which are contemplated to be undertaken by the tribunal under Sections 13 and 17 of SARFAESI.

60. While the petitioners had asserted that they had ultimately liquidated all liabilities in terms of the OTS, this fact was seriously disputed by the respondent. It was contended for and on behalf of the respondent that since the petitioners had failed to adhere to the repayment schedule as fixed under the OTS, the settlement did not survive and it was thus open for them to have recalled the loan facility. Whether the petitioners have ultimately paid the entire sum which was due under the OTS and its terms adhered to are questions which the DRT is statutorily empowered and enabled to decide. In fact, it is these very disputes which could be said to squarely fall within the scope of Sections 13 and 17 of SARFAESI. Viewed in light of the above, the Court comes to the conclusion that the issues raised clearly fall in the genre of non-arbitrability and would have to be raised and challenged in accordance with the procedure specified under SARFAESI. The Court thus comes to conclude that the petitioners have failed to establish that the dispute raised would fall

within the exceptions which were carved out and judicially enunciated in the various precedents referred to above.

61. Accordingly, and for all the aforesaid reasons, the present petitions shall stand dismissed.

YASHWANT VARMA, J.

DECEMBER 19, 2022
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