IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 11149 of 2021

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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RAJESH SUKAMARAN NAMBIAR
Versus
THE CENTRAL BANK OF INDIA THROUGH THE CHIEF MANAGER

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Appearance:
MR. VIMAL A PUROHIT(5049) for the Petitioner(s) No. 1,2
MR. SHRENIK R JASANI(9486) for the Petitioner(s) No. 1,2
MR. SANDIP C BHATT(6324) for the Respondent(s) No. 1

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CORAM:**HONOURABLE MS. JUSTICE VAIBHAVI D. NANAVATI**

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Date : 25/08/2022

CAV JUDGMENT

1. By way of the present petition, petitioners are invoking the issuance of writ against the impugned notice issued by the respondent-Bank under the provisions of Section 13(2) of the Securitization & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act, 2002') dated 16.07.2021, by virtue of which the respondent-Bank has demanded a sum of Rs.33,96,571/- to the directors of the company/ guarantor of Pentacool Soft Drinks Private Limited (hereinafter referred to as 'the Company' for short) registered under the provisions of the Companies Act, 2013. The said notice mentions the present petitioner in the capacity of guarantor. It is the case of the petitioners i.e. petitioner no.1 Rajeshkumar Sukumaran Nambiar was one of the founder directors of the company, which came to be incorporated on 01.04.2011. In all there were two directors including the present petitioner no.1.

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2. It appears that the company had availed the financial facility from the respondent-Bank, against which the residential property mentioned in the Schedule-III in the impugned notice dated 16.07.2021 came to be mortgaged. It is further stated that alongwith the property of the petitioner No.1, the other director had also mortgaged immovable property as a security and that the petitioner no.2 stood as guarantor of the petitioner no.1.

3. It is stated that one more Director came to be added / appointed in the company viz., Aparna Mangal Bariwal and necessary resolutions / changes came to be passed in this regard.

4. The petitioners thereafter tendered their resignation on 14.11.2017, which was accepted by the Board of Directors. That necessary resolution also came to be filed before the Registrar of Companies and the aforesaid change was also accordingly carried-out by the authority. The petitioners have also applied by preferring the Form No. DIR-12 under Section

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168 before the Ministry of Corporate Affairs.

5. It appears that the petitioner no.1 approached the respondent Bank addressing a communication dated 02.08.2018 requesting to release his property mortgaged with the Bank and to issue No Due Certificate, in view of the fact that the property of the Director, who is subsequently added, has already offered his property as a security which is also mortgaged by the respondent bank. It appears that the bank issued No Due Certificate on 27.03.2019 which is duly produced (at page no.38), subject to the payment of Rs.20,00,000/- towards the said liabilities and subject to the liabilities of other Directors of the Pentacool Soft Drinks Pvt. Ltd.

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6. The petitioner no.1 by proposal dated 05.03.2019 proposed to deposit a sum of Rs.20,00,000/- so as to secure the bank proportionately. The said proposal dated 05.03.2019 came to be acknowledged by the respondent Bank, and accordingly, the payment came to be made. It is further stated

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that the total liability at the time of the communication dated 14.11.2017 was approximately Rs.41,00,000/- against which the Bank was already having collateral security worth Rs.87,00,000/- (clubbing the property of two directors except the property of the present petitioners), which was sufficient to cover the loan amount, and therefore, the property of the petitioners was required to be released.

7. It is stated that as on date, as per the impugned Notice dated 16.07.2021 issued under Section 13(2) of the SARFAESI Act, 2002, the respondent-Bank has demanded a sum of Rs.33,96,571/- to the directors of the company in default. The said notice reflected the names of the petitioners as well as the mention of clause which reflects that under the eventuality the demand is not satisfied, the bank shall be constrained to recover the same by sale of the mortgaged property, which also includes the property of the petitioners as property-III.

8. In view of above, the respondent-Bank was pleased

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to issue No Due Certificate releasing the petitioners from all such liabilities arising in the capacity of the Director as well as in personal capacity. The property in question would still remain mortgaged with the respondent-Bank as far as housing loan is concerned, for which the petitioners have no objection. It is stated that the petitioners were under impression that the petitioners were absolved from all the liabilities i.e. personal as well as in the capacity of director of the company and the only liability which remains is the housing loan, which does not have any concern with the liabilities of the company. It is to the utter shock and surprise for the petitioners that the petitioners were served with a notice dated 16.07.2021 issued under the provision of Section 13(2) of the SARFAESI Act, 2002. It is the case of the petitioners that the impugned notice dated 16.07.2021 is required to be quashed and set aside qua the present petitioners in view of the fact that petitioners are neither the directors nor guarantor, more particularly, considering the fact that the respondent-Bank had already issued No Due Certificate releasing the petitioners from all the

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liabilities. It is stated that even otherwise the provisions of the SARFAESI Act, 2002 would not be applicable to the present petitioners, in view of the fact that the said proceedings are pertaining to the recovery of debt and as far as the present petitioners are concerned, the petitioners are neither borrowers nor the debtors of the respondent-Bank.

9. In view of above, it is stated that the action initiated by the respondent-Bank is illegal as well as without jurisdiction qua the present petitioners, more particularly, in view of the fact that the respondent-Bank itself had issued No Due Certificate to prove that the present petitioners were discharged from the liabilities of the company, and therefore, on the default made by the company, the petitioners cannot be dragged into the recovery proceedings. The notice issued by the respondent-Bank under Section 13(2) of the SARFAESI Act, 2002 is an action undertaken by the respondent-Bank without jurisdiction, and therefore, the only remedy with the present petitioners is to approach this Hon'ble Court under Article-226

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of the Constitution of India. The filing of appeal before the DRT would not be an efficacious remedy so far as the present petitioners are concerned. It is stated that, upon receipt of the impugned notice, the petitioners also replied to the respondent-Bank on **26.07.2021**, clarifying the position of the petitioners. However, the respondent-Bank has not been responded subsequent to the aforesaid reply filed by the petitioners.

10. Being aggrieved and dissatisfied with the impugned notice dated **16.07.2021,** the petitioners are constrained to approach this Court seeking the following reliefs:

> *"(A) YOUR LORDSHIP'S may be pleased to admit and allow the petition;*
>
> *(B) YOUR LORDSHIP'S may be pleased to issue a writ of Prohibition prohibiting the respondent bank from proceedings further with the impugned notice dated **16.07.2021** or a writ of mandamus or any other appropriate writ in the nature of mandamus, order or direction quashing and setting aside the impugned notice dated: **16.07.2021** issued by the respondent bank u/s 13 (2) of the SARSAESI Act, 2002 qua the present petitioner;*
>
> *(C) YOUR LORDSHIP'S may be pleased to hold and declare that the proceedings initiated by the respondent bank under the provisions of SARFAESI Act, 2002 against the present Petitioners is illegal, bad in law without jurisdiction;*

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(D) During the pendency and final disposal of the present petition, YOUR LORDSHIPS may be pleased to stay the operation, implementation and execution of the notice dated: 16.07.2021 u/s 13 (2) of the SARFAESI Act and further be pleased to restrain the respondent bank to initiate further action under the provisions of SARFAESI Act, 2002 qua the present Petitioners;

(E) Pass any such other and/or further orders that may be thought just and proper, in the facts and circumstances of the present case."

11. Heard Mr. Vimal Purohit, learned counsel appearing for the petitioners.

11.1. Mr. Vimal Purohit, learned counsel submitted that the petitioners were the founder/director of the company in question, which was incorporated on 01.04.2011. On 14.11.2017, the petitioner no.1 tendered the resignation as a Director of the company and on the even date, the company passed resolution, resolving to accept the resignation of the petitioner no.1 and the said resolution came to be filed before the Registrar of the Companies.

11.2. Mr. Vimal Purohit, learned counsel submitted that

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the MoU dated 26.09.2017 came to be executed between the company and the new Director, viz. Aparna Bariwal placing reliance on Clause-17 of the MoU and resolution No.2 held on 14.11.2017, new director Ms. Aparna Bariwal mortgaged her residential house engaged by the company.

11.3. Mr. Vimal Purohit, learned counsel submitted that the petitioners were released from his proportionality duty and hence the petitioners are entitled to get his schedule-property released mortgaged with the respondent-Bank.

11.4. Mr. Vimal Purohit, learned counsel further submitted that the petitioners having deposited a sum of Rs.20,00,000/- with the Bank against the pending liability of the Company as a part payment acknowledged by the Bank to secure another property, the said proposal having been accepted by the Bank, No Due Certificate also came to be issued on 27.03.2019 by the respondent-Bank.

11.5. Placing reliance on the aforesaid submissions, Mr.

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Vimal Purohit, learned counsel submitted that the Bank having issued No Due Certificate dated 27.03.2019, the properties were required to be released, though, the mortgage of the said property could continue qua the home loan, which has been availed by the petitioner from the respondent-Bank. Mr. Vimal Purohit, learned counsel submitted that, though the petitioners had deposited Rs.20,00,000/- with the respondent-Bank and No Due Certificate was issued by the respondent-Bank on 27.03.2019, the Notice under Section 13(2) of the SARFAESI Act could not have been issued to the petitioners. Though, the petitioners were aware of the statutory remedy to approach the Tribunal, the said remedy would not be an effective remedy, in view of the fact that, in the instant case, the action on the part of the respondent-Bank is without jurisdiction, and therefore, the impugned notice dated 16.07.2021 under Section 13(2) of the SARFAESI Act be quashed and set aside.

12. Heard Mr. Sandip C. Bhatt, learned counsel appearing for the respondent-Bank.

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12.1. Mr. Sandip C. Bhatt, learned counsel, at the outset submitted that the petitioners be relegated to avail the statutory remedy available under Section 17 of the SARFAESI Act, 2002 and that there is no violation of any provisions of the SARFAESI Act, 2002 as alleged.

12.2. Mr. Sandip C. Bhatt, learned counsel appearing for the respondent-Bank submitted that the company approached the respondent-Bank seeking financial assistance which was considered favourably by the respondent-Bank and thereby granted cash credit facility of Rs.10.00 lakh and Rs.15.00 lakh as term loan, which was subsequently enhanced and thereby granted cash credit facility of Rs.20.00 lakh and term loan of Rs.26.50 lakh were sanctioned to the company, wherein, the petitioner no.1 stood as director cum guarantor and petitioner no.2 stood as a guarantor. The property i.e. Flat No. A-1/202, Spring Wood Residency, Tandalja, Vadodara, which was mortgaged by the petitioners in the housing loan, was extended the mortgage for the facility availed by the company.

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On 29.09.2017, the respondent-Bank had received the letter from the company informing the bank about the change of board of directors of the company alongwith MoU dated 26.09.2017 as per the terms and conditions mentioned herein. The respondent-Bank was informed by the said letter dated 26.09.2017 informing the change of the board of the company to the bank, the registered deed of mortgage came to be executed by the mortgagors (old management and new management) to secure the credit facilities granted to M/s. Pentacool Soft Drinks Pvt. Ltd. which came to be registered with the SRO, Vadodara-3 (Akota) vide registration No. 5704 dated 02.04.2018 and thereby mortgage was extended for the properties mentioned therein.

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12.3. Mr. Sandip C. Bhatt, learned counsel appearing for the respondent-Bank submitted that the petitioners had also executed the affidavit-cum-declaration confirming the mortgage created / extended in favour of the respondent-Bank, and therefore, it is not open for the petitioners to submit that, in

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view of the No Due Certificate dated **27.03.2019,** the petitioners are not liable to make the payment towards the dues of the Pentacool Soft Drinks Pvt. Ltd. to the bank, and hence, the petition is required to be dismissed.

12.4. Mr. Sandip C. Bhatt, learned counsel submitted that the respondent Bank had sanctioned Cent Guaranteed Emergency Credit Line (CGECL) in pursuant to the notification issued by the Government of India, wherein also, it is clearly mentioned that security extension of charge over the existing primary and collateral security, and therefore, it cannot be said that the property of the petitioners cannot be enforced in the event of default towards the dues of the said company Pentacool Soft Drinks Pvt. Ltd. The said sanctioned letter dated **02.06.2020** is duly produced at Annexure-R-**3.**

12.5. Mr. Sandip C. Bhatt, learned counsel submitted that before issuance of the notice dated **16.07.2021**, the respondent -bank demanded an amount of Rs.**33,96,571.24** which was the

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amount due and payable to the Bank. The petitioners through their advocate issued Notice to the respondent bank asking release of the property in view of the resignation given by the petitioners from the Director of Pentacool Soft Drinks Pvt. Ltd. and in reply to the same, the Bank had informed that in view of the execution of the registered mortgage dated 02.04.2018, the securities are extended to the credit facility granted to the company, and therefore, the properties mortgaged with the bank could not be released. However, the petitioners have approached this Court, being aggrieved by the aforesaid action undertaken by the respondent Bank by issuance of Notice under Section 13(2) of the SARFAESI Act dated 16.07.2021.

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12.6. Mr. Sandip C. Bhatt, learned counsel further submitted that No Due Certificate issued on 27.03.2019 by the respondent-Bank was subject to the payment of Rs.20.00 lakh towards the said liabilities and subject to the liabilities of other directors of the Pentacool Soft Drinks Pvt. Ltd., and hence, it cannot be said that the petitioners cannot be called for the

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payment of the outstanding amount of the said company. The said No Due Certificate does not tantamount to absolve of mortgage-charge created by the petitioners.

12.7. Mr. Sandip C. Bhatt, learned counsel submitted lastly submitted that, this Court may not exercise its extraordinary jurisdiction under Article-226 of the Constitution of India and relied on the order passed in Special Civil Application No. 15813 of 2019 in the case of Kiritkumar Keshavlal Patel Vs. Yes Bank, wherein, the petition was dismissed on the ground that the dispute is with regard to the fact of alternative remedy and in view of the aforesaid ratio, the present petition be dismissed.

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13. Notice came to be issued on 06.08.2021 and ad-interim relief came to be granted in terms of Para-26(D).

14. Heard Mr. Vimal Purohit, learned counsel appearing for the petitioners and Mr. Sandip C. Bhatt, learned counsel appearing for the respondent – Bank.

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15.1. It is the case of the petitioners that the petitioners were the founder and directors of the company, which came to be incorporated on 01.04.2021. The company availed the finance facility from the respondent- bank, against which the residential property as mentioned in the schedule-property III in the impugned notice dated 16.07.2021 came to be mortgaged as a security. That alongwith the property of the petitioner no. 1, other director had also mortgaged their property, as security. The petitioner no.2 stood as guarantor of the petitioner no.1. It is the case of the petitioners that, Mrs. Aparna Mangal Bariwal came to be incorporated as a new director of the company as per the resolution no.2 of the board meeting held on 14.11.2017 and new director had mortgaged her property with the bank, and therefore, the property which was mortgaged by the petitioner was required to be released, in view of the fact that the petitioner herein seized to be the director of the company. The petitioners having deposited an amount of Rs.20,00,000/- towards the

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outstanding amount of the property, which was mortgaged and No Due Certificate which was duly issued by the respondent-Bank, it was not open for the respondent-Bank to issue the impugned notice under Section 13(2) of the SARFAESI Act to the petitioners.

15.2. Having considered the rival contentions by the learned counsels appearing for the respective parties, in view of this Court, it appears that petitioners have relied on the MoU dated 26.07.2019 and the terms of the MoU. Though there was change in the board of management of the company, the registered deed of mortgage came to be executed by the mortgagers (old management and new management) to secure the credit facility granted to Pentacool Soft Drinks Pvt. Ltd. (the company) which came to be registered with the concerned SRO, Vadodara-3 (Akota) vide registration No. 5704 dated 02.04.2018 and that mortgage was extended for the property mentioned therein. The said MOE (Memorandum of Entry - Extension of Mortgage) dated 02.04.2018 is duly signed by the

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petitioner, wherein, the newly appointed Director had mortgaged her property as referred to in Schedule-I and the petitioners herein have also mortgaged their property which is the subject property being Flat No. A-1/202, Spring Wood Residency, Mouje: Tandalja, Tal. & Dist.: Vadodara. The said MoE (Memorandum of Entry- Extension of Mortgage) A is duly produced at Page No. 63 and is also signed by the petitioners as also the new director. The aforesaid transaction is not disputed by the petitioners.

15.3. At this stage it is apposite to refer to the No Due Certificate which was issued by the respondent – Bank and on which heavy reliance is placed by the petitioners. The No Due Certificate dated 27.03.2019 reads thus:

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"BM/KARELI/SEC/2018-19/252

Date: 27.03.2019

NO DUE CERTIFICATE

We certify that Mr Rajesh Nambiar and Hemlata R Nambiar, R/O A1/202, Springwood Residency-1, behind Reliance Mall, Old Padra Road, Vadodara are the Director and Guarantor in

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the Pentacool Softdrinks Pvt Ltd and from now onwards both are discharged from all their liabilities and responsibilities of Pentacool Softdrinks Pvt Ltd but subject to the payment of Rs.20.00 lakhs towards the said liabilities and subject to the liabilities of other Directors of the Penta Cool Soft Drinks P Ltd.

<u>THE DETAILS OF DDS ARE</u>:
1. BOB, Akota P No 638487 for Rs.450000/- dated 27.03.2019
2. Federal Bank Alkapuri Br P/No 220483 for Rs.10,00,000/- dated 27.03.2019
3. Federal Bank Alkapuri Br P/No 220481 for Rs.5,00,000/- dated 27.03.2019
4. Federal Bank Alkapuri Br P/No 220482 for Rs.50,000/- dated 27.03.2019

As the NOC is issued to Mr Rajesh Nambiar & Mrs Hemlata R Nambiar for the personal liability as well as Director Liabilities towards the CC account No 3140181063 and Tloan account No 3328687852 of Pentacool Softdrinks Put Ltd.

The property is still remaining mortgaged till the discharge of full and final payment for housing loan pending vides Account no 3134285685."

15.4. While issuing No Due Certificate dated 27.03.2019, it is stated that the same is the subject to the liabilities of the other directors of Pentacool Softdrinks Pvt. Ltd. The property would still be mortgaged till the discharge of full and final payment of the bank. The mortgage has been executed on 02.04.2018 as stated above for the subject property and it

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appears that while issuing No Due Certificate, the same was issue subject to the liability of the other directors of Pentacool Softdrinks Pvt. Ltd.

15.5. This Court at thinks it fit to refer to the ratio as laid down by the Hon'ble Supreme Court in Civil Appeal No. 3563 of 2009 in the case of Punjab National Bank & Anr. v/s. M/s. Imperial Gift House & Ors. and held as under:

> *"Leave granted.*
> *Heard learned counsel for the parties.*
> *By the impugned order, in effect and substance, the High Court has quashed notice issued by the bank under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (for short, "the Act"]. Upon receipt of notice, respondents filed representation under Section 13(3)(A) of the Act, which was rejected, Thereafter, before any further action could be taken under Section 13(4) of the Act by the Bank, the writ petition was filed before the High Court. In our view, the High Court was not justified in entertaining the writ petition against the notice issued under Section 13(2) of the Act and quashing the proceeding initiated by the bank.*
>
> *Accordingly, the appeal is allowed, impugned order passed by the High Court is set aside and the writ petition filed before it is dismissed."*

15.6. The aforesaid ratio as laid down by the Hon'ble

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Supreme Court has been followed in Writ Petition No. 23067 of 2019 and allied matters in the case of S.V. Developers v/s. State Bank of India and others. dated 07.06.2022 in the High Court of State of Telangana. The relevant para of the same reads thus:

> *"30. Thus, on a careful consideration of the statutory language employed in the proviso to Sub-Section (3A) of Section 13 of the SARFAESI Act read with the Explanation to Sub-Section (1) of Section 17 of the SARFAESI Act, it is crystal clear that a notice under Section 13 (2) of the SARFAESI Act or the rejection of the objection raised to it including the reasons in support thereof would not give rise to a cause of action for instituting an action in law. To that extent, we find sufficient force in the contention advanced by the respondents that the writ petition filed is premature. The statute does not contemplate any intervention at this preliminary stage. Only when the process ripens into a definitive action taken by the secured creditor under Sub-Section (4) of Section 13 of the SARFAESI Act, the aggrieved person can avail the statutory remedy under Section 17 of the SARFAESI Act by filing securitization application before the jurisdictional Debts Recovery Tribunal.*
>
> *31. This aspect was highlighted by the Supreme Court in Punjab National Bank Vs. Imperial Gift House. In that case, the High Court had interfered with the notice issued under Section 13 (2) of the SARFAESI Act and quashed the proceedings initiated by the Bank. Setting aside the order of the High Court, Supreme Court held that the High Court was not justified in entertaining the writ petition before any further action could be taken by the Bank under Section 13 (4) of the SARFAESI Act.*

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32. That being the position, we are of the view that filing of this writ petition is misconceived. Consequently Writ Petition No.23643 of 2020 is dismissed. However, dismissal of the writ petition would not foreclose the remedies available to the petitioner under the law as and when the cause of action arises".

44. This decision was followed in the subsequent judgment dated 03.03.2022 passed in M/S. TANDRA IMPEX PRIVATE LIMITED Vs. PUNJAB NATIONAL BANK (W.P.No.23268 of 2020, dated 03.03.2022). After analyzing the provisions of Section 13 (2) of the SARFAESI Act and the decision in W.P.Nos.23643 of 2020 and 20046 of 2021, this Court held as follows:

"From the above, it is quite clear that the legislative intent is to ensure that there should be no judicial or quasi judicial interdiction at the stage of issuance of demand notice under Section 13 (2) of the SARFAESI Act. This is so because of the very object and reasons behind enactment of the SARFAESI Act.

** * * We have already noticed above that classification of loan account by the secured creditor is at a stage prior to issuance of the demand notice under Section 13(2) of the SARFAESI Act. If at the stage of issuance of demand notice, interference by the Court and Tribunal is not to be made, we fail to understand as to how such intervention can be made at a stage prior to issuance of demand notice under Section 13(2) of the SARFAESI Act".*

45. Therefore, answer to issue No.1 is very clear: at the stage of issuance of notice under Section 13 (2) of the SARFAESI Act, no interference is called for by the Court. Therefore, question of examining legality and validity of such demand notice would not arise. The adjudication would have to wait till the stage of Sub-Section (4) of Section 13 is reached, where after the aggrieved person including a borrower can file securitization application under Section 17

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of the SARFAESI Act in which all grounds of challenge would be available.

46. Before we proceed to the next issue, we may also mention that classification of a defaulter's loan account as NPA precedes issuance of demand notice under Section 13 (2) of the SARFAESI Act. As held in M/S. TANDRA IMPEX PRIVATE LIMITED (supra), if a demand notice under Section 13 (2) of the SARFAESI Act does not give rise to any actionable claim or cause of action within the meaning of the SARFAESI Act, we fail to understand as to how action of the secured creditor in classifying the loan account as NPA can be challenged at this stage. The challenge thereto would also have to stand deferred till the stage of Section 13 (4) of the SARFAESI Act is reached."

15.7. Section 13 of the SARFAESI Act, 2002 reads thus:

13. Enforcement of security interest.-

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the int rvention 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 on- 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 e ercise all or any of the rights under sub- section (4).

(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.

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(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 secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

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

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

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

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub- section (4), by the secured creditor or by the manager on behalf of the secured 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 ischarge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at

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any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the s cured creditor, and no further step shall be taken by him for transfer or sale of that secure asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursua t to sub- section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three- fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors: Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A 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 su- 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 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen' s dues cannot be asc rtained, the liquidator shall intimate the estimated amount of 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 estimate 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 w th 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 three- fourth in value of the amount outstanding on such date;

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(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, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measured specifies in clause (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 con ent of the secured creditor.

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15.8. Section 17 of the SARFAESI Act, 2002 reads thus:

Section 17 in The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002

17. Right to appeal.—

(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, 1[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 measures had been taken:—(1) Any person (including borrower), aggrieved by any of the measures referred to in

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sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, 1[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 measures had been taken\:" 2[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.] 3[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.]3[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.]" 4[(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 of the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in-sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order 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.

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(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 l3 to recover his secured debt.

(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 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.]

16. In view of the ratio as laid down in the aforesaid decisions, this Court is not inclined to entertain the present petition under Article 226 of the Constitution of India,

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challenging the notice under Section 13(2) of the SARFAESI Act issued by the respondent-Bank. In view of above, this Court deems it fit not to opine on the merits of the matter and the discussion as referred hereinabove are merely to arrive at the present conclusion. If the petitioners were to avail the statutory remedy by filing application/appeal before the Tribunal, the Tribunal shall decide the same independently, without being influenced by the observations made hereinabove.

17. It is open for the petitioners to avail statutory remedy by preferring an appeal/application under Section 17 of the SARFAESI Act, as per the ratio as referred hereinabove. No interference is called for at the stage of issuance of notice under Section 13(2) of the SARFAESI act. Consequently, the question of examining legality and validity of such demand notice would not arise. The adjudication would have to wait till the stage of Section 13(4) is reached, whereafter, any person including the borrower, aggrieved by any of the measures referred to in Section 13(4) of the SARFAESI Act,

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2002 taken by the secured creditor or his authorized officer under this chapter, can file securitization application / appeal under Section 17 of the SARFAESI Act before the DRT.

18. In view of the settled proposition of law, this Court is not inclined to exercise its extraordinary jurisdiction under Article-226 of the Constitution of India. The petition stands disposed of, accordingly. Interim relief, if any, shall stand vacated.

(VAIBHAVI D. NANAVATI,J)

***FURTHER ORDER*:**

After the judgment is pronounced, Mr. Shrenik R. Jasani, learned counsel appearing for the petitioners requested for continuing the interim relief, granted earlier, for a period of four weeks. However, this Court is not inclined to accede to the request as prayed for.

(VAIBHAVI D. NANAVATI,J)

Pradhyuman

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