IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 10476 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MS.JUSTICE HARSHA DEVANI

and
HONOURABLE MR.JUSTICE VIRESHKUMAR B. MAYANI

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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SHIRPUR POWER PVT LTD
Versus
STATE BANK OF INDIA

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Appearance:
MR. S. N. SOPARKAR, SENIOR ADVOCATE with MR BIJAL CHHATRAPATI and MR SIDDHARTH SINHA, ADVOCATES for M/s J SAGAR ASSOCIATES(8162) for the Petitioner(s) No. 1,2,3
NOTICE SERVED BY DS(5) for the Respondent(s) No. 2
MR GAURAV MOHANTY, ADVOCATE with MR SUSHIL JETHMALANI, ADVOCATE for M/s SHARDUL AMARCHAND MANGALDAS AND CO(8426) for the Respondent(s) No. 1,3

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CORAM: HONOURABLE MS.JUSTICE HARSHA DEVANI
and
HONOURABLE MR.JUSTICE VIRESHKUMAR B. MAYANI

Date : 28/08/2019

ORAL JUDGMENT
(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)

1. By this petition under articles 226 and 227 of the Constitution of India, the petitioners have challenged the order dated 2.5.2019 passed by the Debts Recovery Appellate Tribunal, Mumbai in Miscellaneous Appeal (L) No.3 of 2019, and seek a direction to the Debts Recovery Tribunal-1, Ahmedabad to frame, consider and decide as preliminary issues, the issues raised by the petitioners in their pleadings of Original Application No.551 of 2018 and Original Application No.678 of 2018.

2. The facts as averred in the petition are that the respondents financed setting up of a 300 MW (150 MW x 2) Thermal Power Plant at MIDC Dhule, Maharashtra (hereinafter referred to as "the Project") by Shirpur Power Pvt. Ltd. (hereinafter referred to as "the first petitioner /borrower"), the original cost whereof was Rs.1762.92 crores. The respondents No.1, 2 and 3, viz., State Bank of India, Bank of Baroda and IDBI Bank, claim to have executed the COR Common Loan Agreement (COR Facility Agreement) dated 8th December, 2012 with the first petitioner for the same. Thereafter, on account of factors beyond the control of the borrower, there was a cost overrun. To meet this cost overrun, the borrower, the respondents and the SBICAP Trustee Company Limited (hereinafter referred to as "the SBICAP") entered into a COR Facility Agreement dated 9th February, 2016, whereby the borrower availed an additional financial assistance of Rs.192 crores from the banks.

2.1 On or around 4th July, 2018, the respondents filed Original Application No.551 of 2018 before the Debts Recovery Tribunal against the petitioners No.2 and 3 (arrayed as defendants No.1 and 2 therein), based on personal guarantee agreements dated 9th February, 2016 executed by the petitioners No.2 and 3 in favour of the respondents and the SBICAP Trustee Company Limited. Thereafter, somewhere around 11th September, 2018, the respondents filed another original application against the first petitioner. The petitioners have filed affidavits-in-reply to the original applications, while categorically and expressly disputing the jurisdiction of the Debts Recovery Tribunal to try and entertain Original Application No.551 of 2018.

2.2 It is further averred in the petition that the petitioners No.2 and 3 are not parties to the COR Facility Agreement. Furthermore, the borrower has not been joined as a party to the original application. The Original Application No.551 of 2018 appears to be based on a document, executed after the execution of the COR Facility Agreement on 9th February, 2016, purporting to be a personal guarantee in favour of the SBICAPS.

2.3 It is further the case of the petitioners that the Project faced considerable financial stress on account of various factors affecting the electricity sector, on account of which the borrower was facing difficulty in making payment of interest installments under the Common Loan Agreement and COR Facility Agreement to the respondents. Various communications ensued between the parties as set out in detail in the memorandum of petition culminating into a “Call

up notice" dated 10th May, 2018 to the petitioners recalling the entire loan facility including principal and all interest due, viz., an amount of Rs.1658.14 crores (approximately). It is the case of the petitioners that they had attempted to resolve the crisis and evolve a long lasting solution. However, the respondents issued a so-called "Demand Certificate" to the petitioners No.2 and 3 calling upon them to pay an amount of Rs.212,06,90,981/- under the purported personal guarantee within seven days of the receipt of the same. In response thereto, the petitioners gave their reply dated 21st June, 2018. It appears that the respondents did not respond to the said letter of the petitioners No.2 and 3, but jointly filed Original Application No.551 of 2018 before the Debts Recovery Tribunal, Ahmedabad under section 19 of the Recovery of Debts and Bankruptcy, Insolvency Resolution and Bankruptcy of Individuals and Partnership Firms Act, 1993 (hereinafter referred to as "the Act") against the petitioners No.2 and 3 herein (original defendants No.1 and 2), praying that the defendants be ordered and decreed to jointly and severally pay to them a sum of Rs.212,37,10,140/- as on 25th June, 2018 within interest thereon at 18% interest from 26th June, 2018 till payment and/or realisation and other ancillary reliefs.

2.4 Subsequently, the respondents filed Original Application No.678 of 2018 against the petitioner No.1 before the Debts Recovery Tribunal, Ahmedabad. The petitioners thereafter filed their interim affidavit-in-reply to the aforesaid Original Application No.551 of 2018 stating that the original application, as framed, is not maintainable and no reliefs sought therein can be granted for the reasons set out in paragraph GG of the memorandum of petition.

2.5 The petitioners No.2 and 3 filed Interim Application No.1159 of 2018 in Original Application No.551 of 2018 raising several issues to be considered as preliminary issues. It appears that the said application was not heard and at the same time, the Debts Recovery Tribunal insisted on proceeding with the original application. The petitioners thereafter moved another application being Interim Application No.1427 of 2018 on 13.11.2018 in Original Application No.551 of 2018, essentially seeking similar reliefs as sought for in Interim Application No.1159 of 2018 and requesting that the matter as regards framing of preliminary issues be taken up. By an order dated 14.11.2018, the Debts Recovery Tribunal permitted withdrawal of the same in view of the fact that a similar application was already pending. The withdrawal was with express liberty to file a fresh application on the same cause of action and also expressly without prejudice to the applicant's rights in the earlier application, that is, Interim Application No.1159 of 2018.

2.6 Since Interim Application No.1159 of 2018 was not being heard and the Debts Recovery Tribunal was insisting on proceeding with the original application, the petitioners approached this court by way of a writ petition being Special Civil Application No.17611 of 2018 praying that the Debts Recovery Tribunal should frame and consider the preliminary issues as stated in Interim Application No.1159 of 2018. The petition came to be disposed of on 10.12.2018 on the ground that the petitioners had approached this court without availing the liberty to move fresh application for the same relief already granted by the Debts Recovery Tribunal vide order

dated 14.11.2018.

2.7 On 22.12.2018, the petitioners moved a fresh application being Interim Application No.1722 of 2018 before the Debts Recovery Tribunal, which came to be heard by the Debts Recovery Tribunal together with Interim Application No.1159 of 2018. Both the applications came to be rejected on merits by an order dated 15.1.2019.

2.8 Being aggrieved, the petitioners filed an appeal before the Debts Recovery Appellate Tribunal being Appeal No.3 of 2019 along with Miscellaneous Application No.74 of 2019 seeking stay of the proceedings of the Original Application No.551 of 2018 pending before the Debts Recovery Tribunal. By an order dated 22.1.2019, the Debts Recovery Appellate Tribunal rejected Miscellaneous Application No.74 of 2019.

2.9 Since the Debts Recovery Tribunal was insisting on proceeding with the original application despite the pendency of the appeal before the Debts Recovery Appellate Tribunal, on 24.1.2019, the petitioners approached this court by way of a writ petition being Special Civil Application No.1443 of 2019 challenging the order of the Debts Recovery Appellate Tribunal dated 22.1.2019. By an order dated 28.1.2019, this court disposed of the writ petition without going into merits, but directed the Debts Recovery Appellate Tribunal to expedite the hearing of the Appeal No.3 of 2019 and dispose of the same within a period of three weeks. Since the Debts Recovery Appellate Tribunal did not hear the appeal and on the other hand, the Debts Recovery Tribunal continued to insist on proceeding with the original application, the petitioners once

again approached this court by way of a writ petition being Special Civil Application No.4900 of 2019. By an order dated 7.3.2019, this court disposed of the writ petition, while once again not going into the merits as the proceedings were pending before the Debts Recovery Appellate Tribunal, observing that the Debts Recovery Appellate Tribunal may prepone the hearing, while in the meantime the proceedings before the Debts Recovery Tribunal may be adjourned. The Debts Recovery Appellate Tribunal heard the appeal on 27.3.2019 and 9.4.2019, and the matter was kept CAV for orders on 2.5.2019.

2.10 The petitioners once again approached this court by way of Miscellaneous Application No.1 of 2019 in Special Civil Application No.4900 of 2019 praying that the Debts Recovery Tribunal adjourn the original application as the Debts Recovery Appellate Tribunal had kept the matter for orders after almost three weeks post the hearing, but the Debts Recovery Tribunal was inclined to proceed with the original application.

2.11 By an order dated 18.4.2019, this court disposed of the miscellaneous application directing the Debts Recovery Tribunal to adjourn the proceedings of Original Application No.551 of 2018 beyond 6.5.2019. By the order dated 2.5.2019, the Debts Recovery Appellate Tribunal dismissed the appeal, which has given rise to the present petition seeking the reliefs noted hereinabove.

3. Mr. S. N. Soparkar, Senior Advocate, learned counsel with Mr. Bijal Chhatrapati, learned advocate for M/s J. Sagar Associates, learned advocates for the petitioners, assailed the

orders passed by the Debts Recovery Tribunal as well as the Debts Recovery Appellate Tribunal contending that the Tribunals have failed to understand the controversy in issue in proper perspective by holding that the preliminary issues proposed by the petitioners are mixed questions of law and fact. It was submitted that in this case, it is the respondent banks, namely, the original applicants who have tendered the deed of personal guarantee as well as other documents on record, which have been admitted by the petitioners. The preliminary issues are required to be decided on the basis of the admitted documents without there being any necessity of adducing oral evidence. It was submitted that when it is possible to decide the issues without leading any oral evidence, the issues are pure questions of law and cannot be said to be mixed questions of fact and law. According to the learned counsel, any question which for its determination does not require evidence to be led, is a question of law and that all the issues proposed by the petitioners are purely questions of law as no evidence is required to be adduced. It was argued that when a preliminary issue is raised that the court has no jurisdiction, if such issue is decided in favour of the petitioners, the applications would fail.

3.1 Adverting to the preliminary issues raised before the Tribunal, the learned counsel submitted that issues I and II relate to deficit court fees. It was contended that unless adequate court fees are paid, it is not permissible for the Tribunal to proceed further with the hearing of the applications; therefore, this question has to be decided as a preliminary issue. The learned counsel for the petitioners has placed reliance upon various decisions of the Supreme Court

and has made submissions on the merits of these issues; however, considering the fact that the respondents have now paid the so-called deficit court fees without prejudice to their right to contend that the court fee paid initially was adequate, this question no longer survives and hence, it is not necessary to delve any further into the matter.

3.2 It was submitted that issues III and IV relate to the locus of the respondent banks to file such applications in the absence of there being any privity of contract between the petitioners No.2 and 3 and the respondent banks. It was submitted that the personal guarantees as executed by the petitioners No.2 and 3 are purportedly in favour of the security trustee SBICAPS and not in favour of the banks. The petitioners No.2 and 3 have not entered into any agreement with the banks. Thus, no enforcement can be sought by the banks who are not parties to the purported personal guarantees. It was submitted that the banks have no right to sue and/or *locus standi* to initiate or maintain the present proceedings as there is no privity of contract between the banks and the petitioners and as such, the original application, as filed by the petitioners, is not maintainable and ought to be rejected on this ground alone.

3.3 Referring to the recitals “E” and “F” contained in the COR Facility Agreement, it was submitted that the same rule out initiation of proceedings by the respondents as the personal guarantees themselves preclude filing of the original application by the banks. Reference was made to recitals “D” and “F” of the personal guarantees and recital “D” and articles 2.1, 2.2, 2.2.1(b) and (c), 3.1(e) and 4.1(b) of the Security

Trustee Agreement, to submit that it is an admitted position that the personal guarantees were issued after the COR Facility Agreement, and, therefore, the personal guarantees themselves preclude the filing of the original applications by the banks and that the banks cannot institute the subject original application.

3.4 Next it was submitted that the respondent banks being mere beneficiaries under the Security Trustee Agreement, cannot file the application as it is only the security trustee, namely, SBICAPS, who can enforce the security on behalf of the respondent banks. The attention of the court was invited to the scheme of the Indian Trusts Act, 1882 and more particularly to the provisions of sections 6, 23, 31 and 56 to 58 thereof. It was submitted that a beneficiary has a right to sue for execution of the trust only in the circumstances provided under section 59 of the Indian Trusts Act. Reference was made to section 59 of the Indian Trusts Act, which reads thus:

> *"59. Right to sue for execution of trust.—Where no trustees are appointed or all the trustees die, disclaim or are discharged, or where for any other reason the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee."*

It was submitted that unless SBICAPS is discharged as a trustee, the proceedings cannot be maintained at the instance

of the beneficiaries, viz., the respondent banks.

3.5 It was submitted that the fact that the personal guarantees have not been made out in favour of the respondent banks is evident from a plain reading of the documents produced by the banks themselves and does not require the leading of any evidence. It was urged that the question whether the banks have any right to sue as suggested vide question IV can be decided on a perusal of the pleading and documents and upon consideration of the relevant law and judgments, relied upon by the parties, making it a question of law.

3.6 The attention of the court was invited to section 19(1) of the Act to point out that the same contemplates making of an application by a bank or financial institution only. Reference was made to section 2(d) and 2(h) of the Act, which define “bank” and “financial institution” respectively, to submit that SBICAPS, namely, the security trustee, is neither a bank nor a financial institution and is, therefore, not competent to institute proceedings under section 19 of the Act. It was contended that the respondent banks being beneficiaries, while keeping the trust alive, cannot make an application under section 19 of the Act and therefore, the application as moved, is not competent.

3.7 Referring to the impugned orders passed by the Debts Recovery Tribunal and the Debts Recovery Appellate Tribunal, it was submitted that both the Tribunals have failed to understand the scope and ambit of their powers. It was submitted that by virtue of section 22 of the Act, the Debts

Recovery Tribunal is not bound by the procedure laid down under the Code, but it has wider powers as held by the Supreme Court in ***Industrial Credit and Investment Corporation of India Ltd. v. Grapco Industries Ltd.***, *(1999) 4 SCC 710*, wherein the court has held that when section 22 of the Act says that the Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, it does not mean that it will not have jurisdiction to exercise powers of a court as contained in the Code of Civil Procedure. Rather, the Tribunal can travel beyond the Code of Civil Procedure and the only fetter that is put on its powers is to observe the principles of natural justice.

3.8 Reliance was also placed upon the decision of the Supreme Court in ***ITC Limited v. Debts Recovery Appellate Tribunal***, *(1998) 2 SCC 70*, wherein the appellant therein had made an application under rule 11 of Order VII of the Code before the Debts Recovery Tribunal, which was rejected by the Debts Recovery Tribunal. The appellant went in appeal before the Debts Recovery Appellate Tribunal, which dismissed the appeal. The Supreme Court held that the fact that issues have been framed in a suit cannot come in the way of consideration of the application filed by the appellant under Order VII rule 11. The court thereafter examined as to whether the allegations in the plaint prove a cause of action against the appellant for recovery by the bank and found that there was no cause of action even from the allegations in the plaint against the appellant and held that the plaint was liable to be rejected under Order VII rule 11 of the CPC.

It was submitted that thus, though section 22 of the Act does

not refer to the provisions of Order VII rule 11 of the Code, the Supreme Court has considered an application thereunder on merits. Therefore, the provisions of Order XIV rule 2 of the Code for deciding preliminary issues would also be applicable to proceedings before the Debts Recovery Tribunal.

3.9 Next it was submitted that proposed questions V and VI relate to lack of consideration for the personal guarantees and consequently, the personal guarantees being void for lack of consideration. It was submitted that both these suggested issues are issues of law and do not require any examination of facts or leading of evidence. It was submitted that it is an admitted position that no independent consideration flowed from the respondent banks in favour of the purported personal guarantors, viz., the petitioners No.2 and 3 herein. The question that, therefore, arises is as to whether the purported personal guarantees can be said to be backed by any consideration as required under section 25 of the Indian Contract Act, 1872, which is a neat question of law. The connected issue as to whether, in the absence of any consideration for the execution of the purported personal guarantees, would these be enforceable at law, is a question which has to be decided on the basis of the relevant law and judgments relied upon by the parties, without necessitating the leading of any evidence, making it a question of law. In support of such submissions, reliance was placed upon the decision of the Rajasthan High Court in the case of ***Ram Narain v. Lt. Col. Hari Singh***, 1963 *SCC 430*, wherein the court held thus:

> *"13. From all the cases aforesaid as well as from the language of Section 127 it clearly emerges that the*

creditor must have done some thing for the benefit of the principal debtor to sustain the validity of a contract of guarantee. There is some divergence, however, on the view whether the benefit is given at the time of the execution of the guarantee or even a past benefit can constitute a valid consideration for the sustenance of such an engagement. Xxxx"

"14. A reference to illustration (c) of Section 127 of the Indian Contract Act may be made. It reads:

"A. sells and delivers goods to B. C. afterwards, without consideration, agrees to pay for them in default of B. The agreement is void."

From this illustration, I feel fortified in my conclusion that anything done or any promise made for the benefit of the principal debtor must be contemporaneous to the surety's contract of guarantee in order to constitute consideration therefor. A contract of guarantee executed afterwards without any consideration is void. The case decided in AIR 1940 Oudh 346, however, lays down that the use of the word 'done' in Section 127 is indicative of the inference that past benefit to the principal debtor can be good consideration. With great respect, I regret, I am unable to agree with the interpretation put oy their Lordships in this judgment. It is giving the word 'done' an unnatural meaning. In Kali Charan's case, AIR 1918 PC 226 the circumstances were that though the agreement was executed subsequently but it was in pursuance to an earlier agreement. Illustration (c) to Section 127 completely negatives a consideration which the Oudh Court has chosen to give to Section 127 of the Indian Contract Act. Apart from this the case originally set out by the plaintiff was that Ex. 2 had for its consideration cash. The Lt. Col. had challenged this fact in his written statement and the plaintiff changed his case in the course of trial. No consideration qua Harisingh passed from the plaintiff at the time of execution of Ex. 2 nor was anything done for his benefit on that day. The contract of guarantee, therefore, in my opinion, has been rightly held by the learned District Judge to be one without consideration."

3.10 It was further submitted that suggested issues VII and VIII pertain to the personal guarantees not being tripartite agreements. It was submitted that these issues are also questions of law. The determination of the issue as to whether an agreement or arrangement which is admittedly not a tripartite agreement between the lender, borrower and the guarantor, can at all be considered to be a guarantee, does not require the leading of any evidence, but can be decided on the appreciation of the relevant documents, of law and upon consideration of the judgments relied upon by the parties, making it a question of law.

3.11 Adverting to suggested issues IX and XII, which relate to the amount not having become due and therefore, the demand made by the banks being premature, it was submitted that these issues for their adjudication, only need reading and appreciation of the documents produced by the banks themselves and no leading of evidence is required.

3.12 Reference was made to article 2.12 of the COR Facility Agreement to submit that the same contemplates that the repayment obligation is to be in accordance with the repayment schedule set forth in Schedule IV. It was submitted that in terms of Schedule IV, a tentative repayment schedule is contemplated therein, but it ultimately provides that the repayment schedule is tentative and shall be fixed based on COD to be fixed at the time of project completion. The COD or Commercial Operation Date is defined as the date on which the project commences the commercial operation and the LIE has delivered the completion certificate. The project means the 2 x 150 MW Thermal Power Projects at MIDC, Nardana,

Taluka Sindkheda, Dhule District, in the State of Maharashtra. It was submitted that admittedly, the project has not commenced commercial operations and consequently, there is no project completion. “Completion Certificate” which means the certificate to be issued by the lenders’ independent engineer for the project evidencing completion of the project as per the envisaged project parameters has not been issued. It was submitted that the COR Facility Agreement defines “Due Date” and accordingly, the due date for the alleged principal outstanding has not yet fallen due. It was submitted that therefore, in terms of COR Facility Agreement, no part of the principal repayment is/was due for payment. Reference was made to various other clauses of the COR Facility Agreement, to submit that in the absence of any valid and legal demand for the recall of COR Facility, no question of any claims under the purported personal guarantee arises.

3.13 Reliance was placed upon the decision of the Supreme Court in ***Raghwendra Sharan Singh v. Ram Prasanna Singh***, *2019 SCC Online 372*, wherein the trial court had rejected the application submitted by the original defendant to reject the plaint in exercise of powers under Order 7 rule 11(d) of the Code of Civil Procedure. Insofar as the observations made by the trial court as well as the High Court that the question with respect to the limitation is a mixed question of law and facts, which can be decided only after the parties lead the evidence is concerned, the Supreme Court held that as observed in the cases of *Sham Lal alias Kuldip v. Sanjeev Kumar, (2009) 12 SCC 454, N.V. Srinivas Murthy v. Mariyamma, (2005) 5 SCC 548* as well as in *Ram Prakash Gupta v. Rajiv Kumar Gupta, (2007) 10 SCC 59*, considering

the averments in the plaint if it is found that the suit is clearly barred by law of limitation, the same can be rejected in exercise of powers under Order 7 rule 11(d) of the CPC.

3.14 Reliance was also placed upon the decision of the Calcutta High Court in the case of ***Arun Bharat Ram and others v. Punjab National Bank***, *MANU/WB/0989/2018*, wherein the court held that the Debts Recovery Tribunal did not commit any error of jurisdiction in allowing the application under section 14 of the Limitation Act. Reliance was also placed upon the decision of the Orissa High Court in the case of ***Sri Bireswar Das Mohapatra and another v. State Bank of India***, *MANU/OR/0224/2006*, wherein the court held that the DRT proceedings cannot proceed ignoring the winding up proceeding initiated on the recommendations of BIFR given under section 20 of SICA. The court accordingly directed the DRT to decide whether, in view of the objections taken before it, the proceedings can continue despite the pendency of winding up proceedings before the High Court.

3.15 In conclusion, the learned counsel submitted that these arguments do not need any evidence to be led and hence, the issues be directed to be decided as preliminary issues.

4. Opposing the petition, Mr. Gaurav Mohanty, learned advocate for M/s Shardul Amarchand Mangaldas & Co., learned advocates for the respondent banks, submitted that the Act does not contain any provisions requiring the Debts Recovery Tribunal to frame and decide preliminary issues of law separately before dealing with issues of facts and that the Act

does not contemplate the consideration of preliminary issues of law separately before dealing with the issues of facts. According to the learned advocate, section 19 of the Act lays down exhaustively the procedure to be followed by the Debts Recovery Tribunal following the receipt of an application under the Act, which does not contemplate the consideration of preliminary issues of law without consideration of facts. The narrow discretion to frame and try preliminary issues is only conferred on a civil court under Order XIV rule 2 of the Code, wherein the issues both of law and of facts arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. However, the Debts Recovery Tribunal has not been vested with the discretionary power of a civil court under Order XIV rule 2 of the Code to frame preliminary issues of law.

4.1 Reference was made to sub-section (1) of section 22 of the Act, to submit that the same clearly stipulates that the provisions of the Code are not applicable to the procedure before the Debts Recovery Tribunal in an application under that Act. As such, the provisions for framing of preliminary issues under Order XIV rule 2 of the Code are not applicable to the Debts Recovery Tribunal under the Act. The only stipulation by the legislature to the Debts Recovery Tribunal is to be guided by the principles of natural justice. It was submitted that the right available to a litigant to have an issue decided as a preliminary issue of pure law, is a mere procedural right afforded by the Code and cannot be

demanded as of a right by a litigant if the statute does not explicitly provide for it. It was urged that it is settled law that every litigant has a vested right in substantive law, but no such right exists in procedural law.

4.2 The learned advocate next submitted that while the provisions of the Code are not applicable to the Debts Recovery Tribunal under the Act, the legislature has vested the Debts Recovery Tribunal with the power of a civil court only in specific cases of procedure like receiving evidence, reviewing decisions, discovery, summons, etc., as set out in sub-section (2) of section 22 of the Act. However, none of these procedural powers granted to the Debts Recovery Tribunal include the power to frame and decide preliminary issues of law first.

4.3 It was contended that the procedure contemplated under section 19 of the Act is a summary procedure envisaged for expedited resolution of recovery cases to allow banks to recover enormous amounts of public money which used to be earlier held up in protracted litigations. Therefore, if the provision for framing of preliminary issues is read into section 22 of the Act, the entire object and purpose of the Act will stand defeated. It was argued that on a conjoint reading of section 19 and section 22 of the Act, it is clear that the Debts Recovery Tribunal has not been vested with the discretionary power of a civil court under the Code to frame and try issues of law first before trying issues of fact. It was submitted that in view of the exhaustive provisions of the Act, it is clear that the Act does not contain any provisions requiring the Tribunal to frame and decide preliminary issues of law separately before

dealing with the issues of fact.

4.4 Next it was submitted that without prejudice to the contention that the Tribunal is not empowered to decide issues as preliminary issues, even otherwise the proposed issues are not pure questions of law, but are merely questions of fact and cannot be termed as preliminary issues of law as contemplated under Order XIV rule 2 of the Code. It was submitted that both the Debts Recovery Tribunal as well as the Debts Recovery Appellate Tribunal have rightly held that the proposed issues are mixed questions of law and fact. It was submitted that a pure question of law is one where the defendants avers that even assuming the truth of all the allegations in the pleadings, the plaint is not maintainable at law, which is not so in the present case. It was submitted that even if Order XIV rule 2 of the Code is applicable, the issues can be decided as preliminary issues provided the same relate to (a) the jurisdiction of the court, or (b) a bar to the suit is created by any law for the time being in force. Reference was made to the decision of this court in the case of ***Saurashtra Cement and Chemicals Industries Ltd. and others v. Esma Industries P. Ltd. and others***, *(1989) 30(2) GLR 1263*, wherein the court held thus:

> *"19. After the amendment in this provision in 1976, it becomes clear that the Legislature has frowned upon trial of suits piecemeal. The reason is obvious. If, on a preliminary issue, the suit is tried and if the issue is decided one way or the other, it would lead to further proceedings by way of appeal or revision. A number of years would lapse and ultimately when the highest court which is approached in the hierarchy decides the matter one way or the other, a stage may be reached where the suit has to be tried further and that would involve a lot*

of delay and the parties would get completely exhausted and exasperated by the passage of time underlying such piecemeal trial of suits. With a view to avoiding such delay and exasperation to the litigant public, this provision of Order 14, rule 2 in the amended from has been brought in the statute book. Consequently, the underlying principle of this provision is a laudable and beneficial one. As per this provision, it is indicated by the Legislature that suits must be tried as a whole on all issues, save and except in the following exceptional circumstances, wherein trial of preliminary issues can be permitted:

(1) That the concerned issue must be a pure issue of law, meaning thereby, no question of leading evidence to prove or disprove the issue would be countenanced. Even a mixed issue of law and fact cannot be tried as preliminary issue ;

(2) Even as a pure issue of law, a preliminary issue can be framed and tried only if it touches upon the question of jurisdiction of the court ; or

(3) Such pure issue of law raises the question about proceedings being barred by any provision of law."

4.5 It was submitted that the preliminary issues of lack of consideration for a contract, *locus standi* of the lenders, etc., constitute an investigation into the relevant clauses of the personal guarantees and *ipso facto* are not pure questions of law. It was submitted that the concept of pure question of law envisaged by the mandate of Order XIV rule 2 of the Code is borrowed from the English law concept of demurer, whereas in the present case the concept of demurrer would not be applicable as the petitioners have not accepted the averments made by the respondents in the original application. Reliance was placed upon the decision of the Rajasthan High Court in

the case of ***Prithvi Raj v. Munnalal***, *1957 RLW 323*, wherein the court held thus:

> *"7. The next question, which immediately arises, is whether issues of jurisdiction are issues of law pure and simple. In this connection, we may refer to the observations of Beaumont C. J. in Sowkabai vs. Tukojirao Holkar (1). The learned Chief Justice was considering the scope of rule 2 of O. XIV, and observed as follows -*
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> > *That R.2 seems to be intended to introduce the practice which used to be known in England, before the passing of the Judicature Act, 1873, as "demurrer". That means that the defendant may say that, assuming the truth of all the allegations in the statement of claim, nevertheless the statement of claim in point of law discloses no cause of action, and therefore, the suit should be dismissed.*
> >
> > *It is this kind of issue of law which is enjoined under O. XIV, r.2 to be decided as a preliminary issue."*
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> *"9. If we may say so with respect, this is exactly the situation with an issue of jurisdiction. Where there is no dispute between the parties as to the facts, and the facts alleged in the plaint are accepted as correct by the defendant, and he still raises the question as to the court's jurisdiction, the issue of jurisdiction so arising is an issue of law. But if the plaintiff makes an allegation that the court has jurisdiction, say for example on the ground that the defendant was resident within the jurisdiction of the court even though the cause of action arose elsewhere, and the defendant objects to the jurisdiction on the ground that he is not the resident within the jurisdiction, a question of jurisdiction certainly arises, but it is not a question of law pure and simple. There is first to be a determination of a question of face, namely, the residence of the defendant, and then only can it be decided whether the court has territorial jurisdiction or not. In such a case, the question of jurisdiction is not a question of law within the meaning of O. XLV, r.2, and the court is not bound under that provision to decide it as a preliminary issue on the request of any of the parties. Of course, this does not*

mean that the court may not decide it as a preliminary issue if it feels that it can dispose of the suit by deciding that issue, where it feels that prima facie the chances are that it will hold that the court had no jurisdiction. But generally speaking, where mixed issues of law and fact arise in an issue relating to jurisdiction, it would, in our opinion, be not improper for the court to say that it will decide the question of jurisdiction also along with other issue in the case."

4.6 It was submitted that the petitioners, namely, the personal guarantors have on numerous occasions in their petition, pleadings in the original application, written submissions as well as oral arguments during the course of hearing of the writ petition, submitted that the lenders have made an incorrect statement in the original application that there are personal guarantees executed by the personal guarantors in favour of the lenders. It was submitted that this is the first critical point of dispute on which the entire axle of the defence of the personal guarantors rest. Therefore, the "facts alleged in the plaint" are not "accepted as correct by the defendant" in terms of the aforesaid decision of the Rajasthan High Court.

4.7 Adverting to the individual issues raised by the petitioners as preliminary issues, it was submitted that the issue whether the invocation of purported personal guarantees by the lenders is maintainable when the purported personal guarantees are not issued in favour of the lenders is concerned, while the petitioners submit that there exists no personal guarantee in favour of the lenders; the lenders submit that the personal guarantees have been executed in their favour. It was submitted that this is, therefore, a mixed question of fact and law as it requires examination of the

personal guarantees to determine whether the personal guarantee was issued in favour of the lender.

4.8 As regards the second issue as to whether the lenders have any right to sue on the purported personal guarantees, it was submitted that the petitioners have submitted that only the security trustee is entitled to initiate action under the personal guarantee; whereas the respondents' contention is that the personal guarantees empower the lenders to initiate action under the personal guarantee, and therefore, this is a question of fact as it requires the examination of the relevant clauses of the personal guarantees.

4.9 It was submitted that issues V and VI relate to the personal guarantees not being backed by any consideration as required under section 25 of the Indian Contract Act, 1872. While the petitioners have submitted that the personal guarantees having been executed after the COR Facility Agreement are void for lack of consideration; it is the case of the respondents that both the COR Facility Agreement and the personal guarantees were executed on the same day and further, that the Indian Contract Act covers the past consideration. It was submitted that therefore, these are mixed questions of fact and law as the same require examination of the personal guarantees to identify the consideration.

4.10 As regards the issues VII and VIII which pertain to whether the purported personal guarantees, not being a tripartite arrangement or agreements, be at all considered as guarantees, and whether the purported personal guarantees,

not being a guarantee as contemplated under section 126, would at all come within the provision of section 127 of the Indian Contract Act, 1872. It was submitted that both these issues raise mixed questions of law and fact as the same require examination and confirmation by the Tribunal that the personal guarantee is not a guarantee which cannot be carried out without leading evidence.

4.11 Insofar as issues IX, X, XI and XII, which relate to the "due date" as well as whether the amount claimed by the respondents against the petitioners is at all due in the absence of the commencement of commercial operation of the project, and whether the invocation of personal guarantees is premature; it was submitted that according to the petitioners, the amounts due under the COR Facility Agreement has not become due and payable yet; whereas the respondents are disputing such facts, and hence, these are basically questions of fact requiring examination of the relevant clauses of the personal guarantees.

4.12 It was submitted that therefore, even if it is assumed that the petitioners/personal guarantors have indeed raised pertinent questions of law, all the alleged preliminary issues of law raised by the personal guarantors are inextricably linked to issues of fact in the present original application and must be tried together by the Debts Recovery Tribunal.

4.13 To bolster his submissions, the learned advocate placed reliance upon the decision of the Supreme Court in ***Ramesh B. Desai v. Bipin Vadilal Mehta***, *(2006) 5 SCC*

638, wherein the court held thus:

> ***"13.*** *Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497, and it was held as under:*
>
> > *"Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit."*
>
> *Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the abovequoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."*

4.14 It was submitted that therefore, a preliminary trial of the issues of law raised before the Debts Recovery Tribunal

without appreciation of the facts would result in a lopsided trial of the application before the Debts Recovery Tribunal. The Debts Recovery Tribunal may have to make factual determinations while determining the alleged preliminary issues raised by the personal guarantors, and as such, the matters can be suitably heard at the stage of final hearing. It was submitted that the alleged preliminary issues of law raised by the petitioners, viz., (a) privity of contract between the parties; (b) invalidity of the personal guarantees due to alleged lack of consideration; (c) premature claim of the lenders under the personal guarantees, and (d) deficit in court fees, are not questions having any bearing on the jurisdiction of the Tribunal that can be determined without examination of evidence.

4.15 It was submitted that the issue of privity of contract has categorically been denounced as a preliminary issue of pure law. In this regard, reliance was placed upon the decision of the Delhi High Court in the case of ***Utair Aviation v. Jagson Airlines Limited***, *2012 (129) DRJ 630*, wherein the court held thus:

> *"28. A reading of the aforementioned judicial opinion coupled with well recognized exceptions that the privity can be created by virtue of conduct acknowledgment and admission, it becomes clear that any case where one party is made aware about the relationship of the other party with that of a stranger and the said party proceeds to contract out only with other party in question, knowing fully well the participation and role of the said stranger, further, it corresponds with the said third party/ stranger, and conduct suggests kind of relationship, then there can be said to be a nexus or a privity which can be said to have been created by virtue of conduct. The said question essentially becomes a*

question of fact and basing upon the said fact finding, the law has to be necessarily applied as to whether the said person is a complete stranger to a contract or whether the privity can be said to have been created by way of conduct.

29. Therefore, the said question relating to privity having been created by virtue of conduct, acknowledgment and admission becomes a mixed question of fact and law as it requires a fact finding as well as due application of law. Furthermore, once the judicial opinion exists that courts are entitled to do justice when all are before the court, then it is unwise to reject the plaint at the threshold, considering the question of privity of contract as a pure question of law when actually the conduct of the parties and the attending circumstances reveal otherwise."

4.16 It was submitted that in respect of the preliminary issues raised by the petitioners, the personal guarantees may have certain features and may have been executed in certain circumstances which appear to be interpreted differently by the petitioners and the respondents. The allegations on validity of the personal guarantees justify a close scrutiny before the allegation by the petitioners can be accepted. Therefore, the preliminary issues of law cannot be tried before detailed examination of the facts.

4.17 Reliance was placed upon the decision of the Delhi High Court in the case of ***Jagdamba Industries v. Sh. Krishan Pratap***, *ILR (2011) 2 Delhi 115*, wherein the court has held thus:

"6. ... ... Thus the impugned judgment has for the purpose of deciding the application under Order 7 Rule 11 CPC referred to and relied upon documentary evidence to allow the application under Order 7 Rule 11

CPC though the settled legal position is that for deciding either a preliminary issue under Order 14 Rule 2 CPC or an application under Order 7 Rule 11 CPC only the averments in the plaint can be looked into and disputed questions of facts cannot be decided by reference to documentary evidence. Surely a disputed question of fact cannot be decided in a summary manner by reference to documentary evidence without allowing parties to lead complete evidence of all its witnesses, and, disputed questions of facts cannot be the subject matter of a preliminary issue as held by the Supreme Court in the case of Ramesh B. Desai (supra).”

4.18 Reliance was also placed upon an unreported decision of this court in the case of ***Babubhai Ushmanbhai Mandali v. Mehbubbhai Rasulbhai Mandali*** rendered on 19.9.2018 in Second Appeal No.236 of 2018, wherein the court held thus:

“38. Only an issue of law can be decided as a preliminary only where it is such that its decision does not necessitate investigation into the facts and it relates either to the jurisdiction of the court or to the suit being barred under any prevailing law, and that, in the opinion of the court the decision of the issue will result in the decision of the whole or a part of the suit. The discretion in this regard must always be exercised on the basis of sound judicial principles. It may, however, be made clear that even if an issue of law can be decided as a preliminary issue as aforesaid, the court is not always bound to decide it as a preliminary issue and can, in its discretion, postpone its decision also along with other issues, whether of law or fact. The whole purpose behind the amended provision is to restrict piecemeal decision and unnecessary multi-tier appeals at intermediate stages on preliminary issue alone and thus avoid procrastination of litigation. The new provision justly aims at abridging the proceeding in the suit rather than permitting prolongation thereof.”

4.19 It was submitted that when a judicial verdict on the

questions of law lies on the basis of a consideration of all the features and circumstances surrounding the execution of the personal guarantees, it cannot be said that such issues can be tried as preliminary issues and the entire original application can be disposed of without recording any evidence.

4.20 It was further submitted that the proceedings of the underlying original application are already at an advanced stage where the matter is part-heard before the Debts Recovery Tribunal. The respondents have duly filed their evidence, which after inspection by the petitioners has already been taken on record by the Debts Recovery Tribunal.

4.21 Reference was made to an unreported decision of the Calcutta High Court in the case of ***Sri Vishal Bardhan Jayaswal v. Sri Samar Singh Jayaswal***, rendered on 28.4.2011 in C.O. No.1175 of 2011, wherein the court held thus:

> *"32. Here, admittedly the opposite party has not raised an objection that the revocation case is barred by any law. The objection is one questioning the jurisdiction of the Court to hear the revocation case at the instance of parties who have no standing in law to seek revocation of the probate granted in favour of the opposite party. It is found that the Court has received the said deeds from the opposite party in its attempt to decide the preliminary issue. The said deeds have been filed by the opposite party to negate the claim of the petitioners that coparcenary properties were bequeath and to support his claim that the testator bequeath his self-acquired properties. Once documentary evidence is received, it would be obligatory for the party relying on the same to prove it. An investigation of facts would thereafter follow. It does not, therefore, remain within the realm of a pure question of law and partakes the*

character of a mixed question of fact and law. Such mixed question of law and fact cannot be decided as a preliminary issue."

"35. On consideration of the facts of this case, I consider it undesirable to direct the trial Court to try the revocation case piecemeal for it might protract litigation and, without investigation of facts, the issue raised by the petitioners cannot be decided. In the result, the order dated 24th February, 2011 and the impugned 12 order stand quashed. The learned Judge shall try and decide all issues that might be framed for the purpose of a proper and just decision on the application for revocation."

4.22 It was further submitted that the petitioners have prayed for the Debts Recovery Tribunal to use powers of a civil court under Order XIV rule 2 of the Code on the ground that grave prejudice would be caused to them if they were to appeal the order before the Debts Recovery Appellate Tribunal and pay the required pre-deposit under section 21 of the Act, however, such submission is flawed on the following grounds:

(1) A party cannot be allowed to use the possibility of an appeal in the future to claim prejudice as it tantamounts to anticipating an order against the party before the forum has had any opportunity to deal with the issues of fact and law involved in the case.

(2) A party cannot be allowed to use the condition to deposit under section 21 of the Act as an excuse to compel the Debts Recovery Tribunal to hear the alleged preliminary issues first. Any alleged hardship caused due to extant provisions cannot be used as an excuse or a pressure tactic to obtain relief from a court.

(3) It is settled law that the requirement of pre-deposit under the Act was enacted by the legislature in its full wisdom to prevent defaulting guarantors like the personal guarantors to frustrate the proceedings before the Debts Recovery Tribunal. If the personal guarantors are able to demonstrate that there is indeed any financial hardship on it for pre-depositing the amount, they can make such representation before the Debts Recovery Appellate Tribunal which has the power to waive the pre-deposit amount.

4.23 Lastly, it was submitted that even if the issues of law raised by the petitioners can be decided as preliminary issues before proceeding with the determination of issues of fact, the Debts Recovery Tribunal is not bound to do the same and can, in its discretion, postpone its decision on the issues, whether of law or fact or both. It was submitted that the petitioners are attempting to delay the final hearing of the original application by filing multiple proceedings with regard to the same issues. It was submitted that in view of the dilatory tactics adopted by the petitioners to frustrate the proceedings, this court may not exercise its discretion to allow the relief claimed by the petitioners in the writ petition.

4.24 Dealing with the decisions relied upon by the learned advocate for the petitioners, it was submitted that insofar as the decision of the Supreme Court in ***Raghwendra Sharan Singh v. Ram Prasanna Singh*** (supra), the Supreme Court had directed for rejection of plaint under Order VII rule 1 of the Code upon the touchstone of limitation. It was submitted that the requirements under Order VII rule 1 of the

Code, which require disclosure of cause of action are starkly different from the requirement of a pure question of law touching upon the jurisdiction of a court under Order XIV rule 2 of the Code. It was submitted that by virtue of section 24 of the Act, the provisions of the Limitation Act are applicable to proceedings before the Debts Recovery Tribunal and as such, this decision has no relevance to the present case.

4.25 As regards the decision of the Supreme Court in ***ITC Limited v. Debts Recovery Appellate Tribunal*** (supra), it was submitted that the Supreme Court while setting aside the orders of the High Court, Debts Recovery Appellate Tribunal and Debts Recovery Tribunal, rejected the plaint on the ground that no cause of action is disclosed in the plaint in terms of Order VII rule 1 of the Code. It was submitted that the requirements under Order VII rule 1 of the Code which require disclosure of cause of action are starkly different from the requirement of a pure question of law touching upon the jurisdiction of a court under Order XIV rule 2 of the Code. It was further pointed out that in the facts of the said case, the case was instituted before the Act came into force and was subsequently transferred to the Debts Recovery Tribunal. In terms of section 31(2)(b) of the Act, transfer cases continued from where they were in the civil court before the transfer took place. As such, all the provisions of the Code applicable to a plaint in the Code become applicable to the transferred application before the Debts Recovery Tribunal.

4.26 Dealing with the decision of the Supreme Court in ***Industrial Credit and Investment Corporation of India Ltd. v. Grapco Industries Ltd.*** (supra), it was submitted that

the case dealt with the Debts Recovery Tribunal invoking powers of section 22 of the Act to grant injunction on *ex-parte* basis. It was submitted that firstly, section 22(2)(f) of the Act expressly allows the Debts Recovery Tribunal to proceed on *ex-parte* basis, whereas section 22 contains no provision for framing of preliminary issues of law. Secondly, granting *ex-parte* injunction is the power of the court based on equities and consideration of grave harm and prejudice to the applicant, which puts it within the realm of natural justice. This is a substantive right accrued in favour of a litigant under the Code. It was submitted that the Debts Recovery Tribunal is permitted by the Act to exercise powers of a civil court when it comes to following the principles of natural justice. It was submitted that the power of a civil court to frame and decide preliminary issues of law is a procedural right under the Code, and the same was not covered by this decision.

4.27 As regards the decision of the Orissa High Court in ***Sri Bireswar Das Mohapatra and another v. State Bank of India*** (supra), it was submitted that in the facts of the said case, the Debts Recovery Tribunal was required to decide the maintainability of the application at the first instance in light of the bar under Sick Industrial Companies (Special Provisions) Act, 1985. It was submitted that the said decision dealt with a bar to the jurisdiction of the Debts Recovery Tribunal by virtue of SICA. Order XIV rule 2 of the Code also stipulates that bar to the jurisdiction of a court under any statute has to be decided first. It was submitted that in the facts of the present case, the petitioners have not alleged any bar to the jurisdiction of the Debts Recovery Tribunal by virtue of any other statute and hence, the said decision would have no applicability to the

facts of the present case.

4.28 In conclusion, it was urged that that the Debts Recovery Tribunal has no power under the Act akin to the power of a civil court under Order XIV rule 2 of the Code to frame and decide preliminary issues of law first before deciding the case on merits. Alternatively, it was submitted that the purported issues raised by the petitioners are not pure issues of law as contemplated by Order XIV rule 2 of the Code to be decided as preliminary issues as they require fact finding based on investigation of documents. It was, accordingly, urged that the petition being devoid of merit, deserves to be dismissed.

5. In rejoinder, Mr. Soparkar, learned counsel for the petitioners submitted that the respondent Banks being only beneficiaries of the personal guarantees have no right to maintain the proceeding without joining the trustee. It was contended that all the issues raised by way of preliminary issues can be decided on the basis of admitted documents and cannot be relegated to be decided at a later stage.

5.1 Dealing with the decisions on which reliance has been placed by the learned advocate for the respondents, it was submitted that insofar as the decision of this court in ***Saurashtra Cement and Chemicals Industries Ltd. and others v. Esma Industries P. Ltd. and others*** (supra) is concerned, the same issue does not in any manner support the case of the respondents, inasmuch as it has been held therein that the concerned issue must be a pure issue of law, meaning thereby, no question of leading evidence to prove or

disprove the issue would be countenanced. It is submitted that it is exactly the case of the petitioners that the present case relates only to pure questions of law wherein no evidence is required to be adduced.

5.2 As regards the decision of the Supreme Court in ***Ramesh B. Desai v. Bipin Vadilal Mehta*** (supra) as well as the decision of the Rajasthan High Court in ***Prithvi Raj v. Munnalal*** (supra), it was submitted that in fact, the petitioners are saying exactly what is stated in paragraph 14 of the Supreme Court decision and paragraph 9 of the High Court decision; therefore, the said decisions on the contrary help the case of the petitioners.

5.3 As regards the decision of the Delhi High Court in ***Utair Aviation v. Jagson Airlines Limited*** (supra), it was submitted that the question of trustees versus beneficiary was not at all an issue in that present case. Moreover, the findings recorded in paragraph 19 of the said decision do not deal with the provisions of the Indian Trusts Act and hence, no reliance can be placed upon the said decision.

5.4 Dealing with the decision of the Delhi High Court in ***Jagdamba Industries v. Sh. Krishan Pratap*** (supra), it was submitted that in that case, the trial court had decided the preliminary issue not by taking the averments in the plaint as correct, but the judgment had been passed by reference to the documents filed by the respective parties.

5.5 As regards the decision of this court in ***Babubhai Ushmanbhai Mandali v. Mehbubbhai Rasulbhai Mandali***

(supra), it was submitted that if the issue is decided along with the main issue, unlike an appeal under the Code of Civil Procedure where there is no condition precedent to pre-deposit, in an appeal before the Debts Recovery Tribunal as a condition precedent, the appellant will have to deposit 50% of the amount and not less than 25%. Thus, the petitioners will be non-suited from filing an appeal if the preliminary issues are decided along with the other issues.

6. In the backdrop of the facts and contentions noted hereinabove, the questions that arise for consideration are:

(1) Whether the Debts Recovery Tribunal is empowered to decide issues as preliminary issues?

(2) Whether the issues proposed by the petitioners can be said to be pure questions of law?

(3) Whether even if the issues proposed by the petitioners are pure questions of law, can they be decided as preliminary issues as contemplated under Order XIV rule 2 of the Code?

7. Dealing with the first question as to whether the Debts Recovery Tribunal is empowered to decide issues as preliminary issues, it would be necessary to refer to the provisions of section 22 of the Act, which read as under:

> ***"22. Procedure and powers of the Tribunal and the Appellate Tribunal****.—(1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural*

justice and, subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or deciding it ex parte;

(g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;

(h) any other matter which may be prescribed.

(3) Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196, of the Indian Penal Code (45 of 1860) and the Tribunal or the Appellate Tribunal shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).”

7.1 On a plain reading of the above section, it is clear that sub-section (1) thereof specifically lays down that the Tribunal is not bound by the procedure laid down in the Code, but shall be guided by the principles of natural justice and subject to the other provisions of the Act and of any rules, shall have the power to regulate its own procedure. Sub-section (2) of section 22 of the Act circumscribes the applicability of the Code to the

matters enumerated thereunder. While the Code has *inter alia* been made applicable to review of decisions, dismissal of an application for default or deciding it *ex parte*; the provisions for rejection of plaint under Order VII rule 11 of the Code and framing of preliminary issues as contemplated under Order XIV rule 2 of the Code, have not been included.

7.2 Therefore, *prima facie*, the Act does not contemplate deciding issues as preliminary issues by the Debts Recovery Tribunal. This is more so considering the object behind the enactment, viz., setting up of Special Tribunals for recovery of dues of the banks and financial institutions by following a summary procedure. The intention of the legislature in enacting the Act is to provide for expeditious adjudication and recovery of debts due to banks and financial institutions; therefore, if all the provisions of the Code are applied to proceedings before the Debts Recovery Tribunal, it would defeat the very object of the enactment. Nonetheless, while ordinarily the Debts Recovery Tribunal should not decide issues as preliminary issues, in the opinion of this court, if the issue raised is one which goes to the root of the matter and strikes at the very jurisdiction of the Tribunal to decide the application, the court is of the view that the Tribunal is not barred from deciding such issue as a preliminary issue merely because section 22 of the Act does not specifically refer to the power to frame and decide preliminary issues. However, such power should be exercised sparingly, only in cases where the question of the jurisdiction of the Debts Recovery Tribunal to decide the case is involved.

8. Proceeding to the second question, viz., whether the

issues proposed by the petitioners can be said to be pure questions of law; the petitioners have suggested in all twelve preliminary issues, which read thus:

I. Whether adequate court fees have been paid on the Original Application No.551 of 2018 by the defendants?

II. Whether the Original Application No.551 of 2018 can at all be heard finally, without payment of adequate court fee?

III. Whether the invocation of purported personal guarantees by the defendants is maintainable, when the purported personal guarantee are not issued in favour of the defendants – original applicants – banks?

IV. Whether the defendants – original applicants – banks have any right to sue, on the purported personal guarantees?

V. Whether the purported personal guarantees are backed by any consideration, as required under section 25 of the Indian Contract Act, 1872?

VI. Whether in absence of consideration, can the purported personal guarantees be enforceable in law?

VII. Whether the purported personal guarantees, not being a tripartite arrangement or agreements, be at all considered as guarantees?

VIII. Whether the purported personal guarantees, not being a guarantee as contemplated under section 126, would at all

come within the provisions of section 127 of the Indian Contract Act, 1972?

IX. Whether "Due Date" can be a date before the project commences commercial operations?

X. Whether the amount claimed by the defendants – original applicants – banks against the borrower – Shirpur Power Pvt. Ltd. under the COR Facility Agreement, is at all due, in absence of the commencement of commercial operations of the project?

XI. Whether in absence of the purported debt being due, against the borrower Shirpur Power Pvt. Ltd. as also against the applicants herein, whether the invocation of the purported personal guarantee is premature?

XII. Whether, in absence of any amounts being either unpaid and/or outstanding, as a result of the project having yet to commence commercial operations, any acceleration of declaring the purported outstanding dues as being payable forthwith, is valid or legal?"

8.1 Insofar as Issues I and II which relate to deficit court fee and the question as to whether the applications can be heard without payment of adequate court fee are concerned, during the pendency of this petition, the respondent banks, with the permission of this court, have deposited the so called deficit court fees without prejudice to their right to contend that they are not liable to pay any additional court fee. The issues have, therefore, become academic and hence, it is not necessary to

delve any further into those issues. The court has therefore not referred to the submissions advanced by the learned counsel for the respective parties on these issues as well as the decisions cited in this regard.

8.2 Issues III and IV pertain to the maintainability of the applications at the instance of the respondent banks by invoking personal guarantees which are not issued in their favour and whether the respondents have any right to sue on the personal guarantees. In this regard, a perusal of the written submissions tendered by the respective parties makes it manifest that each of them relies upon various clauses of the admitted documents in support of its submissions. Evidently, therefore, the Debts Recovery Tribunal would be required to examine the various clauses of the admitted documents and give a finding of fact as to whether or not the respondent Banks have any right under the personal guarantees and after giving a finding one way or the other, would be required to decide the question of law as to whether the respondent banks have a right to sue on the basis of the personal guarantees and whether the application is maintainable at the instance of the respondent banks. Thus, these questions involve firstly ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on the application of the appropriate principles of law to the facts ascertained. While the questions as to whether the application under section 19 of the Act is maintainable or whether the respondent banks have the right to sue under the bank guarantees may be questions of law; however, for the purpose of deciding the same, firstly, the personal guarantees would be required to be examined and after ascertaining the

facts on the basis of the admitted documents, a finding of fact would be required to be given as to whether the personal guarantees were issued in favour of the lenders and thereafter, the question of law as regards the maintainability of the application and the right of the respondent banks to sue can be answered. Thus, these issues are not pure questions of law, but are mixed questions of fact and law.

8.3 Issues V, VI, VII and VIII are connected issues. While it is the case of the petitioners that the personal guarantees having been executed after the COR facility agreement are void for lack of consideration; it is the case of the respondents that both the COR facility agreement and the personal guarantees were executed on the same day and further that the Indian Contract Act covers past consideration. As to whether the personal guarantees are backed by any consideration as required under section 25 of the Contract Act, 1872 is again a mixed question of law and fact as it would first require examination of the documentary evidence, viz., the personal guarantees and the COR Facility Agreement to ascertain as to whether the personal guarantees are backed by any consideration and the nature of consideration; which are essentially findings of fact and based upon such findings, the question of law as to whether such consideration falls within the ambit of such expression as contemplated under section 25 of the Contract Act, 1872, would be required to be answered. Therefore, the said questions are also mixed questions of law and facts.

8.4 Insofar as the proposed issues regarding whether the personal guarantees can at all be considered as guarantees or

whether they would fall within the ambit of section 127 of the Indian Contract Act are concerned, as rightly submitted by the learned counsel for the respondents, the same would require examination of the personal guarantees and the Facility Agreements to identify the three parties, which again is a mixed question of law and facts as the Debts Recovery Tribunal would first require to give a finding of fact as to whether or not there is a tripartite agreement and based upon such finding, answer the question of law as to whether the personal guarantees can be considered to be guarantees and whether such guarantees fall within the ambit of section 127 of the Contract Act.

8.5 Insofar as the suggested issue IX is concerned which relates to the “due date”, the same is essentially a question of fact which can be decided upon examination of the documentary evidence and the relevant clauses thereof.

8.6 The suggested issues X, XI and XII, which raise questions as to whether the amount claimed by the respondents is at all due in the absence of the commencement of commercial operations of the Project; whether in the absence of the purported debt being due, whether the invocation of the purported personal guarantee is premature, and the issue as to whether in the absence of any amounts being either unpaid and/or outstanding, as a result of the project having yet to commence commercial operations, any acceleration of declaring the purported outstanding dues as being payable forthwith, is valid or legal; are in the opinion of this court essentially mixed questions of facts and law, which are required to be decided on the basis of the documents

produced on record.

8.7 The submission of the learned counsel for the petitioners that any question which can be decided on the basis of admitted documents which does not require leading of oral evidence, is a question of law, deserves to be stated only to be rejected as being contrary to the settled legal position as laid down by the Supreme Court in a catena of decisions. In ***Sree Meenakshi Mills Ltd. v. Commissioner of Income Tax***, *AIR 1957 SC 49 = (1957) 31 ITR 28*, the Supreme Court held thus:

> ***"8.*** *It was next contended for the appellant that inference from facts was a question of law, and that as the conclusion of the Tribunal that the intermediaries were dummies and that the sales standing in their names were sham and fictitious was itself an inference from several basic facts found by it was a question of law and that the appellant had the right under Section 66(1) to have the decision of the court on its correctness, and support for this position was sought from certain observations in Edwards (Inspector of Taxes) v. Bairstow, 1955-28 I.T.R. 579(B), Bomford v. Osborne, 1942 A.C. 14 : 1942-10 I.T.R. (Sup.) 27(C),Thomas, Fattorini (Lancashire) Ltd. v. Commissioners of Inland Revenue, 1942 A.C. 643 : 24 Tax. Cas328(D) Cameron v. Prendergast, 1940 A.C.549 : (1940) 8 I.T.R. (Sup.) 75(E) and The Gramophone and Typewriter Company, Ltd. v. Stanley, (1908) 2 K.B. 89 : 5 Tax.Cas.358(F). At the first blush, it does sound somewhat of a contradiction to speak of a finding of fact as one of law even when that finding is an inference from other facts, the accepted notion being that questions of law and of fact form antithesis to each other with spheres distinct and separate. When the Legislature in terms restricts the power of the court to review decisions of Tribunals to questions of law, it obviously intends to shut out questions of fact from its jurisdiction. If the contention of the appellant is correct, then a finding of fact must, when it is*

an inference from other facts, be open to consideration not only on the ground that it is not supported by evidence or perverse but also on the ground that it is not a proper conclusion to come to on the facts. In other words, the jurisdiction in such cases is in the nature of a regular appeal on the correctness of the finding. And as a contested assessment-and it is only such that will home up before the Tribunal under Section 33 of the Act, must involve disputed questions of fact, the determination of which must ultimately depend on findings on various preliminary or evidentiary facts, it must result that practically all orders of assessment of the Tribunal could be brought up for review before courts. That will, in effect, be to wipe out the distinction between questions of law and questions of fact and to defeat the policy underlying Sections 66(1) and 66(2). One should hesitate to accept a contention which leads to consequences so startling, unless there are compelling reasons therefor. Far from that being the case, both principle and authority are clearly adverse to it.

9. *Considering the question on principle, when there is a, question of fact to be determined it would usually be necessary first to decide disputed facts of a subsidiary or evidentiary character, and the ultimate conclusion will depend on an appreciation of these facts. Can it be said that a conclusion of fact, pure and simple, ceases to be that when it is in turn a deduction from other facts? What can be the principle on which a question of fact becomes transformed into a question of law when it involves an inference from basic facts? To take an illustration, let us suppose that in a suit on a promissory note the defence taken is one of denial of execution. The court finds that the disputed signature is unlike the admitted signatures of the defendant. It also finds that the attesting witnesses who speak to execution were not, in fact, present at the time of the alleged execution. On a consideration of these facts, the court comes to the conclusion that the promissory note is not genuine. Here, there are certain facts which are ascertained, and on these facts, a certain conclusion is reached which is also one of fact. Can it be contended that the finding that the promissory note is not*

genuine is one of law, as it is an inference from the primary facts found? Clearly not. But it is argued against this conclusion that it conflicts with the view expressed in several English decisions, some of them of the highest authority, that it is a question of law what inference is to be drawn from facts. The fallacy underlying this contention is that it fails to take into account the distinction which exists between a pure question of fact and a mixed question of law and fact, and that the observations relied on have reference to the latter and not to the former, which is what we are concerned with in this case.

10. *In between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained. To take an example, the question is whether the defendant has acquired title to the suit property by adverse possession. It is found on the facts that the land is a vacant site that the defendant is the owner of the adjacent residential house and that he has been drying grains and cloth and throwing rubbish on the plot. The further question that has to be determined is whether the above facts are sufficient to constitute adverse possession in law. Is the user continuous or fugitive? Is it as of right or permissive in character? Thus, for deciding whether the defendant has acquired title by adverse possession the court has firstly to find on an appreciation of the evidence what the facts are. So far, it is a question of fact. It has then to apply the principles of law regarding acquisition of title by adverse possession, and decide whether on the facts established by the evidence, the requirements of law are satisfied. That is a question of law. The ultimate finding on the issue must, therefore, be an inference to be drawn from the facts found, on the application of the proper principles of law, and it will be correct to say in such cases that an inference from facts is a question of law. In this respect, mixed questions of law and fact differ from pure questions of fact in which the final determination equally with the finding or ascertainment of basic facts does not involve the application of any*

principle of law. The proposition that an inference from facts is one of law will be correct in its application to mixed questions of law and fact but not to pure questions of fact.

8.8 Thus, the Supreme Court has held that in between the domains occupied respectively by questions of fact and of law, there is a large area in which both these questions run into each other, forming so to say, enclaves within each other. The questions that arise for determination in that area are known as mixed questions of law and fact. These questions involve first the ascertainment of facts on the evidence adduced and then a determination of the rights of the parties on an application of the appropriate principles of law to the facts ascertained. In the facts of the present case also, as discussed hereinabove, the issues suggested by the petitioners as preliminary issues, firstly involve the ascertainment of facts on the admitted documents produced on record by the respondent banks and then a determination of the rights of the parties on the application of the appropriate principles of law to the facts ascertained, which clearly fall within the ambit of mixed questions of law and facts.

8.9 It has also been contended by the learned counsel for the petitioners that having regard to the fact that the documentary evidence produced by the respondent banks (original applicants) has been admitted by the petitioners, the matter can proceed on a demurer. In this regard, the learned counsel placed reliance upon the observations made by the Supreme Court in paragraph 14 of its decision in the case of ***Ramesh B. Desai v. Bipin Vadilal Mehta*** (supra), wherein it has been held thus:

*"**14.** The plea raised by the contesting respondents is in fact a plea of demurrer. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further. In O.N. Bhatnagar v. Rukibai Narsindas, (1982) 2 SCC 244, it was held that the appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by Respondent 1 under Section 91(1) of the Act and those allegations must be taken to be true. In Roop Lal Sathi v. Nachhattar Singh Gill, (1982) 3 SCC 487, it was observed that a preliminary objection that the election petition is not in conformity with Section 83(1)(a) of the Act i.e. it does not contain the concise statement of the material facts on which the petitioner relies, is but a plea in the nature of demurrer and in deciding the question the Court has to assume for this purpose that the averments contained in the election petition are true. Reiterating the same principle in Abdulla Bin Ali v. Galappa, (1985) 2 SCC 54, it was said that there is no denying the fact that the allegations made in the plaint decide the forum and the jurisdiction does not depend upon the defence taken by the defendants in the written statement. In Exphar SA v. Eupharma Laboratories Ltd., (2004) 3 SCC 686, it was ruled that where an objection to the jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In this case the decision of the High Court on the point of the jurisdiction was set aside as the High Court had examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of the Delhi High Court and also that Respondent 2 did not carry out business within the jurisdiction of the said High Court. Following the same principle in Indian Mineral & Chemicals Co. v. Deutsche Bank, (2004) 12 SCC 376, it was observed*

that the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on the point of demurrer."

8.10 Examining the facts of the present case in the light of the above principles, in the present case, the petitioners do not admit that the averments made in the application under section 19 of the Act are true. However, they contend that because the petitioners (original defendants) admitted the documents on which the respondents (original applicants) rely, they are entitled to raise a plea in the nature of demurer. In the opinion of this court, such plea of demurer would be available to the petitioners if they had admitted the averments made in the application and the questions were required to be decided on the basis thereof. However, the preliminary issues proposed by the petitioners are based on the contents of the documents tendered by the respondents which the petitioners have admitted, and which both the parties seek to interpret differently, and not on the basis of the averments made in the application under section 19 of the Act. Under the circumstances, the petitioners are not entitled to the plea of demurer.

9. Adverting to the last preliminary issue as to whether even if the issues proposed by the petitioners are pure questions of law, can they be decided as preliminary issues as contemplated under Order XIV rule 2 of the Code.

9.1 In this regard, it may be apposite to refer to the decision of this court in ***Saurashtra Cement and Chemicals Industries Ltd. and others v. Esma Industries P. Ltd. and others*** (supra), wherein the scope and ambit of Order XIV

rule 2 of the Code has been delineated by this court. The court held that as per Order XIV rule 2 of the Code, suits must be tried as a whole on all issues, save and except in the following exceptional circumstances, wherein trial of preliminary issues can be permitted:

(1) That the concerned issue must be a pure issue of law, meaning thereby, no question of leading evidence to prove or disprove the issue would be countenanced. Even a mixed issue of law and fact cannot be tried as preliminary issue;

(2) Even as a pure issue of law, a preliminary issue can be framed and tried only if it touches upon the question of jurisdiction of the court; or

(3) Such pure issue of law raises the question about proceedings being barred by any provision of law.

9.2 In ***Ramesh B. Desai v. Bipin Vadilal Mehta*** (supra), on which reliance has been placed by the learned counsel for the respondents, the Supreme Court held thus:

> ***"13.*** *Sub-rule (2) of Order 14 Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in Major S.S. Khanna v. Brig. F.J. Dillon, AIR 1964 SC 497, and it was held as under:*
>
> > *"Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any*

part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the court; not to do so, especially when the decision on issues even of law depend upon the decision of issues of fact, would result in a lopsided trial of the suit."

Though there has been a slight amendment in the language of Order 14 Rule 2 CPC by the amending Act, 1976 but the principle enunciated in the abovequoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue."

9.3 In the facts of the present case, the petitioners have not contended that the Tribunal lacks the jurisdiction to entertain and decide the application under section 19 of the Act; the preliminary issues raised by the petitioners do not touch upon the jurisdiction of the Tribunal to decide the application made by the respondents; and it has also not been contended that the proceedings are barred by any provision of law. Under the circumstances, considering the nature of the issues raised by the petitioners as preliminary issues, even if the same were pure questions of law, the same would not fall within the scope and ambit of Order XIV rule 2 of the Code.

10. As can be seen from the order passed by the Debts

Recovery Tribunal, it has held that the proposed issues III to XII are not purely legal issues, but involve mixed questions of law and facts. According to the Debts Recovery Tribunal, once the issue involves a mixed question of law and fact, it cannot be treated as a preliminary issue. It has further found that the proposed issues show that the petitioners have put their entire defence in the preliminary issues.

11. The Debts Recovery Appellate Tribunal, in the impugned order dated 2.5.2019, has held that even under the Code of Civil Procedure, only issues relating to jurisdiction and the issue relating to bar of suit have to be decided as preliminary issues and in the present case, the objections raised are not in respect of those two points. The Debts Recovery Appellate Tribunal has dealt with all the decisions relied upon by the parties and has held that all the issues I to XII as referred to in the applications are not issues attracting jurisdiction or bar under any statute and all these issues are mixed questions of law and facts.

12. In the light of the above discussion, this court is in agreement with the view adopted by the Debts Recovery Appellate Tribunal and does not find any legal infirmity in the impugned order so as to warrant interference.

13. The petition, therefore, fails and is, accordingly, dismissed. Rule is discharged with no order as to costs. The interim relief granted earlier stands vacated.

14. At this stage, Mr. Tabish Samdani, learned advocate for M/s J. Sagar Associates, learned advocates for the petitioners,

has prayed that the operation of this judgment be stayed for a period of four weeks so as to enable the petitioners to approach the higher forum.

15. In this case, right from the inception the order of the Debts Recovery Appellate Tribunal has not been stayed and the petitioners were permitted to seek an adjournment before the Debt Recovery Tribunal during the pendency of the petition. It is only for a short period between the time when the petition was finally heard and the judgment was delivered that the proceedings of Original Application No.551 of 2018 had been stayed, whereas since in case of Original Application No.678 of 2018 no application for hearing of preliminary issues was pending, no interim protection was granted. In view of these facts, the court is not inclined to accept the request made on behalf of the petitioners. Such request is accordingly declined.

(HARSHA DEVANI, J)

(VIRESHKUMAR B. MAYANI, J)

B.U. PARMAR