**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**R/SPECIAL CIVIL APPLICATION NO. 15765 of 2019**

**FOR APPROVAL AND SIGNATURE:**

**HONOURABLE MR.JUSTICE BIREN VAISHNAV sd/-**

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

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MANGLESH CHAMPAKLAL GANDHI

Versus

ADITYA BIRLA FINANCE LTD.

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Appearance:
MS DEVANGI B SOLANKI(8888) for the Petitioner(s) No. 1,2,3
MR ADITYA J PANDYA(6991) for the Petitioner(s) No. 1,2,3
MR MIHIR THAKORE, SENIOR ADVOCATE WITH MR BOMI H SETHNA(5864) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE BIREN VAISHNAV**

**Date : 07/10/2019**

**CAV ORDER**

1. This petition under Article 226 of the Constitution of India has been filed by the petitioner with the following prayers :

> "9 (A). YOUR LORDSHIPS be pleased to issue writ of certiorari or any other writ, order or direction in the nature of certiorari and be pleased to quash and set aside the order dated 14.08.2019 passed by the ld. Debts Recovery Appellate Tribunal, Mumbai in Appeal No. 28 of 2019.
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> (B) During the Pendency and till final disposal of this petition, YOUR LORDSHIP be further pleased to stay the operation and implementation of the order 14.08.2019 passed by the ld. Debts Recovery Appellate Tribunal, Mumbai in Appeal No. 28 of 2019 and the respondent be further restrained from taking any securitisation actions."

2. By the impugned order dated 14.08.2019, the Debt Recovery Appellate Tribunal at Mumbai (for short 'DRAT') in an appeal filed by the respondent institution has set aside the order of the Debt Recovery Tribunal-II, Ahmedabad (for short 'DRT') dated 08.01.2019 in Securitization Application No. 7 of 2019 filed by the petitioner. By the order under challenge, the DRAT has held that once the Debt Recovery Tribunal clearly recorded a finding that the petitioners had failed to approach the Tribunal within 45 days, and since therefore there was a clear finding that the application is filed beyond 45 days, the DRT could not have passed the order dated 08.01.2019. According to DRAT, an application under Section 17 of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') has to be filed within 45 days and the DRT is not expressly conferred with the power to condone

delay and therefore the Presiding Officer was not right in entertaining the application on merits, when it was filed beyond the period of 45 days. Since the order of the DRT dated 08.01.2019 in favour of the petitioner was set aside by the DRAT, the petitioner is before this Court.

3. Facts in brief are as under:

3.1 The petitioners had availed finance from the respondent financial institution by mortgaging their properties. The petitioners were borrowers and co-borrowers respectively who had availed of the loans by mortgaging the title deeds of their immovable properties. On 05.04.2017, as the petitioners were not repaying the instalments, the respondent declared the petitioner's account as NPA.

3.1 A notice under Section 13(2) of the SARFAESI Act was issued on 25.04.2017 calling upon the petitioners to clear the outstanding amount of Rs.2,17,20,894/- payable by the petitioners in lieu of the loan availed by deposit of title deeds. On the petitioners failing to repay the amount, the respondent issued a notice on 11.07.2017 under Section 13(4) of the SARFAESI Act intimating the petitioner that they had taken symbolic possession of the property. An application under Section 14 of the SARFAESI Act was filed before the Magistrate and the Magistrate by an order dated 17.07.2018 passed an order authorizing the person to take possession of the mortgage properties. Pursuant to the said order, physical possession was taken over according to the petitioners, on 03.11.2018. On 30.11.2018, a sale notice was issued intimating the petitioner that the respondents intend to hold

an auction.

3.2 Being aggrieved by such action of the respondents, the petitioners approached the DRT by filing Securitization Application No. 7 of 2019. The prayers made in the Securitization Application filed by the petitioners read as under:

> "(a) YOUR LORDSHIPS MAY BE PLEASEDE TO hold that the sale notice of the Securitization and Reconstruction of the financial Assets and Enforcement of Security interest Act 2002 dated 30/11/2018 is to be stayed and consequently YOUR LORDSHIPS MAY BE PLEASED to quash and set aside the aforesaid notice.
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> (b) YOUR LORDSHIPS MAY BE PLEASEDE TO grant ad-interim relief by way of Status quo as on date to the applicants in regards to the said property till further orders.
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> (c) PENDING HEARING AND FINAL DISPOSAL OF THIS APPEAL, YOUR LORDSHIPS BE PLEASED to grant any such relief which may be necessary for protecting the interest of the parties as well as interest of the secured assets."

3.3 On hearing of this application so filed before the DRT, Ahmedabad, by an order dated 08.01.2019, the petitioners' Securitization application was allowed and the respondent financial institution was restrained from proceeding further on the auction conducted. The DRT directed that the respondent financial institution may proceed afresh in accordance with law to recover its dues further. Perusal of the order passed by the DRT would reveal that the basic contention of the petitioners before the DRT was that the

Bank had failed to serve any demand notice, that on seeing the postal receipts the notices were sent by one Mr. Vinay Patil and not by the respondent institution or its authorized officer and that there was non compliance of rules 8(1), 8(2), 8(6) & 8(7) of The Security Interest (Enforcement) Rules, 2002 (for short 'the Rules'). It was further submitted by the petitioners that it was the circle officer who took possession of the properties despite specific order of the District Magistrate. The Circle Officer was therefore not authorized because a delegate could not further delegate the powers as once the Mamlatdar was authorized he could not have further delegated the powers to the Circle Officer. It was on these grounds that the DRT held as under:

> "Although the applicants have failed to approach this Tribunal within 45 days but the glaring mistake in the process of the respondent bank since initiation is so vital flagrant and glaring which cannot be ignored. It will go into the root of case as only authorized officer can issue notice under SARFAESI Act, 2002 as persona-designeta and not in his individual name. So I feel judicious to quash the entire process of the respondent financial institution. The respondent financial institution is directed to **reverse** the possession as the same was taken by Circle Officer against the spirit of Securitization Act, 2002 and orders passed by Ld. District Magistrate.
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> I find prima facie case in favour of the applicants, so respondent financial institution is restrained from proceeding further on the auction conducted.
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> The respondent financial institution may proceed afresh in accordance with law to recover its dues. Further, the respondent not to debit expenses incurred on defective process in the account of the borrowers.

> Accordingly, the Securitization Application is disposed of finally.
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> Let copies of this order be supplied to the parties as per rules."

3.4 It is aggrieved by this order of the DRT the respondent filed appeal which was allowed.

4. Mr. Aditya Pandya, learned advocate for the petitioners has taken me through the orders of the DRT as well as the DRAT and the relevant provisions of the Securitization Act, 2002 (for short 'Securitization Act') and the Recovery of Debts and Bankruptcy Act, 1993. Inviting my attention to Section 17 of the SARFAESI Act, Mr. Pandya would contend that under Section 17 of the SARFAESI Act, the person is required to make an application. Further inviting my attention to the provisions of Section 17(7) of the SARFAESI Act, Mr. Pandya would contend that when any application is filed under Section 17 by any person aggrieved by any of the measures referred to in Section 13(4), the DRT shall dispose of such application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act (for short ' RDDB Act'). He then invited my attention to the provisions of Section 37 of the SARFAESI Act and submitted that in accordance with the provisions of Section 37, the provisions of SARFAESI Act or rules made thereunder are in addition to and not in derogation of the Acts listed therein or any other law for the time being in force. In his submission, therefore, the provisions of the Limitation Act would be applicable to the proceedings under Section 17 wherein an application is filed before the Tribunal.

4.1 Mr. Pandya then invited my attention to the provisions of Section 24 of the RDDB Act to submit that the provisions of the Limitation Act shall as far as may apply to an application made to the Tribunal. Therefore, according to Mr. Pandya, when in accordance with sub section 7 of Section 17, the application has to be disposed in accordance with the provisions of the RDDB Act, reading this together with Section 24 of the RDDB Act, the provisions of the Limitation Act would be applicable to an application under Section 17.

4.2 Mr. Pandya then invited my attention to the definition of the term “suit” as defined in Section 2(l) of the Limitation Act and submitted that as per the definition, “suit” does not include an appeal or an application. He then invited my attention to Section 29 of the Limitation Act to submit that in accordance with sub-section (2) of Section 29 where any special or local law prescribes for any suit, appeal or an application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 4 to 24 shall apply insofar as to the extent to which they are not expressly excluded by such special or local law. In his submission, since what is to be filed under Section 17 is an application, which is not a suit within the meaning of Section 2(l) of the Limitation Act and when there is an inclusive provision by virtue of a conjoint reading of Section 24 of the RDDB Act and Section 17 of the SARFAESI Act, Sections 4 to 24 of the Limitation Act would apply to the provisions of the SARFEASI Act and an application under Section 17 made thereunder and therefore in accordance with the provisions of Section 5 of the Limitation Act, the Tribunal has powers to

condone the delay.

4.3 In support of his submissions that the Tribunal has power to condone the delay, Mr. Pandya relied on a decision of the Division Bench of this Court reported in the case of **Corporation Bank vs. Jayshreeben and Others reported in 2013 (1) GLH 628.** Extensive reading of the decision was made by Mr. Pandya. He invited my attention to the contention raised by the Bank wherein also it was specifically argued by the Bank that the provisions of Limitation Act especially Section 5 would not be applicable and having considered the entire scheme of the Act, the Division Bench of the Court held that even if the contention of the Bank is accepted that the Tribunal is not a Court as per the view taken in the case of Nahar Industrial Estate, it cannot be accepted that Section 5 of the Limitation Act would not apply to the proceedings under Section 17 of the SARFAESI Act. He would invite my attention to the relevant paragraphs of the decision of the Division Bench wherein it was categorically held that the provisions of the Limitation Act would apply to an application filed under Section 17 of the SARFAESI Act. Relevant paragraphs of the decision of the Division Bench which considered a decision of the Single Bench of that Court in the case of **Union of India vs. Chairperson, Debts Recovery Appellate Tribunal and Another [2010 (1) GLH 443]**. The Division Bench's relevant paragraph wherein the discussion has been made and it is held that the limitation act applies to Section 17 of the SARFAESI Act after considering the decisions of the Bombay High Court in the case of **UCO Bank vs. M/s. Kanji Manji Kothari and Others** and that of

Madras High Court in the case of **Ponnuswamy and Another vs. Debt Recovery Tribunal**, is reproduced as under:

> "13. Mr.Kavina, learned counsel appearing for the petitioner is right in contending that this Court (learned Single Judge) had no occasion to examine the matter in light of the examination of the matter as considered by the Calcutta High Court in the case of ***Akshat Commercial Private Limited*** (supra). He submitted that the decision of the Calcutta High Court is broadly based on the distinction that (i) the proceedings under section 17 of the Act are original in nature like suit, (ii) the proceedings are not before the Court, but are before the Tribunal and (iii) outer limit has been provided under section 17 of the Act for disposal of the matter. Therefore, he submitted that if the aforesaid three aspects are considered, different view than as taken by the learned Single Judge of this Court deserves to be taken similar to the view taken by the Calcutta High Court in the case of *Akshat Commercial Private Limited* (supra). Therefore, we need to examine as to the aspect of applicability of section 5 of the Limitation Act bearing in mind the aforesaid three aspects and whether any different view deserves to be taken or not.
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> **<u>On 12.12.2012 :</u>**
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> 14. As observed earlier, section 29 of the Limitation Act makes no distinction for any suit or appeal or application provided by the special or local law. It is true that as observed by the Apex Court in the case of ***Mardia Chemicals Limited and another Vs. Union of India and others***, reported at ***(2004) 4 SCC 311 = AIR 2004 SC 2371*** read with the judgment of the Apex Court in the case of ***M/s Transcore Vs. Union of India and another*** reported at ***AIR 2007 SC 712***, the proceedings under section 17 of the Act are not the appellate proceedings and may be termed as the original proceedings, but then also when the special law uses the language of the word appeal, it cannot be

said that the proceedings under section 17 of the Act can be termed as suit for the purpose of applicability of the Limitation Act if one goes by the plain and literal meaning of the language used by the Parliament in the Act. Even, if it is considered that literal meaning cannot be accepted and in view of the above referred decisions of the Apex Court in the case of *Mardia Chemicals Limited* (supra)and *M/s Transcore* (supra), the proceedings under section 17 of the Act may be termed as analogous to the proceedings of any suit, then also in our view, as per the language of section 29(2) read with the language used under the special law i.e. the Act in the present case, the distinction as considered by the Calcutta High Court in the case of *Akshat Commercial Private Limited* (supra) cannot be emphasized. At this stage, we may refer to the decision of the Apex Court in the case of ***The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma*** reported at ***AIR 1977 SC 282*** wherein the Apex Court had an occasion to consider applicability of the provisions of the Limitation Act in light of the provisions of section 16(3) of the Indian Telegraph Act enabling the owner or occupier of the property to demand compensation by preferring the petition to the District Judge. The Apex Court, in the said decision did observe, *inter alia*, at paragraph 18 as under.

> ....But it has to be an application to a court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when Court is closed and extension of prescribed period if applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period.

15. Therefore, even in case where the proceedings were provided by the special law for a petition which may be termed as original in nature rather at par with the suit, the Apex Court did observe for application of sections 4 and 5 of the Limitation Act in respect of the special law i.e. Indian Telegraph

Act read with the Indian Electricity Act. Hence, in our view, applicability of the Limitation Act by virtue of section 29(2) of the Limitation Act would not be different merely because if under any special law, the proceedings by way of an appeal or application has been provided which are in the nature of original proceedings.

16. The aforesaid is with the additional circumstance that under the RDDB Act whenever any application is made to the Tribunal by the bank or financial institution for recovery of the amount, it is to be termed as the original proceedings and section 24 of the RDDB Act expressly provides for the application of the provisions of the Limitation Act. Further, as recorded earlier, section 24 of the RDDB Act is imported under the Act for the proceedings under section 17 of the Act by virtue of the provisions of section 17(7) of the Act. This shows that the Parliament, while applying the provisions of the Limitation Act to the RDDB Act or to the present Act for the purpose of original proceedings, may be at par with the suit proceedings, made no distinction for any applicability of the provisions of the Limitation Act, but it can rather be said that consciously the provisions of the Limitation Act have been provided by the express provisions of section 24 of the RDDB Act which are to apply by virtue of the provisions of section 17(7) of the Act to the proceedings under section 17 of the Act.

17. Next aspect is that whether the proceedings before the Court or Tribunal would make any difference for applicability of the provisions of the Limitation Act or not. Again, if special law by express provisions provides for making of any application or appeal before any forum, it is to such forum the provisions of the Limitation Act would be applicable by virtue of the provisions of section 29(2) of the Limitation Act. Not only that, but the said aspect has been considered in the decision of this Court in the case of ***Mahesh Harilal Khamar Vs. B.N.Narasimhan*** reported at ***1982 GLH 700*** which has also been considered in the decision of this Court in the case of *Union Bank of India*

(supra) at paragraph 8 and relevant observations for ready reference, we may reproduce as under.

> .....As stated above, Section 3(1) of the Limitation Act itself provides that its operation is subject to Sections 4 to 24. Consequently, if the provisions of Sections 4 to 24 are made applicable, they would necessarily override and super-impose themselves upon the operation of Section 3(1) of the Limitation Act. In other words, the legislative mandate under Section 3(10 has to be read subject to Sections 4 to 24 following the said Section. Section 5 is necessarily included in the conspectus of Sections 4 to 24. It is trite to say that if section 3 applies to the first respondent acting under Section 27 (5) of the Act then it must follow as a necessary corollary that Section 5 of the Limitation Act would equally apply by virtue of Section 29(2) read with Section 3(1) of the Limitation Act. It cannot be urged for a moment that Section 3(1) of the Limitation Act would apply but Section 5 thereof would not apply to the first respondent's proceedings because he is not a court.
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> .....This is the logical effect of the applicability of Section 29(2) of the Limitation Act and hence the question whether the concerned authority is a court within the strict meaning of the term as envisaged by the Limitation itself, would necessarily pale into insignificance. (Emphasis supplied).

18. In any case, apart from the above aspect as observed in earlier paragraph, when section 24 of the RDDB Act is imported by virtue of section 17(7) of the Act for the purpose of applicability of the Limitation Act, we are of the view that whether the proceedings are before the Court or Tribunal would not make any difference for applicability of the

> Limitation Act by virtue of the provisions of section 29(2) of the Limitation Act if the forum is so provided by any such special law like the Act in the present case."

The submission of Mr. Pandya, therefore, was that the DRAT committed an error in holding that the DRT had no powers to condone the delay.

4.4 The second limb of the argument of Mr. Pandya was that in fact there was no delay in filing the application before the DRT inasmuch as the sale notice was dated 30.11.2018 and the application before the Tribunal was filed on 08.01.2019. Though the notice under Section 13(2) was given on 25.04.2017, notice for symbolic possession was given on 11.04.2017 and physical possession was taken on 03.11.2018, the DRT in the order passed in the original proceedings had categorically held that the entire procedure right from notice of possession dated 11.07.2017 was in violation of the provisions of The Securitization Interest (Enforcement) Rules, 2002 and therefore even if there was a delay, since the action itself was bad, the Tribunal committed no error in allowing the application.

4.5 Mr. Pandya invited my attention to a decision of the DRAT in which it has been held that even if the possession notice is not challenged, various steps which have been permitted to be taken by law for the realisation of the secured asset cannot be considered in isolation. According to Mr. Pandya, as held by the DRAT in the case of **Bank of Baroda vs. Veena Chandyoke and Another**, they constitute a chain, the sale after taking possession is an onwards step for the

ultimate culmination of the proceedings starting with the issuance of notice under Section 13(2) of the Act and therefore the right to challenge would come to an end only from the expiry of 45 days reckonable from the last stage concluded, in the present case that being 30.11.2018 and therefore there was in fact no delay in filing such an application and even otherwise therefore there was no delay.

4.6 In support of the findings of the DRT that the procedures under Rule 8(1), 8(2), 8(6) & 8(7) were not followed and the Tribunal was right in holding such, Mr. Pandya extensively invited my attention to page 67 of the paper book wherein notice under Section 13(2) is annexed. He would contend that if this notice is perused together with the postal receipt at page 69, it is signed by one Mr. Vinay Patil. He would further submit that the fact that when the name in the postal receipt shows Mr. Vinay Patil, it cannot be said that the notice under Section 13(2) was served by an authorized officer. Drawing my attention to a complaint filed with the postal authorities by the respondent Bank at page 77A, Mr. Pandya would contend that it was an admitted position on reading the complaint that it was after ten months, the notice under Section 13(2) was not delivered to the petitioners and therefore there was violation of the provisions of the Enforcement Rules.

4.7 According to Mr. Pandya, the DRT committed an error in relying on the decision in the case of **International Asset Reconstruction Co. Of India Ltd. Vs. Official Liquidator reported in (2017) 16 SCC 137**. He invited my attention to the relevant paragraphs of the decision and contended that the Apex Court in the said case considered Section 13 of the

RDDB Act and in context of such provisions opined that the provisions of Section 5 of the Limitation Act are not applicable and once the Division Bench of this Court had so held that the provisions of Limitation Act were applicable, what the Apex Court had considered was an application in context of Section 19 which was an original proceeding in substitution of the suit that was to be filed and therefore the judgement in the case of International Asset Reconstruction (supra) would not be applicable.

4.8 Mr. Pandya then invited my attention to page 73 of the paper book to suggest that notice of symbolic possession though shows that it was served on 11.07.2017 and newspaper of that date was photographed and superimposed on such notice to prove a case of issuance and service of notice on 11.07.2017, what is evident on reading page 78 of the paper book is that the notice was published only in an English newspaper and not published in a vernacular newspaper and was not even dispatched to the borrowers/the petitioners and admittedly there was breach of mandatory provisions of the **SARFAESI Enforcement Rules, 2002**.

4.9 Inviting my attention to the order passed under Section 14 of the Act by the District Magistrate and Collector, Surat dated 17.07.2018, Mr. Pandya would contend that the order was bad because as required under Section 14, what is popularly called “a nine pointer affidavit” which is mandatory was not filed by the Bank and therefore the proceedings under Section 14 were bad. Inviting my attention to the order, Mr. Pandya would further contend that reading of the Rojkam which is annexed to the petition at page 31A would

reveal that the District Magistrate had delegated the power to the Mamlatdar to take possession who further delegated the power to Circle Officer to take possession which was apparent on reading the Rojkam the possession was taken over on 03.11.2018 by an officer, a delegatee who was sub delegated the power which could not have been done and therefore the action was bad and in violation of the Rules.

4.10 Mr. Pandya would further contend that even the sale notice dated 30.11.2018 shows the same address of which possession has been taken over and the sale notice was also published on 06.12.2018, there was a violation of the mandatory provisions. The Tribunal therefore rightly while allowing the application of the petitioner relied on the decision of the Supreme Court in the case of **Vasu P Shetty vs. Hotel Vandana Palace and Another [(2014) 5 SCC 660]** which held that once there is a violation of the provisions of the Enforcement Rules, they being mandatory requirements, the Tribunal had rightly set aside the auction and held that the directions which were given by the Tribunal to redo the entire process was right. According to Mr. Pandya, therefore, when the order of the DRT is read an apparent violation of the mandatory provision has been recorded and therefore there was no error committed by the Tribunal in allowing the application.

4.11 In short therefore Mr. Pandya's submission was twofold (a) The provisions of the Limitation Act were applicable to the provisions of the SARFAESI Act and therefore the DRAT committed an error in holding that the provisions of the Limitation Act were not applicable. His submissions have

been founded on the decision of the Division Bench in the case of **Corporation Bank (supra)** (b) The second submission was that even if there was no delay in fact in view of the fact that all the notices right from the inception of the proceedings under Sections 13(2), 13(4) and the last sale notice dated 30.11.2018 were part of the same transaction and the time of 45 days had to be reckoned on and from 30.11.2018 relying on the decision of the **Bank of Baroda (supra)** of the DRAT, there was no delay and therefore the DRT committed no error in passing the order in favour of the petitioner.

5. Mr. Mihir Thakore, learned Senior Counsel appearing for the respondent first addressed on the issue whether the original application filed by the petitioner was in fact within time. According to Mr. Thakore, Mr. Pandya, learned advocate for the petitioner was not right in submitting by relying on the decision of DRAT in the case of **Bank of Baroda (supra)** that the period of limitation or the date of reckoning of the period of 45 days would begin from last date i.e. the date of sale notice. Mr. Thakore drew my attention to the provisions of sub-section (4) of Section 13 to contend that in case the borrower fails to discharge his liability in full, the secured creditor may take recourse to one or more of the following measures to recover his debt. According to Mr. Thakore when the secured creditor takes one or more measures, reading this with Section 17 of the Act which suggests that an application needs to be filed by an aggrieved party by any of the measures referred to in Section 13(4), according to Mr. Thakore each measure is a separate measure and in absence of any challenge to the first measure, the limitation would start running from the date of the first

measure i.e. when symbolic/physical possession was taken under Section 13(4) and therefore the cause of action would begin from 11.07.2017 and it cannot be said that the 45 days have to be reckoned from 30.11.2018. In Mr. Thakore's submission, the view taken by the DRAT, therefore, is in accordance with law.

5.1 With regard to the procedural violations so held by the DRT, Mr. Thakore would not dispute the proposition of law as laid down in the case of **Vasu Shetty (supra)** that when the mandatory provisions are violated, the action of issuance of notice would need to be set aside. However, in the facts of the case, Mr. Thakore would contend that there was no violation of the procedures as required under the Rules of Enforcement under the SARFAESI Act. He invited my attention to the notice under Section 13(2) of the SARFAESI Act dated 25.04.2017 and submitted that the stamp of the Bank is apparently seen and the signatory is Mr. Vinay Patil who was in fact the authorized person and the notice was issued on the letter head of the Bank. The Tribunal committed a grave error in holding that the notice was issued by one Mr. Vinay Patil merely because the postal receipt bore his name. Mr. Thakore also relied on the provisions of Section 27 of the General Clauses Act and Section 114 of the Evidence Act to suggest that the presumption is in favour of the service of notice when the postal acknowledgement of the Registered AD is produced and therefore the contention of Mr. Pandya that the notices were not served is misconceived.

5.2 Mr. Thakore invited my attention to provisions of Rule 8 of the Enforcement Rules, 2002 and submitted that the

notices namely the possession notice has to be delivered to the borrower and should be affixed outside the house in accordance with Appendix IV. He would submit that the notice dated 11.07.2017 taking over symbolic possession was affixed on the house that was mortgaged by the petitioner. The photograph of the house on which the notice was affixed was annexed to the memo of the appeal. The notice in accordance with the provisions of Rules 8(2) & 8 (1) was published in two different newspapers of which one was in vernacular language. He would further submit that Rule 8(6) required the respondent to issue an auction notice to the borrower prior to the 30 days of the auction. The auction notice was issued on 30.11.2018 apprising the borrower of the auction to be held and therefore there was compliance.

5.3 As far as the challenge to the possession having taken by the Circle Officer, Mr. Thakore would contend that the financial institution only if required would take assistance of the District Magistrate. It can take over possession on its own, however, the findings of the Recovery Tribunal have been assailed on the ground that the District Magistrate did not delegate the powers of passing orders but only empowered the Mamlatdar to undertake the exercise of taking over possession. The Mamlatdar further assigned the task to the Circle Officer and it is under those circumstances that the act done by the delegatee should be construed to be done by the delegator himself and the Tribunal was therefore wrong in coming to such a conclusion.

5.4 Mr. Thakore would also submit that even otherwise now that in view of the Tribunal having quashed the sale notice the

issue has become academic as now a fresh sale notice has been issued by the respondent Bank and therefore no purpose will be served in entertaining the petition at this stage.

5.5 With regard to the decision of the Division Bench of this Court in the case of **Corporation Bank (supra)**, Mr. Thakore would contend that the Division Bench of this High Court while taking a decision and holding that the provisions of the Limitation Act would apply to the provisions of Section 17 of the SARFAESI Act, relied on the decision of the Bombay high Court in the case of **M/s. Kanji Manji (supra)** and Madras High Court,. In viwe of the decision of the Apex Court in the case of **Baleshwar vs Bank of India and Others [ (2016) 1 SCC 444]**, the decision of the Division Bench is no longer good law. He would invite my attention to the provisions of Section 18(2) read with section 36 of the SARFAESI Act and would contend that as per Section 18(2) of the SARFAESI Act, the DRAT has to dispose of the appeal in accordance with the provisions of the RDDB Act. Section 20 of the RDDB Act as so reproduced in the judgement would indicate that under the RDDB Act, sub section (3) of Section 20 would provide that if the appeal is not filed within a period of 45 days, as per the proviso, the Tribunal would have the power to condone such delay if satisfied that a sufficient cause is made out. Based on a conjoint reading of section 18(2) of the SARFAESI Act with provisions of Section 20(3) of the RDDB Act, the Apex Court had held that when the provisions of Section 18(2) provided for the decision in an appeal to be taken in accordance with the proviso to Section 20(3) of the RDDB act, since both the acts are complimentary, in context of Section 18(2) which specifically provided for the decision of an appeal in

accordance with the RDDB Act, and in view of a specific power to condone the delay as so prescribed under Section 20(3) of the RDDB Act, the Appellate Tribunal had power to condone the delay.

5.6 Mr. Thakore then read out paragraphs 11 & 12 of the judgement to contend that in the case of **Baleshwar Dayal (supra)**, the Apex Court though had approved the decisions of the Bombay, Madras and Andhra Pradesh High Courts, it categorically held that Section 29(2) of the Limitation Act had no application as looking to the scheme of the SARFAESI Act, the same impliedly excludes the applicability of the provisions of the Limitation Act to the extent a different scheme is adopted. He contended that if no provision of the Limitation Act was expressly adopted it may be possible to hold that by virtue of Section 29(2) power to condone delay was available. However, in accordance with Section 29(2) of the Act when provisions of the Limitation Act were impliedly excluded from the SARFAESI Act, the judgement of the Division Bench was no longer good law. Inviting my attention to para 14 of the decision in the case of **Baleshwar Dayal (supra),** he would contend that Section 29(2) stands impliedly excluded and therefore the Apex Court to that extent differed from the view taken by the Andhra Pradesh, Madras and Bombay High Courts and therefore the decision of the Division Bench of this Court in the case of **Corporation Bank (supra)** would not be a good law.

5.7 In other words, Mr. Thakore would submit that under Section 18(2) read with Section 20(3) there was a power to condone delay and therefore the provisions of the Limitation

Act were expressly included in the scheme whereas merely because Section 17(1) provides that the application be disposed of in accordance with the RDDB Act, there is no provision to condone the delay and Section 24 of the Limitation Act would not apply when there is an express provision under Section 36 of the Securitization Act which specifically suggests that no secured creditor shall be entitled to take all or any of the measures under Section 13(4) unless his claim in respect of the financial asset is made within the period of limitation as prescribed under the Act. Once the provisions of the Limitation Act therefore stand impliedly excluded from the provisions of the SARFAESI Act, vis-a-vis Section 17, the judgement of the Apex Court in the case of **Corporation Bank (supra)** is impliedly overruled. It is in this context that Mr. Thakore submitted that the Tribunal did not commit any error of law and relied on a decision of the Apex Court in the case of **International Asset (supra)** by holding that provisions of the Limitation Act were not applicable to the provisions of the SARFAESI Act. By drawing emphasis on paragraph 11, the submission of Mr. Thakore was that when the legislature did not specifically provide for limitation, the Tribunal would have no power to condone the delay unless it was so expressly provided for in the statute. Section 17 had no such express provision and in view of Section 29(2) to be impliedly excluded, the Appellate Tribunal committed no error in dismissing the original application of the petitioner and allowing the appeal filed by the respondent institution.

6. Having noted the submissions of Mr. Aditya Pandya, learned advocate for the petitioner and Mr. Mihir Thakore,

learned Senior Advocate with Mr. Bomi Sethna for the respondents, the questions that need to be considered are twofold.

(I) Whether the DRAT, was right in allowing the appeal of the Respondent Bank holding that the DRT had no powers to condone delay in light of the law laid down by the Supreme Court in the case of **International Asset Reconstruction Co. Of India Ltd. Vs. Official Liquidator reported in (2017) 16 SCC 137**.

(II) When does the cause of action accrue under Section 13(4) of the SARFAESI Act, 2002 and as to whether is it incumbent upon the borrower to come as soon as the cause of action accrues as the limitation would start running from that date or there is continuous cause of action and it is open for the borrower to come till the stage of the sale of the properties attached.

The answer to this question is also interrelated somewhat to the first question because the arguments on behalf of the parties were that even otherwise there was no delay as the petitioners had approached the Tribunal with a prayer to quash and set aside the sale notice dated 30.11.2018, to quash and set aside notice dated 25.04.2017 under Section 13(2) of the SARFAESI Act, 2002, notice under Section 13(4) and order passed under Section 14.

7. Before dealing with these questions so raised, a brief revisit of facts with the relevant dates is necessary.

i) Credit facilities were granted to the petitioners towards mortgage of immovable property owned by the Petitioner No.1
ii) Demand Notice dated 25.04.2017 under Section 13(2) of the SARFAESI Act, 2002 was issued demanding Rs.2,17,20,894 from the petitioners.
iii) Notice under Section 13(4) read with Rule 8(1) of The Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the "Enforcement Rules") was issued on 11.7.2017 for symbolic possession of the mortgaged property.
iv) On an Application filed under Section 14 of the SARFAESI Act, 2002, the Magistrate passed an ex-parte order on 17.07.2018. According to the petitioners the same was contrary to law.
v) Physical Possession was handed over on 03.11.2018.
vi) Sale notice dated 30.11.2018 was issued under Rule 8(5) of the Enforcement Rules.
vii) The SA was filed before the DRT on 08.01.2019.

7.1 These dates are essential because in context of the submissions made by the learned advocate for the Petitioner/DRT Applicant, the application was filed on 08.01.2019 i.e. within 45 days of sale notice dated 30.11.2018 and hence the application was within 45 days as prescribed under Section 17 of the SARFAESI Act. According to Mr. Pandya, even if the application was to be made from the date of 11.07.2017 and/or 03.11.2018, the DRT had power to condone delay of 45 days on sufficient cause shown. Alternative submission was that upto the sale notice it was a continuous cause of action and therefore even otherwise the

application was within time. The language of Section 13(4) when read would indicate that the applicant could challenge any one or more measures when read with Section 17 of the SARFAESI Act, 2002 which will include not only act of taking possession but would include steps for realizing the secured asset.

7.2 As opposed thereto the gist of the arguments of the Bank was that the Tribunal had no power to condone delay of 45 days. That the limitation would start running from the date of the notice dated 11.07.2017 under Section 13(4) read with Rule 8(2) of the Enforcement Rules. The language of the Section 13(4) was clear that one or more measures were available. Every measure was a separate measure. Every action taken must be challenged and in absence of challenge to the first measure of taking symbolic possession, subsequent measures and recourse to the plea of extension of time under the pretext of continuous cause of action cannot hold good to get over the delay prescribed of 45 days. The Tribunal was wrong in quashing the sale notice in absence of the challenge to the past notices of possession.

8. Let us now analyse these submissions in the context of the events as stated hereinabove.

8.1 The first issue that needs to be decided is as to whether, under the SARFAESI Act, 2002, in an Application filed under Section 17 of the said Act, the DRT has power to condone the delay when the Section provides that a person aggrieved by any of the measures referred to in sub-section (4) of Section 13 may make an application within 45 days from

the date on which such measures had been taken. In this regard it shall be fruitful to peruse the relevant provisions of the SARFAESI Act, 2002, namely Sections 13, 17, 18, 35, 36 and 37 and the same are reproduced as under:

> **13. Enforcement of security interest.-** (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882 ), any security interest created in favour of any secured creditor may be enforced, without the int rvention of the court or tribunal, by such creditor in accordance with the provisions of this Act.
> (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as on- performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to e exercise all or any of the rights under sub-section (4).
> (3) The notice referred to in sub- section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non- payment of secured debts by the borrower.
> (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-
>
> (a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;
>
> (b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

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

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

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

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

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

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the s cured creditor, and no further step shall be taken by him for transfer or sale of that secure asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing

of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub- section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three- fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors: Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956 ): Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956 ), may retain the sale proceeds of his secured assets after depositing the workmen' s dues with the liquidator in accordance with the provisions of section 529A of that Act: Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen' s dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956 ) and in case such workmen' s dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen' s dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator: Provided also that in case the secured creditor deposits the estimated amount of workmen' s dues, such creditor shall be liable to pay the balance of the workmen' s dues or entitled to receive the excess amount, if any, deposited by the secured creditor w th the liquidator: Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen' s dues, if any. Explanation.- For the purposes of this sub- section,-

(a) " record date" means the date agreed upon by the secured creditors representing not less than three- fourth in value of the amount

outstanding on such date;

(b) " amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

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

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

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

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

**17. Right to appeal.-** (1) Any person (including borrower), aggrieved by any of the measures referred to in sub- section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty- five days from the date on which such measure had been taken.

(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy- five per cent. of the amount claimed in the notice referred to in sub- section (2) of section 13:

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.
(3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993 ) and rules ma e thereunder.

**18. Appeal to Appellate Tribunal.-** (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.
(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993 ) and rules made thereunder.

**35. The provisions of this Act to override other laws.-** The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any uch law.

**36. Limitation.-** No secured creditor shall be entitled to take all or any of the measures under sub- section (4) of section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 963 (36 of 1963 ).

**37. Application of other laws not barred.-** The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956 ), the Securities Exchange Board of India Act, 1992 (15 of 1992 ), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993 ) or any other law for the time being in force.

8.2 Since reading of the provisions of Section 17 and Section 18 of the SARFAESI Act, 2002 fall back upon the provisions of The Recovery of Debts and Bankruptcy Act, 1993 ('RDDB Act' for short'), it shall be worthwhile to reproduce the relevant provisions of the said Act also herein:

> **2(b)** "application" means an application made to a Tribunal under section 19;
>
> **19. Application to the Tribunal.—**
> (1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction—
>
> (a) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or
>
> (b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or
>
> (c) the cause of action, wholly or in part, arises:
>
> [Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act:
> Provided further that any application made under the first proviso for seeking permission from the Debts Recovery Tribunal to withdraw the

application made under sub-section (1) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application: Provided also that in case the Debts Recovery Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the reasons therefor.]

(2) Where a bank or a financial institution, which has to recover its debt from any person, has filed an application to the Tribunal under sub-section (1) and against the same person another bank or financial institution also has claim to recover its debt, then, the later bank or financial institution may join the applicant bank or financial institution at any stage of the proceedings, before the final order is passed, by making an application to that Tribunal.

(3) Every application under sub-section (1) or sub-section (2) shall be in such form and accompanied by such documents or other evidence and by such fee as may be prescribed: Provided that the fee may be prescribed having regard to the amount of debt to be recovered: Provided further that nothing contained in this sub-section relating to fee shall apply to cases transferred to the Tribunal under sub-section (1) of section 31.

(4) On receipt of the application under sub-section (1) or sub-section (2), the Tribunal shall issue summons requiring the defendant to show cause within thirty days of the service of summons as to why the relief prayed for should not be granted.

(5) The defendant shall, at or before the first hearing or within such time as the Tribunal may permit, present a written statement of his defence.

(6) Where the defendant claims to set-off against the applicant’s demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt sought to be set-off.

(7) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Tribunal to pass a final order in respect both of the

original claim and of the set-off.
(8) A defendant in an application may, in addition to his right of pleading a set-off under sub-section (6), set up, by way of counter-claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant either before or after the filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.
(9) A counter-claim under sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.
(10) The applicant shall be at liberty to file a written statement in answer to the counter-claim of the defendant within such period as may be fixed by the Tribunal.
(11) Where a defendant sets up a counter-claim and the applicant contends that the claim thereby raised ought not to be disposed of by way of counter-claim but in an independent action, the applicant may, at any time before issues are settled in relation to the counter-claim, apply to the Tribunal for an order that such counter-claim may be excluded, and the Tribunal may, on the hearing of such application, make such order as it thinks fit.
(12) The Tribunal may make an interim order (whether by way of injunction or stay or attachment) against the defendant to debar him from transferring, alienating or otherwise dealing with, or disposing of, any property and assets belonging to him without the prior permission of the Tribunal.
(13) (A) Where, at any stage of the proceedings, the Tribunal is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay or frustrate the execution of any order for the recovery of debt that may be passed against him,—

(i) is about to dispose of the whole or any part of his property; or
(ii) is about to remove the whole or any part of his property from the local limits of the

jurisdiction of the Tribunal; or

(iii) is likely to cause any damage or mischief to the property or affect its value by misuse or creating third party interest, the Tribunal may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Tribunal, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the certificate for the recovery of debt, or to appear and show cause why he should not furnish security.

(B) Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Tribunal, the Tribunal may order the attachment of the whole or such portion of the properties claimed by the applicant as the properties secured in his favour or otherwise owned by the defendant as appears sufficient to satisfy any certificate for the recovery of debt.

(14) The applicant shall, unless the Tribunal otherwise directs, specify the property required to be attached and the estimated value thereof.

(15) The Tribunal may also in the order direct the conditional attachment of the whole or any portion of the property specified under sub-section (14).

(16) If an order of attachment is made without complying with the provisions of sub-section (13), such attachment shall be void.

(17) In the case of disobedience of an order made by the Tribunal under sub-sections (12), (13) and (18) or breach of any of the terms on which the order was made, the Tribunal may order the properties of the person guilty of such disobedience or breach to be attached and may also order such person to be detained in the civil prison for a term not exceeding three months, unless in the meantime the Tribunal directs his release.

(18) Where it appears to the Tribunal to be just and convenient, the Tribunal may, by order—

(a) appoint a receiver of any property, whether before or after grant of certificate for recovery of debt;

(b) remove any person from the possession or

custody of the property;

(c) commit the same to the possession, custody or management of the receiver;

(d) confer upon the receiver all such powers, as to bringing and defending suits in the courts or filing and defending application before the Tribunal and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Tribunal thinks fit; and

(e) appoint a Commissioner for preparation of an inventory of the properties of the defendant or for the sale thereof.

(19) Where a certificate of recovery is issued against a company registered under the Companies Act, 1956 (1 of 1956) the Tribunal may order the sale proceeds of such company to be distributed among its secured creditors in accordance with the provisions of section 529A of the Companies Act, 1956 and to pay the surplus, if any, to the company.

(20) The Tribunal may, after giving the applicant and the defendant an opportunity of being heard, pass such interim or final order, including the order for payment of interest from the date on or before which payment of the amount is found due upto the date of realisation or actual payment, on the application as it thinks fit to meet the ends of justice.

(21) The Tribunal shall send a copy of every order passed by it to the applicant and the defendant.

(22) the Presiding Officer shall issue a certificate under his signature on the basis of the order of the Tribunal to the Recovery Officer for recovery of the amount of debt specified in the certificate.

(23) Where the Tribunal, which has issued a certificate of recovery, is satisfied that the property is situated within the local limits of the jurisdiction of two or more Tribunals, it may send the copies of the certificate of recovery for execution to such other Tribunals where the property is situated: Provided that in a case where the Tribunal to which the certificate of recovery is sent for execution

finds that it has no jurisdiction to comply with the certificate of recovery, it shall return the same to the Tribunal which has issued it.
(24) The application made to the Tribunal under sub-section (1) or sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application finally within one hundred and eighty days from the date of receipt of the application.
(25) The Tribunal may make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice.]

20. **Appeal to the Appellate Tribunal.—** (1) Save as provided in sub-section (2), any person aggrieved by an order made, or deemed to have been made, by a Tribunal under this Act, may prefer an appeal to an Appellate Tribunal having jurisdiction in the matter.
(2) No appeal shall lie to the Appellate Tribunal from an order made by a Tribunal with the consent of the parties.
(3) Every appeal under sub-section (1) shall be filed within a period of forty- five days from the date on which a copy of the order made, or deemed to have been made, by the Tribunal is received by him and it shall be in such form and be accompanied by such fee as may be prescribed: Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it with in that period.
(4) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.
(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Tribunal.
(6) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within six

months from the date of receipt of the appeal.

3**0. Appeal against the order of Recovery Officer.—** (1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.
(2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive).]

8.3 Similarly, relevant provisions of the Limitation Act, 1963 read as under:

**2(l)** "Suit" does not include an appeal or an application;

**5. Extension of prescribed period in certain cases.-** Any appeal or any application, other than an application under any of the provisions of Order XXI of the Code of Civil Procedure, 1908 (**5** of 1908), may be admitted after the prescribed period, if the appellant or the applicant satisfies the court that he had sufficient cause for not preferring the appeal or making the application within such period.

Explanation.- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this Section.

**29. Savings.—** (1) Nothing in this Act shall affect **section** 25
of the Indian Contract Act, 1872 (9 of 1872)
(2) Where any special or local law prescribes for

> any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in section 5 to 24 (inclusive shall apply only in so far, as and to the extent to which, they are not expressly excluded by such special or local law.
> (3) Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law.
>
> (4) Sections 25 and 26 and the definition of "easement" in section 2 shall not apply to cases arising in the territories to which the Indian Easements Act,1882 may for the time being extend.

9. Having perused the sections of the Acts which are relevant for the purpose of deciding the controversy involved, let us not proceed to analyse the same. Mr. Aditya Pandya submitted that the issue no longer is a matter of debate as by a decision of the Division Bench of this Court rendered in the case of **Corporation Bank versus Jayshreeben and Ors. reported in 2013(1) GLH 628**, this Court considering the Division Bench decision of the Bombay High Court in the case of **UCO Bank vs. M/s Kanji Manji Kothari reported in 2008(4) Mh.LJ 424** held that the provisions of Section 5 of the Limitation Act, 1963 shall apply to the provisions of Section 17 of the SARFAESI Act and therefore the DRT would have power to condone the delay if applications are filed before the DRT beyond the period of 45 days and if there is sufficient cause shown. The Mumbai High Court in the case of **M/s. Kanji Manji (supra)**, in extenso considered the relevant provisions of the SARFAESI Act in juxtaposition with

the provisions of the RDDB Act and the Limitation Act, 1963. Since the judgement in the case of **Corporation Bank (supra)** extensively has referred to the Bombay High Court judgement in the case of **M/s. Kanji Manji (supra)**, it will be in the fitness of things to refer to the said decision first in point.

9.1 The Court in the case of **Kanji Manji (supra)** had posed the same questions and answered the question of applicability of Limitation Act as the second. The question was answered from para 58 onwards after considering the decisions of the Supreme Court in the cases of **Mukum Rai vs Lalit Narain [AIR 1974 SC 480]; Mangu Ram vs Delhi Municipality [AIR 1976 SC 105]; Union Of India vs M/S Popular Construction Co. [AIR 2001 SC 4010]; Fairgrowth Investments Ltd.vs Custodian (2004)11 SCC 472**. The propositions that emerged from the judgements referred to hereinabove have been set out by the Bombay High Court in Paragraph 68 and they read as under:

> "68. The following propositions emerge from the above judgments:
>
> a) There is no inherent power in the court to condone delay.
>
> b) The prescribed period for taking steps in legal proceedings is intended to be abided by subject to any power expressly conferred on the court to condone delay.
>
> c) The fixation of period of limitation must always be to some extent arbitrary and may frequently result in hardship. But in construing such provisions equitable considerations are out of

> place, and the strict grammatical meaning of the words is the only safe guide.
>
> (d) The provisions of Sections 4 to 29 of the Limitation Act, 1963 will apply when i) there is a special law or local law which prescribes a different period of limitation for any suit, appeal or application and, ii) the special or local law does not expressly exclude those sections (Union of India v. Popular Construction Company (supra)).
>
> e) A mere provision of a period of limitation in howsoever peremptory or imperative language is not sufficient to displace the applicability of section.
>
> f) If on an examination of the relevant provisions of the special law, it is clear that the provisions of the Limitation Act are necessarily excluded then the benefits conferred therein cannot be called in aid to supplement the provisions of the Special Act.
>
> g) Where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the court to examine whether and to what extent the nature of the provisions or the nature of the subject matter and the scheme of the special law exclude their operation.
>
> (h) If the Special Act and the Limitation Act can be read harmoniously without doing violence to the words used therein then there is no prohibition in doing so. [State of Goa v. Western Builders (supra).] ”

9.2 Considering the provisions of the SARFAESI Act, namely Sections 17, 35, 36 read with Section 24 of the RDDB Act in context of the decision of the Supreme Court in the case of **Transcore vs Union Of India and Another reported in (2008) 1 SCC 125**, the Division Bench held as under:

"69. In this case, we are concerned with a special law which prescribes a different period of limitation so far as application made by the borrower under Section 17(1) are concerned. Section 17(1) reads as under:

> *17. Right to appeal.(1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorized officer under this Chapter, (may make an application along with such fee, as may be prescribed) to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measures had been taken.*

70. So far as secured creditor is concerned, Section 36 of the NPA Act states that the period of limitation as prescribed in the Limitation Act would be applicable. Section 36 reads as under:

> *"36. Limitation. No secured creditor shall be entitled to take all or any of the measures under subsection (4) of Section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963). "*

71. Therefore, the Legislature has made two different provisions for the borrower and the secured creditor so far as period of limitation is concerned. On a proper reading of the NPA Act and the DRT Act, we are unable to come to a conclusion that this indicates that the legislature has consciously excluded the application of the Limitation Act to applications made by the borrower or the aggrieved person under Section 17 of the NPA Act.

72. Section 35 of the NPA Act gives it an overriding effect. Section 37 states that application of other laws is not barred. It reads thus:

> *"37. Application of other laws not barred. The provisions of this Act or the rules made*

*thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force. ”*

73. Section 17(7) states that the DRT shall, as far as may be, dispose of the applications in accordance with the DRT Act and the Rules made thereunder. Under Section 22 of the DRT Act, the DRT is not bound by the procedure laid down by the Civil Procedure Code, but shall be guided by the principles of natural justice and shall have power to regulate its own procedure. Under the said section, Debts Recovery Tribunal, Maharashtra & Goa Regulations of Practice, 2003 have been enacted. Under Regulation 3(7), "interlocutory application" inter alia means application for condonation of delay.

74. Section 24 of the DRT Act states that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to an application made to a Tribunal. In Transcore's case (supra), the Supreme Court has, after considering the statement of objects and reasons of the NPA Act, the scheme of the NPA Act and the nature of its provisions, held that the enactment of NPA Act is not in derogation of the DRT Act. Their object is recovery of debts by non- adjudicatory process and they provide cumulative remedies to the secured creditor. In fact, Section 37 of the NPA Act states that the provisions of the NPA Act shall be in addition to and not inderogation to the DRT Act. If we examine the relevant provisions of the NPA Act and the observations of the Supreme Court in Transcore's case (supra), the conclusion is irresistible that Section 5 of the Limitation Act is applicable to the NPA Act. There is no express exclusion of the Limitation Act. So far as borrower's applications under Section 17(1) are concerned, a different period of limitation is prescribed. Hence, on a bare

reading of Section 29 (2), Section 5 of the Limitation Act would be applicable to them. So far as the secured creditor is concerned, he can take measures under Section 13(4) within the period prescribed under the Limitation Act. Though Section 35 gives overriding effect to the NPA Act, Section 37 states that application of other laws is not barred and the NPA Act is in addition to DRT Act and not in derogation thereof. It is important to note that under Section 17(7), the DRT has to dispose of the applications in accordance with the DRT Act and the rules made thereunder and Section 24 of the DRT Act makes provisions of the Limitation Act applicable to the application before the DRT. Since after considering the scheme, provisions and object of the NPA Act, the NPA Act Page 0771 and the DRT Act are held complementary to each other by the Supreme Court in Transcore's case (supra), we hold that the provisions of Section 5 of the Limitation Act are applicable to the provisions under the NPA Act. This will also lead to even treatment to the secured creditor as well as to the borrower or any aggrieved person. We may quote the observations made by the Supreme Court in Mardia Chemical's case (supra), while disposing of the matter. The Supreme Court observed as under:

> *"Before we part with the case, we would like to observe that where a secured creditor has taken action under Section 13(4) of the Act, in such cases, it would be open to borrowers to file appeals under Section 17 of the Act within the limitation as prescribed therefor, to be counted with effect from today. "*

75. We are aware that the powers of the Supreme Court are far more extensive and perhaps the above observations were made by the Supreme Court because the matters with which it was concerned were pending for a long time. But we draw some support from these observations to strengthen our view that if Section 5 of the Limitation Act is held to be applicable to the appeal/application under Section 17(1) of the NPA Act that will be in the interest of justice.

76. We are mindful of the fact that expeditious and speedy disposal of proceedings is the essence of the NPA Act. This is seen from Section 17(5) which requires DRT to dispose of an application within 60 days from the date of the application. Under proviso thereof, DRT can extend the said period for reasons to be recorded in writing but the total period of the application shall not exceed four months from the date of the application. If the application is not disposed of by the DRT within four months, any party to the application may make an application to the DRAT for appropriate direction to the DRT for expeditious disposal and the DRAT shall make an order for expeditious disposal. In the light of the settled legal principles as regards applicability of the Limitation Act and in the interest of justice, we have held that Section 5 of the Limitation Act is applicable to the proceedings under Section 17(1) of the NPA Act. However, while dealing with applications for condonation of delay, the DRT must bear the scheme of the NPA Act in mind and should not allow any person to procrastinate the proceedings by making frivolous applications for condonation of delay.

77. The above discussion leads us to the following conclusions:

a) Forty-five days' period of limitation prescribed under Section 17(1) of the NPA Act starts running from the date when symbolic possession is taken or from the date when actual possession is taken as there is no dichotomy between the two.

b) The provision of Section 5 of the Limitation Act is applicable to the proceedings under Section 17(1) of the NPA Act.

78. The petition is disposed of in the aforestated terms. ”

9.3 Thus, what the Division Bench of the Bombay High Court held, if put briefly is:

(a) On reading of Sections 17 and 36 of the SARFAESI Act, the Court found that there are two different provisions, as far as limitation is concerned. The borrower has to file an application within 45 days whereas the secured creditor is entitled to take measures within the period prescribed under the Limitation Act, 1963. Therefore, in accordance with Section 29(2) of the Limitation Act, 1963 there is no express exclusion of the provisions of Sections 4 to 24 of the Limitation Act,1963.

(b) Relying on Section 17(7) of the SARFAESI Act, the Court held that there is a specific mention that the application shall be disposed of in accordance with the provisions of the RDDB Act. Therefore, provisions of the RDDB Act and the NPA Act are not in derogation of each other but they provide cumulative remedies. Section 24 of the Limitation Act which provides that the provisions of the Limitation Act, 1963 will be applicable to application under Section 19 would therefore mutatis mutandis apply to applications under Section 17 of the SARFAESI Act and therefore there is in fact no express exclusion of the Limitation Act on this count too. This was keeping in mind the judgement of the Supreme Court in the case of **Transcore (supra)** wherein the Supreme Court held that conceptually there is no inherent or implied inconsistency between the remedies provided under Section 17 of the SARFAESI Act and Section 19 of the RDDB Act,1993.

(c) With regard to Section 29(2) of the Limitation Act,

keeping in view the judgements of the Supreme Court on the issue as in the case of **Mukum Narain (supra) and Manguram(supra) and Popular Construction (supra)** observed that in view of the fact that there was no express exclusion of the provisions of the Limitation Act, 1963 and though it is possible that where a special law does not exclude the provisions of Section 4 to 24 it would nonetheless be open to the court to examine whether and to what extent the nature of the provisions or the nature of the subject and the scheme of the special law exclude their operation.

9.4 Whether there is an implied exclusion of the Limitation Act, 1963 will be dealt with at a later point since the Counsel for the Respondent Bank has so argued that there is an implied exclusion of the provisions of the Limitation Act,1963.

9.5 To recapitulate therefore, the Bombay High Court found that, in view with the provisions of Section 17(7) of the SARFAESI Act, 2002, the application under Section 17 has to be disposed of in accordance with the provisions of the RDDB Act, 1993. The RRDB Act has Section 24 which provides that the Limitation Act, 1963 shall apply to the applications before the Tribunal. Also Section 36 of the SARFAESI Act provides for the applicability of the Limitation Act, 1963 and therefore there is no express exclusion of the Limitation Act, 1963. The DRT therefore has the power to condone the delay in applications filed before the DRT under Section 17 of the SARFAESI Act.

9.6 I thought it fit to first discuss the Bombay High Court judgement rather than the judgement of this Court in the case

of the **Corporation Bank (supra)** as this Court, though has given its independent reasoning but has also extensively quoted the judgement in the case of **Kanji Manji (supra)**. In the case of the **Corporation Bank (supra),** this Court was also faced with a challenge of the order of the DRT where it had condoned the delay in filing an Application under Section 17 of the SARFAESI Act. Considering the Sections 17 & 35 of the SARFAESI Act and the provisions of Section 24 of the RDDB Act read with Section 29(2) of the Limitation Act,1963, the Court held that reading the provisions together and when there was no outer limit provided for filing an application after the expiry of 45 days the legislature has not curtailed the exercise of entertaining an application beyond 45 days and therefore the provisions of Section 5 of the Limitation Act would apply.

9.7 On the question whether Section 5 would apply only to the proceedings before the Court and not the Tribunal, the Division Bench relied on a decision of the Gujarat High Court in the case of **Mahesh Harilal Khamar vs. B.N. Narasimhan [1982 GLH 700]** and held that it did apply to the Tribunal. The Division Bench thereafter extensively reproduced the relevant paras of the decision of the Bombay High Court in the case of **Kanji Manji (supra)** and the decision of the Madras High Court in the case of **Ponnuswami and Others (supra)** holding that Section 5 of the Limitation Act would apply to DRT in an application under Section 17 of the SARFAESI Act.

9.8 The Division Bench further considering the decisions of

the Supreme Court in the case of **Mardia Chemicals Ltd. vs Union Of India reported in (2004)4 SCC 311** and **Transcore (supra)** held that even if the application under Section 17 was in the nature of original proceedings the provisions of the Limitation Act were applicable. Reading provisions of Section 24 of RDDB Act as applicable to applications under Section 19 of the Act which are also original proceedings and drawing an analogy therefrom, the Court held that in view of Section 17(7) of the SARFAESI Act, there has been a conscious inclusion of the provisions of the Limitation Act, 1963 in the SARFAESI Act.

9.9 In other words, what emerges from the decision of the Division Bench of this Court also is that it has followed the decisions of the Bombay and the Madras High Court respectively and in view of the provisions of Section 17(7) of the SARFAESI Act, the provisions of the RDDB Act can be read into the Act, and since the provisions of the Limitation Act, 1963 apply to the RDDB Act as per Section 24 thereof the provisions of the Limitation Act apply to SARAESI Act, 2002 also. In addition thereto, drawing recourse to provisions of Sections 36 and 37 of the SARFAESI Act, the Court held that when there is no express exclusion of the Limitation Act,1963 in view of Section 36 and the Application of any other laws is not barred as per Section 37, the DRT was not in error in entertaining an application under Section 17 of the SARFAESI Act.

10. What therefore emerges is that the Limitation Act, 1963 is applicable to the provisions of the SARFAESI Act and in context of an application under Section 17 of the Act, the

same has been considered by the three Division Benches of three High Courts and it is held that the DRT has powers to condone delay. I am in respectful agreement to the view taken by this Court in the case of **Corporation Bank(supra)** which followed the decision in the case of **Kanji Manji (supra)** of the Bombay High Court as they are binding decisions on the question of law so raised.

(i) The Limitation Act, Section 2(l) defines a “suit” as “suit” does not include an appeal or an application.
(ii) The provisions of Section 17 of the SARFAESI Act provide for filing of an application under Section 17 of the Act.
(iii) Section 17(7) provides that the Tribunal shall dispose of the Application in accordance with the provisions of the RDDB Act.
(iv) The judgements in the cases of **Mardia Chemicals (supra)** and **Transcore (supra)** have considered the scheme of the SARFAESI Act and the RDDB Act especially when in Mardia’s case the Supreme Court extended the period of limitation as observed in Para 83 as under:

> *“Before we part with the case, we would like to observe that where a secured creditor has taken action under Section 13(4) of the Act, in such cases, it would be open to borrowers to file appeals under Section 17 of the Act within the limitation as prescribed therefor, to be counted with effect from today. ”*

11. Therefore, the fact that there is a provision for extension of period of limitation is apparent. Moreover, as per the decision rendered in **Transcore (supra),** both Acts are complementary to each other and operate in the same field

and not in derogation to each other and the provisions of the Limitation Act are applicable to the Application under Section 17 of the SARFAESI Act in view of sub-section (7) thereof read with Section 24 of the RDDB Act and therefore there is no express exclusion as per Section 29(2) of the Limitation Act, of the provisions of Sections 4 to 24 of the Limitation Act, 1963 and therefore the view of the DRAT, that the DRT had no powers to condone delay is not correct. (That it has considered the decision of the Supreme Court in the case of **International Assets (supra)** is being dealt with in the later part of this judgement).

12. The question now therefore which needs to be answered is whether in view of the decision of the Supreme Court in the case of **Baleshwar Dayal Jaiswal (supra)** overruling the decision of the Madhya Pradesh High Court**,** the judgements of the Division Bench of the Bombay High Court, Madras High Court and the Division Bench of this Court are impliedly overruled and are therefore no longer a good law. In the case of **Baleshwar Dayal Jaiswal (supra),** the question was whether the Appellate Tribunal under the SARFAESI Act, 2002 has power to condone delay in filing an Appeal under Section 18(1) of the said Act. Considering that, the submission of the appellants was that in view of Section 18(2) which provides that the Appellate Tribunal shall follow the provisions of the RDDB Act in disposing of the appeal and that Section 20(3) of the RDDB Act empowers the Appellate Tribunal to entertain an appeal after the expiry of period of limitation, if sufficient cause is shown for not filing an appeal within the period of limitation, the proviso to Section 20(3) of the RDDB Act is incorporated in Section 18(2) of the

SARFAESI Act,2002. The other submission was that in view of Section 24 of the RDDB Act read with Section 36 of the SARFEASI Act, the provisions of the Limitation Act were not expressly excluded. The Supreme Court in Paras 7 to 10 held as under:

> "7. The first point for consideration is the applicability of proviso to Section 20(3) of the RDB Act to the disposal of an appeal by the Appellate Tribunal under Section 18(2) of the SARFAESI Act. A bare perusal of the said Section 18(2) makes it clear that the Appellate Tribunal under the SARFAESI Act has to dispose of an appeal in accordance with the provisions of the RDB Act. In this respect, the provisions of the RDB Act stand incorporated in the SARFAESI Act for disposal of an appeal. Once it is so, we are unable to discern any reason as to why the SARFAESI Appellate Tribunal cannot entertain an appeal beyond the prescribed period even on being satisfied that there is sufficient cause for not filing such appeal within that period. Even if power of condonation of delay by virtue of Section 29(2) of the Limitation Act were held not to be applicable, the proviso to Section 20(3) of the RDB Act is applicable by virtue of Section 18(2) of the SARFAESI Act. This interpretation is clearly borne out from the provisions of the two statutes and also advances the cause of justice. Unless the scheme of the statute expressly excludes the power of condonation, there is no reason to deny such power to a Appellate Tribunal when the statutory scheme so warrants. Principle of legislation by incorporation is well known and has been applied inter alia in *Ram Kirpal Bhagat vs. The State of Bihar, Bolani Ores Ltd. vs. State of Orissa, Mahindra and Mahindra Ltd. vs. Union of India and Onkarlal Nandlal vs. State of Rajasthan* relied upon on behalf of the appellants. We have thus no hesitation in holding that the Appellate Tribunal under the SARFAESI Act has the power to condone the delay in filing an appeal before it by virtue of Section 18(2) SARFAESI Act and proviso to Section

20(3) of the RDB Act.

8. The fact that RDB Act and the SARFAESI Act are complimentary to each other, as held by this Court in Transcore vs. Union of India[9], also supports this view.

9. We may now deal with the conflicting views of the High Courts on the subject. The Madhya Pradesh High Court has held that the power of condonation of delay stood excluded by principle of interpretation that if a later statute has provided for shorter period of limitation without express provision for condonation, it could be implied that there was no power of condonation. Reliance has been placed on principles of statutory interpretation by Justice G.P. Singh, 12th Edition, 2010, page 310. It was further observed that the Limitation Act was made applicable to a Tribunal under Section 24 of the RDB Act, but there was no similar provision with respect to the Appellate Tribunal. To justify such an inference, reliance has also been placed on Gopal Sardar case and Fairgrowth Investments Ltd. vs. The Custodian[10]. It was further observed that the object of SARFAESI Act was to ensure speedy recovery of the dues and quicker resolution of disputes arising out of action taken for recovery of such dues. We find the approach to be erroneous and incorrect understanding of the principle of interpretation which has been relied upon. The principle discussed in the celebrated Treatise in question is as follows:

> *"... '15. ... When an amending Act alters the language of the principal statue, the alteration must be taken to have been made deliberately."*

10. It is difficult to appreciate how the above principle justifies the view of the High Court. The change intended in SARFAESI Act has to be seen from the statute and not from beyond it. No doubt the period of limitation for filing appeal under Section 18 of the SARFAESI Act is 30 days as against 45 days under Section 20 of the RDB Act.

> To this extent, legislative intent may be deliberate. The absence of an express provision for condonation, when Section 18(2) expressly adopts and incorporates the provisions of the RDB Act which contains provision for condonation of delay in filing of an appeal, cannot be read as excluding the power of condonation. As already observed, the proviso to Section 20(3) which provides for condonation of delay (45 days under RDB Act) stands extended to disposal of appeal under the SARFAESI Act (to the extent that condonation is of delay beyond 30 days). There is no reason to exclude the proviso to Section 20(3) in dealing with an appeal under the SARFAESI Act. Taking such a view will be nullifying Section 18(2) of the SARFAESI Act. We are thus, unable to uphold the view taken by the Madhya Pradesh High Court. ”

12.1 In other words, the Supreme Court held that once the provisions of the RDDB Act stand incorporated in the SARFAESI Act for disposal of the appeal, there is no reason why the DRAT cannot entertain an appeal beyond the prescribed period of limitation on being satisfied that there is sufficient cause shown for not filing an appeal within that period. The Supreme Court as appears in Para 9 of the judgement dealt with the conflicting views of the High Courts. The view of the Madhya Pradesh High Court that the DRAT had no power to condone the delay was negatived. The Madhya Pradesh High Court had held as under:

> “16. When I compare Section 18 of the SARFAESI Act with Section 20 of the RDDBFI Act, I find that in Section 18 not only the period of limitation for filing an appeal has been reduced to 30 days from 45 days as provided in Section 20 but the power of the Appellate Tribunal to condone delay has also been excluded which is provided in Section 20 of the RDDBFI Act. This itself leaves no iota of doubt that the legislature has consciously

> intended not to confer the power of condonation of delay with the Appellate Tribunal under Section 18 of the SARFAESI Act. Because, it is a well-settled principle of law that just as use of same language in a later statute as was used in an earlier one in pari materia is suggestive of theintention of the Legislature that the language so used in the later statute is used in the same sense as in the earlier one, change of language ina later statute in pari materia is suggestive that change of interpretation is intended. (See Principles of Statutory Interpretation by Justice G.P. Singh 12th Edition, 2010 Page 310)."

12.2 The Madhya Pradesh High Court in Paras 17 and 18 considered the decisions of the Bombay High Court and the Madras High Court and held that since those decisions were in context of Section 17 of the SARFAESI Act they were not applicable in the present case.

> "17. There is also an identical provision in sub-section (7) of Section 17 of the SARFAESI Act which states that the Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of RDDBFI Act. Under the RDDBFI Act the Tribunal and the Appellate Tribunal are separately established and its Section 24, which deals with limitation, states that the provisions of Limitation Act, 1963 shall, as far as may be, apply to an application made to a Tribunal. As already mentioned above, application under Section 17 can be made by any aggrieved person to the Tribunal within 45 days from the date on which he has suffered an action under any of the measures referred to in sub-section (4) of Section 13 of the SARFAESI Act. Thereafter any person aggrieved by any order made by the Tribunal under Section 17 can perfer an appeal to the Appellate Tribunal under Section 18 within 30 days from the date of receipt of the order of the Tribunal. Section 24 of the RDDBFI Act has not made the provisions of the Limitation Act applicable to an Appellate Tribunal.

This being the position, it is apparent that although the Tribunal can give the benefit of Section 5 of the Limitation Act, while dealing with an application under Section 17 of the SARFAESI Act, the Appellate Tribunal cannot do so while considering the appeal under Section 18. This view also finds support from the decision of the Supreme Court in Gopal Sardar v. Karuna Sardar (2004) 4 SCC 252 : (AIR 2004 SC 3068) wherein it is held that when in the same statute in respect of various other provisions relating to filing of appeals and revisions, specific provisions are made so as to give benefit of Section 5 of the Limitation Act and such provision is not made to an application to be made under a particular Section of that statute, it obviously and necessarily follows that the legislature consciously excluded the application of Section 5 of the Limitation Act. This view was also followed by the Supreme Court in Fairgrowth Investments Limited (2005 AIR SCW 3076) (supra).

18. Having regard to the object of the SARFAESI Act that it intends to ensure speedy recovery of dues of Banks and also for quick resolution of dispute arising out of the action taken for recovery of such dues, I have no hesitation in holding that the legislature has consciously excluded the applicability of the provisions of Section 4 to Section 24 of the Limitation Act insofar as they relate to Section 18 of the SARFAESI Act. The decisions of UCO Bank v. Kanji Manji Kothari and Punnu Swami v. The Debts Recovery Tribunal of Bombay and Madras High Courts relied upon by the learned counsel for petitioner are with regard to the applicability of Section 5 of the Limitation Act only to Section 17 of the SARFAESI Act and not Section 18. In both these decisions, Section 18 has not even been referred. The decisions are, therefore, not applicable in the present case.

19. For these reasons, I conclude that the Appellate Tribunal has no power to condone the delay in filing of appeal before it under Section 18 of the SARFAESI Act and answer the question in negative.”

12.3 It has to be noted that considering the decision of the Supreme Court in the case of **Gopal Sardar vs Karuna Sardar (2004) 4 SCC 252** wherein it was held that when in the same statute in respect of various other provisions relating to filing of appeals and revisions specific provisions are made so as to give the benefit of Section 5 of the Limitation Act and such provision is not made to an application to be made under a particular section of that Statute, it obviously and necessarily follows that the legislature consciously excluded the application of Section 5 of the Limitation Act. However, the court did consider and hold that in view of Section 24 of the RDDB Act provisions of Section 5 of the Limitation Act had been made to the application and not to the appeal and therefore there was power under Section 17 and not under Section 18 to consider condonation of delay. Therefore, the view of the Madhya Pradesh High Court was that since Section 24 of the Limitation Act, 1963 was applicable to applications under the Act and not appeals, such power and the provisions of the Limitation Act were not expressly excluded from the provision of Section 17 of the Act, though Section 18 of the same statute did provide for express exclusion of the provisions of the Limitation Act.

12.3 The Supreme Court, while considering the decision of the Madhya Pradesh High Court and overruling the same was only considering the provisions of Section 18 of the Act and not Section 17 of the SARFAESI Act. What needs to be noted that while overruling the judgement of the Madhya Pradesh High Court, the Supreme Court observed that " the absence of an express provision for condonation, when Section 18(2)

expressly adopts and incorporates the provisions of the RDDB Act which contains provision for condonation of delay in filing an appeal, cannot be read as excluding the power of condonation. As already observed, the proviso to Section 20(3) which provides for condonation of delay (45 days under the RDDB Act) stands extended to disposal of appeal under the SARFAESI Act. The Supreme Court, therefore was considering the express exclusion of the provisions of the Limitation Act, 1963 in context of Section 18 of the SARFAESI Act read with Section 20(3) of the RDDB Act. It was in this context that the view of the Madhya Pradesh High Court was overruled.

13. It is well settled that a word or sentence cannot be picked up from a judgment to construe that it is the ratio decidendi on the relevant aspect of the case. It is also a well settled position of law that a judgment cannot be read as a statute and interpreted and applied to fact situations. One must always bear in mind that the facts of each case and the nature of the decision cited by the parties and what was the exact point to be decided in the decisions so cited. It would not be a proper exercise to extract a sentence here and there from the judgment and to build upon it because the essence of the decision is its ratio and not every observation found therein.

14. Now to consider the submission of Mr. Thakore, it shall be beneficial to draw **the emphasis from Paras 11 read with Para 14 of the judgement *in the case of Baleshwar Dayal (supra)* which read as under:**

> "11. We approve the view taken by the Madras, Andhra Pradesh and Bombay High Courts, but for different reasons. The view taken by Andhra Pradesh High Court in Sajida Begum vs. State Bank of India[11] is based on applicability of Section 29(2) of the Limitation Act. In our view, Section 29(2) of the Limitation Act has no absolute application, as the statute in question impliedly excludes applicability of provisions of Limitation Act to the extent a different scheme is adopted. If no provision of Limitation Act was expressly adopted, it may have been possible to hold that by virtue of Section 29(2) power of condonation of delay was available. It is well settled that exclusion of power of condonation of delay can be implied as laid down in Union of India vs. Popular Construction Co., Chhattisgarh State Electricity Board vs. Central Electricity Regulatory Commission, Commissioner of Customs and Central Excise vs. Hongo India Private Limited and Gopal Sardar vs. Karuna Sardar relied upon on behalf of the Banks.
>
> 14. We have already held that the power of condonation of delay was expressly applicable by virtue of Section 18(2) of the SARFAESI Act read with proviso to Section 20(3) of the RDB Act and to that extent, the provisions of Limitation Act having been expressly incorporated under the special statutes in question, Section 29(2) stands impliedly excluded. To this extent, we differ with the view taken by the Andhra Pradesh High Court as well as Madras and Bombay High Courts. We are also in agreement with the principle that even though Section 5 of the Limitation Act may be impliedly inapplicable, principle of Section 14 of the Limitation Act can be held to be applicable even if Section 29(2) of the Limitation Act does not apply, as laid down by this Court in Consolidated Engineering Enterprises vs. Principal Secretary, Irrigation Department and M.P. Steel Corporation vs. Commissioner of Central Excise."

12.5 In Mr Thakore's submission since there was implied exclusion of Section 29(2) of the Limitation Act when there

was no express incorporation of the provisions of the Limitation Act in Section 17 even the provisions of Section 29(2) stands impliedly excluded and to that extent, when the Supreme Court differed with the view of the Madras, Andhra Pradesh and the Bombay High Courts and when Section 5 of the Limitation Act was impliedly inapplicable, the Gujarat High Court's view of the Division Bench too was impliedly overruled.

12.6 The submission of Mr. Thakore needs to be considered in light of the issue that was under consideration before the Supreme Court. The question that was under consideration before the Supreme Court in the case of **Baleshwar Dayal (supra)** was in context of Section 18(2) of the SARFAESI Act and therefore whether the DRAT had power to condone delay in filing an Appeal when there was no express provision for condoning such delay in filing Appeals. The Madhya Pradesh High Court had held otherwise and therefore the Supreme Court reversed the view of the Madhya Pradesh High Court holding that the Madhya Pradesh High Court was wrong in holding that the DRAT had no power to condone delay.

The Supreme Court held that it approves the view taken by the Madras, Andhra Pradesh and the Bombay High Courts, but for different reasons. Considering the argument that though Section 18 did not provide for any provision for condonation of delay beyond the period prescribed, in view of Section 18(2) which said that the appeals be disposed of in accordance with the provisions of the RDDB Act and since Section 20(3) of the RDDB Act provided that in case the appeal was filed beyond a period of 30 days if sufficient cause is shown, the Supreme Court held that the provisions of the

Limitation Act were not expressly excluded and therefore Section 29(2) was applicable.

12.7 It was in background of provisions of Section 18 of the SARFSEASI Act and Section 20(3) of the DRT Act that since the special law did not expressly exclude the provisions of Sections 4 to 24 of the Limitation Act that the Supreme Court considered the provision of Section 29(2) of the Limitation Act and made a passing reference that Section 29(2) stands impliedly excluded and to that extent they differ from the view taken by the Andhra Pradesh High Court as well as the Madras and the Bombay High Court. The question was never raised and discussed in context of Section 17 of the SARFAESI Act and therefore in my opinion the judgements of Madras, Bombay and Gujarat High Court cannot be said to be overruled.

13. Let us now consider as to whether even if there is no express exclusion of the Limitation Act as per Section 29(2) does the section stand impliedly excluded? In the case of **Mukum Narain Yadav (supra),** the Supreme Court has observed that even in a case where the special law does not exclude the provisions of Sections 4 to 24 of the Limitation Act by an express reference, it would nonetheless be open to the Court to examine whether and to what extent the nature of the subject-matter and the scheme of the operation of the special law exclude their operation. It was in the context of Sections 17(7) of the SARFAESI Act read with Section 24 of the Limitation Act and therefore there was an express inclusion of the Limitation Act into the SARFAESI Act, on the same reasonings which the Supreme Court has adopted for

Section 18 have been given by the Division Benches of the High Court i.e. by holding that both, the SARFAESI Act and the RDDB Act are complimentary to each other and not in derogation. In context of reading the question of implied exclusion on the basis of the scheme of the Act that it has been held so.

13.1 For instance in the case of **Gopal Sardar (supra)** while dealing with the implied exclusion of the provisions of Section 5 of the Limitation Act in Para 13 of the said judgement, the Supreme Court observed as under:

> "Section 8 of the Act prescribes definite period of limitation of three months or four months, as the case may be, for initiating proceedings for enforcement of right of pre-emption by different categories of people with no provision made for extension or application of Section 5 of the Limitation Act. When in the same statute in respect of various other provisions relating to filing of appeals and revisions, specific provisions are made so as to give benefit of Section 5 of the Limitation Act and such provision is not made to an application to be made under Section 8 of the Act, it obviously and necessarily follows that the legislature consciously excluded the application of Section 5 of the Limitation Act. Considering the scheme of the Act being self-contained code in dealing with the matters arising under Section 8 of the Act and in the light of the aforementioned decisions of this Court in the case of Hukumdev Narain Yadav, Anwari Basavaraj Patil and M/s. Parson Tools (supra), it should be construed that there has been exclusion of application of Section 5 of the Limitation Act to an application under Section 8 of the Act. In view of what is stated above, the non- applicability of Section 5 of the Limitation Act to the proceedings under Section 8 of the Act is certain and sufficiently clear. Section 29(2) of the Limitation Act as to the express

> exclusion of Section 5 of the Limitation Act and the specific period of limitation prescribed under Section 8 of the Act without providing for either extension of time or application of Section 5 of the Limitation Act or its principles can be read together harmoniously. Such reading does not lead to any absurdity or unworkability or frustrating the object of the Act. At any rate in the light of the Three-Judge Bench decision of this Court in Hukumdev Narain Yadav case (supra) and subsequently followed in Anwari Basavaraj Patil case (supra), even though special or local law does not state in so many words expressly that Section 5 of the Limitation Act is not applicable to the proceedings under those Acts, from the scheme of the Act and having regard to various provisions such express exclusion could be gathered. Thus, a conscious and intentional omission by the Legislature to exclude application of Section 5 of the Limitation Act to the proceedings under Section 8 of the Act, looking to the scheme of the Act, nature of right of pre-emption and express application of Section 5 of the Limitation Act to the other provisions under the Act, itself means and amounts to "express exclusion" of it satisfying the requirement of Section 29(2) of the Limitation Act.”

14. All the judgements of the Supreme Court considered in **Baleshwar Dayal (supra)** were in context of provisions of the same Act and considering that in the context only of Section 18 of the SARFAESI Act did the Supreme Court make a passing reference of implied exclusion of Section 29(2) of the Limitation Act, 1963 not in the context of Section 17(7) of the SARFAESI Act read with Section 24 of the RDDB Act and Sections 36 and 37 of the SARFAESI Act. The implied exclusion of Section 29(2) was only a passing reference and cannot be even be an “obiter dictum” in absence of considering the provisions of Section 17 of the Act.

The Division Bench judgements have considered the Scheme of the SARFAESI Act and in context of the judgement of the Supreme Court in the case of **Transcore (supra)** have found that both the Acts are complementary and therefore in accordance with the provisions of Section 17(7) of the SARFAESI Act that Section 24 of the RDDB Act read with Section 36 of the SARFAESI Act expressly includes the provisions of the Limitation Act and therefore in compliance with Section 29(2), provisions of Section 5 of the Limitation Act would apply to the provisions of Section 17. Section 24 of the RDDB Act states that the provisions of the Limitation Act apply to an application under Section 19 and therefore since both, Applications under Section 17 of the SARFAESI Act are original proceedings as held by **Mardia Chemicals (supra),** Section 24 of the RDDB Act would apply to Section 17 and therefore the DRT would have power to decide applications and take into consideration Section 5 of the Limitation Act,1963.

15. I therefore hold that the judgement of the Gujarat High Court in the case of **Corporation Bank (supra)** is still a good law and therefore the DRAT was in error in holding that the DRT had no power to condone the delay in Applications filed under Section 17 of the SARFAESI Act.

16. Before I deal with the submissions of Shri Aditya Pandya on the continuity of cause of action, I also need to consider whether the DRAT could have relied on the decision of the Supreme Court in the case of **International Asset Reconstruction (supra)** and hold that the DRT has no power to condone delay. In the case of **International Asset**

**(supra)** pursuant to a recovery certificate issued by the Tribunal under Section 19(22) of the RDDB Act, the Recovery Officer passed necessary orders under Section 28 of the Act. An Appeal was preferred by the aggrieved person before the Tribunal beyond the prescribed period of 30 days. Section 30(1) of the RDDB Act 1993 provides for preferring an Appeal before the Tribunal against the order of the Recovery Officer. It will be beneficial to reproduce paras 11 to 13 of the said judgement which read as under:

> "11. An "application" is defined under Section 2(b) of the RDB Act as one made under Section 19 of the Act. The latter provision in Chapter IV, deals with institution of original recovery proceedings before a Tribunal. An appeal lies against the order of the Tribunal under Section 20, before the Appellate Tribunal within 45 days, which may be condoned for sufficient cause under the proviso to Section 20(3) of the Act. The Tribunal issues a recovery certificate under Section 19(22) to the Recovery officer who then proceeds under Chapter V for recovery of the certificate amount in the manner prescribed. A person aggrieved by an order of the Recovery officer can prefer an appeal before the Tribunal under Rule 4, by an application in the prescribed Form III. Rule 2(c) defines an "application" to include a memo of appeal under Section 30(1). **The appeal is to be preferred before the Tribunal, as distinct from the appellate tribunal, within 30 days. Section 24 of the RDB Act, therefore, manifestly makes the provisions of the Limitation Act applicable only to such an original "application" made under Section 19 only. The definition of an "application" under Rule 2(c) cannot be extended to read it in conjunction with Section 2(b) of the Act extending the meaning thereof beyond what the Act provides for and then make Section 24 of the RDB Act applicable to an appeal under Section 30(1) of the Act. Any such interpretation shall be completely contrary to the legislative intent, extending**

**the Rules beyond what the Act provides for and limits. Had the intention been otherwise, nothing prevented the Legislature from providing so specifically.**

12. A comparative study of Section 30, pre and post amendment in the year 2000, reveals that the deemed status of proceedings before the Recovery officer, as a Tribunal, stands denuded. Had the proceedings before the Recovery officer deemed to be before a Tribunal, entirely different considerations may have arisen.

| Old Section 30 before 2000 amendment | Section 30 after the 2000 amendment |
|---|---|
| "30. Orders of Recovery Officer to be deemed as order of Tribunal.- Notwithstanding anything contained in Section 29, an order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive), shall be deemed to have been made by the Tribunal and an appeal against such orders shall lie to the Appellate Tribunal." | "30. Appeal against the order of Recovery Officer.- (1)Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal. (2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such enquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise ofhis powers under |

| | |
|---|---|
| | Sections 25 to 28 (both inclusive).” |

13. The RDB Act is a special law. The proceedings are before a statutory Tribunal. The scheme of the Act manifestly provides that the Legislature has provided for application of the Limitation Act to original proceedings before the Tribunal under Section 19 only. The appellate tribunal has been conferred the power to condone delay beyond 45 days under Section 20(3) of the Act. The proceedings before the Recovery officer are not before a Tribunal. Section 24 is limited in its application to proceedings before the Tribunal originating under Section 19 only. The exclusion of any provision for extension of time by the Tribunal in preferring an appeal under Section 30 of the Act makes it manifest that the legislative intent for exclusion was express. The application of Section 5 of the Limitation Act by resort to Section 29(2) of the Limitation Act, 1963 therefore does not arise. The prescribed period of 30 days under Section 30(1) of the RDB Act for preferring an appeal against the order of the Recovery officer therefore cannot be condoned by application of Section 5 of the Limitation Act.”

[Emphasis Supplied]

16.1 Once we read Para 11 of the said judgement closely what is clearly borne out is that reading the definition of Section 2(b) of the RDDB Act which defines the term “application” as one made under Section 19, the Supreme Court was conscious of the difference in the nature of proceedings before the Tribunal filed by virtue of an Application under Section 19 and the one by way of an Appeal under Section 30 of the RDDB Act. It will be worthwhile to emphatically quote the observations of the Supreme Court in para 11 which read as under:

> " The appeal is to be preferred before the Tribunal, as distinct from the Appellate Tribunal, within 30 days. Section 24 of the RDDB Act, therefore, manifestly makes the provisions of the Limitation Act applicable only to such an original "application" made under Section 19 only. The definition of an "application" under Rule 2(c) cannot be extended to read it in conjunction with Section 2(b) of the Act extending the meaning beyond what the Act provides for and then make Section 24 of the Act applicable to an Appeal under Section 30(1) of the Act. Any such interpretation shall be completely contrary to the legislative intent, extending the Rules beyond what Act provides for and limits. Had the intention been otherwise, nothing prevented the legislature from providing so specifically"

16.2 Section 30 of the RDDB Act falls in Chapter V which has the title " RECOVERY OF DEBT DETERMINED BY TRIBUNAL" Section 30 provides for Appeal against the order of the Recovery Officer. The section reads as under:

> **30. Appeal against the order of Recovery Officer.—**
>
> (1) Notwithstanding anything contained in section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.
> (2) On receipt of an appeal under sub-section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under sections 25 to 28 (both inclusive).

16.3 What essentially needs to be seen is that once the process of an adjudication by a quasi-judicial forum in an

Application under Sections 19 and 20 of the RDDB Act is over, the Recovery Officer is appointed by the Central Government. The term “Recovery Officer” is defined under Section 2(k) of the RDDB Act to mean a ‘Recovery Officer” appointed by the Central Government for each Tribunal under sub-section (1) of Section 7 of the Act. Section 7 of the Act has the heading :STAFF OF THE TRIBUNAL. “Tribunal” is defined under Section 2(o) of the Act;”Tribunal” means the Tribunal established under sub-section(1) of Section 3. Section 3 of the Act is for the ESTABLISHMENT OF TRIBUNAL and sub-section (1) thereof says that the Central Government may by notification establish one or more Tribunals. Section 4 of the Act deals with COMPOSITION OF TRIBUNAL. Sub-section (1) says that the Tribunal shall consist of one person only referred to as the Presiding Officer to be appointed by the Central Government. Section 5 is regarding QUALIFICATIONS FOR APPOINTMENT AS PRESIDING OFFICER:It suggests that the presiding officer has to be a qualified akin to a District Judge. Similarly, Sections 8,9 and 10 deal with Establishment, Composition and Qualifications for appointment of Appellate Tribunal. The incumbent has to be a person who is or has been or is qualified to a Judge of the High Court.

16.4 The purpose of reproducing the relevant provisions hereinabove is to demonstrate that unlike in cases where Applications and Appeals are decided by the Tribunals by judicial officers, a Recovery Officer who issues a Recovery Certificate and against whom Appeal lies is an appointee of the Central Government and Staff of the Tribunal with a ministerial act of issuing certificates facilitating recovery pursuant to the Orders of the Tribunal and therefore his

position and appeals against his Orders cannot hold the exalted position akin to quasi-judicial or judicial proceedings akin to Applications under Section 19 or Appeals under Section 20 of the RDDB Act and it is this context the Supreme Court observed that there is no power to condone delay.

16.5 However the purpose of reproducing an extract of Para 11 from the case of **International Reconstruction (supra)** is essentially to suggest that it also answers the question in Para 14 of **Baleshwar Dayal Jaiswal (supra)** inasmuch as it holds that proceedings by way of an Application filed under the RDDB Act when read with Section 24 would indicate that Limitation Act applies and therefore the submission that Section 29(2) is impliedly excluded would also not be an argument of the Respondent Bank here that can be accepted by relying on **Baleshwar Dayal Jaiswal (supra).** As the case of **International Asset (supra)** was in context of a proceeding instituted by a Recovery Officer and the Appellate proceedings cannot be in any manner compared to a judicial proceeding of an Application under Section 17 of the SARFAESI Act, the DRAT in my opinion could not have held that the same would apply in Applications filed under Section 17 of the Act. The judgement is applied completely out of context and cannot be made applicable to proceedings of a statutory tribunal.

17. This brings us to the second question raised by the parties which is when does the cause of action to file an Application under Section 13(4) would accrue and whether the Section is for more measures than one and any such measure can be challenged in an Application under Section 17

and that is there a continuous cause of action till the date of sale?

17.1 Section 13 of the SARFAESI Act is regarding enforcement of security interest. Under Section 13(2) of the Act on any default by the borrower in making payment the secured creditor may call upon the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice. As per sub-section (4) in case the borrower fails to discharge his liability in full within the specified sixty days, the secured creditor may take recourse to one or more measures to recover his secured debt. For the present we are concerned with measure (a).
Clause(a) of sub-section (4) of Section 13 reads as under:

> "(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset."

17.2 In this context just to recapitulate the submission of Mr. Aditya Pandya, learned advocate for the petitioner, the sale notice was dated 30.11.2018 and the Application was filed on 08.01.2019 within 45 days. He further submitted that the process of taking over possession and selling of secured asset as provided under Section 13(4)(a) is a continuous process and sale is an onward step which results in ultimate culmination of proceedings. Therefore the borrower can challenge the action of the Bank within 45 days from the last step of the process i.e.upto culmination of sale. Inviting my attention to Section 17 of the Act, Mr Pandya would submit

that a person aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor may make an application. Challenge to the sale notice was therefore one of the measures and therefore the Application was within time.

18. Mr. Thakore had submitted that as each measure is separate and distinct, the cause of action of each measure was different and in absence of a challenge to the first measure of taking possession, subsequent action of the sale notice could not be set aside. Both the learned advocates for the parties had submitted that there is no decision on the issue at hand regarding when the cause of action could be said to commence and whether right upto the sale notice could it be said to be continuous. Mr. Pandya had drawn my attention to a decision of the DRAT, Delhi in the case of **Bank of Baroda vs Veena Chandyoke and Anr** where the DRAT in Paras 12 , 13 and 14 the Tribunal has observed as under:

> "12. Since the notices under Section 13(2) of the SRFAESI Act and sale notice had been sent by the Bank to be served on respondent No. 1 herein (applicant in S.A.) in Australia, the above rules of the Australia Post are relevant. It is the own case of the appellant - Bank that the notices were received back unclaimed. Going by the above clarification as to the unclaimed articles given by the Australia Post, the notices were not actually served on respondent No. 1 herein. The Bank got them back in India unserved.
>
> 13. Even the sale notice was returned to the sender (Bank) on 9.1.2006. Sale took place on 6.1.2006. Rule 8 of the Security Interest (Enforcement) Rules, 2002 provides that the authorised officer would serve on the borrower a notice of 30 days of

> sale of immovable secured asset. When the sale notice itself was returned to the sender (Bank) from Australia on 9.1.2006, it is clear that notice was not sent with sufficient time margin to ensure its service before 30 days of the date of sale. Various steps permitted by law for realisation of the secured asset by the Bank of Financial Institution are not to be considered in isolation. In fact, they constitute a chain. Sale after taking possession is an onward step for the ultimate culmination of the proceedings starting with the issuance of notice under Section 13(2) of the SRFAESI Act. The sale having taken place on 6.1.2006, the filing of the S.A. on 12.1.2006 by respondent No. 1 could not at all be deemed to be beyond time. The Bank has unnecessarily been trying to put respondent No. 1 out of Court on nonexistent technical ground of limitation.
>
> 14. Adoption of measure by the Bank under Section 13(4) of the SRFAESI Act is towards sale of the secured asset for the realisation of the dues of the Bank and the borrower can challenge the action of the Bank till the final stage is reached. The right to challenge would come to an end only after the expiry of 45 days reckonable from the date of last concluded stage of the action of the Bank."

18.1 The Tribunal has therefore held that various steps are not to be considered in isolation. In fact they constitute a chain. Sale after taking possession is an onward step for the ultimate culmination of the proceedings starting with the issuance of a notice under Section 13(2) of the SARFAESI Act. Adoption of the measure by the Bank under Section 13(4) of the SARFAESI Act is towards sale of the secured asset for realization of the dues of the Bank and the borrower can challenge the action till the final stage is reached. The right to challenge would come to an end only after the expiry of 45 days reckonable from the date of last concluded stage of the action of the Bank.

19. In **M/s. Kanji Manji (supra),** it was the case before the Bombay High Court that a challenge to the notice under Section 13(2) was made 9 months after action under Section 13(4) notice was initiated after taking symbolic possession. The DRT rejected the application as time barred as it was filed beyond 45 days of the date of symbolic possession. On appeal the DRAT held that there cannot be any other possession than actual possession and that an effective action can be taken by the aggrieved party only after actual possession is taken and therefore the borrower has a right to file an application within 45 days from the date of taking physical possession. The DRAT thus allowed the Appeal of the borrower and remanded the matter to decide the same in accordance with law which the Bank challenged by way of a Petition. **The Bombay High Court in Para 39 of the judgement relying on the decision of the Supreme Court in the case of Mardia Chemicals (supra) held as under.**

> “39. What is important to note is that while dealing with the grievance that the NPA Act is a draconian legislation and that it affords no protection to the borrower, the Supreme Court made the above observations. The Supreme Court fixed the point at which the borrower can make a grievance and clarified the scope of appeal under Section 17. The Supreme Court held that the borrower's right to approach the DRT as provided under Section 17 matures on any measures having been taken under Sub-section 4 of Section 13 of the NPA Act and on measures having been taken under subsection 4 of Section 13 and before the date of sale/auction of the property, it would be open for the borrower to file an appeal under Section 17 before the DRT. Thus appeal can be filed from the date on which any measures are taken under Section 13(4) till the

date of sale/auction of the property. Obviously, therefore, after sale, there can be no appeal."

19.1 It will be apt to quote para 80 of the judgement in the case of **Mardia Chemicals (supra)** which reads as under:

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

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

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

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

> 4. In view of the discussion already held in this behalf, we find that the requirement of deposit of 75% of the amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.
>
> 5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court."

19.2 The Supreme Court in **Mardia Chemicals (supra)** held that on measures having been taken under sub-section(4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal under Section 17 of the Act before the Debts Recovery Tribunal. It would be necessary to reproduce what the Bombay High Court culled as the gist of what the Supreme Court has said in **Mardia Chemicals (supra)** and **Transcore (supra)**.

> "43. The following is the gist of what the Supreme Court has said in Mardia Chemical's case (supra) and Transcore's case (supra).
>
> > (i) The NPA Act deals with crystallized liability. It deals with rights of the secured creditors.
> >
> > (ii) The NPA Act proceeds on the basis that the asset is created in favour of the secured creditors, which could be assigned to the Asset Management Company, which steps into the shoes of the secured creditors. The NPA Act provides for recovery of possession by non-adjudicatory process.

(iii) Section 13(2) deals with liquidation of liability. It contemplates a notice of demand and constitutes action under the NPA Act. It proceeds on the basis that the borrower is already under a liability i.e. the debt has become due and the borrower's account in the bank is classified as substandard. It acts as an attachment because Section 13(13) forbids the borrower, after receipt of notice under Section 13(2), from transferring the secured assets, in any manner, without written consent of the secured creditor.

(iv) Notice under Section 13(2) is a condition precedent to the invocation of Section 13(4) by the secured creditor and once notice under Section 13(2) is issued, the secured creditor is entitled to take any of the measures provided in Section 13(4).

(v) Once any of the measures under Section 13(4) are taken, the security interest is already created in favour of the secured creditor. Under Rule 8 of the said Rules, the authorized officer is empowered to take possession by delivering the possession notice as per the prescribed format informing the borrower that the secured creditor has taken possession of the secured assets.

(vi) Where possession is taken by the authorized officer, he shall take steps to protect the secured assets till they are sold (rule 8(4)).

(vii) Provision for time of sale, issue of sale certificate and delivery of possession, etc. is made in Rule 9.

(viii) Though Rule 8 refers to sale of immoveable secured assets, it deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9.

(ix) Recourse to take possession of the secured assets of the borrower under Section 13(4) of the NPA Act comprehends the power to take actual possession of the secured

assets.

(x) There is no dichotomy between symbolic possession and actual possession.

(xi) Any transfer of secured assets after taking possession or after taking over management of business under Section 13(4) by the secured creditor vests in the transferee all rights in relation to the secured assets. This is because thereafter assets vest in the secured creditor free of all encumbrances (Section 13(6)).

(xii) If the dues of the secured creditor together with the costs, etc. are tendered to the secured creditor before the date fixed for sale/transfer, the secured assets shall not be sold or transferred by the secured creditor (Section 13(8)).

(xiii) The provisions as contained under Sections 13 and 17 of the NPA Act provide adequate and efficacious mechanism to consider and decide the objections and disputes raised by a borrower against the recovery.

(xiv) The right of the borrower to approach the DRT as provided under Section 17 of the NPA Act matures on any measures having been taken under Section 13(4) of the NPA Act.

(xv) On measures having been taken under Section 13(4) of the NPA Act and before the date of sale/auction of the property, it would be open to the borrower to file an appeal under Section 17 before the DRT.

(xvi) Any person including the borrower aggrieved by any of the measures referred to in Sub-section (4) of Section 13 can approach the DRT by way of an application within 45 days from the date on which the measures are taken.

(xvii) Remedy under Section 17 is in the nature of original proceedings. It is wrongly described as an appeal. It is a remedy in lieu

of a suit.

(xviii) Under Section 17(2), the DRT is required to consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor are in accordance with the provisions of the NPA Act and the said Rules.

(xix) If the DRT comes to the conclusion that the said measures are taken not in accordance with the provisions of the NPA Act and the said Rules, it may declare the recourse taken to the said measures as invalid and restore the possession of the secured assets to the borrower and may pass appropriate orders in relation thereto.

(xx) The scheme of Section 13(4) read with Section 17(3) is that, if the borrower is dispossessed not in accordance with the provisions of the NPA Act, then the DRT is entitled to put the clock back by restoring the status quo ante.

(xxi) Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorized officer.

[Emphasis Supplied]

19.3 The gist at (v) suggests that once any measures under Section 13(4) are taken, the security interest is already created in favor of the secured creditor. Under Rule 8 of the Rules, the authorized officer is empowered to take possession by delivering the possession notice as per the prescribed format informing the borrower that the secured creditor has taken possession of the secured assets. Gist (xiv) reads that the right of the borrower to approach the DRT as provided under Section 17 of the Act matures on any measures having been taken under Section 13(4) of the NPA Act. Gist(xv)

reads that on measures having been taken under Section 13(4) of the NPA Act and before the date of sale/auction of property, it would be open to the borrower to file an appeal under Section 17 of before the DRT. Gist (xvi) reads that any person including the borrower aggrieved by any of the measures referred to in sub-section (4) of Section 13 can approach the DRT by way of an Application within 45 days from the date on which measures are taken. (xix) of the gist reads that if the DRT comes to the conclusion that the said measures are taken not in accordance with the provisions of the NPA Act and the said Rules, it may declare the recourse taken to the said measures as invalid and restore the possession of the secured assets to the borrower and may pass appropriate orders in relation thereto. (xx) reads that the scheme of Section 13(4) read with Section 17(3) is that, if the borrower is dispossessed not in accordance with the provisions of the NPA Act,then the DRT is entitled to put the clock back by restoring the position status quo ante. As per gist (xxi) it cannot be said that if possession is taken before the confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorized.

19.4 The Bombay High Court then in Paragraphs 51 and 52 held as under:

> “51. In our opinion, in the light of the observations of the Supreme Court in Mardia Chemical's case (supra) and in Transcore's case (supra), **the conclusion is irresistible that though the proceedings before the DRT are in the nature of civil suit, the DRT cannot entertain a debate on the question whether the debt has become due or not because the NPA Act proceeds on the basis that the liability is crystallized and the debt has become due. The moment action**

> **under Section 13(4) is taken, security interest is also created in the secured assets. The DRT Act can obviously consider whether possession of the secured assets is taken in accordance with the NPA Act and the said Rules.** This is more so because if the secured creditor is required to approach the Chief Metropolitan Magistrate/District Magistrate, as the case may be, under Section 14 of the NPA Act for help to take actual possession, notice is not required to be given to the borrower. He is not required to be heard (See Trade Well and Anr. v. Indian Bank and Anr. 2007 (1) Bom.C.R. (Cri.) 783). Therefore, if the borrower is dispossessed not in accordance with the provisions of the NPA Act and the said Rules, he can make grievance only before the DRT by filing an appeal under Section 17 and the DRT can restore the possession if a case is made out. The liability is crystallized. It cannot be adjudicated upon. In this connection, we may also refer to Section 19 of the NPA Act which enables the DRT to award compensation and costs to the borrower in case it finds, while dealing with an application under Section 17, that possession of the secured assets was not taken in accordance with the Page 0763 NPA Act and the said Rules. Section 17 covers borrower as well as aggrieved third parties. All grievances relating to measures under Section 13(4) not having been taken in accordance with the NPA Act and the rules made thereunder can be raised under Section 17(1). That is the width or the amplitude of those proceedings. Proceedings under Section 17 are an original action to the above extent.
>
> **52. As stated by the Supreme Court, the right of the borrower to resort to Section 17 matures on measures having been taken under Section 13(4) and he can file an appeal till the sale of the secured assets. There can be no appeal after the sale**."

19.5 The Bombay High Court held that the right of the borrower to resort to Section 17 measures having been taken

under Section 13(4) of the NPA Act **he can file an Appeal till the sale of the secured assets**. (emphasis supplied). In paragraphs 53 & 55 of the judgement, the Bombay High Court held as under:

> "53. In our opinion, in the light of the exposition of law made by the Supreme Court in Mardia Chemical's case (supra) and Transcore's case (supra), it must be held that under the scheme of the NPA Act and the said Rules, taking over possession of the secured assets and sale of the secured assets are two distinct and different concepts. The borrower's right, title and interest in the secured assets is extinguished the moment measures under Section 13(4) are taken such as taking over symbolic or actual possession of the secured assets. He can make a grievance that those measures were not taken in accordance with the provisions of the NPA Act. Thereafter, he has no right to appeal against any steps taken towards sale.
>
> 55. We are unable to agree with his submission that Rules 8(3) and 8(4) and Rules 8(5) and 9(6) contemplate accrual of cause of action at those stages or that they are sub-measures for taking possession. Such a view will frustrate the object of the NPA Act viz. enforcement of security interest. We have already observed that taking over possession of the secured assets and sale of the secured assets are two different and distinct concepts. Since the security interest is created in the secured assets, the borrower after possession is taken over, having lost his right, title and interest has no locus to challenge the sale. Undoubtedly, Rule 8 contemplates a notice of sale to the borrower. Rule 9(1) also contemplates a notice to the borrower. Rule 9 says that if the authorized officer fails to obtain a price higher than the reserved price, he may with the consent of the borrower and the secured creditor effect the sale at a price less than the reserved price. In our opinion, these rules reflect the anxiety of the legislature to

> ensure that as far as possible the secured asset is sold at the highest available price. The intention is not to be unfair to the borrower. In fact, as per Section 13(8), if the dues of the secured creditor together with costs, etc. are tendered at any time before the sale, the secured asset is not to be sold or transferred by the authorized officer. It is clear from this that the intention of the legislature is not to encourage the secured creditor to somehow take possession of the secured assets. A long rope is given to the borrower to pay the debts or else the secured asset in which the security interest of the secured creditor is Page 0764 already created is liable to be sold and the borrower cannot frustrate the sale. Notice of sale contemplated under the said Rules is obviously to give an opportunity to the borrower to bring a buyer who can buy the secured assets at a higher price. But, in no way, he can make the sale an impossibility by raising objections. We, therefore, reject the submission of Mr. Bulchandani that under Rules 8(3) and (4) and Rules 8(5) and (6), there is accrual of cause of action and the borrower can appeal at that stage."

19.6 Reading of the enunciations in the aforesaid paras would indicate that the Bombay High Court opined that taking over possession of the secured assets are two different concepts. The borrower's right, title and interest in the secured assets is extinguished the moment measures under Section 13(4) are taken such as taking over symbolic or actual possession of the secured assets. He can make a grievance that those measures were not taken in accordance with the provisions of the NPA Act. Thereafter, he has no right to appeal against any steps taken towards sale. (emphasis supplied). In the aforesaid para the submissions of the Learned Advocate for the borrower made in Paras 21 and 22 were rejected. To better appreciate the question decided it will be better to produce the gist of submissions made in

Paras 21 and 22. They read as under:

> "21. Mr. Bulchandani submitted that if the case of the petitioners is to be accepted that the rights of borrowers extinguish on expiry of 45 days of date of possession notice issued under Rule 8(1), then breaches of subsequent Rules 8(3) to (6) will not be open to any challenge/scrutiny. Mr. Bulchandani submitted that if the submission of the petitioner is to be accepted, then there will be no case before DRT for consideration whether the procedure under Rules 8(3) to (6) has been complied with by the secured creditor, since according to the petitioners rights of borrower is completely extinguished and, therefore, none can question any illegality committed by the secured creditor. This would dilute provisions of Sections 17(2) and (3), besides causing grave and irreparable harm, injury and injustice to the borrower.
> 22. Mr. Bulchandani laid stress on Sections 13(6), 13(8), Rule 8(1), (3) to (6) and contended that there is sufficient indication in these provisions that the borrower can pay the debt and redeem the secured asset. He submitted that the liability to pay crystalizes but the extent of liability is always subject to the scrutiny of DRT. When the extent of liability is disputed or when non-compliances of the provisions of the NPA Act or the said Rules is alleged by the borrower, it is DRT which is the forum for the borrower to approach Page 0755 and this in the cause of justice, equity and fair deal to the borrower has to be at any stage before the sale of the asset. Thus, it stands to logic and rationality that the borrower has a right to approach DRT either after the symbolic possession is taken after service of possession notice under Section 13(4)(a) read with Rules 8(1) and (2), or after actual possession is taken under Section 13(4)(a) read with Section 14 and Rules 8(3), (4) or after sale notice is received by the borrower under Rule 8(6), all read with Section 17(1), but before completion of sale."

19.7 In the context of the submissions therefore that the

borrower has a right to approach DRT either after symbolic possession is taken after service of possession notice under Section 13(4)(a) read with Rules 8(1) and 8(2) or after actual possession is taken under Section 13(4)(a) read with section 14 and Rules 8(3), (4) or after sale notice is received by the borrower under Rule 8(6), all read with Section 17(1), but before the completion of sale is rejected when one reads Para 55 of the judgement. Therefore, what can be culled out from the judgement is that the borrower has to approach the DRT by way of an Appeal at the first instance. Reading Para 56 of the judgement so indicates.

> "56. Mr. Bulchandani laid stress on the observations of the Supreme Court that on measures having been taken under Sub-section (4) of Section 13 and before the sale/auction, it would be open to the borrower to file an appeal under Section 17. There can obviously be no dispute about this proposition. But, it cannot be inferred from this that, at every stage, in the process of sale, the borrower can appeal to the DRT. The borrower cannot wait till the date of auction is fixed and treat any time in between as the starting point for limitation and frustrate the sale. Besides, that will encourage indolence which the law does not approve. The law does not encourage the indolent. What the Supreme Court has emphasized is that after sale, there can be no appeal. But, that does not mean that procedure for sale can be challenged by filing an appeal because as already stated by us, the right, title and interest of the borrower is already extinguished after measures under Section 13(4) are taken."

19.8 The Bombay High Court held that though there can be no dispute about the proposition that the borrower can approach the DRT before the date of sale but the Court held

that it cannot be inferred from this that at every stage, in the process of sale, the borrower can appeal. The borrower cannot wait till the date of auction is fixed and treat any time in between as the starting point for limitation and frustrate the sale.The law does not encourage the indolent. What the Supreme Court,in the opinion of the Bombay High Court held that after sale, there can be no appeal.

20. In a recent decision in the case of **Hindon Forge Private Limited and Another versus State Of Uttar Pradesh and Another reported in (2019) 2 SCC 198,** the Full Bench decision of the Allahabad High Court was under scrutiny. Before the Allahabad High Court, a learned single judge noticed divergent opinions expressed by two different benches on the question whether an application under Section 17(1) of the SARFAESI Act at the instance of the borrower, is maintainable even before physical or actual possession of secured assets is taken by the Banks/Financial Institutions in exercise of powers under Section 13(4) of the Act read with Rule 8 of the Enforcement Rules,2002. The Full Bench in the relevant paras answered the questions as under:

> “34. Thus, the scheme of the provisions of Sections 13 and 17 of the Act, read with Rules 8 and 9 of the Rules, would show that the “measure” taken under Section 13(4)(a) read with Rule 8 would not be complete unless actual (physical) possession of the secured assets is taken by the Bank/Financial Institutions. In our opinion, taking measure under Section 13(4) means either taking actual/physical possession under clause (a) of sub-section (4) of Section 13 or any other measure under other clauses of this Section and not taking steps to take possession or making unsuccessful attempt to take measure under Section 13(4) of the

Act. Similarly, following the procedure laid down under Section 14 and/or Rules 8 and 9, where the Bank meets with resistance, would only mean taking steps to seek possession under Section 13(4)(a) and the "measure" under sub-section (4)(a) of Section 13 would stand concluded only when actual/physical possession is taken or the borrower loses actual/physical possession. It is at this stage alone or thereafter, the borrower can take recourse to the provisions of Section 17(1) of the Act. The transfer of possession is an action. Mere declaration of possession by a notice, in itself, cannot amount to transfer of possession, more particularly where such a notice meets with resistance. When the possession is taken by one party, other party also loses it. In the present case, adversial possession in being claimed by the secured creditor against the borrower. It is not possible that both will have possession over the secured assets. The possession of the secured creditor would only come into place with the dispossession of the borrower. We may also observe that in a securitisation application under Section 17(1), the borrower will have to make a categoric statement that he lost possession or he has been dispossessed and pray for possession.

106. Issuance of possession notice, as observed earlier, gives borrower and the public in general an intimation that the secured creditor has taken possession of the property and at that stage, it is quite possible, may be in view of resistance or if the Banks chooses to take only symbolic possession, to state that the secured creditor has taken symbolic/constructive possession and not physical possession, but that by itself would not entitle the borrower to raise challenge under Section 17(1) of the Act, as held by the Supreme Court in Noble Kumar (supra). Unless the borrower loses actual (physical) possession, he cannot take recourse to provisions of Section 17(1). Even while taking steps under Section 13(4) of the Act read with Rule 8 of the Rules, in a given case, the bank may not physically dispossess the borrower and wait till it takes steps to conduct actual sale/auction of the secured assets i.e. till he issues notice under

> Rule 8(6) of the Rules. Even that by itself, from the scheme of the Act and the Rules, in the backdrop of the objective of the Act, in our opinion, does not confer any right to take recourse to Section 17(1). The borrower can file securitisation application under Section 17(1) only when he physically loses possession.
>
> 111. We are, therefore, of the firm and considered opinion that taking "symbolic possession" or issuance of possession notice under Appendix IV of the Rules, meeting with any resistance, cannot be treated as "measure"/s taken under Section 13(4) of the Act and, therefore, the borrower at that stage cannot file an application under Section 17(1) before DRT. In other words, a securitisation application under Section 17(1) of the Act is maintainable only when actual/physical possession is taken by the secured creditor or the borrower loses actual/physical possession of the secured assets. Once the right to approach DRT matures and securitisation application under Section 17(1) is filed by the borrower, it is open to DRT to deal with the same on merits and pass appropriate orders in accordance with law. Thus, the question referred to for our consideration stands answered in terms of this judgment. The judgment of this Court in Aum Jewels (supra), in our opinion, does not enunciate the correct law."

20.1 Therefore, the Full Bench of the Allahabad High Court held that only when actual possession and not symbolic possession is taken over that the borrower's right to file an Application under Section 17 (1) of the SARFAESI Act matures. The Supreme Court disagreed with the view of the Full Bench after a detailed analysis of the provisions of Section 13(4) read with the provisions of Rule 8 of the Enforcement Rules, 2002. In Para 23 of the judgement the Supreme Court observed as under:

> "23. The judgment in Mardia Chemicals (supra) had made it clear in paragraph 80 that all measures having been taken under section 13(4), and before the date of sale auction, it would be open for the borrower to file a petition under section 17 of the Act. This paragraph appears to have been missed by the Full Bench in the impugned judgment."

20.2 The Court held that in view of the judgement of **Mardia Chemicals (supra)** all measures having been taken under Section 13(4) and before the auction-sale, it would be open for the borrower to file a petition under Section 17 of the Act. Paragraphs 24 to 34 and Paras 41 and 42 thereof of the judgement in the case of **Hindon Forge (supra)** are reproduced hereunder:

> "24. A reading of section 13 would make it clear that where a default in repayment of a secured debt or any instalment thereof is made by a borrower, the secured creditor may require the borrower, by notice in writing, to discharge in full his liabilities to the secured creditor within 60 days from the date of notice. It is only when the borrower fails to do so that the secured creditor may have recourse to the provisions contained in section 13(4) of the Act. Section 13(3-A) was inserted by the 2004 Amendment Act, pursuant to Mardia Chemicals (supra), making it clear that if on receipt of the notice under section 13(2), the borrower makes a representation or raises an objection, the secured creditor is to consider such representation or objection and give reasons for non-acceptance. The proviso to section 13(3-A) makes it clear that this would not confer upon the borrower any right to prefer an application to the Debts Recovery Tribunal under section 17 as at this stage no action has yet been taken under section 13(4).
>
> 25. When we come to section 13(4)(a), what is clear is that the mode of taking possession of the

secured assets of the borrower is specified by rule 8. Under section 38 of the Act, the Central Government may make rules to carry out the provisions of the Act. One such rule is rule 8. Rule 8(1) makes it clear that "the authorised officer shall take or cause to be taken possession". The expression "cause to be taken" only means that the authorised officer need not himself take possession, but may, for example, appoint an agent to do so. What is important is that such taking of possession is effected under sub-rule (1) of rule 8 by delivering a possession notice prepared in accordance with Appendix IV of the 2002 Rules, and by affixing such notice on the outer door or other conspicuous place of the property concerned. Under sub-rule (2), such notice shall also be published within 7 days from the date of such taking of possession in two leading newspapers, one in the vernacular language having sufficient circulation in the locality. This is for the reason that when we come to Appendix IV, the borrower in particular, and the public in general is cautioned by the said possession notice not to deal with the property as possession of the said property has been taken. This is for the reason that, from this stage on, the secured asset is liable to be sold to realise the debt owed, and title in the asset divested from the borrower and complete title given to the purchaser, as is mentioned in section 13(6) of the Act. There is, thus, a radical change in the borrower dealing with the secured asset from this stage. At the stage of a section 13(2) notice, section 13(13) interdicts the borrower from transferring the secured asset (otherwise than in the ordinary course of his business) without prior written consent of the secured creditor. But once a possession notice is given under rule 8(1) and 8(2) by the secured creditor to the borrower, the borrower cannot deal with the secured asset at all as all further steps to realise the same are to be taken by the secured creditor under the 2002 Rules.

26. Section 19, which is strongly relied upon by Shri Ranjit Kumar, also makes it clear that compensation is receivable under section 19 only when possession of secured assets is not in

accordance with the provision of this Act and rules made thereunder.24 The scheme of section 13(4) read with rule 8(1) therefore makes it clear that the delivery of a possession notice together with affixation on the property and publication is one mode of taking “possession” under section 13(4). This being the case, it is clear that section 13(6) kicks in as soon as this is done as the expression used in section 13(6) is “after taking possession”. Also, it is clear that rule 8(5) to 8(8) also kick in as soon as “possession” is taken under rule 8(1) and 8(2). The statutory scheme, therefore, in the present case is that once possession is taken under rule 8(1) and 8(2) read with section 13(4)(a), section 17 gets attracted, as this is one of the measures referred to in section 13(4) that has been taken by the secured creditor under Chapter III.

27. Rule 8(3) begins with the expression “in the event of”. These words make it clear that possession may be taken alternatively under sub-rule (3). The further expression used in sub-rule (3) is “actually taken” making it clear that physical possession is referred to by rule 8(3). Thus, whether possession is taken under either rule 8(1) and 8(2), or under rule 8(3), measures are taken by the secured creditor under section 13(4) for the purpose of attracting section 17(1).

28. The argument made by the learned counsel for the respondents that section 13(4)(a) has to be read in the light of sub-clauses (b) and (c) is therefore incorrect and must be rejected. Under sub-clause (c), a person is appointed as manager to manage the secured assets the possession of which has been taken over by the secured creditor only under rule 8(3). Further, the rule of noscitur a sociis cannot apply. Sub-clause (b) speaks of taking over management of the business of the borrower which is completely different from taking over possession of a secured asset of the borrower. Equally, sub-clause (d) does not speak of taking over either management or possession, but only speaks of paying the secured creditor so much of the money as is sufficient to pay off the secured debt. These arguments must therefore be rejected.

29. Equally fallacious is the argument that section 13(4) must be read in the light of sections 14 and 15. There is no doubt whatsoever that under section 14(1), the Magistrate takes possession of the asset and “forwards” such asset to the secured creditor. Equally, under section 15 there is no doubt that the management of the business of a borrower must actually be taken over. These are separate and distinct modes of exercise of powers by a secured creditor under the Act. Whereas sections 14 and 15 have to be read by themselves, section 13(4)(a), as has been held by us, has to be read with rule 8, and this being the case, this argument must also be rejected.

30. Yet another argument was made by the learned counsel for the respondents that section 17(3) would require restoration of possession of secured assets to the borrower, which can only happen if actual physical possession is taken over. Section 17(3) is a provision which arms the Debts Recovery Tribunal to give certain reliefs when applications are made before it by the borrower. One of the reliefs that can be given is restoration of possession. Other reliefs can also be given under the omnibus section 17(3)(c). Merely because one of the reliefs given is that of restoration of possession does not lead to the sequitur that only actual physical possession is therefore contemplated by section 13(4), since other directions that may be considered appropriate and necessary may also be given for wrongful recourse taken by the secured creditor to section 13(4). This argument again has no legs to stand on.

31. Another argument made by learned senior counsel for the respondents is that if we were to accept the construction of section 13(4) argued by the appellants, the object of the Act would be defeated. As has been pointed out hereinabove in the Statement of Objects and Reasons of the original enactment, paragraphs 2(i) and 2(j) make it clear that the rights of the secured creditor are to be exercised by officers authorised in this behalf in

accordance with the rules made by the Central Government. Further, an appeal against the action of any bank or financial institution is provided to the concerned Debts Recovery Tribunal. It can thus be seen that though the rights of a secured creditor may be exercised by such creditor outside the court process, yet such rights must be in conformity with the Act. If not in conformity with the Act, such action is liable to be interfered with by the Debts Recovery Tribunal in an application made by the debtor/borrower. Thus, it can be seen that the object of the original enactment also includes secured creditors acting in conformity with the provisions of the Act to realise the secured debt which, if not done, gives recourse to the borrower to get relief from the Debts Recovery Tribunal. Equally, as has been seen hereinabove, the Statement of Objects and Reasons of the Amendment Act of 2004 also make it clear that not only do reasons have to be given for not accepting objections of the borrower under section 13(3-A), but that applications may be made before the Debts Recovery Tribunal without making the onerous pre-deposit of 75% which was struck down by this Court in Mardia Chemicals (supra). The object of the Act, therefore, is also to enable the borrower to approach a quasi-judicial forum in case the secured creditor, while taking any of the measures under section 13(4), does not follow the provisions of the Act in so doing. Take for example a case in which a secured creditor takes possession under rule 8(1) and 8(2) before the 60 days' period prescribed under section 13(2) is over. The borrower does not have to wait until actual physical possession is taken (this may never happen as after possession is taken under rule 8(1) and 8(2), the secured creditor may go ahead and sell the asset). The object of providing a remedy against the wrongful action of a secured creditor to a borrower will be stultified if the borrower has to wait until a sale notice is issued, or worse still, until a sale actually takes place. It is clear, therefore, that one of the objects of the Act, as carried out by rule 8(1) and 8(2) must also be subserved, namely, to provide the borrower with instant recourse to a quasi-judicial body in case of wrongful action taken by the secured

creditor.

32. Another argument that was raised by learned senior counsel for the respondents is that the taking of possession under section 13(4)(a) must mean actual physical possession or otherwise, no transfer by way of lease can be made as possession of the secured asset would continue to be with the borrower when only symbolic possession is taken. This argument also must be rejected for the reason that what is referred to in section 13(4)(a) is the right to transfer by way of lease for realising the secured asset. One way of realising the secured asset is when physical possession is taken over and a lease of the same is made to a third party. When possession is taken under rule 8(1) and 8(2), the asset can be realised by way of assignment or sale, as has been held by us hereinabove. This being the case, it is clear that the right to transfer could be by way of lease, assignment or sale, depending upon which mode of transfer the secured creditor chooses for realising the secured asset. Also, the right to transfer by way of assignment or sale can only be exercised in accordance with rules 8 and 9 of the 2002 Rules which require various pre-conditions to be met before sale or assignment can be effected. Equally, transfer by way of lease can be done in future in cases where actual physical possession is taken of the secured asset after possession is taken under rule 8(1) and 8(2) at a future point in time. If no such actual physical possession is taken, the right to transfer by way of assignment or sale for realising the secured asset continues. This argument must also, therefore, be rejected.

33. Shri Ashish Dholakia, learned Advocate, appearing for the intervenor, State Bank of India, argued that if we were to upset the Full Bench judgment, there would be little difference between the Recovery of Debts Act and the SARFAESI Act as banks would not be able to recover their debts by selling properties outside the court process without constant interference by the Debts

Recovery Tribunal. We are of the view that this argument has no legs to stand on for the reason that banks and financial institutions can recover their debts by selling properties outside the court process under the SARFAESI Act by adhering to the statutory conditions laid down by the said Act. It is only when such statutory conditions are not adhered to that the Debts Recovery Tribunal comes in at the behest of the borrower. It is needless to add that under the Recovery of Debts Act, banks/financial institutions could not recover their debts without intervention of the Debts Recovery Tribunal, which the SARFAESI Act has greatly improved upon, the only caveat being that this must be done by the secured creditor following the drill of the SARFAESI Act and rules made thereunder. Shri Dholakia then referred to and relied upon section 3 of the Transfer of Property Act, 1882. Under the said section, "a person is said to have notice" of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he would have known it. Shri Dholakia referred to and relied upon Explanation II to this definition, which reads as under:

"Explanation II.—Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof."

34. We fail to understand what relevance Explanation II could possibly have for a completely different statutory setting, namely, that of the SARFAESI Act and the 2002 Rules thereunder. For the purpose of the Transfer of Property Act, a person acquiring immovable property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof. For the purpose of the SARFAESI Act read with the 2002 Rules, the taking of possession by a secured creditor of the secured asset of the borrower would include taking of possession in any of the modes prescribed under

rule 8, as has been held by us hereinabove. This argument must also, therefore, be rejected.

41. Appendix IV-A which is now inserted by the said notification reads as follows:

"APPENDIX - IV-A

[See proviso to rule 8 (6)]

Sale notice for sale of immovable properties E-Auction Sale Notice for Sale of Immovable Assets under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 read with proviso to Rule 8 (6) of the Security Interest (Enforcement) Rules, 2002 Notice is hereby given to the public in general and in particular to the Borrower (s) and Guarantor (s) that the below described immovable property mortgaged/charged to the Secured Creditor, the constructive/physical _____ (whichever is applicable) possession of which has been taken by the Authorised Officer of _____ Secured Creditor, will be sold on "As is where is", "As is what is", and "Whatever there is" on _____ (mention date of the sale), for recovery of Rs. due to the _____ Secured Creditor from (mention name of the Borrower (s)) and _____ (mention name of the Guarantor (s)). The reserve price will be Rs. _____ and the earnest money deposit will be Rs. _____ (Give short description of the immovable property with known encumbrances, if any) For detailed terms and conditions of the sale, please refer to the link provided in _____ Secured Creditor's website i.e. www. (give details of website)

Date: Authorised Officer

Place:"
(emphasis supplied)

This appendix makes it clear that statutorily, constructive or physical possession may have been taken, pursuant to which a sale notice may then be issued under rule 8(6) of the 2002 Rules. Appendix

> IV-A, therefore, throws considerable light on the controversy before us and recognises the fact that rule 8(1) and 8(2) refer to constructive possession whereas rule 8(3) refers to physical possession.
>
> 42. We are therefore of the view that the Full Bench judgment is erroneous and is set aside. The appeals are accordingly allowed, and it is hereby declared that the borrower/debtor can approach the Debts Recovery Tribunal under section 17 of the Act at the stage of the possession notice referred to in rule 8(1) and 8(2) of the 2002 Rules. The appeals are to be sent back to the Court/Tribunal dealing with the facts of each case to apply this judgment and thereafter decide each case in accordance with the law laid down by this judgment.

20.3 From reading the paras quoted hereinabove, it is clear that on reading the provisions of Section 13(4) with Rule 8, the Court held that once possession notice is given under Rule 8(1) and Rule 8(2) by the secured creditor to the borrower, the borrower cannot deal with the secured asset at all and all further steps to realize the same are to be taken by the secured creditor under the 2002 Rules. The Court further held that the scheme of Section 13(4) read with Rule 8(1) therefore makes it clear that the delivery of a possession notice together with the affixation on the property and publication is one of the modes of taking possession. The statutory scheme therefore is that once possession is taken under Rule 8(1) and 8(2) read with Section 13(4)(a), Section 17 gets attracted, as this is one of the measures referred to in Section 13(4) that has been taken by the secured creditor under Chapter III. The Supreme Court considering the object of the act held that is also to enable the borrower to approach

a quasi-judicial forum in case the secured creditor, while taking any of the measures under Section 13(4), does not follow the provisions of the Act in doing so. Therefore, if the judgement of **Mardia Chemicals (supra)** and **Hindon Forge (supra)** are read together what emerges is that a borrower's right to approach the Tribunal under Section 17 of the Act gets attracted the moment possession notice under Rules 8(1) and 8(2) of the 2002 Rules are issued. The other question that is also decided is that as per **Mardia Chemicals (supra)** he can approach the Tribunal before the date of auction sale.

21. In my opinion therefore the submission of Mr Pandya that the borrower can challenge the action of the Bank within 45 days from the last step of the process i.e. sale notice which is obviously before the date of auction sale is a proposition that deserves to be accepted. The case of the petitioner before the Tribunal was that there was complete non-compliance of the mandatory provisions of the Rules and therefore the Tribunal has observed that although the petitioners have failed to approach the Tribunal within 45 days but the glaring mistake in the process of the respondent bank since the initiation is so vital flagrant and glaring that the Tribunal set aside the entire process and directed that the Bank can proceed further afresh and restrained the Bank further on the auction.

22. The DRAT has reversed the decision of the DRT only on the ground that there was no power with the DRT to condone the delay once it was admittedly beyond time by 45 days. In the Appeal filed before the DRAT, the DRAT did not examine the contentions of the Bank on merits raised in the Appeal,

regarding the fact that it had in fact followed the mandatory provisions of Rules such as issuance of notice; procedure of affixation and publication etc. The DRAT, though such contentions were raised, decided the appeal only on the ground of the powers of the DRT to condone delay without going into the merits of the issues raised before the DRT. Since in the earlier part of the judgment while deciding the first question, I have held that the DRT had the powers to condone delay, the judgement of the DRAT which is only based on this issue is quashed and set aside. Accordingly the order dated 14.08.2019 passed by the DRAT in Appeal No.28 of 2019 is quashed and set aside.

23. In light of the decisions of the Supreme Court in the case of **Mardia Chemicals (supra)** and **Hindon Forge (supra)** which have held that the cause of action to the borrower accrues from the time the notice under Rule 8(1) and 8(2) is issued and the borrower can approach the Tribunal before the date of auction sale, I agree with the submission of Mr. Pandya that the right accrues till such date and negate the submission of Mr. Mihir Thakore, learned Senior Advocate that each measure is a separate cause of action and once the first measure is not challenged the petitioner cannot subsequently do so. Such submission of Mr. Thakore is not in consonance with the law as discussed hereinabove.

24. With regard to the rest of the issues, it will be open for the respective parties to raise all the contentions before the DRAT, which shall proceed to decide the appeal on merits. The matter is therefore remanded to the DRAT to decide the Appeal No.28 of 2019 on merits. With the aforesaid

observations and directions, the petition is allowed.

**sd/-**

**(BIREN VAISHNAV, J)**

DIVYA