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(2017) 16 Supreme Court Cases 741

(BEFORE ROHINTON FALI NARIMAN AND SANJAY KISHAN KAUL, JJ.)

M.D. FROZEN FOODS EXPORTS PRIVATE LIMITED AND OTHERS .. Appellants;

Versus

HERO FINCORP LIMITED .. Respondent.

Civil Appeal No. 15147 of 2017†, decided on September 21, 2017

A. **Debt, Financial and Monetary Laws — Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Ss. 35 and 37 — Arbitration proceedings — Not a bar to proceedings under SARFAESI Act**

— Following the ruling in *Transcore*, (2008) 1 SCC 125, wherein it was held that application of SARFAESI Act will be in addition to and not in derogation of the provisions of RDDB Act, held, the provisions of SARFAESI Act are a remedy in addition to the provisions of Arbitration and Conciliation Act, 1996 — Further, SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process — Thus, SARFAESI proceedings and arbitration proceedings can proceed simultaneously/in parallel — Arbitration and Conciliation Act, 1996, Ss. 7, 8 and 11

B. **Debt, Financial and Monetary Laws — Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Ss. 13, 2(1)(f), 2(1)(o) and 2(1)(m) — Proceedings under SARFAESI Act — Applicability of, to transactions entered into prior to coming into force of the Act/prior to the lender coming within the purview of the Act — Relevance of date on which debt/account is declared NPA — Proceedings under SARFAESI Act — Procedural and not substantive in nature**

— Held, the scheme of the SARFAESI Act sets out an expeditious, procedural methodology, enabling the bank to take possession of the property for non-payment of dues, without intervention of the court — The mere fact that a more expeditious remedy is provided under the SARFAESI Act does not mean that it is substantive in character or has created an altogether new right — Thus, the provisions of the SARFAESI Act would become applicable qua all debts owing and live when the SARFAESI Act became applicable

— Appellants borrowed monies by the creation of mortgage by deposit of title documents on 30-9-2015 and 21-10-2015 — The account of the appellants became a "non-performing asset" (NPA) within the meaning of S. 2(1)(o) of the SARFAESI Act on 6-7-2016 — On 5-8-2016, a Notification was issued in exercise of powers conferred under S. 2(1)(m)(iv) r/w S. 31-A specifying certain "non-banking financial companies" as financial institutions

† Arising out of SLP (C) No. 19559 of 2017. Arising from the Final Order and Judgment in *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincrop Ltd.*, 2017 SCC OnLine Del 9190 (Delhi High Court, ARB. A. (Comm.) No. 15 of 2017, dt. 13-7-2017)

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and directing that the SARFAESI Act shall with certain exceptions apply to such financial institutions; the respondent was at Sl. No. 68 of the said notification — In the present case, held, the right to proceed under the SARFAESI Act accrued once the notification was issued — Similarly, the date on which a debt is declared as an NPA would again have no impact — The provisions of the SARFAESI Act would become applicable qua all debts owing and live when the Act became applicable to the respondent — Statute Law — Retrospective/Retroactive Operation/Retrospectivity (Para 39)

C. **Debt, Financial and Monetary Laws — Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — S. 13 — Applicability of the 2002 Act — Parameters for, summarised**

D. **Arbitration and Conciliation Act, 1996 — Ss. 7, 8 and 11 — Arbitrable matters — What are — Claim of money by a bank or financial institution, an arbitrable matter — Held, all disputes relating to the rights in personam are arbitrable and, therefore, the choice is given to the parties to choose this alternative forum — Further, a claim of money by a bank or a financial institution cannot be treated as right in rem which is not arbitrable**

E. **Debt, Financial and Monetary Laws — Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — S. 19 — Matters which come within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, held, can still be referred to arbitration on satisfaction of the requirements thereof — Arbitration and Conciliation Act, 1996, Ss. 7, 8 and 11**

The appellants borrowed monies for their business against security of immovable properties by the creation of an equitable mortgage by deposit of title documents (seven such properties) on 30-9-2015 and 21-10-2015. The account of the appellants became a "non-performing asset" (NPA) within the meaning of Section 2(1)(*o*) of the SARFAESI Act on 6-7-2016 itself.

The agreement inter se the parties contained an arbitration clause and thus, the matter went to arbitration on the lender/respondent invoking the arbitration clause on 16-11-2016. However, prior to this invocation, a Notification was issued on 5-8-2016 in exercise of powers conferred under Section 2(1)(*m*)(*iv*) read with Section 31-A of the SARFAESI Act, specifying certain "non-banking financial companies" (NBFC) covered under Section 45-I(*f*) of the Reserve Bank of India Act, 1934 (the RBI Act), having assets of Rs 500 crores and above, as financial institutions and directing that, in public interest, the provisions of the SARFAESI Act shall apply to such financial institutions, with the exceptions of the provisions of Sections 13 to 19, which shall apply only to such security interest which is obtained for securing repayment of secured debt with principal amount of Rs 1 crore and above. The respondent is at Sl. No. 68 of the said notification.

In view of the aforesaid notification, the respondent issued a notice under Section 13(2) of the SARFAESI Act on 24-11-2016 for one of the seven properties.

The issues involved in this appeal were:

(*i*) Whether the arbitration proceedings can be carried on along with the SARFAESI proceedings simultaneously?

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(*ii*) Whether resort can be had to Section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement/mortgage created prior to the application of the SARFAESI Act to the respondent?

(*iii*) Whether the lender can invoke the SARFAESI Act provisions where its notification as financial institution under Section 2(1)(*m*) has been issued after the account became an NPA under Section 2(1)(*o*) of the said Act?

Dismissing the appeal of the borrowers, the Supreme Court

Held :

1. On simultaneous carrying on of Arbitration and SARFAESI proceedings

The setting up of the Debt Recovery Tribunal under the RDDB Act resulted in this specialised Tribunal entertaining such claims by the banks and financial institutions. In fact, suits from the civil jurisdiction were transferred to the Debt Recovery Tribunal. The Tribunal was, thus, an alternative to civil court recovery proceedings. (Para 26)

The doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. A reading of Section 37 discloses that the application of the SARFAESI Act will be in addition to and not in derogation of the provisions of the RDDB Act. In other words, it will not in any way nullify or annul or impair the effect of the provisions of the RDDB Act. The two Acts are, thus, complementary to each other and it is not a case of election of remedy. (Paras 27 29)

Transcore v. *Union of India*, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116; *Mathew Varghese* v. *M. Amritha Kumar*, (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254, *followed*

It is trite to say that arbitration is an alternative to the civil proceedings. In fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both the parties have incorporated such a clause, the answer was given in the affirmative. That being the position, the appellants can hardly be permitted to contend that the initiation of arbitration proceedings would, in any manner, prejudice their rights to seek relief under the SARFAESI Act. (Para 30)

The jurisdiction of the civil court is barred for matters covered by the RDDB Act, but the parties still have freedom to choose a forum, alternate to, and in place of the regular courts or judicial system for deciding their inter se disputes. All disputes relating to rights in personam are arbitrable and, therefore, the choice is given to the parties to choose this alternative forum. A claim of money by a bank or a financial institution cannot be treated as a right in rem, which has an inherent public interest and would thus not be arbitrable. (Para 31)

M.D. Frozen Foods Exports (P) Ltd. v. *Hero Fincrop Ltd.*, 2017 SCC OnLine Del 9190, *affirmed*

HDFC Bank Ltd. v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566, *approved*

The aforesaid is not a case of election of remedies, since the alternatives are between a civil court, Arbitral Tribunal or a Debt Recovery Tribunal constituted under the RDDB Act. Insofar as that election is concerned, the mode of settlement

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of disputes to an Arbitral Tribunal has been elected. The provisions of the SARFAESI Act are thus a remedy in addition to the provisions of the Arbitration Act. (Para 32)

Transcore v. *Union of India*, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116, *followed*

SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand. (Paras 33 and 34)

Sarthak Builders (P) Ltd. v. *Orissa Rural Dev. Corpn. Ltd.*, 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83; *HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566; *Pradeep Kumar Gupta* v. *State of U.P.*, 2009 SCC OnLine All 877 : AIR 2010 All 3, *approved*

Deccan Chronicles Holdings Ltd. v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78; *Subhash Chandra Panda* v. *State of Orissa*, 2008 SCC OnLine Ori 10 : AIR 2008 Ori 88, *overruled*

2. On resort to Section 13 of the SARFAESI Act in respect of debts created prior to the application of the SARFAESI Act

The SARFAESI Act was brought into force to solve the problem of recovery of large debts in NPAs. Thus, the very rationale for the said Act to be brought into force was to provide an expeditious procedure where there was a security interest. It certainly did not apply retrospectively from the date when it came into force. (Para 36)

The Act applies to all the claims which would be alive at the time when it was brought into force. Thus, qua the respondent or other NBFCs, it would be applicable similarly from the date when it was so made applicable to them. (Para 37)

No doubt, till the respondent was not a "financial institution" within the meaning of Section 2(1)(*m*)(*iv*) of the SARFAESI Act, it was not a "secured creditor" as defined under Section 2(1)(*zd*) of the SARFAESI Act and, thus, could not invoke the provisions of the SARFAESI Act. However, the right to proceed under the SARFAESI Act accrued once the notification was issued. (Para 38)

Sarthak Builders (P) Ltd. v. *Orissa Rural Dev. Corpn. Ltd.*, 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83, *approved*

In case of retroactivity, Parliament takes note of the existing conditions and promulgates the remedial measures to rectify those conditions. In fact the SARFAESI Act was to remedy such a position and provide a measure against secured interests. The scheme of the SARFAESI Act is really to provide a procedural remedy against security interest already created. Therefore, an existing borrower, who had been granted financial assistance was covered under Section 2(1)(*f*) of the said Act as a "borrower". Not only this expression, the definition clauses dealing with "debt securities", "financial assistance", "financial assets", etc., clearly convey the legislative intent that the SARFAESI Act applies to all existing agreements irrespective of the fact whether the lender was a notified "financial institution" on

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the date of the execution of the agreement with the borrower or not. The scheme of the SARFAESI Act sets out an expeditious, procedural methodology, enabling the bank to take possession of the property for non-payment of dues, without intervention of the court. The mere fact that a more expeditious remedy is provided under the SARFAESI Act does not mean that it is substantive in character or has created an altogether new right. (Para 39)

Unique Engg. Works v. *Union of India*, 2003 SCC OnLine Utt 107 : (2004) 2 BC 241 (DB), *considered*

Zile Singh v. *State of Haryana*, (2004) 8 SCC 1; *Govind Das* v. *CIT*, (1976) 1 SCC 906 : 1976 SCC (Tax) 133; *CIT* v. *Vatika Township (P) Ltd.*, (2015) 1 SCC 1; *Shyam Sunder* v. *Ram Kumar*, (2001) 8 SCC 24; *Garikapati Veeraya* v. *N. Subbiah Choudhry*, 1957 SCR 488 : AIR 1957 SC 540; *Hitendra Vishnu Thakur* v. *State of Maharashtra*, (1994) 4 SCC 602 : 1994 SCC (Cri) 1087, *distinguished*

A retrospective operation is not to be given to a statute so as to impair an existing right or obligation, *otherwise than as regards matter of procedure*, unless that effect cannot be avoided without doing violence to the language of the enactment. (Para 41)

Trimbak Damodhar Rajpurkar v. *Assaram Hiraman Patil*, AIR 1966 SC 1758 : 1962 Supp (1) SCR 700, *relied on*

West v. *Gwynne*, 1911 2 Ch 1 (CA); *Athlumney, In re, ex p Wilson*, (1898) 2 QB 547, *approved*

Similarly, the date on which a debt is declared as an NPA would again have no impact. The provisions of the SARFAESI Act would become applicable qua all debts owing and live when the Act became applicable to the respondent in terms of the following parameters:

(i) Existence of a present actionable debt;

(ii) Status of the person invoking the jurisdiction is that of a secured creditor;

(iii) Assets have been secured in satisfaction of the debt; and

(iv) That the debtor/borrower should have been declared an NPA. (Paras 42 and 18)

Mardia Chemicals Ltd. v. *Union of India*, (2004) 4 SCC 311; *United Bank of India* v. *Satyawati Tondon*, (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260, *relied on*

M.D. Frozen Foods Exports (P) Ltd. v. *Hero Fincrop Ltd.*, 2017 SCC OnLine Del 9190, *affirmed*

State Bank's Staff Union (Madras Circle) v. *Union of India*, (2005) 7 SCC 584 : 2005 SCC (L&S) 994; *D.S. Nakara* v. *Union of India*, (1983) 1 SCC 305 : 1983 SCC (L&S) 145, *referred to*

VN-D/59161/SV

Advocates who appeared in this case :

D.K. Devesh, U.P. Singh, Balakishore, S.K. Roshan and Ms Khyali, Advocates, for the Appellants;

C.A. Sundaram, Senior Advocate (Venancio D'costa, Faisal Sherwani, Divij Kumar, Ms Astha, Damandeep Singh Bhalla, Ms Rohini Musa, Abhishek Gupta, Apporva Tripathi and Zafar Inayat, Advocates) for the Respondent.

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1. 2017 SCC OnLine Del 9190, *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincrop Ltd.* 748*c-d*, 748*d*, 751*b-c*, 753*c-d*, 753*d*, 754*d-e*
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15. (2001) 8 SCC 24, *Shyam Sunder* v. *Ram Kumar* 749*c-d*
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19. AIR 1966 SC 1758 : 1962 Supp (1) SCR 700, *Trimbak Damodhar Rajpurkar* v. *Assaram Hiraman Patil* 755*g-h*
20. 1957 SCR 488 : AIR 1957 SC 540, *Garikapati Veeraya* v. *N. Subbiah Choudhry* 749*d*
21. 1911 2 Ch 1 (CA), *West* v. *Gwynne* 755*f*
22. (1898) 2 QB 547, *Athlumney, In re, ex p Wilson* 756*a*

The Judgment of the Court was delivered by

SANJAY KISHAN KAUL, J.— Leave granted.

Prologue

2. Borrowers want to see the colour of their money in haste. The problem arises when loans have to be repaid. All kinds of techniques were and are deployed, to prolong the legal endeavours to recover the debts by lending institutions. Thus, the procedure became cumbersome and time consuming, affecting the lending activity.

3. An endeavour towards banking sector reforms was the setting up of Expert Committees known as "The Andhyarujina Committee", and "The Narasimham Committees I and II". To facilitate the disposal of the claims of recovery made by various banks and financial institutions, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred

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to as "the RDDB Act") was enacted, providing for specialised tribunals, exclusively dealing with the jurisdiction of the civil courts. This was followed up by the implementation of the suggestions of the aforesaid two Committees, for bringing in a law-empowering financial institution to take possession of the securities and to sell the same without the intervention of the Court — thus the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act").

4. The "Statement of Objects and Reasons" for bringing in the SARFAESI Act, itself shows that the absence of legal provisions for facilitating securitisation of financial assets of banks and financial institutions was the reason for its enactment. The legal framework relating to commercial transactions had not kept pace with the changing commercial practices and financial sector reforms. The slow pace of recovery of defaulting loans and the mounting levels of non-performing assets of banks and financial institutions had resulted in the setting up of the aforesaid two Committees.

5. It needs to be emphasised that any impetus to the industrial development of the country by encouraging banks and other financial institutions to formulate a liberal policy for grant of loans had to be necessarily coupled with a quick and efficacious recovery process. The background and salient features of the SARFAESI Act have been extensively analysed by this Court in *Mardia Chemicals Ltd.* v. *Union of India*[1] and in *United Bank of India* v. *Satyawati Tondon*[2].

The facts

6. The appellants borrowed monies for their business against security of immovable properties by the creation of an equitable mortgage by deposit of title documents (seven such properties) on 30-9-2015 and 21-10-2015. The financial discipline was not adhered to, apparently almost from the inception, and the account of the appellants became a "non-performing asset" ("NPA") within the meaning of Section 2(1)(*o*) of the SARFAESI Act on 6-7-2016 itself.

7. The agreement inter se the parties contained an arbitration clause and thus, the matter went to arbitration on the lender/respondent invoking the arbitration clause on 16-11-2016. However, prior to this invocation, a Notification was issued on 5-8-2016 in exercise of powers conferred under sub-clause (*iv*) of clause (*m*) of sub-section (1) of Section 2 read with Section 31-A of the SARFAESI Act, specifying certain "non-banking financial companies" (hereinafter referred to as "NBFC") covered under clause (*f*) of Section 45-I of the Reserve Bank of India Act, 1934 (hereinafter referred to as "the RBI Act"), having assets of Rs 500 crores and above, as financial institutions and directing that, in public interest, the provisions of the SARFAESI Act shall apply to such financial institutions, with the exceptions of the provisions of Sections 13 to 19, which shall apply only to such security interest

1 (2004) 4 SCC 311
2 (2010) 8 SCC 110 : (2010) 3 SCC (Civ) 260

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which is obtained for securing repayment of secured debt with principal amount of Rs 1 crore and above. The respondent is at Sl. No. 68 of the said notification.

8. In view of the aforesaid notification, the respondent issued a notice under Section 13(2) of the SARFAESI Act on 24-11-2016 for one of the seven properties. The statement of claim was filed by the respondent before the arbitrator on 14-12-2016 and interim orders were granted by the arbitrator on 5-1-2017 restraining the appellant from creating any third-party interest over the properties. On 16-2-2017, the respondent issued another notice under Section 13(2) of the SARFAESI Act for two more of the seven properties.

9. Insofar as the arbitration proceedings are concerned, the interim order of 5-1-2017 was confirmed on 3-3-2017. In order to remove any possible impediment in the SARFAESI proceedings, an application was filed by the respondent to substitute the order of status quo qua parties with the name of the appellants/borrowers, which was allowed on 19-5-2017.

10. The appellants, aggrieved by this order, filed an appeal under Section 37(2)(*b*) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as "the Arbitration Act"), which has been dismissed by the impugned order dated 13-7-2017[3] of the learned Single Judge of the Delhi High Court.

Legal issues

11. A perusal of the impugned order[3] and the submissions made by the learned counsel for the parties have thrown up the following legal issues for determination:

11.1. (*i*) Whether the arbitration proceedings initiated by the respondent can be carried on along with the SARFAESI proceedings simultaneously?

11.2. (*ii*) Whether resort can be had to Section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement/mortgage created prior to the application of the SARFAESI Act to the respondent?

11.3. (*iii*) A linked question to Question (*ii*), whether the lender can invoke the SARFAESI Act provision where its notification as financial institution under Section 2(1)(*m*) has been issued after the account became an NPA under Section 2(1)(*o*) of the said Act?

Appellants' case

12. The appellants appearing through Mr Guru Krishna Kumar, Senior Advocate sought to contend that Section 13(2) of the SARFAESI Act was a substantive provision and imposed a new burden affecting an existing obligation, thus repelling the plea of the respondent that the said provision was only procedural in nature. The security interest was capable of being enforced under the SARFAESI Act without the intervention of the court or the Tribunal, and this right was available notwithstanding any provisions contained in Sections 69 and 69-A of the Transfer of Property Act, 1882 [Section 13(1) containing the notwithstanding provision]. It was thus pleaded that it was impermissible to take recourse to the provisions of the SARFAESI Act in respect

3 *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincrop Ltd.*, 2017 SCC OnLine Del 9190

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of an account already declared an NPA, as that would amount to retrospective application of a substantive law. The appellants sought to dispute the plea of the absence of any new obligation or additional burden as advanced by the respondent, since the debts had to be repaid within 60 days from the date of issuing the notice under Section 13 of the SARFAESI Act.

13. The appellants also pleaded that the expressions "retrospective" and "retroactive" are almost synonymous and in that behalf referred to the definition of these expressions as found in *Black's Law Dictionary* and *Wharton's Law Lexicon* treating the provisions as synonymous. A reference was also made to the judgment in *State Bank's Staff Union (Madras Circle)* v. *Union of India*[4] and *D.S. Nakara* v. *Union of India*[5] to advance a proposition that the statute could have only prospective application, unless it states in clear terms, to be expressly retrospective.

14. The appellants referred to a catena of judgments for the legal proposition that a statute which affects substantive rights is presumed to be prospective in operation unless made retrospective and the basis of the same is the principle of "fairness" — [*Zile Singh* v. *State of Haryana*[6]; *Govind Das* v. *CIT*[7]; *CIT* v. *Vatika Township (P) Ltd.*[8]; *Shyam Sunder* v. *Ram Kumar*[9]; *Garikapati Veeraya* v. *N. Subbiah Choudhry*[10]; *Hitendra Vishnu Thakur* v. *State of Maharashtra*[11].]

15. The reason why the appellants claimed that it was a case of substantive law, and not procedural law, is that more stringent provisions in terms of the entitlement of debtors to liquidate a secured asset, without the intervention of the Court, are brought into force.

16. Another plea which was sought to be advanced is that the NBFCs stand on a different footing, and that it is not as if ipso facto, all NBFCs are included within the ambit of the Act, but only such of the NBFCs as are notified by the Central Government. Further, it was stated that the RDDB Act does not include in its term the NBFC. These factors were stated to be material to exclude the security interest created prior to the application of the Act.

17. On the first legal issue referred to aforesaid, it has been contended that a notice seeking arbitration was issued first, and that too after the provisions of the SARFAESI Act had been made applicable to the respondent and thus, the respondent had elected its remedy by seeking recovery through the arbitration process and, therefore, could not subsequently and simultaneously initiate proceedings under the SARFAESI Act.

4 (2005) 7 SCC 584 : 2005 SCC (L&S) 994
5 (1983) 1 SCC 305 : 1983 SCC (L&S) 145
6 (2004) 8 SCC 1
7 (1976) 1 SCC 906 : 1976 SCC (Tax) 133
8 (2015) 1 SCC 1
9 (2001) 8 SCC 24
10 1957 SCR 488 : AIR 1957 SC 540
11 (1994) 4 SCC 602 : 1994 SCC (Cri) 1087

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Respondent's case

18. On behalf of the respondent, Mr C.A. Sundaram, Senior Advocate contended that the effect of notifying the respondent as an NBFC to which the SARFAESI Act applies, would imply that the provisions of the said Act can be used to take recourse to any live and actionable debt i.e. a debt in praesenti. In order to invoke the provision, it was submitted, four factors are of significance:

(*i*) Existence of a present actionable debt;

(*ii*) Status of the person invoking the jurisdiction is that of a secured creditor;

(*iii*) Assets have been secured in satisfaction of the debt; and

(*iv*) That the debtor/borrower should have been declared an NPA.

19. The learned Senior Counsel contended that the Act itself was brought into force to eliminate the problem of recovery of the debts by means of the sale of security interest and thus, obviously applied to all the past debts which were still due and pending. The only difference was that qua the respondent, it came into force when the notification was issued. It was stated that a contrary interpretation, if taken to the logical conclusion, would imply that when the Act was brought into force, none of the existing security interests would be affected, thereby defeating the very objective of the SARFAESI Act.

20. It was further submitted that insofar as the respondent is concerned, a common Notification dated 5-8-2016 specifies the financial parameters in respect of which the said Act would apply. Those parameters are met in the present case and there is no differentiation in the enforcement mechanism contained in Section 13 of the said Act between a bank and an NBFC, as both these institutions are similarly placed.

21. It was contended that the SARFAESI Act did not create any new obligation on the appellants, who are the borrowers required to repay debts secured by mortgaged properties, but only provides a procedure, without the intervention of the courts to enforce the rights which have already accrued to the lender, by virtue of having lent monies. It is only a new remedy in terms of the manner of such recovery. The legislation itself is procedural in nature.

22. On the issue of simultaneous proceedings for recovery under the arbitration process and the SARFAESI Act it was contended that there is no prohibition in law from doing so. The process of recovery could have taken place in a civil suit prior to the enactment of the RDDB Act which provides for a specialised forum for recovery of dues. It is settled legal position that both the RDDB Act and the SARFAESI Act can be resorted to simultaneously and thus the arbitration proceedings are only an alternative to the RDDB Act. Section 37 of the SARFAESI Act, in fact, makes it clear that the provisions of the Act are in addition to and are not in derogation of any other law for the time being in force.

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Cleavage of judicial opinions

23. The opinions of various High Courts, as cited before us, show that while the Full Bench of the Orissa High Court[12], as also the Delhi High Court[13] and the Allahabad High Court[14] have taken a view favourable to the respondent in terms of the simultaneous legal processes under the SARFAESI Act and arbitration recovery proceedings, the Andhra Pradesh High Court[15] has taken a divergent view.

Conclusion

24. We have examined the rival contentions and the judicial precedents cited before us. The impugned order[3] is a well-reasoned order giving cogent reasons, but what persuaded us to grant leave and hear the matter finally, was this cleavage of judicial opinions inter se the High Courts, requiring this Court to settle the law on the point.

25. We now proceed to examine each of the three questions of law framed.

Question (i)

26. A claim by a bank or a financial institution, before the specified laws came into force, would ordinarily have been filed in the civil court having the pecuniary jurisdiction. The setting up of the Debt Recovery Tribunal under the RDDB Act resulted in this specialised Tribunal entertaining such claims by the banks and financial institutions. In fact, suits from the civil jurisdiction were transferred to the Debt Recovery Tribunal. The Tribunal was, thus, an alternative to civil court recovery proceedings.

27. On the SARFAESI Act being brought into force seeking to recover debts against security interest, a question was raised whether parallel proceedings could go on under the RDDB Act and the SARFAESI Act. This issue was clearly answered in favour of such simultaneous proceedings in *Transcore* v. *Union of India*[16]. A later judgment in *Mathew Varghese* v. *M. Amritha Kumar*[17] also discussed this issue in the following terms: (*Mathew Varghese case*[17], SCC pp. 640-41, paras 45-46)

> "*45*. A close reading of Section 37 shows that the provisions of the SARFAESI Act or the Rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that

12 *Sarthak Builders (P) Ltd.* v. *Orissa Rural Dev. Corpn. Ltd.*, 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83
13 *HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566
14 *Pradeep Kumar Gupta* v. *State of U.P.*, 2009 SCC OnLine All 877 : AIR 2010 All 3
15 *Deccan Chronicles Holdings Ltd.* v. *Union of India*, 2014 SCC OnLine AP 104 : AIR 2014 AP 78
3 *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincrop Ltd.*, 2017 SCC OnLine Del 9190
16 (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116
17 (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254

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in the event of any of the provisions of the RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, the SARFAESI Act and the RDDB Act, would be complementary to each other. In this context reliance can be placed upon the decision in *Transcore* v. *Union of India*[16]. In para 64 it is stated as under after referring to Section 37 of the SARFAESI Act: (SCC p. 162)

> '*64*. … According to *American Jurisprudence*, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. *In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply*. Even according to *Snell's Principles of Equity* (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. *In any event, there is no repugnancy nor inconsistency between the two remedies*, therefore, the doctrine of election has no application.'

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

28. These observations, thus, leave no manner of doubt and the issue is no more res integra, especially keeping in mind the provisions of Sections 35 and 37 of the SARFAESI Act, which read as under:

> "**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 such law.
>
> * * *
>
> **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

16 (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116

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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."

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

30. The only twist in the present case is that, instead of the recovery process under the RDDB Act, we are concerned with an arbitration proceeding. It is trite to say that arbitration is an alternative to the civil proceedings. In fact, when a question was raised as to whether the matters which came within the scope and jurisdiction of the Debt Recovery Tribunal under the RDDB Act, could still be referred to arbitration when both parties have incorporated such a clause, the answer was given in the affirmative.[13] That being the position, the appellants can hardly be permitted to contend that the initiation of arbitration proceedings would, in any manner, prejudice their rights to seek relief under the SARFAESI Act.

31. The discussion in the impugned order[3] refers to a judgment of the Full Bench of the Delhi High Court in *HDFC Bank Ltd.* v. *Satpal Singh Bakshi*[13] opining that an arbitration is an alternative to the RDDB Act. In that context, the learned Single Judge[3] has rightly held that this Full Bench judgment[13] does not, in any manner, help the appellants but, in fact, supports the case of the respondent. The jurisdiction of the civil court is barred for matters covered by the RDDB Act, but the parties still have freedom to choose a forum, alternate to, and in place of the regular courts or judicial system for deciding their inter se disputes. All disputes relating to the "right in personam" are arbitrable and, therefore, the choice is given to the parties to choose this alternative forum. A claim of money by a bank or a financial institution cannot be treated as a "right in rem", which has an inherent public interest and would thus not be arbitrable.

32. The aforesaid is not a case of election of remedies as was sought to be canvassed by the learned Senior Counsel for the appellants, since the alternatives are between a civil court, Arbitral Tribunal or a Debt Recovery Tribunal constituted under the RDDB Act. Insofar as that election is concerned, the mode of settlement of disputes to an Arbitral Tribunal has been elected. The provisions of the SARFAESI Act are thus, a remedy in addition to the provisions of the Arbitration Act. In *Transcore* v. *Union of India*[16] it was clearly observed that the SARFAESI Act was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. Liquidation of secured interest through a more expeditious procedure is what has been envisaged under the SARFAESI Act and the two Acts are cumulative remedies to the secured creditors.

13 *HDFC Bank Ltd.* v. *Satpal Singh Bakshi*, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566
3 *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincrop Ltd.*, 2017 SCC OnLine Del 9190
16 (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116

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33. SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process. In the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum.

34. We are, thus, unequivocally of the view that the judgments of the Full Bench of the Orissa High Court in *Sarthak Builders (P) Ltd.* v. *Orissa Rural Dev. Corpn. Ltd.*[12], the Full Bench of the Delhi High Court in *HDFC Bank Ltd.* v. *Satpal Singh Bakshi*[13] and the Division Bench of the Allahabad High Court in *Pradeep Kumar Gupta* v. *State of U.P.*[14] lay down the correct proposition of law and the view expressed by the Andhra Pradesh High Court in *Deccan Chronicles Holdings Ltd.* v. *Union of India*[15] following the overruled decision of the Orissa High Court in *Subhash Chandra Panda* v. *State of Orissa*[18] does not set forth the correct position in law. SARFAESI proceedings and arbitration proceedings, thus, can go hand in hand.

Questions (ii) & (iii)

35. The issue of whether resort can be had to Section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement/mortgage created prior to the application of the SARFAESI Act to the respondent, though urged before us, appears really not to have been canvassed before the learned Single Judge[3] of the Delhi High Court. At least, it finds no substantive mention. We, however, are of the view that in the larger interest of settling the question of law, this issue is also required to be dealt with.

36. The SARFAESI Act was brought into force to solve the problem of recovery of large debts in NPAs. Thus, the very rationale for the said Act to be brought into force was to provide an expeditious procedure where there was a security interest. It certainly did not apply retrospectively from the date when it came into force. The question is whether the Act being applicable to the respondent at a subsequent date and thereby allowing the respondent to utilise its provisions with regard to a past debt, would make any difference to this principle. We are of the view that the answer to the same is in the negative.

37. The Act applies to all the claims which would be alive at the time when it was brought into force. Thus, qua the respondent or other NBFCs, it would be applicable similarly from the date when it was so made applicable to them.

38. The Full Bench of the Orissa High Court in *Sarthak Builders (P) Ltd.* v. *Orissa Rural Dev. Corpn. Ltd.*[12] has, in fact, succinctly set out this aspect. No doubt, till the respondent was not a "financial institution" within the meaning

12 2014 SCC OnLine Ori 75 : AIR 2014 Ori 83
13 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566
14 2009 SCC OnLine All 877 : AIR 2010 All 3
15 2014 SCC OnLine AP 104 : AIR 2014 AP 78
18 2008 SCC OnLine Ori 10 : AIR 2008 Ori 88
3 *M.D. Frozen Foods Exports (P) Ltd.* v. *Hero Fincrop Ltd.*, 2017 SCC OnLine Del 9190

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of Section 2(1)(*m*)(*iv*) of the SARFAESI Act, it was not a "secured creditor" as defined under Section 2(1)(*zd*) of the SARFAESI Act and, thus, could not invoke the provisions of the SARFAESI Act. However, the right to proceed under the SARFAESI Act accrued once the notification was issued.

39. The Full Bench referred to a Division Bench judgment of the Uttarakhand High Court in *Unique Engg. Works* v. *Union of India*[19] which dealt with the issue of retrospectivity and retroactivity. In case of retroactivity, Parliament takes note of the existing conditions and promulgates the remedial measures to rectify those conditions. In fact the SARFAESI Act, in our view, was to remedy such a position and provide a measure against secured interests. The scheme of the SARFAESI Act is really to provide a procedural remedy against security interest already created. Therefore, an existing borrower, who had been granted financial assistance was covered under Section 2(1)(*f*) of the said Act as a "borrower". Not only this expression, the definition clauses dealing with "debt securities", "financial assistance", "financial assets", etc., clearly convey the legislative intent that the SARFAESI Act applies to all existing agreements irrespective of the fact whether the lender was a notified "financial institution" on the date of the execution of the agreement with the borrower or not. The scheme of the SARFAESI Act sets out an expeditious, procedural methodology, enabling the bank to take possession of the property for non-payment of dues, without intervention of the court. The mere fact that a more expeditious remedy is provided under the SARFAESI Act does not mean that it is substantive in character or has created an altogether new right. To accept the argument of the appellants would imply that they have an inherent right to delay the enforcement against the security interest!

40. The catena of judgments referred to by the learned Senior Counsel for the appellants on substantive law not being retrospective in operation, unless expressly stated so in the Act would, thus, have no application to the matter in issue, in view of what we have observed aforesaid. On the other hand, as observed by Buckley, L.J. in *West* v. *Gwynne*[20], retrospective operation is one matter and interference with existing rights is another. In that context, it was ruled that the provisions of the Conveyancing and Law of Property Act, 1892 were held applicable to leases containing a covenant, condition or agreement against assigning, under-letting or parting with possession or disposing of land or property leased without licence or consent to all leases whether executed before or after the commencement of the Act. Such a construction was held not to make the Act retrospective in operation but merely effected the future existing rights under all leases whether executed before or after the date of that Act. (Discussed in *Trimbak Damodhar Rajpurkar* v. *Assaram Hiraman Patil*[21].)

19 2003 SCC OnLine Utt 107 : (2004) 2 BC 241 (DB)
20 1911 2 Ch 1 at pp. 11, 12 (CA)
21 AIR 1966 SC 1758 : 1962 Supp (1) SCR 700

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41. In a similar vein are the observations made in *Athlumney, In re, ex p Wilson*[22], where the question posed before the Queen's Division Bench was whether Section 23 of the Bankruptcy Act, 1890 was retrospective in its operation. In the aforementioned context, Wright, J., speaking for the Bench, illuminatingly opined: (QB pp. 551-52)

> "... Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, *otherwise than as regards matter of procedure*, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only. ... it is a general rule that when the legislature alters the rights of parties by taking away or conferring any right of action, its enactments, unless in express terms they apply to pending actions, do not affect them. *It is said that there is one exception to that rule, namely, that, where enactments merely affect procedure and do not extend to rights of action, they have been held to apply to existing rights, and it is suggested here that the alteration made by this section is within that exception.*" (emphasis supplied)

42. Similarly, the date on which a debt is declared as an NPA would again have no impact. We are, thus, of the view that the provisions of the SARFAESI Act would become applicable qua all debts owing and live when the Act became applicable to the respondent in terms of the parameters contended by the learned Senior Counsel for the respondent and enlisted at Serial Nos. (*i*) to (*iv*) in para 18.

43. We are, thus, of the view that the appeal is completely devoid of merit, and is only an endeavour to prolong the ultimate "date of judgment" for the appellants to meet their obligations.

44. The appeal is dismissed with costs quantified at Rs 20,000.

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22 (1898) 2 QB 547