IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 701 OF 2014

1. Shri Shivabassappa I. Kankanwadi,
son of Mr. I. Kankanwadi,
aged 70 years,
r/o H.No.348-D(1)4,
"Green Field Apartments",
Xetiawado, Duler,
Mapusa Goa

2. Mrs. Sushila S. Kankanwadi,
wife of Shri Shivabassappa I. Kankanwadi,
aged 60 years,
Housewife,
R/o H.No.348-D(1)4,
"Green Field Apartments",
Xetiawado, Duler,
Mapusa Goa. … Petitioners

V e r s u s

1. Mapusa Urban Co-operative Bank of Goa Ltd.,
Through its Branch Manager,
"Nandadeep", Mapusa Goa.

2. Mr. Shrikant Y. Naik,
son of (Not known),
Major of age, (Not known),
r/o H.No.G-2, "Darshan Apartments",
Porvorim Goa.
Deleted as per the order dated 02.12.2014.

3. Mamlatdar of Bardez,
Office of the Mamlatdar of Mapusa,
Mapusa Goa.

4. The District Magistrate,
Office of the District Collector,
North Goa District,
Panaji Goa. … Respondents

Mr. G. Agni and Mr. Eeshan Usapkar, Advocates for the petitioners.

Mr. P. Rao, Advocate for the respondent no.1.

Mr. D. Lawande, Government Advocate for the respondent nos. 3 and 4.

Respondent no.2 deleted.

Coram:- F. M. REIS &
K. L. WADANE, JJ

Judgment Reserved on :- 22.09.2015
Clarification sought on :- 27.01.2016
Judgment Pronounced on :-17.03.2016

J U D G M E N T (Per F. M. Reis, J)

Heard Mr. G. Agni, learned counsel appearing for the petitioners, Mr. P. Rao, learned counsel appearing for the respondent no.1 and Mr. D. Lawande, learned Government Advocate appearing for the respondent nos. 3 and 4.

2. The above Writ Petition seeks for a direction inter-alia to quash and set aside the impugned orders dated 10.07.2014 and 30.10.2014 and the impugned notices dated 31.10.2011 and 20.11.2013 issued under Sections 13(2) and 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred to as " the SARFAESI Act") being illegal and bad in law.

3. Briefly, the facts of the case as stated by the petitioners are that the petitioner no.1 appointed one Mr. Ajay Verma, proprietor of M/s. Aesquire Estates to develop a plot of land belonging to the petitioner no.1. The said Mr. Ajay Verma availed a loan from the

respondent no.1 by offering a security of the petitioners' land with building. The respondent no.1 sanctioned a loan of Rs.15 lakhs on 05.12.1998 in the name of the petitioner no.1. However, in the same sanctioned letter, clandestinely, it was mentioned that the entire loan amount is to be adjusted to the cash credit account of M/s. Asqueire Estate and the account was to be closed. The purpose of the loan was also mentioned to take over the entire existing liability of M/s. Asqueire Estate. It is further the contention of the petitioners that without their consent, sanctioned loan was re-worked at Rs.18 lakhs somewhere in the year 1999. It is further their case that the petitioners assumed that the loan was required for the purpose of putting up the construction in the subject property wherein the petitioners were supposed to get a flat and as such, the petitioners were induced by the said Mr. Ajay Verma to execute a mortgage deed by convincing the petitioners. The petitioners further states that bonafidely believing the said Mr. Ajay Verma that they would be put in possession of the entire ground floor and on the basis of the assurance of the said Mr. Ajay Verma, the deed of mortgage was signed with the respondent no.1 without understanding the consents or implications thereof. It is further the case of the petitioners that on 25.05.2007, an arbitral award ordering the recovery of the loan amount came to be obtained by the respondent no.1 by initiating proceedings under Section 84(4) of the Multi State Co-operative Societies Act, 2002 (herein after referred to as “ the Co-operative Societies Act, 2002”). But however, the arbitral award came to be set aside by the learned District Judge on 03.06.2011 by holding that the whole transaction of disbursement was fraught with disparities and for all purposes it was a fraudulent transaction. Thereafter, on 31.10.2011, the respondent no.1 issued notice under Section 13(4) of the SARFAESI Act and subsequently, on 20.11.2013 the petitioners were issued possession notice taking over of the premises of the petitioners as mentioned in the said notice. The said notice was duly replied by the petitioners pointing out that by judgment dated 03.06.2011 the award dated 25.05.2007 passed by the Arbitrator was quashed and set aside. It was also pointed out that having availed of the remedy for recovery of the alleged amount by way of arbitration proceedings and having so failed, it was now not available in law to the respondent no.1 to initiate another proceedings by way of second inning. Despite of receiving the said reply, the respondent no.1 continued to visit the property and threatened the petitioners which forced the petitioners to lodge a complaint to the police. Thereafter, the impugned order came to be passed dated 10.07.2014 and subsequently, the second impugned order came to be passed on 31.10.2014. Being aggrieved by the said orders as being unsustainable in law, the petitioners have filed the above Writ Petition for the reliefs referred to herein above.

4. The respondent no.1 filed their affidavit in reply inter-alia contending that the petitioners have approached this Court to quash

the impugned order dated 10.07.2014 passed by the respondent no.4 as well as the order dated 30.10.2014 passed by the respondent no.3 besides the notices issued under Section 13(2) and Section 13(4) of the SARFAESI Act, against which orders the petitioners have an effective and efficacious remedy of filing application under Section 17 of the SARFAESI Act. It is further their case that the petitioners had availed a loan of Rs.18 lakhs and have been consistent defaulters. It is further their case that the proceedings for taking possession under the SARFAESI Act, are non-adjudicatory in nature and considering the scheme, scope and object of the SARFAESI Act, this Court may relegate the petitioners to the alternate remedy. It is further their contention that the petitioners have sought for loan of Rs. 18 lakhs vide application dated 28.01.1999 and in terms of the said application the said loan was disbursed and as sought by the petitioners the loan amount was appropriated to utilize the taking over of the entire/balance liability from M/s. Aesquire Estates. It is further their contention that the security for repayment of such amount was in the form of a flat at Green Field Apartments and the entire lower ground floor with associated land. It is further their case that the petitioners had defaulted in repayment of the said loan amount which entitled the respondent no.1 to issue a statutory demand notice. It is further their case that the deed of mortgage was executed whereby the petitioner no.1 mortgaged the entire ground floor which he had agreed to purchase from M/s. Aesquire Estates, who was authorized to develop the property by the petitioners and the second mortgagors. It is further their case that the petitioners have also mortgaged the flat on the upper ground floor bearing house no.348/D in the building known as "Green Field Apartments". It is further their case that the acquisition notices were issued in terms of the SARFAESI Act for the recovery of the said loan amount from the petitioners. It is further their case that the respondent no.4 after examining the affidavit and in discharge of his statutory duties passed an order for delivering the possession to the respondent no.1. The said possession was obtained in terms of Section 14 of the SARFAESI Act. It is further their case that the entire procedure as provided under the SARFAESI Act, have been duly complied with and the possession of the said properties was not handed over to the respondent no.1 by the respondent no.3 as the respondent no.1 was informed by the respondent no.3 that he was intimated that this Court had passed an order restraining the respondents herein from taking any further action in pursuance to the order dated 10.07.2014 and notice dated 13.10.2014. It is further contention of the respondent no.1 that prior to initiating such proceedings under the SARFAESI Act, the proceedings under the Co-operative Societies Act, 2002 were also resorted to by the respondent no.1 wherein the Arbitrator has passed an award against the petitioners and one Shrikant Naik on 25.05.2007 whereby the petitioners and said Shrikant Naik were directed to pay an amount of Rs.18,10,855/- as on 11.10.2001, with further interest at the rate of 18.5% per annum. It is further their case that the petitioners challenged the said arbitral award on 22.05.2008 before the Principal District Judge, North Goa, Panaji under Section 34 of the Arbitration and Conciliation Act, 1996, (herein after referred to as "the Arbitration Act, 1996") who has set aside the arbitral award dated 25.05.2007. It is further their case that the said judgment and order dated 03.06.2011 is without jurisdiction and is a nullity, inasmuch as the learned District Judge had no jurisdiction to entertain any application under Section 34 of the Arbitration Act, 1996 beyond 25.09.2007 even if it was accompanied by an application for condonation of delay. It is further their case that the proceedings under the Co-operative Societies Act, 2002 being in the nature of proceedings for recovery of dues of the respondent no.1 are in fact complimentary to the expeditious mode of recovery envisaged and sanctioned under the SARFAESI Act. It is further their case that the learned District Judge has gone beyond the scope envisaged under Section 34 of the Arbitration Act, 1996 and as such the orders passed therein are without any jurisdiction. The respondent no.1 as such points out that all the contentions sought to be raised by the petitioners in the above petition can be raised under Section 17 of the SARFAESI Act and as such prayed that the petition be rejected.

5. Mr. Agni, learned counsel appearing for the petitioners has pointed out that the proceedings sought to be initiated under the SARFAESI Act, are patently without jurisdiction and in any event

erroneous exercise of jurisdiction as admittedly, the respondent no.1 had already initiated proceedings under the Co-operative Societies Act, 2002 which resulted in an order in favour of the petitioners. The learned counsel further pointed out that it is the case of the petitioners that the alleged mortgage sought to be invoked by the respondent no.1 is a fraudulent document which does not inher any benefit to the petitioners and as such the respondent no.1 is not entitled to invoke such document to initiate the proceedings under the SARFAESI Act. The learned counsel further pointed out that the contention of the respondent no.1 that the judgment passed by the learned District Judge setting aside the award passed by the Arbitrator is a nullity is totally baseless as according to him such judgment came to be passed upon hearing the petitioners and the respondent no.1 wherein there are categorical findings that the purported mortgage relied upon by the respondent no.1 was a fraudulent document executed at the instance of Mr. Ajay Verma for his personal business. The learned counsel further pointed out that the findings in the said judgment clearly demonstrate the fraud committed by the respondent no.1 in collusion with the said Mr. Ajay Verma in whose business the purported loan was taken to liquidate the liability of M/s. Asqueire Estate which is a Proprietary concern of the said Mr. Ajay Verma. The learned counsel further pointed out that the developer had mislead the petitioners to execute the mortgage deed on false pretension. The learned counsel as such points out that the learned District Judge has rightly come to the conclusion that such document was not binding on the petitioners. The learned counsel has further pointed out that the proceedings initiated are patently without jurisdiction and/or in excess of jurisdiction and as such there is no bar for this Court to entertain a writ petition under Article 226 of the Constitution of India. The learned counsel further pointed out that the jurisdiction under Section 17 of the SARFAESI Act cannot be an efficacious remedy considering that the findings arrived at by the learned District Judge have become resjudicata or binding on the respondent no.1 on the principle of analogous to resjudicata. The learned counsel further submits that the contention of the respondent no.1 that the learned District Judge has exercised jurisdiction beyond the period stipulated therein is also an erroneous as there was a clear explanation for the delay which was condoned by the learned District Judge as such, delay was not at the instance of the petitioners as the Co-operative Court had not returned the certified copy of the award passed by the Arbitrator. The learned counsel further pointed out that the petitioners have diligently pursued the remedy in law and as such the contention of the respondent no.1 that such proceedings are without jurisdiction is totally erroneous. The learned counsel further pointed out that admittedly, the respondent no.1 had not challenged the judgment passed by the learned District Judge which has become final and binding on the respondent no.1 and as such the proceedings initiated under the SARFAESI Act is an abuse of process of the Statute. The learned counsel has thereafter taken us through the material on record to point out that the respondent no.1 are not entitled to invoke the provisions of the SARFAESI Act and as such the impugned orders challenged in the present writ petition are required to be quashed and set aside. In support of his submissions, Mr. Agni, learned counsel appearing for the petitioners has relied upon the judgments reported in **AIR 2008 Patna 153** in the case of **Kanhaiya Lal Vs State Bank of India & Ors, AIR 1964 SC 907** in the case of **Ittyavira Mathai vs Varkey Varkey and Another** and **AIR 1962 SC 1621** in the case of **Smt. Ujjam Bai Vs State of Uttar Pradesh and another.**

6. On the other hand, Mr. P. Rao, learned counsel appearing for the respondent no.1 has submitted that the present petitioners have challenged the order dated 10.07.2014 passed by the respondent no.4 in exercise of powers under Section 14 of the SARFAESI Act as well as the order dated 30.10.2014 passed by the respondent no.3. But however, it is submitted that Section 17 of the SARFAESI Act, affords an effective and efficacious remedy to the petitioners to challenge such orders. It is further his contention that the provisions under Section 13 of the SARFAESI Act, proceed on the basis of crystallized liability and are in the nature of enforcement of security interest and as the petitioners have defaulted in repayment of the loan, the respondent no.1 is entitled to proceed in terms of the provisions of the SARFAESI Act. It is further the contention of the learned counsel that the proceedings under the Co-operative Societies Act, 2002 and the

SARFAESI Act are both complementary and as such there is no question of applicability of doctrine of election. The learned counsel in support of the said submissions has relied upon the judgments reported in **(2004) 4 SCC 311** in the case of **Mardia Chemicals Ltd., Vs Union of India, (2009) 8 SCC 366** in the case **Authorized Officer, Indian Overseas Bank & Anr. V/s Ashok Saw Mill, (2010) 8 SCC 110** in the case of **United Bank of India V/s Satyawati Tondon & Anr., (2011) 2 SCC 782** in the case of **Kanaiyalal Lalchand Sachdev & Ors V/s State of Maharashtra & Ors**., and **(2013) 10 SCC 83** in the case of **Sri Siddeshwara Cooperative Bank Ltd., V/s Ikbal**. In support of his contention that orders under Section 14 of the SARFAESI Act can also be challenged, Mr. Rao, learned counsel has relied upon the judgment reported in **(2013) 9 SCC 620** in the case of **Standard Chartered Bank V/s V. Noble Kumar & Ors.**

7. It is further submitted by Mr. Rao, learned counsel that the judgment dated 03.06.2011 passed by the learned District Judge cannot be relied upon as it is a nullity as according to him the application under Section 34 of the Arbitration Act, 1996 was entertained beyond the limitation prescribed by Section 34 of the Arbitration Act, 1996. The learned counsel further submits that the arbitral award was passed on 25.05.2007 which was received on 12.06.2007 by the petitioners. It is further pointed out that an appeal was filed by the petitioners on 11.07.2007 before the Registrar of Co-

Operative Societies which was dismissed for want of jurisdiction on 15.01.2008 and the application under Section 34 was filed on 22.05.2008 which was hopelessly barred by limitation. The learned counsel further points out that in the first place exclusion of time under Section 14 of the Limitation Act was not applicable to the petitioners as according to him the proceedings before the Registrar are not before the Court. It is further his contention that the District Court has no power to condone the delay to entertain an application under Section 34 of the Arbitration Act, 1996 beyond three months and maximum of 30 days. The learned counsel further points out that as such the judgment passed by the learned District Judge is lacking inherent jurisdiction and in support of his submissions, he has relied upon the judgment of the Apex Court reported in **1954 SC 340 in the case of Kiran Singh Vs Chaman Paswan.** The learned counsel further pointed out that considering the findings of the learned District Judge that the Arbitral Tribunal itself was wrongly constituted, it would be a coram non-judice and as such the entire proceedings would be a nullity. The learned counsel further pointed out that invoking a remedy under the two Acts namely the Co-operative Societies Act, 2002 and SARFAESI Act by the respondent no.1 are complementary to each other and not inconsistent with each other, and as such the issue of applicability of the doctrine of election does not arise. In support thereof he has relied upon the judgment reported in 2008(1) SCC 125 in the case of Transcore V/s Union of India. The learned counsel as such points out that the petition be rejected.

8. We have considered the submissions of the learned counsel and we have also gone through the records. Before we proceed to deal with the contentions of the learned counsel appearing for the respective parties, we shall first proceed to examine whether the judgment passed by the learned District Judge in the proceedings under Section 34 of the Arbitration Act, 1996 dated 03.06.2011 is without jurisdiction as such proceedings were barred by limitation. The records reveal that the award came to be passed by the learned Arbitrator under Section 84(4) of the Co-operative Societies Act, 2002 on 25.05.2007. Apparently, the arbitral award was received by the petitioners on 12.06.2007 and an appeal was preferred by the petitioners on 11.07.2007. The fact that such appeal was within time is not disputed by the respondent no.1. The appeal was dismissed for want of jurisdiction by the Registrar on 15.01.2008 and immediately thereafter, upon the return of the certified copy of the impugned award from the Registrar, the proceedings under Section 34 of the Arbitration Act, 1996 were initiated by the petitioners on 22.05.2008. The fact that the application for condonation of delay was filed and allowed by the learned District Judge has not been disputed by the respondent no.1 though there was no question of delay as the Registrar had delayed in returning the certified copy of the impugned award to enable the petitioners to file such application. On perusal of the application under Section 34 of the

Arbitration Act, 1996 there is a specific averment therein to the effect that in terms of the order dated 15.01.2008 the petitioners were required to file their objections within three months of the said order i.e. by 14.04.2008, considering that the time taken before the Registrar is to be excluded in terms of Section 14 of the Limitation Act, 1963. It is further stated therein that as the certified copy of the award was required to be obtained from the Arbitrator for filing such objections, the petitioners applied for the certified copy of the impugned award on 05.04.2008. But however, the learned Arbitrator by his letter dated 18.04.2008 informed the petitioners that he could not issue a certified copy of the award and asked the petitioners to obtain the same from the office of the Assistant Registrar of Co-operative Societies. Accordingly, the petitioners sought for such copy from the office of the Assistant Registrar who informed by letter dated 06.05.2008 that the said office had no authority to issue a copy and ultimately the petitioners sought return of the certified copy from the office of the Registrar of Co-operative Societies and as such according to the petitioners the application was within time. The learned District Judge accepted the said explanation of the petitioners and proceeded to decide the objection under Section 34 of the Arbitration Act, 1996 thereby setting aside the award passed by the Arbitrator. Considering the said averments, we find that the contention of Mr. Rao, learned counsel appearing for the respondent no.1 that the learned District Judge has exercised jurisdiction not vested in it beyond the period of limitation cannot be accepted. The proceedings to challenge the award was immediately initiated by the petitioners by fling an appeal before the Registrar which was dismissed for want of jurisdiction as the objection had to be raised in terms of Section 34 of the Arbitration and Conciliation Act, 1996. In the light of such factual position, the contention that the learned District Judge had proceeded to exercise jurisdiction beyond the period prescribed cannot be accepted. Section 14 of the Limitation Act, 1963 clearly provides that time taken in proceedings in the Court without jurisdiction can be excluded and in the present case, the learned District Judge has rightly exercised the discretion vested in it to exclude such period and proceed to decide the application on merits in accordance with law. The respondent no.1 in fact did not raise such contention before the learned District Judge and as such the respondent no.1 is now estopped from raising such objection in the present petition.

9. With regard to the contention of Mr. Rao, learned counsel appearing for the respondent no.1 that the provisions of Section 14 of the Limitation Act, are not applicable to applications under Section 34 of the Arbitration Act, 1996, we find that the Apex Court in the judgment in the case of **Consolidated Engineering Enterprises V/s Principal Secretary, Irrigation Department and others**, reported in **(2008) 7 SCC 169** has observed at para 22 thus :

"**22**. The policy of the section is to afford protection to a litigant against the bar of limitation when he institutes a proceeding which by reason of some technical defect cannot be decided on merits and is dismissed. While considering the provisions of Section 14 of the Limitation Act, proper approach will have to be adopted and the provisions will have to be interpreted so as to advance the cause of justice rather than abort the proceedings. It will be well to bear in mind that an element of mistake is inherent in the invocation of Section 14. In fact, the section is intended to provide relief against the bar of limitation in cases of mistaken remedy or selection of a wrong forum. On reading Section 14 of the Act it becomes clear that the legislature has enacted the said section to exempt a certain period covered by a bona fide litigious activity. Upon the words used in the section, it is not possible to sustain the interpretation that the principle underlying the said section, namely, that the bar of limitation should not affect a person honestly doing his best to get his case tried on merits but failing because the court is unable to give him such a trial, would not be applicable to an application filed under Section 34 of the Act of 1996. The principle is clearly

> applicable not only to a case in which a litigant brings his application in the court, that is, a court having no jurisdiction to entertain it but also where he brings the suit or the application in the wrong court in consequence of bona fide mistake or (sic of) law or defect of procedure. Having regard to the intention of the legislature this Court is of the firm opinion that the equity underlying Section 14 should be applied to its fullest extent and time taken diligently pursuing a remedy, in a wrong court, should be excluded."

10. Noting the said observations, the contention of Mr. Rao, learned counsel to the effect that the time taken for the proceedings before the Registrar cannot be excluded deserves to be rejected.

11. The Apex Court in the judgment in the case of **Smt. Ujjam Bai** (supra) relied upon by Mr. Agni, learned counsel appearing for the petitioners, has observed at para 15 thus :

> "**15**. Now, I come to the controversial area. What is the position with regard to an order made by a quasi-judicial authority in the undoubted exercise of its jurisdiction in pursuance of a provision of law which is admittedly intra vires ? It is necessary first to clarify the concept of jurisdiction. Jurisdiction means authority

to decide. Whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal. Where a quasi-judicial authority has jurisdiction to decide a matter, it does not lose its jurisdiction by coming to a wrong conclusion whether it is wrong in law or in fact. The question, whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable "at the commencement, not at the conclusion, of the inquiry". (Rex v. Boltan (1841)1 QB 66 at p. 74). Thus, a tribunal empowered to determine claims for compensation for loss of office has jurisdiction to determine all questions of law and fact relating to the measure of compensation and the tenure of the office, and it does not exceed its jurisdiction by determining any of those questions incorrectly; but it has no jurisdiction to entertain a claim for reinstatement or damages for wrongful dismissal, and it will exceed its jurisdiction if it makes an order in such terms, for it has no legal power to give any decision whatsoever on those matters. A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required, (i. e., has jurisdiction) to determine. The strength of this theory of jurisdiction lies in its logical consistency. But there are other cases where Parliament when it empowers an inferior tribunal to enquire into certain facts intends to demarcate two areas of enquiry, the tribunal's findings within one area being conclusive and within the other area impeachable. "The jurisdiction of an inferior tribunal may depend upon the fulfilment of some condition precedent or upon the existence of some particular fact. Such a fact is collateral to the actual matter which the tribunal has to try and the determination whether it exists or not is logically prior to the determination of the actual question which the tribunal has to try. The tribunal must itself decide as to the collateral fact when, at the inception of an inquiry by a tribunal of limited jurisdiction, a challenge is made to its jurisdiction, the tribunal has to make up its mind whether it will act or not, and for that purpose to arrive at some decision on whether it has jurisdiction or not. There may be tribunals which, by virtue of legislation constituting them, have the power to determine finally the preliminary facts on which the further exercise of their jurisdiction depends; but, subject to that an inferior tribunal cannot, by a wrong decision with regard to a collateral fact, give itself a jurisdiction which it would not otherwise possess."

(Halsbury's Laws of England, 3rd Edn. Vol. II page 59). The characteristic attribute of a judicial act or decision is that it binds, whether it be right or wrong. An error of law or fact committed by a judicial or quasi-judicial body cannot, in general, be impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends. These principles govern not only the findings of inferior courts strito sensu but also the findings of administrative bodies which are held to be acting in a judicial capacity. Such bodies are deemed to have been invested with power to err within the limits of their jurisdiction; and provided that they keep within those limits, their decisions must be accepted as valid unless set aside on appeal. Even the doctrine of res judicata has been applied to such decisions. (See Livingstone v. Westminister Corporation

[1904] 2 K.B. 109, Re Birkenhead Corporation, (1952) Ch. 359, Re 56 Denton Road, Twickenham [1953] Ch. 51., Society of Medical Officers of Health v. Hope [1959] 2 W.L.R. 377, 391, 396, 397, 402. In Burn & Co. Calcutta v. Their Employees [1956] S.C.R. 781. {(S) AIR 1957 SC 38 } this Court said that although the rule of res judicata as enacted by S. 11 of the Code of Civil Procedure did not in terms apply to an award made by an industrial tribunal its underlying principle which is founded on sound public policy and is of universal application must apply. In Daryao v. The State of U. P., this Court applied the doctrine of res judicata in respect of applications under Art. 32 of the Constitution. It is perhaps pertinent to observe here that when the Allahabad High Court was moved by the petitioner under Art. 226 of the Constitution against the order of assessment passed on an alleged misconstruction of the notification of December 14, 1957, the High Court rejected the petition on two grounds. The first ground given Was that the petitioner had the alternative remedy of getting the error corrected by appeal; the second ground given was expressed by the High Court in the following words:

> "We have, however, heard the learned counsel for the petitioner on

merits also, but we are not satisfied that the interpretation put upon this notification by the Sales Tax Officer contains any obvious error in it. The circumstances make the interpretation advanced by the learned counsel for the petitioner unlikely. It is admitted that even handmade biris, have been subject to Sales Tax since long before the date of the issue of the above notification. The object of passing the Additional Duties of Excise (Goods of Special Importance) Central Act No. 58 of 1957, was to levy an additional excise duty on certain important articles and with the concurrence of the State Legislature to abolish Sales Tax on those articles. According to the argument of the learned counsel for the petitioner during the period 14th December, 1957, to 30th June, 1958, the petitioner was liable neither to payment of excise duty nor to pay- ment of Sales Tax. We do not know why there should have been such an exemption. The language of the notification might well be read as meaning that the notification is to apply only to those goods on which an additional Central excise duty had been levied and paid".

If the observations quoted above mean that the High Court rejected the petition also on merits, apart from the other ground given, then the principle laid down in Daryao v. The State of U. P. will apply and the petition under Art. 32 will not be maintainable on the ground of res judicata. It is,' however, not necessary to pursue the question of res judicata any further, because I am resting my decision on the more fundamental ground that an error of law or fact committed by a judicial body cannot, in general, be

> impeached otherwise than on appeal unless the erroneous determination relates to a matter on which the jurisdiction of that body depends."

12. Taking note of the said observations, the contention raised by Mr. Rao, learned counsel appearing for the respondent no.1 that the judgment passed by the learned District Judge is without jurisdiction deserves to be rejected.

13. In such circumstances, we shall now proceed to examine the merits of the contention of the learned counsel considering that the learned District Judge while deciding the objection under Section 34 of the Arbitration Act, 1996 has come to the conclusion that the award passed against the petitioners is unsustainable in law for the reasons stated therein. The point as such to be examined is whether once the proceedings initiated under the Multi State Co-operative Societies Act, 2002 have attained finality, whether the respondent no.1 – Bank is entitled in law to initiate proceedings under the SARFAESI Act. Sections 35 and 37 of the SARFAESI Act read thus :

> **"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 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."

14. A combined reading of Sections 35 and 37 of the SARFAESI Act would show that there is no inconsistency between the two provisions. The true import of these Sections is that in case there is anything inconsistent in the provisions of such Acts and under the provisions of the SARFAESI Act, the provisions of SARFAESI Act shall override the inconsistent provisions of these Acts. But to the extent the provisions of the named Acts are not inconsistent with the provisions of the Act, the provisions of those Acts shall have full application and can neither be ignored nor overridden nor bye-passed. For example, the banks being fully empowered to pursue their remedy or claim against the debtors by invoking the remedy under Section 84 of the Co-operative Societies Act, 2002 can resort to such remedy which is by no standards less efficacious. It is open to the bank to take recourse to that remedy inspite of the pendency of the petition. But, the special nature of the provisions under the SARFAESI Act, do not confer any special benefit or exemption. The inherent nature of these provisions require them to abide by the provisions of such Act excepting the field of inconsistency. The term "in addition to" is synonymous with "also",

"moreover", "likewise" or "besides". The term cannot of course be construed as meaning "in lieu of" and is rather diametrically opposed to limitation or abatement or abridgment. The term "in addition to" signifies an increase of or accession to and thus conveys the idea of protecting the reliefs already available under the named Acts. In the present case, there is no inconsistency between the Co-operative Societies Act, 2002 and the provisions of the SARFAESI Act. In such circumstances, once the respondent no.1 has exercised its power in terms of the Co-Operative Societies Act, 2002 and the orders therein have attained finality, the question of proceeding to recover the alleged debt on the basis of the same security document which was found to be a fraud by the learned District Judge cannot be accepted.

15. Section 84 of the Co-operative Societies Act, 2002 clearly provides that a dispute touching the business of a society would be referred to an Arbitrator. Section 84(5) provides that the provisions of the said Arbitration Act, 1996 shall apply to all arbitrations under that Act as if the proceedings for arbitration were referred for settlement or decision under the provisions of the Arbitration Act, 1996. In the present case, it is not disputed that after the award came to be passed by the Arbitrator, the petitioners challenged the said award by preferring an application under Section 34 of the Arbitration Act, 1996. The learned District Judge, after hearing the parties came to the conclusion that the mortgage documents invoked by the respondent

were vitiated by fraud and set aside the award passed by the Arbitrator. Section 35 of the Arbitration Act, 1996 clearly provides that subject to this part an arbitral award shall be final and binding on the parties and the persons claiming under them respectively. The provisions of this Section must be read as subject to the right of an appeal conferred by the Act or arising under the rules of arbitral institution. In the present case, it is not disputed that the judgment of the learned District Judge was not challenged by the respondent no. 1- Bank and, as such, findings and issues raised therein have attained finality. Final in this context means that as between the parties to the reference and the persons claiming under them the award is conclusive as to the issues with which it deals unless and until there is a successful challenge to the award. As such, the findings in the judgment of the learned District Judge in terms of Section 34 of the Arbitration Act, 1996 had attained finality and respondent no. 1 - Bank is estopped from now relying upon the same security documents to initiate proceedings under the SARFAESI Act for recovery of the said amount.

16. Considering the above though the principle of resjudicata may not be strictly applicable to the proceedings under the said Co-Operative Societies Act, 2002 nevertheless, the principles analogous thereto are to be applied in such situation. Admittedly, in the present proceedings the learned District Judge upon hearing the petitioners and the respondent no.1 has come to the conclusion that the said

purported mortgage document cannot be invoked against the petitioners herein which findings have attained finality. The learned District Judge also found that the petitioners were not the borrowers of the respondent no.1. On the background of these categorical findings of the learned District Judge, we find that the exercise resorted to by the respondent no.1 in proceeding to invoke the provisions of the SARFAESI Act is an erroneous exercise of jurisdiction. The fact that the learned District Judge otherwise has jurisdiction to decide such dispute has not been disputed by the respondent no.1. Hence, the findings rendered by the learned District Judge in exercise of its jurisdiction are binding on the petitioners and the respondent no.1. As such findings have attained finality and are binding on the respondent no.1, it is not possible for the respondent no.1 to sideline such findings to resort to the remedy to recover the purported loan against the petitioners based on the alleged security document. The principle of finality or conclusiveness of a prior decision or the general principle of res judicata are applicable even to quasi judicial bodies cannot be doubted. The principle underlying the above rule is founded on public policy but it is not the same as the rule of res judicata. This rule has to be applied in the interest of administration of justice to cases where principle analogous thereto would be applicable. Hence, in view of the findings of the learned District Judge in the judgment dated 03.06.2011, the question of proceeding to invoke the provisions of SARFAESI Act to recover the loan amount from the petitioners is not at all justified and cannot be sustained. The proceedings as such initiated by the respondent no.1 for recovery of the loan amount under SARFAESI Act cannot be sustained and deserves to be quashed and set aside. The notices issued under Section 13 as well as the orders passed under Section 14 of the SARFAESI Act, cannot be sustained and deserve to be quashed and set aside.

17. The Patna High Court in the case of **Kanhaiya Lal** (supra) has observed at paras 2 and 3 thus :

> "**2**. Admittedly, there is no appeal against the original order passed in the year 2000 determining the liability. That order has attained finality and binds both Bank and the petitioner. The submission of the petitioner is that ignoring the said order Bank cannot move under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred to as the "SARFAESI Act") for recovery of its dues. Once Bank had a statutory remedy and it availed it and let it attain finality, having thus taken the remedy to its conclusion its result cannot be discarded or ignored and proceedings afresh started under SARFAESI Act.
>
> **3**. In my view, the principles of estoppel by conduct shall apply. Bank is

> estopped from now ignoring the order they suffered and which attained finality with regard to dispute inter se that order binds both parties, it being an order competently passed by a competent Court in a competent jurisdiction."

18. In order to invoke the provisions of the SARFAESI Act, there has to be a security agreement executed between the parties in connection with the subject property. In terms of Section 2(zb), security agreement means an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor. Under Section 13(1) of the SARFAESI Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of the Act. The security interest claimed by the respondent no. 1 based on the documents have been held to be vitiated in the judgment dated 03.06.2011 passed by the learned District Judge in the earlier proceedings initiated under the said Co-operative Societies Act, 2002. As the secured interest claimed by the respondent no. 1 cannot be invoked, the question of proceedings under the SARFAESI Act by the respondent no. 1 is not at all justified in law. The contention of Mr. Rao, learned counsel appearing for the respondent no. 1 that there

is no declaration in the judgment disposing of the proceedings under Section 34 of the Arbitration Act, 1996 cannot be accepted in view of the said provisions of Section 35 of the Arbitration Act, 1996 which clearly, inter alia, provides that the decision on the issues raised attained finality. As such, the respondent no. 1 - Bank is not entitled to invoke the same documents which have been held to be vitiated to proceed to initiate action under the SARFAESI Act.

19. In this connection, the learned Division Bench of Calcutta High Court in the judgment reported in **AIR 2011 CALCUTTA 57** in the case of **Debasree Das V/s The State of West Bengal & Ors**, has observed at paras 10, 11, 12 and 13 thus :

> "**10**. In view of the aforesaid fact, we find that there was no valid mortgage in favour of the IDBI Home Finance Ltd. in respect of the flat in question either at the instance of the writ petitioner or his predecessor, who was undisputedly the owner of the property. The IDBI Home Finance Ltd., as it appears from record, on the basis of an agreement with two persons, viz. Goutam Kumar Bose and Bharati Rani Bose, exercised its alleged right under Section 13 of the Act although by virtue of such agreement no such right accrued in its favour as at the time of entering into such agreement or even subsequently, those two persons never acquired any title to the said flat from the

lawful owner.

11. We are of the view that in the facts of the present case where a citizen of India has been harassed in this way and was dispossessed from his lawful property at the instance of a financial institution who had acquired no interest over the property in question so as to enable it to exercise power conferred under Section 13(4) of the Act, such a citizen is not required to go to the alternative remedy provided under Section 17 of the Act. In the case before us neither the writ petitioner nor her predecessor had ever secured the property in favour of the IDBI Home Finance Ltd. and as such, its act was on the face of it was without jurisdiction.

12. Therefore, this is not a case of adjudication of a disputed question of fact but on the face of defence made out by the IDBI Home Finance Ltd. itself, it appears that it had no subsisting valid mortgage in respect of the property in question and thus it is a fit case of interference under Article 226 of the Constitution of India.

13. If a writ petitioner, an owner of the property, alleges that notwithstanding the fact that he or his predecessor never mortgaged the property in question but in spite of such fact, a financial institution or bank has sought to exercise or has already exercised its power under Section 13 of the Act, it is the duty of the writ Court to ascertain the defence of such bank or financial institution in this regard and if it appears that on the face of the defence taken by it, there was no valid encumbrance created over the property in question at the instance of the writ petitioner or his predecessor, the then lawful owner, in favour of the bank or the financial institution, to grant relief to the writ petitioner and to reject the defence of the bank or the financial institution that the writ petitioner has alternative remedy under Section 17 of the Act. In case of an unauthorised act not approved by the Statute which is apparent on the face of the defence taken, the alternative remedy is no bar in entertaining the writ-application. The position, however, would have been different, if taking of loan from the bank or financial institution by mortgaging the property is admitted but dispute is raised as regards the quantum of amount payable. In those types of the cases, a writ-court should refuse to entertain the writ application on the ground of existence of the alternative remedy for resolving the dispute of the quantum.”

20. Taking note of the said observations, we find that as there is no proper security in favour of the respondent no.1 for the reasons stated hereinabove, the question of invoking the provisions of the SARFAESI Act to recover the purported claim from the petitioners is untenable in law. As such, the interference is called for by this Court in exercise of jurisdiction under Articles 226 and 227 of the Constitution of India.

21. As the jurisdiction of the respondent no. 1 to proceed under the SARFAESI Act itself is being challenged by the petitioners, the question of refusing to exercise jurisdiction in writ petition under Articles 226 and 227 of the Constitution of India as the petitioners have an alternate remedy to challenge the orders under Section 17 of the SARFAESI Act would not at all arise. Wherever the respondent no. 1 has acted without jurisdiction, there is no bar for this Court to exercise its power under Articles 226 and 227 of the Constitution of India even though the petitioners may have an alternate remedy.

22. For the aforesaid reasons, we find that the proceedings initiated by the respondent no. 1 under the SARFAESI Act cannot be sustained and deserve to be quashed and set aside.

23. In view of the above, we pass the following :

<u>O R D E R</u>

(i) The proceedings initiated by the respondent no. 1 under the SARFAESI Act stand quashed and set aside with all legal consequences.

(ii) Rule is made absolute in the above terms.

(iii) The petition stands disposed of with no order as to costs.

K. L. WADANE, J **F. M. REIS, J**

at*