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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment delivered on: 13.07.2017

+ **ARB.A. (COMM.) 15/2017**

**M.D.FROZEN FOODS EXPORTS PRIVATE
LIMITED & OTHERS**

..... Petitioners

versus

HERO FINCORP LIMITED

..... Respondent

Advocates who appeared in this case:

For the Petitioners : Mr Amiet Andlay, Mr Arun Sharma and
Mr Sumit Virmani

For the Respondent : Mr K.K.Sharma, Senior Advocate with Mr
Venancio D'Costa, Mr Divij Kumar and Ms
Asha.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

JUDGMENT

13.07.2017

SANJEEV SACHDEVA, J. (ORAL)

ARB.A.(COMM.) 15/2017 & IA No.7399/2017(stay)

1. The appellants, by this Appeal under Section 37(2)(b) of the Arbitration & Conciliation Act, 1996 (hereinafter referred to as 'the Arbitration Act'), seek quashing of order dated 19.05.2017 passed by the Arbitral Tribunal and further seek a direction for preservation of

the mortgaged properties belonging to Appellant Nos.2 to 4 during the pendency of the arbitration proceedings.

2. The appellants had secured a loan from the respondent. Loan was sanctioned in the sum of Rs.6.5 crores by Sanction Letter dated 29.09.2015. The said loan amount was also released to the appellants. Master Facility Agreement was signed on 30.09.2015. On 21.10.2015, Supplementary Agreement for Rs.1.8 crore was also signed.

3. The repayment of the loan was secured by creation of Equitable mortgage by deposit of Title Deeds of immovable properties. Seven Memorandum of Title Deeds were executed; four dated 30.09.2015 and three dated 21.10.2015.

4. The properties in respect of which charge was created are as follows:-

- “(i) 1202, 12th Floor, Block no. 4, Uniworld Harden, Sector-47, Gurgaon (property in the name of Appellant no. 3)
- (ii) 1604, 15th Floor, Block no. 4, Uniworld Harden, Sector-47, Gurgaon (property in the name of Appellant no. 3)
- (iii) 1904, 18th Floor, Block no. 4, Uniworld Harden, Sector-47, Gurgaon (property in the name of Appellant no. 3)
- (iv) 0.1166 hectare (1166 Sq. Mt.) land situated in Khasra no. 841 in village Masuri, Pargana-Dasna, Ghaziabad, U.P (in the name of Appellant no.2)

- (v) 0.2020 hectare (2020 Sq. Mt.) land situated in Khasra no. 843,844, 845 in village Masuri, Pargana-Dasna, Ghaziabad, U.P (in the name of Appellant no.2).
- (vi) 0.0690 hectare (690 Sq. Mt.) land situated in Khasra No. 2680 in village Masuri, Pargana-Dasna, Ghaziabad, U.P (in the name of Appellant no.2)
- (vii) 0.059 hectare (590 Sq. Ft) land situated in Khasra no. 2681 in village Masuri, Pargana-Dasna, Ghaziabad, U.P (in the name of Appellant no.2).

5. As per the respondent, there was default in payment of the monthly instalments. Loan Recall Notice was issued on 07.10.2016. On 16.11.2016, notice invoking arbitration was issued and Arbitrator appointed. The proceedings before the Arbitrator are underway.

6. On 24.11.2016, notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the 'SARFAESI Act') was issued with regard to property No.1202, 12th Floor, Block No.4, Uniworld Harden, Sector-47, Gurgaon, .

7. The petitioners approached the Arbitral Tribunal by filing an application under Section 17 of the Arbitration Act seeking restraint on the respondent from proceeding further with under Section 14 of the SARFAESI Act in respect of property No. 1202, 12th Floor, Block No.4, Uniworld Harden, Sector-47, Gurgaon.

8. The Arbitrator passed an interim order directing the respondent to maintain *status quo* with regard to the said property.

9. Subsequently, another notice dated 16.02.2017, under Section 13(2) of the SARFAESI Act with regard to Apartment Nos.1604, 15th Floor, Block No.4, Uniworld Harden, Sector-47, Gurgaon and 1904, 18th Floor, Block No.4, Uniworld Harden, Sector-47, Gurgaon, was issued.

10. It is contended by the counsel for the petitioners that petitioners never received notice dated 16.02.2017 issued under Section 13(2) of the SARFAESI Act with regard to the other two properties.

11. By the impugned order dated 19.05.2017, the Arbitrator found no justification to stay the proceedings initiated by the respondent/claimant under the provision of SARFAESI Act. The Arbitrator held that the appropriate remedy of the appellants is also to take proceedings under the SARFAESI Act.

12. The contention of the appellants is that since the respondents have chosen to invoke arbitration and have proceeded under the Arbitration Act for determination of their claim, they could not have simultaneously proceeded to resort to the provision of the SARFAESI Act for taking action of enforcement of the security interest by way of taking possession and subsequent sale of the properties.

13. Learned counsel for the appellants relies on the judgment of the

Division Bench of Andhra Pradesh High Court in **M/s. DECCAN CHRONICLES HOLDINGS LIMITED VERSUS UNION OF INDIA**, AIR 2014 Andhra Pradesh 78, to contend that when a suit cannot be instituted by a party to an Agreement, which contains an arbitration clause, the proceedings under the SARFAESI Act cannot be placed on a higher pedestal and when arbitration proceedings have already initiated, the respondent cannot be permitted to ignore the same and proceed against the security under the SARFAESI Act.

14. Learned counsel for the appellants also relies on the judgment of the Full Bench of this Court in **HDFC BANK LIMITED VERSUS SATPAL SINGH BAKSHI**, 2013 (134) DRJ 566 (FB) to contend that as arbitration is an alternative to the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the RDB Act) and thus the provisions of SARFAESI Act cannot be relied upon by the Respondents while proceeding under the Arbitration Act. The Respondent has to make a choice between the two.

15. *Per contra*, learned senior counsel for the respondent contends that the remedies under the SARFAESI Act are cumulative to the proceedings under the Arbitration Act and not a substitute thereto and thus, the financial institution has a right to proceed simultaneously under both the Acts and merely because the arbitration proceedings are pending does not preclude a financial institution from proceedings under the SARFAESI Act.

16. Learned senior counsel relies on the decision of the Supreme Court in TRANSCORE VERSUS UNION OF INDIA & ANOTHER, (2008) 1 SCC 125.

17. Learned senior counsel further relies on the decision of the Full Bench of the Orissa High Court in SARTHAK BUILDERS PRIVATE LIMITED AND ANOTHER VERSUS ORISSA RURAL DEVELOPMENT CORPORATION LIMITED & OTHERS, AIR 2014 Ori 83, to contend that provisions of SARFAESI Act apply to existing debts even if loan was advanced earlier.

18. It is an admitted position that the appellants have already taken steps under the SARFAESI Act impugning the proceedings initiated by the respondent for enforcing its security interest.

19. The question that arises for determination in this appeal is whether pending arbitration proceedings a bank/financial institution can simultaneously resort to the provision of the SARFAESI Act for taking action of enforcement of the security interest by way of taking possession and subsequent sale of the properties.

20. The Full Bench of this Court in HDFC BANK LIMITED (*supra*) relied upon by learned counsel for the appellant in my view does not help the Appellant on the contrary supports the case of the Respondents. The Full Bench was dealing with the legal question framed by the Division Bench as under:-

“Whether the provisions of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Arbitration Act) are excluded in respect of proceedings initiated by banks and financial institutions under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the RDB Act).”

21. The Full Bench in **HDFC BANK LIMITED** (*supra*) held as under:-

“7. There is no doubt that those matters which are covered by the RDB Act and are to be adjudicated upon by the Debt Recovery Tribunal/ Debt Recovery Appellate Tribunal, jurisdiction of civil courts is barred. Up to this point, we are in agreement with the learned counsels. However, the answer to the question posed before us does not depend upon the aforesaid principle. That principle only ousts the jurisdiction of civil courts. Focus of the issue, however, has to be somewhat different viz. even when a special Tribunal is created to decide the claims of banks and financial institutions of amounts more than Rs. 10 Lakhs, can the parties by mutual agreement still agree that instead of the Tribunal constituted under the RDB Act, these disputes shall be decided by the Arbitral Tribunal. If answer to this question is in the negative, then those submissions made by the counsels shall prevail. On the other hand, if we find that it is permissible for the parties, by agreement, to agree for domestic forum of their own choice, namely, Arbitral Tribunal under the Arbitration Act to deal with such claims, then the edifice of the apparent forceful submissions of Mr. Tripathi would collapse like house of cards as all those submissions would be relegated to the pale of insignificance.

8. No doubt, for determination of disputes the State provides the mechanism in the form of judicial fora, i.e. administration of justice through the means of judicial system established in this country as per the Constitution and the laws. However, it is also recognized that that is not the only means for determination of lis or resolution of conflicts between the parties. Still the parties are given freedom to choose a forum, alternate to and in place of the regular courts or judicial system for the decision of their inter se disputes. There has been a recognition of the concept that notwithstanding the judicial system, parties are free to chose their own forum in the form of arbitration. This was first recognized by enacting Arbitration Act, 1891. Introduction of Section 89 in the Code of Civil Procedure by amendment to the said Code in the year 2002 takes this concept further by introducing various other forums, known as Alternate Dispute Resolution. Thus, even when the matter is pending in the Court, parties to the dispute are given freedom to resort to Lok Adalat, conciliation, mediation and also the arbitration.

11. What follows from the above? When arbitration as alternate to the civil courts is recognized, which is the common case of the parties before us, creation of Debt Recovery Tribunal under the RDB Act as a forum for deciding claims of banks and financial institutions would make any difference? We are of the firm view that answer has to be in the negative. What is so special under the RDB Act? It is nothing but creating a tribunal to decide certain specific types of cases which were earlier decided by the civil courts and is popularly known as “tribunalization of justice”. It is a matter of record that there are so many such tribunals created. Service matters of the civil servants and employees of public

bodies/authorities which were hitherto dealt with by the civil courts and the High Court are now given to the Central Administrative Tribunal and State Administrative Tribunals with the enactment of Administrative Tribunals Act, 1985. Disputes of defence personnel are now dealt with by special tribunals called Armed Forces Tribunal constituted under the Armed Forces Tribunal Act, 2007. With the creation of all these special tribunals, the matters which were up to now dealt with by civil courts or High Courts are to be taken up by these tribunals in the first instance. (We would like to point out that in so far as High Court is concerned, constitutional remedy provided under Article 226 of the Constitution of India remains intact as held in *L. Chandrakumar v. Union of India*, (1994) 5 SCC 539. However, it is not necessary to dilate on this issue as that does not have any bearing on the present issue).

12. With the creation of these alternate fora with all trappings of the Court and with the decision of the disputes which were hitherto dealt with by the civil courts, can it be said that parties are now totally precluded and prohibited of exercising their choice of domestic forum in the form of arbitral tribunal.....

13. What is discernible from the above is that all disputes relating to “right in personam” are arbitrable and choice is given to the parties to choose this alternate forum. On the other hand, those relating to “right in rem” having inherent public interest are not arbitrable and the parties “choice to choose” forum of arbitration is ousted. Examined in this line, it is obvious that a claim of money by the bank or financial institution against the borrower cannot be treated as “right in rem”. Each claim involves adjudication whether, on the facts of that case, money is payable by the borrower to the bank/financial institution and if so to what extent. Each

case is the decision on the facts of that case with no general ramifications. A judgment/decision of the Debt Recovery Tribunal deciding a particular claim can never be “right in rem” and is a “right in personam” as it decides the individual case/claim before it with no elements of any public interest.

14. On the other hand, in so far as tribunal like Debt Recovery Tribunal is concerned, it is simply a replacement of civil court. There are no special rights created in favour of the banks or financial institutions. There are no special powers given to the Debt Recovery Tribunal except that the procedure for deciding the disputes is little different from that of CPC applicable to civil courts. Otherwise, the Debt Recovery Tribunal is supposed to apply the same law as applied by the civil courts in deciding the dispute coming before it and is enforcing contractual rights of the Banks. It is, therefore, only a shift of forum from civil court to the tribunal for speedy disposal. Therefore, applying the principle contained in Booz Allen and Hamilton Inc. (supra), we are of the view that the matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable.

15. Once that conclusion is arrived at, obviously the parties are given a choice to chose their own private forum in the form of arbitration.

(underlining supplied)

22. The Full Bench of this Court in **HDFC BANK LIMITED** (supra) has held that with regard to those matters which are covered by the RDB Act and are to be adjudicated upon by the Debt Recovery Tribunal/ Debt Recovery Appellate Tribunal, jurisdiction of civil

courts is barred. Further even when a special Tribunal is created to decide the claims of banks and financial institutions of amounts more than Rs. 10 Lakhs, the parties by mutual agreement can still agree that instead of the Tribunal constituted under the RDB Act, these disputes shall be decided by the Arbitral Tribunal.

23. The Full Bench of this Court in **HDFC BANK LIMITED** (supra) further held that for determination of disputes the State provides the mechanism in the form of judicial fora. However, it is also recognized that that is not the only means for determination of lis or resolution of conflicts between the parties. The parties are given freedom to choose a forum, alternate to and in place of the regular courts or judicial system for the decision of their inter se disputes. Thus, even when matter is pending in the Court, parties to the dispute are given freedom to resort to Lok Adalat, conciliation, mediation and also the arbitration. When arbitration as alternate to the civil courts is recognized, creation of Debt Recovery Tribunal under the RDB Act as a forum for deciding claims of banks and financial institutions would not make any difference.

24. It has been held that the RDB Act merely creates a tribunal to decide certain specific types of cases which were earlier decided by the civil courts. This is popularly known as “tribunalization of justice”. All disputes relating to “right in personam” are arbitrable and choice is given to the parties to choose this alternate forum. On the other hand, those relating to “right in rem” having inherent public

interest are not arbitrable and the parties “choice to choose” forum of arbitration is ousted. A claim of money by the bank or financial institution against the borrower cannot be treated as “right in rem”. A Tribunal like Debt Recovery Tribunal is simply a replacement of civil court. There are no special rights created in favour of the banks or financial institutions.

25. There are no special powers given to the Debt Recovery Tribunal except that the procedure for deciding the disputes is little different from that of CPC applicable to civil courts. Otherwise, the Debt Recovery Tribunal is supposed to apply the same law as applied by the civil courts in deciding the dispute coming before it and is enforcing contractual rights of the Banks. It is, therefore, only a shift of forum from civil court to the tribunal for speedy disposal. Matters which come within the scope and jurisdiction of Debt Recovery Tribunal are arbitrable. Once that conclusion is arrived at, obviously the parties are given a choice to chose their own private forum in the form of arbitration.

26. From reading of the decision of the Full Bench in **HDFC BANK LIMITED** (*supra*), it is clear that the Full Bench has held that there are three alternative forum i.e. (i) Civil Courts (ii) Arbitral Tribunal and (iii) Debt Recovery Tribunal constituted under the RDB Act.

27. The Tribunal created under the RDB Act, i.e., the Debt Recovery Tribunal was created as an alternative forum to Civil

Municipal Courts to expedite the process of recovery. The Arbitration being alternative to the Civil Courts was treated as an alternative to the Debts Recovery Tribunal as well.

28. In this context, the Full Bench laid down that when arbitration is an alternate to Civil Courts, the same would also be an alternate to the Debts Recovery Tribunal and accordingly, the Full Bench held that matters which are within scope and jurisdiction of Debts Recovery Tribunal would be arbitrable.

29. The Supreme Court in TRANSCORE (*supra*) has held that it is not necessary for the Bank/Financial Institution to withdraw the proceedings under the RDB Act before proceeding under the SARFAESI Act. In the Judgment Supreme Court has referred to the SARFAESI Act as the NPA Act. The Supreme Court held as under:

“12. The NPA Act, 2002 is enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. The NPA Act enables the banks and FI to realise long-term assets, manage problems of liquidity, asset liability mis-match and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets by adopting measures for recovery and reconstruction. The NPA Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. The said Act also empowers the said asset reconstruction companies to take over the

management of the business of the borrower. The constitutional validity of the said Act has been upheld in the case of Mardia Chemicals Ltd. and Ors. v. Union of India and Ors. reported in 2004 (4) SCC 311. After the judgment of this Court in Mardia Chemicals, the amending Act 30 of 2004 was inserted. By the said Act 30 of 2004, Section 19(1) of the DRT Act was recasted simultaneously with section 13 of the NPA Act, 2002. These amendments were made in order to enable the banks/ FIs. to withdraw, with the permission of DRT, the O.As. made to it, and thereafter take action under the NPA Act. In the judgment in Mardia Chemicals (supra) this Court observed that, in cases where a secured creditor has taken action under Section 13(4), it would be open to the borrower to file an application under Section 17 of the NPA Act. In the said judgment, this Court further observed that if the borrower, after service of notice under Section 13(2) of the NPA Act, raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered by the bank/ FI with due application of mind and reasons for not accepting the objections briefly must be given to the borrower. In the said judgment, it is further stated that the reasons so communicated shall only be for the purposes of information/ knowledge of the creditor and such reasons will not give him any right to approach the Tribunal under Section 17 of the NPA Act. The appellant herein (M/s Transcore) mainly relied on the said reasons given by this Court in Mardia Chemicals (supra) in support of its contention that the Notice dated 6.1.2003 under Section 13(2) of NPA Act was merely a show cause notice and it did not constitute "action" under the NPA Act and, therefore, the said bank was obliged statutorily to apply for withdrawal of O.A. No. 354/99 before invoking the NPA Act.

14. There is one more reason for enacting NPA Act, 2002. When the civil courts failed to expeditiously decide suits filed by the banks/ FIs., Parliament enacted the DRT Act, 1993. However, the DRT did not provide for assignment of debts to securitization companies. The secured assets also could not be liquidated in time. In order to empower banks or FIs. to liquidate the assets and the secured interest, the NPA Act is enacted in 2002. The enactment of NPA Act is, therefore, not in derogation of the DRT Act. The NPA Act removes the fetters which were in existence on the rights of the secured creditors. The NPA Act is inspired by the provisions of the State Financial Corporations Act, 1951 ("SFC Act"), in particular Sections 29 and 31 thereof. The NPA Act proceeds on the basis that the liability of the borrower to repay has crystallized; that the debt has become due and that on account of delay the account of the borrower has become sub-standard and non-performing. The object of the DRT Act as well as the NPA Act is recovery of debt by non-adjudicatory process. These two enactments provide for cumulative remedies to the secured creditors. By removing all fetters on the rights of the secured creditor, he is given a right to choose one or more of the cumulative remedies. The object behind Section 13 of the NPA Act and Section 17 r/w Section 19 of the DRT Act is the same, namely, recovery of debt. Conceptually, there is no inherent or implied inconsistency between the two remedies. Therefore, as stated above, the object behind the enactment of the NPA Act is to accelerate the process of recovery of debt and to remove deficiencies/ obstacles in the way of realisation of debt under the DRT Act by the enactment of the NPA Act, 2002.

64. *In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2d, Vol. 25, page 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 Equity (Thirty-first Edition, page 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.*

65. *In our view, the judgments of the High Courts which have taken the view that the doctrine of election is applicable are erroneous and liable to be set aside.*

66. *We have already analysed the scheme of both the Acts. Basically, the NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/ FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section 13 of NPA Act is recovery by non-adjudicatory process. A secured asset under NPA Act is an asset in which interest is created by the borrower in favour of the bank/ FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay*

the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceeds on the basis that security interest in the bank/FI; needs to be enforced expeditiously without the intervention of the court/tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, NPA Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor.

68. The object behind introducing the first proviso and the third proviso to Section 19(1) of the DRT Act is to align the provisions of DRT Act, the NPA Act and Order XXIII CPC. Let us assume for the sake of argument, that an O.A. is filed in the DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account. After filing of O.A., on account of non disposal of the O.A. by the tribunal due to heavy backlog, the bank finds that one of the three accounts has become sub-standard/ loss, in such a case the bank can invoke the NPA Act with or without the permission of the DRT. One cannot lose sight of the fact that even an application for withdrawal/ leave takes time for its disposal. As stated above, with inflation in the economy, value of the pledged property/ asset depreciate on day to day basis. If the borrower does not provide additional asset and the value of the asset pledged keeps on falling then to that extent the account becomes non-performing. Therefore, the bank/ FI is required to move under NPA

Act expeditiously by taking one of the measures by Section 13(4) of the NPA Act. Moreover, Order XXIII CPC is an exception to the common law principle of non-suit, hence the proviso to Section 19(1) became a necessity.

69. For the above reasons, we hold that withdrawal of the O.A. pending before the DRT under the DRT Act is not a pre-condition for taking recourse to NPA Act. It is for the bank/FI to exercise its discretion as to cases in which it may apply for leave and in cases where they may not apply for leave to withdraw. We do not wish to spell out those circumstances because the said first proviso to Section 19(1) is an enabling provision, which provision may deal with myriad circumstances which we do not wish to spell out herein.

(underlining supplied)

30. The Supreme Court in TRANSCORE (*supra*) has clearly held that the SARFAESI Act is enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. The SARFAESI Act enables the banks and Financial Institutions to realise long-term assets, manage problems of liquidity, asset liability mis-match and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets by adopting measures for recovery and reconstruction.

31. The Supreme Court in TRANSCORE (*supra*) further held that there is one more reason for enacting SARFAESI Act, 2002. When the civil courts failed to expeditiously decide suits filed by the banks/

Financial Institutions, Parliament enacted the DRT Act, 1993. The secured assets also could not be liquidated in time. In order to empower banks or Financial Institutions to liquidate the assets and the secured interest, the SARFAESI Act was enacted in 2002.

32. The Supreme Court held that the enactment of SARFAESI Act is not in derogation of the DRT Act. SARFAESI Act removes the fetters which were in existence on the rights of the secured creditors. The SARFAESI Act proceeds on the basis that the liability of the borrower to repay has crystallized; that the debt has become due and that on account of delay the account of the borrower has become sub-standard and non-performing. The object of the DRT Act as well as the SARFAESI Act is recovery of debt by non-adjudicatory process. These two enactments provide for cumulative remedies to the secured creditors. By removing all fetters on the rights of the secured creditor, he is given a right to choose one or more of the cumulative remedies. The object behind Section 13 of the SARFAESI Act and Section 17 r/w Section 19 of the DRT Act is the same, namely, recovery of debt. Conceptually, there is no inherent or implied inconsistency between the two remedies. The object behind the enactment of the SARFAESI Act is to accelerate the process of recovery of debt and to remove deficiencies/ obstacles in the way of realisation of debt under the DRT Act by the enactment of the SARFAESI Act, 2002.

33. The Supreme Court in TRANSCORE (*supra*) held that there are

three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. If in truth there is only one remedy, then the doctrine of election does not apply. The SARFAESI Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply.

34. The SARFAESI Act is enacted to enforce the interest in the financial assets which belongs to the bank/ Financial Institutions by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section 13 of SARFAESI Act is recovery by non-adjudicatory process. A secured asset under SARFAESI Act is an asset in which interest is created by the borrower in favour of the bank/ Financial Institutions and on that basis alone the SARFAESI Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the SARFAESI Act deals with the rights of the secured creditor. Withdrawal of the O.A. pending before the DRT under the DRT Act is not a pre-condition for taking recourse to SARFAESI Act.

35. The Full Bench of our Court in **HDFC BANK LIMITED** (*supra*) has held Debts Recovery Tribunal under the RDB Act as an alternative to the Civil Courts and the disputes arbitrable. The three are thus alternative forums to which recourse can be taken by the Bank/ Financial Institutions for recovery of its dues.

36. The Judgment of the Full Bench of this court in **HDFC BANK LIMITED** (*supra*) when read in the light of the judgment of the Supreme Court in **TRANSCORE** (*supra*) shows that because arbitration is an alternative to the proceedings under the RDB Act, it would not be obligatory on the Bank/Financial Institution to withdraw the proceedings pending before the arbitrator, prior to resorting to secure its interest under the SARFAESI Act. The Bank/financial institution can simultaneously proceed before the Arbitral Tribunal for adjudication of disputes and also take recourse to Section 13 of the SARFAESI Act for enforcement of its security interest. Both the proceedings can continue parallel to each other.

37. I am in respectful disagreement with the view taken by the Division bench of the Andhra Pradesh High Court in **M/S. DECCAN CHRONICLES HOLDINGS LIMITED** (*supra*) that when arbitration proceedings have already initiated, the respondent cannot be permitted to ignore the same and proceed against the security under the SARFAESI Act.

38. Both the Judgment of the Supreme Court in **TRANSCORE** (*supra*) and the Division Bench of our Court in **HDFC BANK LIMITED** (*supra*) were not placed before the Division Bench of Andhra Pradesh High Court. Furthermore, the said issue was not the main question in issue before the Andhra Pradesh High Court but was stated to be a subsidiary question.

39. The main question in issue before the Division Bench of Andhra Pradesh High Court was whether a loan transaction outside the purview of the SARFAESI Act can be brought under its purview, without the consent of the borrower. This question arose as when the loan transaction was entered into the financial institution was not under the purview of SARFAESI and subsequently it came under its purview. The Division Bench of Andhra Pradesh relied upon the judgment of the Division Bench of Orissa High Court in **SUBHASH CHANDRA PANDA VERSUS STATE OF ORISSA** AIR 2008 Ori 88.

40. The view taken by the Division Bench in **SUBHASH CHANDRA PANDA** (*supra*) has been specifically overruled by the Full Bench of Orissa High Court in **SARTHAK BUILDERS PVT. LTD** (*supra*).

41. In view of the above, I find no infirmity in the view taken by the Arbitrator in refusing to injunct the proceedings initiated by the Respondent under the SARFAESI Act. There is no error in the order dated 19.05.2017.

42. The Appeal is accordingly dismissed. There shall be no order as to costs.

43. Order *Dasti* under signatures of the Court Master.

SANJEEV SACHDEVA, J

JULY 13, 2017/Sp'