

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment Reserved on 27.02.2020****Judgment Delivered on 18.05.2020****Writ Appeal No. 362 of 2019**

*{Arising out of order dated 17.05.2019 passed by the learned Single Judge in Writ
Petition (C) No. 1441 of 2019}*

1. Shri Mohan Products Pvt. Ltd. A Company registered under the provisions The Companies Act, 1956, Village: Borjara, Urla Industrial Area, Raipur (C.G.)
Through its Director Shri Ghanshaym Agarwal.
2. Ghanshyam Agrawal, S/o Shri Mohanlal Agarwal, aged about 45 years, R/o Flat No. 2, Ashoka Park, Khamardih Road, Shankar Nagar, Raipur (C.G.)
3. Sajjan Agarwal, S/o Shri Mohanlal Agarwal, aged about 41 years, R/o Flat No. 2, Ashoka Park, Khamardih Road, Shankar Nagar, Raipur (C.G.)

---- Appellants**Versus**

1. State Bank of India, Stressed Assets Recovery Branch, 1st Floor, Madan Complex, Shankar Nagar, Lodhipara Road, Raipur – 492007 (C.G.) Through its Authorized Officer
2. M/s Barbarik Transmission, 211, Samta Shopping Arcade, Samta Colony, Raipur – 492010 (C.G.) Through its Authorized Person Shri Manish Agrawal (Auction Purchaser)

---- Respondents

For Appellants	:	Shri Akshat Agrawal and Shri Yash Agrawal, Advocates.
For Respondent No.1	:	Shri P.R. Patankar, Advocate.
For Respondent No.2	:	Shri Manoj Paranjpe, Advocate.

Hon'ble Shri P. R. Ramachandra Menon, Chief Justice

Hon'ble Shri Justice Parth Prateem Sahu, Judge

CAV Judgment

Per P. R. Ramachandra Menon, Chief Justice

1. Whether the statutory deposit of 50% to be made in terms of the 'second proviso' to Section 18(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'SARFAESI Act') to have the appeal entertained by the Debts Recovery Appellate Tribunal (for short, 'DRAT') is to be reckoned with reference to the amount claimed by the Bank in the notice issued under Section 13(2) of the SARFAESI Act or will it include the subsequent interest as well (as on the date of filing of the appeal), is the question mooted for consideration. There is also an incidental issue as to whether the amount deposited by the 'Auction Purchaser' could be considered or given credit to such 'deposit', so as to enable the Appellant to have the appeal entertained.
2. Dismissal of the writ petition challenging the order passed by the DRAT to deposit an additional sum of Rs. 3.66 Crores, after giving credit to the amount deposited by the 'Auction Purchaser' on sale of the property of the Appellants (so as to make it 50% of the amount due) for entertaining the appeal preferred against the order passed by the DRT under Section 17 of the SARFAESI Act is put to challenge in this appeal.
3. Heard Shri Akshat Agrawal and Shri Yash Agrawal, the learned counsel appearing for the Appellants, Shri P.R. Patankar, the learned counsel appearing for the Respondent No.1/Bank and Shri Manoj Paranjpe, the learned counsel for the Respondent No.2/Auction Purchaser.
4. The sequence of events is as follows: The Appellant company is stated as engaged in the business of manufacturing of Iron Bars, Angles, Channels etc. and had availed financial assistance from the Respondent No.1/Bank creating

security interest over the property in question. Allegedly because of the recession in the world trade and dull market in connection with steel, the Appellant company also suffered much loss; by virtue of which the monthly installments could not be effected on time. Met with the situation, the assets were declared as non-performing assets by the Respondent No.1/Bank who issued notice dated 31.01.2012 under Section 13(2) of the SARFAESI Act demanding a sum of Rs. 4,15,60,893.13/- which was inclusive of the principal amount and interest due as on date.

5. Since the Appellants could not satisfy the demand, the Bank proceeded with further steps in terms of Section 13(4) of the SARFAESI Act and possession notice dated 11.08.2012 was stated as pasted on the premises of the Appellants. It is contented that the possession notice was actually never served to the Appellants, either in person or through post, in terms of the mandatory requirements under Rule 8(1) and 8(2) of the Security Interest (Enforcement) Rules, 2002 (for short, 'Rules of 2002') and that possession of the hypothecated movables – plant and machinery – was taken without complying with the specific requirements under Rule 4(1) and 4(2) of the Rules of 2002. This made the Appellants to challenge the proceedings by filing S.A. No. 210 of 2012 before the Debts Recovery Tribunal (for short, 'DRT') which however, came to be dismissed for non-prosecution, as the counsel for the Appellants could not appear before the DRT, allegedly because of some illness.
6. According to the Appellants, they had contacted the Respondents to have the issue settled under 'One Time Settlement scheme' (OTS) and had offered a sum of Rs. 4.05 Crores in this regard. Since the request was not acceded to, the offer was improved to Rs. 4.25 Crores to avail the benefit of 'OTS' and deposited a sum of Rs. 15 Lacs in a 'No Lien Account'. However, without passing any order in respect of the proposal for 'OTS', notice dated 04.08.2016 was published in the newspaper dated 05.08.2016 for conducting auction of the

properties, scheduled on 07.09.2016. This, according to the Appellants, was without complying the mandatory provisions of Rules 8(6) and 9(1) of the Rules of 2002.

7. Even after publication of the auction notice, though the Appellants were continuously contacting the Respondent/Bank for granting the benefit of 'OTS', without rejecting the 'OTS' proposal, the Bank informed the Appellants that auction had already been conducted on 07.09.2016. On making further enquires in this regard, the Appellants came across various illegalities and irregularities in the matter of conducting auction as contended and as noted below:

“19. That, after continuous follow up, on 14.09.2016 printout of copy of statement of account of SARC Collection Account No. 30777575722 was provided by the banker and after examination of statement of account following illegalities and non-compliance of law and statutory requirement were revealed:

(i) EMD was not deposited through NEFT/RTGS/demand Draft in the account no. 30777575722, name of account SARC Collection Account, IFSC Code SBIN0017728 by or before 03.09.2016.

(ii) Since no EMD was paid by or before 03.09.2016, intending bidder could not be registered for submission of bid.

(iii) Since intending bidder was not registered by or before 03.09.2016, no bid could be submitted on 03.09.2016.

(iv) As per clause 8 of auction notice the successful bidder was required to deposit 25% of the bid amount (adjustment of EMD was permitted) within 24 hours. In the instant case balance 15% has not been deposited by or before 03 p.m. on 08.09.2016.

(v) 75% of the bid amount has not been deposited by or before 15th day from the date of auction.”

Allegedly without any regard to the glaring irregularities as above, 'Sale Certificate' was issued to the Auction Purchaser/2nd Respondent on 23.09.2016.

This made the Appellants to challenge the proceedings of the illegal auction sale held on 07.09.2016 (pursuant to the auction sale notice dated 04.08.2016 published on 05.08.2016) by filing S.A. No. 264 of 2016 under Section 17(1) of the SARFAESI Act before the DRT, Jabalpur.

8. Pursuant to the notice issued by the DRT, the Respondents appeared and filed separate replies with regard to the specific averments of the Appellants that EMD was not submitted as stipulated in the auction notice and that it was not within the specified time. The Respondents sought to rely on the General Financial Rules, 2002 of the Bank, which provided for acceptance of bid security/EMD in the form of 'Fixed Deposit Receipt'.
9. As a matter of fact, the earnest money came to be deposited in the designated account only on 08.09.2016 and as such, the 2nd Respondent had not complied with the satisfaction of the EMD in the form as notified in the auction notice and had not complied with the same on or before the last date prescribed for submitting the EMD. The Appellants filed additional written submissions dated 24.07.2018 and 10.05.2018 referring to the non-satisfaction of the specific requirements, but without proper consideration, the S.A. was dismissed by the DRT wrongly placing reliance on Rule 157 (F) of the General Financial Rules 2005 (enabling to accept EMD in the form of FDR) which was not applicable to a proceeding under the SARFAESI Act, which is a special statute and that the terms and conditions of the publication of notice could not have been modified in any manner.
10. Even the DRT itself has noted in paragraph 11 of the order that contradictory letters have been written to the Dena Bank by another Bank with reference to the FDR and further that the very intention of opting to pay the EMD by way of FDR (instead of the methods settled for the auction), was raising suspicion. It is further contended by the Appellants that the property of the Appellants, having very high market value, was sold in auction for 'throw-away price' (exactly for

the 'reserve price' mentioned); that too, to the 'single bidder' without the consent of the Appellants and in contravention of the mandatory provision under Rule 9(2) of the Rules of 2002.

11. Pointing out the violation of statutory requirements and the procedural rules as mentioned above, the order passed by the DRT was sought to be challenged by filing appeal (Sr. No. 99 of 2018) under Section 18 of the SARFAESI Act before the DRAT. Since the total amount claimed by the Respondent/Bank in the demand notice issued under Section 13(2) of the SARFAESI Act was only Rs. 4,15,60,893.13/- and sale of the property in the meanwhile had fetched a sum of Rs. 2,73,98,000/- (because of the sale of land & building as well as the plant & machinery); recovery of more than 66% of the amount claimed (much above 50% mentioned to second proviso to Section 18(1) of the SARFAESI Act), an I.A. was filed for waiver of deposit of any further amount under the second proviso to Section 18(1) of the SARFAESI Act. After considering the same, the Appellate Tribunal reckoned the total amount payable (including future interest) as Rs. 7.23 Crores (after giving credit to the amount of Rs. 2,73,98,000/- generated by way of auction sale) and accordingly, half of the said amount was directed to be deposited so as to constitute 50% of the amount due.
12. In the said circumstance, a miscellaneous application was filed for review of the said order dated 05.07.2018, seeking to place reliance on the verdicts passed by the Division Bench of Chennai High Court and the Allahabad High Court, to the effect that 'future interest' cannot be considered for working out the statutory deposit in terms of the second proviso to Section 18(1) of the SARFAESI Act, which however, came to be rejected by the Appellate Tribunal as per order dated 12.12.2018. This made the Appellants to challenge the said orders dated 05.07.2018 and 12.12.2018 by filing Writ Petition (C) No. 1441 of 2019.

13. The learned Single Judge observed that the Respondent/Bank had obtained a decree for Rs. 4,65,22,303.23/- and that pursuant to the auction sale of the property, a sum of Rs. 2,73,98,000/- had come to the account of the Bank; with reference to which wavier was sought for by the Appellants. But, placing reliance on the ruling rendered by the Supreme Court in ***Parsn Medicinal Plants Pvt. Ltd. & Another vs. Indian Bank & Others*** reported in **(2011) 15 SCC 253** (that the amount deposited by 'Auction Purchaser' cannot be considered for satisfaction of the second proviso to Section 18(1) of the SARFAESI Act), the writ petition came to be dismissed. This is put to challenge in this appeal.
14. When the matter came up for consideration before this Court on 09.09.2019, it was submitted by the Respondent/Bank that the writ appeal had become infructuous, insofar as the appeal preferred before the DRAT had been dismissed as per order dated 23.08.2019 for non-prosecution as well as for non-compliance of the order dated 05.07.2018 with regard to the statutory deposit. It was also pointed out that the said order dated 23.08.2019 had not been subjected to challenge; which made the Appellants/Petitioners to file I.A. No. 3 of 2019 for amendment, referring to the subsequent developments and also causing the said order to be challenged. In fact, according to the Appellants, it was only as a measure of prudence and caution; though no such challenge was actually necessary, it being purely consequential to the orders already challenged in the writ petition. Further, the order dated 23.08.2019 was passed during pendency of the appeal *i.e.* after passing the judgment by the learned Single Judge (correctness of which is challenged in this appeal).
15. On 14.10.2019, the learned counsel for the Respondent/Bank submitted that the question whether the amount deposited by the 'auction purchaser' could be given credit, to work out the figures in terms of the second proviso to Section 18(1) of the SARFAESI Act had come up for consideration before the Apex

Court in ***Parsn Medicinal Plants Pvt. Ltd. (supra)*** which is stated as answered in the 'negative'. Specific reference was made to 'paragraph 4', where the legal question was formulated, followed by “**paragraphs 17 to 20**”, giving the finding with reasons.

16. After working up the position, the learned counsel for the Appellants submitted on 23.10.2019, that the idea conveyed by the 1st Respondent/Bank before the learned Single Judge and asserted before this Bench that the issue stood covered by the Supreme Court as per the finding and reasoning given in “**paragraphs 17 and 18**” as mentioned above, is quite wrong and unfounded. It was pointed out that the judgment of the Supreme Court contained only 'paragraphs 1 to 4' and that the finding and reasoning in “paragraphs 17 to 20” given therein was only the finding and reasoning in the verdict passed by the High Court of Delhi, which was under challenge before the Apex Court. A proper web copy of the verdict in ***Parsn Medicinal Plants Pvt. Ltd. (supra)*** was also placed for perusal of this Court.
17. The above judgment clearly shows that the 'so called finding and reasoning' mentioned as part of the judgment in ***Parsn Medicinal Plants Pvt. Ltd. (supra)*** was only the reproduced version of the verdict passed by the High Court, which was challenged before the Supreme Court. As a matter of fact, the Apex Court noted the submission made by the Bank, that, if the Bank were permitted to appropriate the amount generated by way of auction sale of the property, the Bank had no objection to have the appeal entertained without any further deposit in terms of the second proviso to Section 18(1) of the SARFAESI Act. This was considered and allowed by the Supreme Court, virtually directing the DRAT to have the appeal considered on merits, without any further deposit, with liberty to the Bank to have the auction deposit to be appropriated; however, making it 'subject to the result of the appeal'. This by itself makes it clear, that the submission made the Respondent/Bank as to the 'finding and reasoning',

actually rendered by the High Court, as if it were rendered by the Supreme Court, unfortunately came to be accepted by the learned Single Judge; which is not correct or sustainable. (The circumstance under which the disputed part of the verdict of the High Court challenged before the Apex Court was shown, as if, it were part of the verdict passed by the Apex Court is discernible from the '**Editor's Note**' published by the Journal).

18. The learned counsel for the 1st Respondent/Bank submits that the amount generated by way of auction sale of the property concerned can be adjusted in respect of the liability under the second proviso to Section 18(1) of the Act, only if the sale is not challenged by the borrower. In the instant case, the Appellants are challenging the auction sale and hence there cannot be any adjustment. We find it difficult to agree. Filing of appeal is to challenge the verdict w.r.t. the steps/proceedings taken by the secured creditor in terms of the Section 13(4) (a to d) of the SARFAESI Act. Section 13(4)(a) very much includes the right to take the possession, transfer and sale of the property and if the sale is not challenged, the party may not be getting the end result/ultimate relief. Even otherwise, it has been made clear by the Apex Court in ***Axix Bank vs. SBS Organics Pvt. Ltd. & Another*** reported in **(2016) 12 SCC 18** that the amount deposited by the borrower in terms of the second proviso to Section 18(1) of the SARFAESI Act is not a secured asset or a secured debt and if the party succeeds, the said amount has to be returned to the borrower. Similarly, the amount deposited by the auction purchaser is in respect of the property of the borrower (the term borrower includes 'guarantor' as well) and if ultimately the borrower succeeds in the appeal, the auction amount will naturally be returned to the auction purchaser. We also find support from the ruling rendered by the Supreme Court in ***Parsn Medicinal Plants Pvt. Ltd. (supra)*** in this regard.
19. The learned counsel for the 1st Respondent/Bank, however, sought to place reliance on the verdicts passed by a Division Bench of the Bombay High Court

in ***Eskays Construction Pvt. Ltd. vs. Soma Papers & Industries Ltd. & Others*** reported in **AIR 2017 Bombay 10** and of the same High Court in Writ Petition No. 2414 of 2013 (alongwith Writ Petition No. 2512 of 2013); to the effect that auction deposit cannot be reckoned for the purpose of satisfaction of the statutory deposit in terms of the second proviso to Section 18(1) of the SARFAESI Act, for entertaining the appeal filed by the borrower. Whether the auction deposit could have been reckoned or not, with regard to the second proviso to Section 18(1) of the SARFAESI Act however, does not arise as a direct question to be answered in the present appeal, insofar as the DRAT itself, as per the order dated 05.07.2018, has given credit to the said amount and it was only after minusing the said amount from the total amount stated as due (including the subsequent interest), that the balance amount was worked out so as to fix 50% of the total amount due. The said order passed by the Tribunal, admittedly, has not been challenged by the 1st Respondent/Bank to the effect that the auction deposit could not have been reckoned under any circumstance and as such, this Court does not find it necessary to go into that question and the scrutiny is confined only to the question whether 50% of the amount to be deposited for entertaining the appeal under the second proviso to Section 18(1) of the SARFAESI Act is to be worked out with reference to the amount claimed in notice issued under Section 13(2) of the SARFAESI Act or will it include the subsequent interest as well, *i.e.* as on the date of filing the appeal.

20. According to the learned counsel for the Appellants, the statute only envisages satisfaction of 50% of the amount due as claimed by the Bank or as determined by the Tribunal, whichever is less. The 'third proviso' to Section 18(1) of the SARFAESI Act is a pointer to the effect that, in appropriate cases, deposit could be reduced by the Appellate Tribunal up to a maximum extent of 25%; below which there cannot be any deduction. If the 'future interest' is also included (as

on the date of filing the appeal), it will go against the scheme of the statute and intention of the law makers in providing the right of appeal which would be made 'illusory'. Reference is also made to the circumstance under which the original provision, as is stood earlier (insisting for deposit of 75% of the amount to have the appeal entertained) came to be struck down by the Supreme Court as unconstitutional in ***Mardia Chemicals Ltd. & Others vs. Union of India & Others*** reported in **(2004) 4 SCC 311**. Reliance is sought to be placed also on decisions on the point rendered by the Division Bench of the Madras High Court in ***Mrs. Mekala Raj vs. The Presiding Officer Debt Recovery Appellate Tribunal Ethiraj Salai Chennai & Others*** reported in **(2017) SCC Online Mad 16033** and another verdict of the very same High Court in ***Sivakumar Textiles vs. Debt Recovery Appellate Tribunal, Chennai & Others*** reported in **AIR 2012 Madras 57**; besides the verdict passed by the Delhi High Court in ***Poonam Manshani vs. J&K Bank Ltd. & Another*** reported in **AIR 2010 Delhi 28**.

21. The contention of the learned counsel appearing for the 1st Respondent/Bank is that the wordings of the second proviso to Section 18(1) of the SARFAESI Act are quite clear and it envisages 'future interest' as well. The learned counsel points out that the scope of the verdict passed by the Division Bench of Madras High Court and that of the other High Courts has been considered by a Division Bench of the Bombay High Court in ***M/s Mrb Roadconst Pvt. Ltd. vs. Rupee Co-op. Bank Ltd.*** reported in **AIR 2016 (NOC) 334 (BOM.)**. The Bombay High Court made specific reference to definition of the term 'debt' as used in Section 2(h-a) of the SARFAESI Act, in relation to the definition of the said term under Section 2(g) of the Recovery of Debts and Bankruptcy Act, 1993 (for short, 'Act of 1993') and held that the term 'debt' clearly included 'interest' as well, which is claimed as due from any person by a Bank or a financial institution and hence it will take in the 'future interest' as well. The Bench also observed that the verdict

passed by the Division Benches of the Madras High Court in ***Sivakumar Textiles vs. Debt Recovery Appellate Tribunal, Chennai & Others*** reported in **AIR 2012 Madras 57** and by the Delhi High Court in ***Poonam Manshani vs. J&K Bank Ltd. & Another*** reported in **AIR 2010 Delhi 28** had not made any specific reference to definition of the term 'debt' appearing under Section 2(h-a) of the SARFAESI Act in the judgment and hence they cannot be relied on.

22. **Section 2(h-a)** of the SARFAESI Act defines the term '**debt**', that it shall have the meaning assigned to it in clause (g) of Section 2 of the Act of 1993. Section 2(g) of the Act of 1993 defines a term 'debt' as follows:

“Section 2(g) “debt” means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application [and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities or;]”

From the above definition, it is clear that the liability (inclusive of interest) which is claimed as due from any person by a Bank or a financial institution has to be understood as it is, with reference to the second proviso to Section 18 (1) of the SARFAESI Act, which is reproduced below:

“18. Appeal to Appellate Tribunal. - (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal [under section 17, may prefer an appeal along with such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:]

[Provides further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.]

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts to Banks and Financial Institution Act, 1993 (51 of 1993) and rules made thereunder.”

23. The second proviso to Section 18(1) of the SARFAESI Act places a bar to entertain the appeal, unless the borrower has deposited 50% of the amount of **'debt'** due from him as claimed by the secured creditor or determined by the DRAT, whichever is less. It has to be borne in mind that the appeal before the DRAT is from an order passed by the DRT under Section 17 (enabling any person including borrower, aggrieved of any measures referred to in sub-section 4 of the Section 17 taken by the secured creditor, to seek remedy by filing an application before the DRT). **Section 13(4)** of the SARFAESI Act refers to the one or more of the four different measures **'a to d'** mentioned therein which could be pursued by the secured creditor to recover the secured debt, if the borrower failed to discharge his liability in full within the period specified in sub-section 2 of the Section 13. Section 13(2) speaks about the liability of the borrower to discharge his liabilities in full to the secured creditor within 60 days on issuance of a default notice envisaged under the said provision. In other words, on the date of issuance of notice under Section 13(2) of the SARFAESI Act (because of the default on the part of borrower), the liability to the secured creditor will naturally include the 'principal amount' and also 'interest' and it is with reference to this total figure, that a claim is made by the secured creditor in the notice issued under Section 13(2) of the SARFAESI Act, requiring the borrower **to discharge his full liability** towards the 'debt'. If there is failure in

this regard, in discharging the liability in full, within the specified time, Section 13(4) comes in, enabling the secured creditor to pursue one or more of the measures under clauses 'a to d' which are in a following terms:

“13. Enforcement of security interest. - (1) xxx

(2) xxx

(3) xxx

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;]

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

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

Thus, cause of action for filing an application under Section 17 before the DRT is with reference to the course and proceedings arising out of Section 13(2), read with Section 13(4) of the SARFAESI Act and if anybody is aggrieved by the order passed by the DRT, the said order is to be challenged before the DRAT under Section 18.

24. Coming back to the second proviso to Section 18(1) of the SARFAESI Act, which was brought into effect from 11.11.2004 (pursuant to declaration of the earlier provision insisting to deposit 75% for entertaining the appeal as unconstitutional by the Supreme Court in ***Mardia Chemicals Ltd. & Others (supra)***), it is to be noted, that it was incorporated to protect the interest of both the 'secured creditor' and also the 'borrower'. Insofar as the secured creditor is concerned, the paramount importance was for realisation of the debts empowering the Bank/Financial Institution to take possession of the securities and to sell them 'without intervention of the Courts'. At the same time, the law makers were conscious enough to provide 'remedy by way of appeal' to the aggrieved parties. Based on the observations made by the Apex Court in ***Mardia Chemicals Ltd. & Others (supra)*** (while setting aside the stipulation in the statute to deposit 75% of the amount due, as a pre requisite to entertain the appeal – as unconstitutional) that the right of appeal shall not be 'illusory', it was decided to provide the restrictive barriers only to the requisite extent, so that it will not be resorted to as protractive tactics. While stipulating deposit of 50% of the amount due as mentioned under the **second proviso** to Section 18(1) of the SARFAESI Act, the law makers went further by providing the '**third proviso**' to the effect that, in appropriate cases, the quantum of deposit to be made under the 'second proviso' could be reduced further up to a limit of 25% by the Appellate Tribunal, for the reasons recorded in writing. This shows that the inclination was more to make the appellate remedy accessible to the genuine litigant. This is further discernible from the terminology used in the 'second proviso' itself, where it says that 50% of the amount as claimed by the secured creditors or determined by the DRT, whichever is less. If the claim made by the secured creditor is of Rs. 10 lakhs and if there is a determination by the DRT that the actual debt is only of a lesser extent, say Rs. 8 lakhs, 50% to be deposited it is that of lesser extent as above and not w.r.t. the amount as claimed by the secured creditor.

25. Another important aspect to be noted is that, the terminology used in the second proviso to Section 18(1) of the said Act is quite specific. It speaks about the deposit of 50% of the amount of debt due from the borrower as claimed by the secured creditors. As mentioned already, the term 'debt' as defined under Section 2(h-a) of the SARFAESI Act (with reference to Section 2(g) of the Act of 1993) takes in 'interest' as well, but these words (doctrine) are further qualified by the subsequent words 'as claimed by the secured creditors'. In other words, firstly, it should be a 'debt due' from the borrower and secondly, it should be as claimed by the secured creditor. An amount will become due only on the date it is to be paid. Interest payable for the month of 'April' or 'May' can not be called 'due' in the previous month of 'March' or before.
26. When Section 13 (2) notice is issued by the secured creditor, it will include the principal amount and also 'interest' having become due as on date. It cannot include any 'future interest', to have it termed as 'due' as on the date of said notice. To put it more clear, future interest is not a 'debt due' on the date of issuance of Section 13(2) notice. The debt due from borrower, as claimed by the secured creditor, can only be the amount as shown in the notice issued under Section 13(2) of the SARFAESI Act and as such, it cannot include future interest to be accrued till the date of filing the appeal. This is more so, since the terminology used in the second proviso to Section 18(1) of the said Act **does not say that the amount to be deposited is 50% of the amount 'claimable' by the secured creditor. It is only 50% of the amount claimed** by the secured creditor which has already become due. This is the reason why further relaxation has been given, conferring the discretion to the DRAT under the 'third proviso' to Section 18(1) of the said Act, enabling it to reduce the extent of statutory deposit (to be made for entertaining the appeal) upto 25% in appropriate and genuine cases (for reasons to be recorded in writing). In other words, it should be 'due' when it is claimed; as the term 'debt' does not say

what is 'claimable' as due, so as to include the 'future interest'. The second proviso to Section 18(1) of the SARFAESI Act also does not say that 50% of the amount to be deposited is that of the "total amount outstanding as on the date of filing of the appeal", so as to include the subsequent interest after issuance of notice under Section 13(2) of the SARFAESI Act. Insofar as, the provision does not say anything with regard to the future/subsequent interest, it cannot be read into the Act; which otherwise would amount to the Court's entering into the forbidden field, re-writing the law.

27. The quantum of deposit to be made has to be read and understood with reference to the 'debt' due as claimed by the secured creditor in the notice under Section 13(2) of the SARFAESI Act, as further discernible from the observations of the Apex Court in 'paragraph 10' of the judgment of **Narayana Chandra Ghosh vs UCO Bank & Others** reported in **(2011) 4 SCC 548** which is reproduced below:

"10. It is stated before us that in the notice issued to the Appellant under Section 13(2) of the Act, the debt due from the Appellant as on 25th September, 2006 was 52,42,474/- (emphasis supplied). Since in the present case Debts Recovery Tribunal had not determined the debt due, we direct that on Appellant's depositing with the Appellant Tribunal an amount of 15 lakhs within a period of four weeks from today, his appeal shall be entertained and decided on merits. We direct that till the Appellate Tribunal takes a final decision in the appeal, the bank shall maintain status quo in respect of the property of which physical possession is stated to have been taken by it."

28. Importance of the words 'as claimed by the secured creditors' coming after the words '50% of the amount of debt due from him' was apparently not brought to the notice of the learned Judges of the Bombay High Court in **Eskays Construction Pvt. Ltd. vs. Soma Papers & Industries Ltd. & Others** reported in **AIR 2017 Bombay 10** and **M/s Mrb Roadconst Pvt. Ltd. vs. Rupee Co-op. Bank Ltd.** reported in **AIR 2016 (NOC) 334 (BOM.)** while

differing from the view taken by the Division Bench of the Madras High Court in ***Sivakumar Textiles vs. Debt Recovery Appellate Tribunal, Chennai & Others*** reported in **AIR 2012 Madras 57**. The scheme of the statute casting a lesser burden upon the borrower for getting the appeal entertained, by using the terms 'whichever is less' between the figures 'as claimed' by the secured creditors or 'determined by the DRT' was also not subjected to discussion. Similarly, the scope of the 'third proviso' conferring power upon the DRAT to reduce the quantum of statutory deposit for entertaining the appeal from 50% to 25% in appropriate cases (for reasons recorded in writing) is also not seen discussed in the verdict passed by the Bombay High Court. In the above circumstances, we most respectfully disagree with the findings rendered by the Bombay High Court in ***Eskays Construction Pvt. Ltd. vs. Soma Papers & Industries Ltd. & Others*** reported in **AIR 2017 Bombay 10** and ***M/s Mrb Roadconst Pvt. Ltd. vs. Rupee Co-op. Bank Ltd.*** reported in **AIR 2016 (NOC) 334 (BOM.)**. We concur with the view expressed by the Division Bench of the Madras High Court ***Sivakumar Textiles vs. Debt Recovery Appellate Tribunal, Chennai & Others*** reported in **AIR 2012 Madras 57** and in ***Mrs. Mekala Raj vs. The Presiding Officer Debt Recovery Appellate Tribunal Ethiraj Salai Chennai & Others*** reported in **(2017) SCC Online Mad 16033**, as well as that of a Division Bench of the Delhi High Court in **AIR 2010 Delhi 28** (supra). We declare that 50% of the amount to be deposited by the borrower for entertaining the appeal preferred before the DRAT, in terms of the second proviso to Section 18(1) of the SARFAESI Act, is 50% of the amount of debt due from him as claimed by the secured creditors in the notice issued under Section 13(2) of the SARFAESI Act and never beyond.

29. Applying the legal position to the given facts and circumstances, we find that the total amount claimed in the notice issued under Section 13(2) of the SARFAESI Act to the Appellants, by the 1st Respondent, is only Rs. 4,15,60,893.13/-. The

amount generated by virtue of the deposit effected of by the 2nd Respondent/auction purchaser (on sale of the property of the Appellant) is Rs. 2,73,98,000/-. It is pointed out by the Appellants that this amount is lying with the Bank, which fact is not rebutted by the Respondent-Bank. As such, in view of the serious challenges raised by the Appellants, with reference to non satisfaction of several mandatory requirements under the relevant provisions of the SARFAESI Act, the matter requires to be considered on merits, without need for effecting any further deposit; more so, in view of the verdict passed by the Apex Court in ***Parsn Medicinal Plants Pvt. Ltd. (supra)***.

30. Accordingly, we set aside the judgment passed by the learned Single Judge, as well as Annexures P/1 and P/2 orders dated 05.07.2018 and 12.12.2018 passed by the DRAT, to facilitate consideration of the appeal on merit. The order dated 23.08.2019 of the Tribunal dismissing the appeal for 'non-prosecution' of the matter and for 'non-compliance' of the direction dated 05.07.2018 is only a consequential order passed during the pendency of the writ appeal *i.e.* after passing the judgment by the learned Single Judge. Since the basic order dated 05.07.2018 and the review order dated 12.12.2018 are set aside, it goes without saying that the consequential order dated 23.08.2019 passed by the Appellate Tribunal is having no consequence. The DRAT is directed to restore the appeal, issue notice to both the sides and hear the merit, particularly, with reference to the alleged infringement of various rules/statutory provisions, w.r.t. the specific conditions in the tender notice and pass a speaking order.
31. Shri Manoj Paranjpe, the learned counsel appearing for the 2nd Respondent submits that there is no fault on the part of the 2nd Respondent in any manner; that the 2nd Respondent has effected the entire deposit/auction amount and that further delay in finalizing the matter will adversely affect his rights and interests. The learned counsel also seeks to fix a time frame, to have the matter finalized.

In the said circumstances, the Appellate Tribunal is directed to complete the exercise as above, in accordance with law, as expeditiously as possible; at any rate, within 'three months' from the date of receipt of a copy of this judgment.

32. In the above circumstance, the appeal stands allowed to the above extent. No costs.

Sd/-

(P. R. Ramachandra Menon)
Chief Justice

Sd/-

(Parth Prateem Sahu)
Judge