

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
+ **W.P.(C) 6060/2020**

Date of decision: 22nd December, 2020

IN THE MATTER OF:

PRUDENT ARC LIMITED

.....Petitioner

Through: Mr. Rajeeve Mehra, Sr.Advocate
with Mr. Abu John Mathew,
Mr. Madhusudan and Mr. Manubhav
Anand, Advocates.

versus

SIDHA NEELKANTH PAPER INDUSTRIES & ORS.

..... Respondents

Through: Mr. Muneesh Malhotra with
Mr. Achin Mittal, Ms. Manpreet
Kaur and Mr. Aditya Malhotra,
Advocates.
Mr. Ratan K.Singh, Advocate
for R4.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

SUBRAMONIUM PRASAD, J.

1. The judgment and order dated 11.03.2020, passed by the learned DRAT, Delhi in Appeal No.467/2019, filed by M/s Sidha Neelkanth Paper Industries Pvt. Ltd. (the respondent No.1 herein) has been challenged in the instant writ petition. By the impugned judgment, the learned DRAT has waived the requirement of 50% pre-deposit of the amount due to the Bank under the second proviso to Section 18 of Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short "the SARFAESI Act"). Aggrieved by the said order, the petitioner has filed the present petition.

FACTS OF THE CASE

2. A glance at the relevant facts and sequence of events leading to passing of the impugned order, is necessary. The respondent No.1/principal borrower had approached the respondent No.5/Andhra Bank for sanction of credit facility and in the year 2008, it had approached Standard Chartered Bank for taking over the debt taken by it. In the year 2010, respondent No.5/Andhra Bank sanctioned Open Cash Credit (in short "OCC") limit for a sum of Rs.15.5 crores in favour of the respondent No.1. Immovable properties were mortgaged by the guarantors and by the respondent No.1 to secure this cash credit facility. After taking over the existing cash credit facility, a further ad-hoc OCC limit to the tune of Rs.3 crores, due to the Standard Chartered Bank, was cleared by the respondent No.5/Andhra Bank.

3. However, respondent No. 1, failed to make prompt re-payment to the respondent No.5/Andhra Bank and as a result, its account was declared as a Non Performing Asset (in short "NPA"). A notice dated 10.05.2013, was issued by the respondent No.5/Andhra Bank under Section 13(2) of the SARFAESI Act, calling upon the respondent No.1 to pay the outstanding amount of Rs.16,61,91,174.67/- (Rupees sixteen crores sixty one lakh ninety one thousand one hundred seventy four rupees and sixty seven paise only), payable as on 27.04.2013. The said payment was to be made within 60 days from the date of receipt of the notice. Objections thereto were raised by the respondents No.1 to 3 under Section 13(3A) of the Act, but

we do not propose to go into the same as they are not relevant for the purposes of deciding the present petition.

4. Since the amount demanded was not paid under Section 13(2) of the SARFAESI Act, measures under Section 13(4) of the SARFAESI Act were initiated by the respondent No.5/Andhra bank that took over possession of one of the mortgaged properties, being property bearing No.170 Deepali Pitampura, Delhi-110034. Respondents No.2 and 3/Mr. Ram Niwas Gupta and Mrs. Saroj Jindal filed S.A. No.264/2013 before the DRT-III, challenging the measures taken by the respondent No.5/Andhra Bank under Section 13(4) of the SARFAESI Act.

5. On 25.07.2013, a conditional interim stay was granted by the DRT-III and the applicants in S.A. No. 264/2013 were directed to deposit a sum of Rs.2 crores within a period of 30 days from the date of the said order. The applicants were also directed to bring a better buyer in respect of the properties in question within a period of 60 days along with 10 per cent of the proposed sale consideration.

6. Since the respondent No.1/borrower failed to comply with the order of the DRT-III, the mortgaged properties were put to auction. Attempts made by the owners of the property to challenge the proposed auction failed inasmuch as the application moved before DRT-III and the appeal preferred before the DRAT were both dismissed. Thereafter, the owners of the properties filed W.P.(C) No.10734/2015 before the High Court which was dismissed as withdrawn on 17.02.2016.

7. Two writ petitions were filed by the borrower and the owners of the property, registered as W.P.(C) No. 6725/2016 and W.P.(C) No. 7611/2016

which prima facie appeared to be tactics to somehow delay the auction proceedings. These petitions were ultimately withdrawn.

8. Respondent No.5/Andhra Bank obtained a valuation report of property bearing No. 170, Deepali, Pitampura, Delhi-110034 from an approved valuer wherein the forced/distress value of the property was stated to be Rs.9,00,00,000/- (Rupees Nine Crores only). The authorized officer of the respondent No.5/Andhra Bank consulted the Board of the petitioner herein and recommended that the reserve price of the property be fixed at Rs.11 crores. Consequently, a notice was published in leading newspapers under Rule 8(6) of the Security Interest (Enforcement) Rules, 2002, informing the owners that the mortgaged properties were to be sold by holding an e-auction on 05.12.2018.

9. In the meantime, respondent No.5/Andhra Bank assigned all its debts and underlying securities to Prudent ARC Limited, the petitioner herein. The borrowers filed W.P.(C) No. 12791/2018 challenging the assignment of debts by Andhra Bank to the petitioner herein which was dismissed by the High Court on 28.11.2018. An intra-court appeal preferred against the said order, registered as LPA No. 343/2019, was also dismissed on 29.09.2019.

10. The respondent No.1 filed an interlocutory application before the DRT to prevent the auction scheduled on 05.12.2018. The matter was taken up for hearing by the DRT on the date of the auction itself and it was noted that the proposals of the borrowers to settle the debt due and find a suitable purchaser for the immovable property, had not materialised. Therefore, the DRT allowed the petitioner herein to proceed with the auction. The auction was conducted on 05.12.2018 and one M/s Tejswi Impex Pvt. Ltd. (auction

purchaser) placed its bid for an amount of Rs. 12.5 crores. The entire amount was deposited and a Sale Certificate was issued in favour of the auction purchaser on 19.12.2018.

11. Respondent No.1 filed an appeal before the DRAT registered as Appeal No.616/2018 challenging the order dated 05.12.2018, passed by the DRT dismissing the application filed by the borrower for restraining the petitioner from proceeding with the auction. The learned DRAT vide order dated 20.12.2018, directed the respondent No.1 herein to comply with the requirements of making a pre-deposit under Section 18 of the SARFAESI Act. This order was in the nature of an interim order.

12. The order dated 20.12.2018, passed by the learned DRAT was challenged before the High Court in W.P.(C) No.14066/2018. Vide order dated 26.12.2018, the court noted that a sum of Rs. 12.5 crores had been recovered against a debt of Rs. 16.61 crores, which was over 50% of the amount of debt due. It was therefore held that the requirement of making a pre-deposit under the second proviso to Section 18 of the SARFAESI Act, had been met and the learned DRAT ought not have asked the petitioner therein to comply with the requirement of making a pre-deposit under the Act. As a result, directions were issued to the learned DRAT to hear the matter on its merits.

13. Ultimately, Appeal No.616/2018 filed by the respondent No.1 was disposed of by the learned DRAT vide order dated 01.08.2019, with a direction issued to the DRT to dispose of the main Securitization Application within a period of 3 months.

14. Subsequently, vide order dated 05.10.2019, the DRT dismissed Securitization Application No.264/2013 filed by the respondents No.2 and

3. Against the said order, respondent No. 1 and the owner of the mortgaged property, Mr. Ram Niwas Gupta filed Regular Appeal No.467/2019 wherein the borrower sought waiver of the statutory pre-deposit under Section 18 of the SARFAESI Act. Relying on the order dated 26.12.2018, passed in W.P.(C) No. 14066/2018, the learned DRAT allowed waiver of the statutory pre-deposit. It is this order, allowing the application of the respondent No.1 for waiver of the pre-deposit that has been challenged by the petitioner in the instant writ petition.

ARGUMENTS ADVANCED

15. Mr. Rajeev Mehra, learned Senior Advocate appearing for the petitioner contended that as on the date of issuance of the Sale notice, i.e. on 03.11.2018, the debt due from the respondent No.1/borrower was to the tune of Rs. 44.24 crores and Section 18 of the SARFAESI Act postulates that no appeal can be maintained unless the borrower has deposited with the Appellate Tribunal, 50% of the debt due from it, as claimed by the secured creditors or determined by the Appellate Tribunal.

16. Learned Senior Advocate argued that after giving due adjustment of the sale proceeds in respect of the immovable property, as on the date of filing of the present petition, the outstanding amount due and payable by the principal borrower is Rs.43.85 crores. Therefore, the respondents must deposit 50% of Rs.43.85 crores without which the appeal filed by them cannot be entertained. He argued that it is now well settled that pre deposit of 50% of the amount of debt due from the respondent No.1/borrower is mandatory and at best, it could have been reduced to 25% by the DRAT and that too, for reasons to be recorded in writing. But if there is any

amount due and payable on the date of filing of the appeal, there cannot be a complete waiver of pre-deposit.

17. Mr. Mehra, learned Senior Advocate further submitted that reliance of the learned DRAT on the judgment in Srishti Arogyadham Pvt Ltd V. Punjab National Bank & Anr., reported as **2018 SCC OnLine Del 12716**, is inappropriate for the reason that in the said case, the amount shown in the auction notice as recoverable from the petitioner therein was Rs. 6,84,28,157.56/- whereas the bank had already recovered a sum of Rs.11.77 crores by sale of the property in auction and therefore, there was no requirement of making a predeposit at all. Unlike that case, in the present case, the amount which has been recovered on adjusting the sale proceeds of the mortgaged property is lesser than the amount mentioned in the notice issued under Section 13(2) and is not even 50% of the amount due as calculated at the time of filing the appeal. He states that the learned DRAT could not have ignored the interest component that has accrued from the date of issuance of the notice under Section 13(2), till the date of filing of the appeal and nor should the DRAT have waived the requirement of making the pre-deposit.

18. Citing a judgment of the Division Bench of the Bombay High Court in Coverntry Springs and Engineering Company Limited and Others v. Assets Reconstruction Company of India Limited (ARCIL) and Others, reported as **2019 SCC OnLine Bom 4528**, Mr. Mehra, Senior Advocate canvassed that the Bombay High Court has not followed the Division Bench judgment of this court in Srishti Arogyadham Pvt Ltd (supra) and has held that there is a jurisdictional bar from entertaining an appeal filed by a borrower from an order under Section 17 unless the borrower deposits

50% of the amount of debt due from him as claimed by the secured creditor. Mr. Mehra also placed reliance on Eskays Construction Pvt. Ltd. v. Soma Papers & Industries Ltd. reported as **2016 SCC OnLine Bom 9827** which has taken the same view.

19. *Per contra*, Mr. Muneesh Malhotra, learned counsel for the respondents No.1 to 3 submitted that the amount mentioned in the notice issued under Section 13(2) of the SARFAESI Act was Rs.16.2 crores and the property has been sold in an auction for a sum of Rs. 12.5 crores which is over 50% of the amount mentioned under the notice. In such a situation, the purpose of pre-deposit, which is only to ensure that the debt is secured, has been fully achieved. Therefore, the DRAT was justified in granting waiver of the pre-deposit. Learned counsel pointed out that the order dated 26.12.2018, passed in W.P.(C) No.14066/2019, referred to in para 12 above, directing the learned DRAT to waive the amount, had also relied on the decision of this court in Srishti Arogyadham Pvt Ltd (supra) and the said order having attained finality between the same parties, the petitioner cannot be heard to state that the respondents No.1 to 3 must comply with the requirement of making a pre-deposit.

OBJECT OF SECTION 18 OF THE SARFESI ACT

20. Before examining the diverse stands taken by learned counsel for the parties, it would be apposite to quote Section 18 of the SARFAESI Act, which reads as below:-

18. Appeal to Appellate Tribunal-

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal ²[under section 17, may prefer an appeal alongwith such fee, as may be

prescribed] to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

³*[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrow:]*

⁴*[Provided 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 Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder. (emphasis added)

21. For a better appreciation of the rival submissions, the object behind enacting the SARFAESI Act must be understood. The Statement of Objects and Reasons for bringing about the legislation that would throw some light on this aspect, reads as under:-

"The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating

securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narsimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction." (emphasis added)

22. A perusal of the above mentioned Objects would show that the purpose of legislating SARFAESI Act was to enable Banks and other Financial institutions to enforce security interest without having to take

recourse to courts of law. It was perceived that the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (for short "RDDB Act") had not managed to achieve its object and therefore, it was necessary to facilitate Banks/Institutions in taking over possession of and/or selling the mortgaged/secured assets without the intervention of courts. It was noted that taking recourse to courts had resulted in slowing down the recovery of defaulting loans and there was an urgent need to speed up the recovery process.

23. Under Section 13(2) of the SARFAESI Act, a secured creditor is required to issue a notice requiring a defaulting borrower to discharge its liabilities in full. If on receipt of such a notice, the borrower is unable to discharge its debts, the secured creditor is free to take recourse under Section 13(4) of the SARFAESI Act which includes taking over possession of the mortgaged property and selling the same, etc. The borrower can only approach the DRT for relief by invoking Section 17 of the SARFAESI Act. It is appropriate to mention that Section 17(2) as originally enacted, required the borrower to deposit 75% of the amount of debt due in order to question any decision taken under Section 13(4) of the SARFAESI Act. However, the said provision was struck down by the Supreme Court in Mardia Chemicals Ltd. v. Union of India, reported as **(2004) 4 SCC 311**, on the ground that since proceedings under Section 17 of the Act were akin to approaching the courts, such a provision in the first instance, was too onerous. After examining the requirement of making a pre-deposit prescribed in other statutes, the Supreme Court held that in all other statutes, pre-deposit was demanded at the appellate stage. Therefore, Section 17(2) as it stood then, requiring a deposit of 75% at the first

instance, could not withstand the test of Article 14 of the Constitution of India and was struck down.

24. Compliance with the condition of making a pre-deposit is therefore limited to the appellate stage, when an appeal is preferred under Section 18 of the SARFAESI Act. The purpose behind insistence on such a pre-deposit has been succinctly highlighted by the Gujarat High Court in Babu Ganesh Singh Deepnarayan v. Union of India & Anr., reported as **AIR 2009 Guj 98**. Paras 5 and 6 of the said judgment read as under:

*"5. Right of appeal is a creature of the statute. Legislature can impose conditions under which it is to be exercised. Without a statutory provision creating such a right, a person aggrieved is not entitled to prefer an appeal. Legislature while granting right of appeal can impose conditions which it thinks reasonable. Such conditions merely regulate the exercise of right of appeal so that the same is not abused by a recalcitrant party, and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. Imposition of such a condition is essential, so that frivolous appeals would not be filed. Ultimately if the appeal is dismissed, the aggrieved party can always seek refund of the amount deposited and therefore, he is not in any way aggrieved. Further the Third Proviso to Section 18 (1) of the Securitization Act also enables the Appellate Tribunal, for the reasons to be recorded in writing, reduce the amount to not less than 25% of the debt referred to in the Second Proviso. We are not prepared to accept the contention that conditions imposed in the second and third proviso to Section 18(1) of the Securitization Act are onerous in nature so as to make the right of appeal illusory. Delhi High Court in **R.V. Saxena's case (supra)** also upheld the*

validity of Second Proviso to Section 18(1) of the Securitization Act with which we fully concur.

6. We have also not come across any provision in the Statute, enabling the secured creditor to adjust or appropriate the amount deposited by the borrower to prefer an appeal under Section 18(1) of the Act. On dismissal of the appeal the amount deposited as a pre-condition for filing the appeal will be refunded to the appellant and therefore, he is no way prejudiced. We therefore, find no merit in the contention raised by the petitioner that the second proviso to Section 18(1) of the Act is discriminatory or violative of Article 14 of the Constitution of India. Petitions lack merit and the same are dismissed." (emphasis added)

25. In fact, in an appeal under the Consumer Protection Act, in Shreenath Corpn. v. Consumer Education & Research Society, reported as **(2014) 8 SCC 657**, the Supreme Court had observed as under:

"9. The second proviso to Section 19 of the Act mandates pre-deposit for consideration of an appeal before the National Commission. It requires 50% of the amount in terms of an order of the State Commission or Rs 35,000, whichever is less for entertainment of an appeal by the National Commission. Unless the appellant has deposited the pre-deposit amount, the appeal cannot be entertained by the National Commission. A pre-deposit condition to deposit 50% of the amount in terms of the order of the State Commission or Rs 35,000 being condition precedent for entertaining appeal, it has no nexus with the order of stay, as such an order may or may not be passed by the National Commission. The condition of pre-deposit is there to avoid frivolous appeals."

(emphasis added)

26. The *raison d'etre* behind directing pre-deposit under Section 18 of the SARFAESI Act has been elaborated by the Supreme Court in Narayan Chandra Ghosh v. UCO Bank, reported as (2011) 4 SCC 548, in the following words:-

"7. Section 18(1) of the Act confers a statutory right on a person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 of the Act to prefer an appeal to the Appellate Tribunal. However, the right conferred under Section 18(1) is subject to the condition laid down in the second proviso thereto. The second proviso postulates 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. However, under the third proviso to the sub-section, the Appellate Tribunal has the power to reduce the amount, for the reasons to be recorded in writing, to not less than twenty-five per cent of the debt, referred to in the second proviso. Thus, there is an absolute bar to the entertainment of an appeal under Section 18 of the Act unless the condition precedent, as stipulated, is fulfilled. Unless the borrower makes, with the Appellate Tribunal, a pre-deposit of fifty per cent of the debt due from him or determined, an appeal under the said provision cannot be entertained by the Appellate Tribunal. The language of the said proviso is clear and admits of no ambiguity.

8. It is well-settled that when a statute confers a right of appeal, while granting the right, the legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be

said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.

9. The argument of the learned counsel for the appellant that as the amount of debt due had not been determined by the Debts Recovery Tribunal, the appeal could be entertained by the Appellate Tribunal without insisting on pre-deposit, is equally fallacious. Under the second proviso to sub-section (1) of Section 18 of the Act the amount of fifty per cent, which is required to be deposited by the borrower, is computed either with reference to the debt due from him as claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less. Obviously, where the amount of debt is yet to be determined by the Debts Recovery Tribunal, the borrower, while preferring an appeal, would be liable to deposit fifty per cent of the debt due from him as claimed by the secured creditors. Therefore, the condition of pre-deposit being mandatory, a complete waiver of deposit by the appellant with the Appellate Tribunal, was beyond the provisions of the Act, as is evident from the second and third provisos to the said section. At best, the Appellate Tribunal could have, after recording the reasons, reduced the amount of deposit of fifty per cent to an amount not less than twenty-five

per cent of the debt referred to in the second proviso. We are convinced that the order of the Appellate Tribunal, entertaining the appellant's appeal without insisting on pre-deposit was clearly unsustainable and, therefore, the decision of the High Court in setting aside the same cannot be flawed." (emphasis added)

27. A perusal of the above mentioned judgment would show that the conditions imposed in Section 18 of the SARFAESI Act are mandatory in nature and cannot be waived at the asking of a party. In case the requirement of making a pre-deposit is not satisfied at the time of preferring an appeal, the Appellate court will decline to entertain the appeal. The purpose is to ensure that the Appellate Tribunal is not choked with non-serious or frivolous appeals.

28. The question that arises for consideration in this case is as to whether the phrase "*amount of debt due*" used in the second proviso to Section 18 would include interest accrued on the amount which the borrower was liable to pay under the notice issued to it under Section 13(2) of the SARFAESI Act, as contended by the petitioner/secured creditor and secondly, would the portion of the debt which has been recovered by the secured creditor on sale of a secured asset, have a bearing on assessing the amount required to be pre-deposited, as contemplated under the SARFAESI Act.

Meaning of the word, "Debt" defined in Section 2(ha) of the SARFESI Act vis-a-vis RDDB Act

29. The word "*debt*" has been defined in Section 2(ha) of the SARFAESI Act as under:

"2. Definitions

(ha) "debt" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993;"

30. Since the term "*debt*" has the same meaning as has been assigned to it in Clause(g) of Section 2 of the RDDB Act, it is considered necessary to refer to the said definition as well which reads as under:

"2(g) "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank of 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;"

31. A similar issue as raised in this appeal, came up for consideration before a Division Bench of this court in Poonam Manshani v. J&K Bank Ltd. & Another, reported as **2010 (114) DRJ 81 (DB)**. In that case, a sum of Rs.40.87 crores was the amount of debt due under the notice issued by the respondent/Bank under Section 13(2) of the Act. A sum of Rs.8.60 crores had been recovered by the creditor on sale of the secured asset. The learned DRAT directed the borrower to deposit a sum of Rs. 10.21 crores, as 25% of the amount of debt due, as per the notice under Section 13(2). On the facts of that case, the court had held that the petitioner therein ought to get the benefit of the amount recovered and be required to pay 25% of

the debt outstanding as on the date, i.e. 25% of Rs.32.27 crores (Rs. 40.87 crores less 8.60 crores). The petitioner therein was directed to deposit a sum of Rs. 8.07 crores with the Appellate Tribunal. Significantly, the court held that the '*amount of debt due*' as claimed by the secured creditor for the purposes of Section 18, shall be the same amount which was reflected in the notice issued under Section 13(2). The interest that may have accrued on the said amount, was ignored for the purposes of determining the "*amount of debt due*" to the secured creditor, in terms of the second proviso to Section 18.

32. The High Court has therefore previously taken a view that the "*amount of debt due*" for the purposes of pre deposit under Section 18 of the Act, is the sum claimed under the notice under Section 13(2). While it was not specifically so stated, the effect of the said judgment was that interest that may have accrued after issuance of the notice under Section 13(2) even if claimed, would not be relevant for the purposes of making the pre-deposit. Interestingly, the view taken by the Delhi High Court for arriving at the "*amount of debt due*" in Poonam Manshani's (supra) is the same as taken by the Bombay High Court in National Polymers v. Union of India, reported as **AIR 2011 Bom 763**, which is that only the amount claimed in the notice under Section 13(2) would be relevant and the interest accruing on such a sum would not be included while computing the "*amount of debt due*". But on a reading of both the decisions, it is apparent that they did not specifically deal with this issue. While computing the "*amount of debt due*", what was taken into consideration was only the sum claimed in the notice under Section 13(2) and not quantum of interest that may have accrued after the notice.

33. During the course of hearing, our attention was drawn to a divergent view taken by the High Court of Bombay and the High Court of Allahabad. In Godavari Laxmi Co-op. Bank Ltd. v. Union of India and Another, reported as **(2012) 2 Mah LJ 472**, the Bombay High Court held that for the purposes of filing an appeal, the "*amount of debt due*" to the secured creditor was to be taken as the sum due as on the date of filing of the appeal. In the facts of the said case, the interest that had accrued on the amount mentioned in the Section 13(2) notice was also taken into account while determining the "*amount of debt due*."

34. Similarly, in MRB Road Const. Pvt. Ltd. v. Rupee Co-op. Bank Ltd, reported as **2016 SCC Online Bom 85**, after framing an issue to this effect, the Bombay High Court held that if the secured creditor had claimed future interest at the time of issuing the notice under Section 13(2), such interest would also have to be taken into consideration while determining the "*amount of debt due*" as claimed by the secured creditor and observed as under:-

"17. On an ex-facie reading of the said definition, it is clear that the word "debt" has been given an extremely wide meaning and means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution during the course of any business activity undertaken by such bank or financial institution 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.

18. On a plain reading of the 2nd proviso to section 18(1) of the SARFAESI Act read with the definition under the word “debt” as defined in section 2(g) of the RDDB Act, it is clear that before an appeal can be entertained by the DRAT, the borrower has to deposit 50% of the amount of debt due from him as claimed by the secured creditors or as determined by the DRT whichever is less. If there is no determination of the debt by the DRT under the provisions of the RDDB Act, then the borrower would have to deposit 50% of the amount of debt due from him as claimed by the secured creditors. The provision on a plain reading does not in any way exclude taking into consideration the future interest that is accrued on the debt owed by the borrower to the secured creditor. In fact, the definition of the word “debt” means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution. Therefore, if the claim made by the secured creditor in the section 13(2) notice includes future interest, the same would certainly be included in the “amount of the debt due” from the borrower to the secured creditor as contemplated under the 2nd proviso to section 18(1) of the SARFAESI Act. There is therefore no justification to hold that it is only the figure that is mentioned in the section 13(2) notice that is to be taken into consideration and not the future interest accrued on the said sum, whilst determining the deposit amount under the 2nd proviso to section 18 of the SARFAESI Act. The amount of deposit would have to be determined on the basis of the amount of debt due by the borrower to the secured creditor on the date when the appeal is filed in DRAT. This would not only include the amount mentioned in the section 13(2) notice but also interest accrued thereon till the date of filing of the appeal under section 18 of the SARFAESI Act. To our mind, this is the only interpretation that is possible of the 2nd proviso to

section 18 of the SARFAESI Act. If we were to accept the contention of the petitioner that the amount to be deposited by the borrower [under the 2nd proviso to section 18(1)] would be only on the basis of the sum/figure as mentioned in the section 13(2) notice and not the interest accrued thereon after the date of the said notice, the same would be violating the plain language of the statute. To interpret the 2nd proviso to section 18(1) in this fashion, to our mind, would clearly violate the plain and unambiguous language of the said section.

19. We must mention here that after the issuance of the notice under section 13(2) and before the appeal is filed in the DRAT under section 18 of the SARFAESI Act, if the borrower has made any part payment of the debt due to the secured creditors, then credit for the same would have to be given to the borrower and for the purposes of deposit under the 2nd proviso to section 18(1), the reduced amount (after giving credit) would have to be taken into consideration for determining the amount required to be deposited by the borrower. This is simply because on the date of filing of the appeal, the debt due to the secured creditor would be reduced after giving credit for the amount already paid." (emphasis added)

35. Having laid much emphasis on the definition of the word "*debt*", the Bombay High Court has clearly differed with the view expressed by the Delhi High Court in Poonam Manshani (supra), on account of its failure to consider the definition of the word, debt. This view has also found favour with the Allahabad High Court in Nathi Lal Rathore v. Debt Recovery Appellate Tribunal, reported as **2016 SCC Online All 3139**.

36. According to the recent views of both, the Bombay High Court and the Allahabad High Court, since the definition of the word "*debt*" in the

SARFAESI Act is an adoption of the definition of "*debt*" under the RDDB Act, it specifically includes the interest component as payable on the date of the application and therefore, the expression "*amount of debt due*", shall necessarily include future interest, in terms of the notice issued under Section 13(2) of the SARFAESI Act.

DISCUSSION

37. Being mindful of the clear divergence in the views taken in respect of the phrase, "*amount of debt due*" in different judgments by different High Courts, we propose to carefully consider all the relevant decisions before arriving at a conclusion.

38. On a reading of the judgments in Poonam Manshani (supra) and National Polymer (supra), it is apparent that there was no discussion on the interpretation of the word "*debt*" in the context of making a pre-deposit. The subsequent decisions of the Bombay High Court and the Allahabad High Court show that the said courts have relied on the definition of "*debt*" to hold that the debt must include interest, even for the purposes of the second proviso to Section 18(1) of the SARFAESI Act.

39. It is noteworthy that Section 2 of both, the RDDB Act and the SARFAESI Act which is the definition clause, begins with the expression, "*unless the context otherwise requires.*" That is to say, the statute which defined the term, notes that meaning other than what has been prescribed in the definition clause, may have to be given to certain words, if so required by the context. The underlying principle of interpretation of a statute is to ensure that the legislative will is given effect to and courts do not end up interpreting a statute in such a manner that would render any part as nugatory.

40. We may usefully refer to the decision of the Supreme Court in RBI v. Peerless General Finance & Investment Co. Ltd., reported as (1987) 1 SCC 424, on the manner in which a statute must be constructed, where it was observed as under :

"33. Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place. It is by looking at the definition as a whole in the setting of the entire Act and by reference to what preceded the enactment and the reasons for it that the Court construed the expression "Prize Chit" in Srinivasa [(1980) 4 SCC 507 : (1981) 1 SCR 801 : 51 Com Cas 464] and we find no reason to depart from the Court's construction." (emphasis added)

41. In Pushpa Devi v. Milkhi Ram, reported as (1990) 2 SCC 134, the Supreme Court has observed as under:-

"18. It is true when a word has been defined in the interpretation clause, prima facie that definition governs wherever that word is used in the body of the statute unless the context requires otherwise. "The context" as pointed out in the book Cross-Statutory Interpretation (2nd edn. p. 48) "is both internal and external". The internal context requires the interpreter to situate the disputed words within the section of which they are part and in relation to the rest of the Act. The external context involves determining the meaning from ordinary linguistic usage (including any special technical meanings), from the purpose for which the provision was passed, and from the place of the provisions within the general scheme of statutory and common law rules and principles." (emphasis added)

42. It would be instructive to refer to Directorate of Enforcement v. Deepak Mahajan, reported as (1994) 3 SCC 440, where highlighting the role of the court in moulding and creatively interpreting the legislation without making it a nullity, the Supreme Court held as below:-

"24. The concerned relevant provisions of the Acts with which we are concerned, no doubt, pose some difficulty in resolving the question with regard to the jurisdiction of the Magistrate authorising detention and subsequent extension of the same when the provisions of those Acts are narrowly and literally interpreted. Though the function of the courts is only to expound the law and not to legislate, nonetheless the legislature cannot be asked to sit to resolve the difficulties in the implementation of its intention and the spirit of the law. In such circumstances, it is the duty of the court to

mould or creatively interpret the legislation by liberally interpreting the statute.

25. In *Maxwell on Interpretation of Statutes*, Tenth Edn. at page 229, the following passage is found:

“Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. ... Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used.”

26. In *Seaford Court Estates Ltd. v. Asher* [(1949) 2 All ER 155, 164] Denning, L.J. said:

“[W]hen a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament ... and then he must supplement the written word so as to give ‘force and life’ to the intention of the legislature. A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.” (emphasis added)

The court went on to observe:

“93. It is apposite, in this context, to refer to the following passage found in Chapter 4 in the book titled *The Loom of Language*:

“Words are not passive agents meaning the same thing and carrying the same value at all times and in all contexts. They do not come in standard shapes and sizes like coins from the mint, nor do they go forth with a decree to all the world that they shall mean only so much, no more and no less. Through its own particular personality, each word has a penumbra of meaning which no draftsman can entirely cut away. It refuses to be used as a mathematical symbol.” (emphasis added)

43. In K.V. Muthu v. Angamuthu Ammal, reported as (1997) 2 SCC 53, the Supreme Court observed as under:-

11. While interpreting a definition, it has to be borne in mind that the interpretation placed on it should not only be not repugnant to the context, it should also be such as would aid the achievement of the purpose which is sought to be served by the Act. A construction which would defeat or was likely to defeat the purpose of the Act has to be ignored and not accepted..

12. Where the definition or expression, as in the instant case, is preceded by the words “unless the context otherwise requires”, the said definition set out in the section is to be applied and given effect to but this rule, which is the normal rule may be departed from if there be something in the context to show that the definition could not be applied. (emphasis added)

44. In B.R. Enterprises v. State of U.P., reported as (1999) 9 SCC 700, the Supreme Court held that the words used around a particular word, can lead to a different meaning in each context. Holding that the use of the

word “trade” in Article 298 and 301 of the Constitution of India, 1949 conveyed different meanings, it was observed as under:-

70. Article 301 is quoted hereunder:

“301. Freedom of trade, commerce and intercourse.—Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.”

In difference, we find that the words used under this Article are “trade, commerce and intercourse”. We find Article 301 is confined to trade and commerce while Article 298 refers to trade and business and to the making of contracts for any purpose. The use of the words “business” and “contracts for any purpose” and its title “... trade, etc.” makes the field of Article 298 wider than Article 301. Significantly, the different use of words in the two Articles is for a purpose; if the field of the two Articles are to be the same, the same words would have been used. It is true, as submitted, that since “trade” is used both in Articles 298 and 301, the same meaning should be given. To this extent, we accept it to be so, but when the two Articles use different words, in a different set of words conversely, the different words used could only be to convey different meanings. If different meaning is given then the field of the two Articles would be different. So, when instead of the words “trade and commerce” in Article 301, the words “trade or business” are used it necessarily has a different and wider connotation than merely “trade and commerce”. “Business” may be of varying activities, may or may not be for profit, but it necessarily includes within its ambit “trade and commerce”; so sometimes it may be synonymous but its field stretches beyond “trade and commerce”.

45. In Pandey & Co. Builders (P) Ltd. v. State of Bihar, reported as (2007) 1 SCC 467, while considering the provision of Section 37(2) of the Arbitration and Conciliation Act, 1996 and the statutory embargo placed on Section 37(3), the Supreme Court observed as under :-

"23. In this case, it is not necessary for us to go into the question as to whether sub-section (3) of Section 37 of the 1996 Act would debar an appeal from appellate order passed under sub-section (2) of Section 37 thereof. The consequences of the statutory embargo would ensue but then the question will have to be considered as and when occasion arises therefor. Sub-section (2) of Section 37 of the 1996 Act prescribes for an appeal to a court. We do not see any reason as to why having regard to its plain language, the definition of "court" shall not be put into service. It may be true that the interpretation clause provides for "unless the context otherwise requires". If application of the interpretation clause contained in Section 2 of the 1996 Act shall lead to anomalous and absurd results, one may not stick to the definition but we do not think that such a case has been made out."
(emphasis added)

46. In Youaraj Rai v. Chander Bahadur Karki, reported as (2007) 1 SCC 770, the significance of the legislative mandate was emphasised while construing the expressions used in a statute and the Supreme Court held thus:-

"28. We are unable to uphold the argument. It is true that the term "election" in Section 2(d) defines as election to fill a seat or seats in either House of Parliament or either House of the legislature of a State. But it must be remembered that the Act deals

with election of both the Houses of Parliament and the State Legislatures and defines the expression "election". Moreover the opening words of Section 2 are "unless the context otherwise requires". Hence, while construing, interpreting and applying the definition clause, the court has to keep in view the legislative mandate and intent and to consider whether the context requires otherwise. As already observed earlier, Section 81 which is in two parts deals with different situations. The first part applies to a Legislative Assembly while the second part applies to a Legislative Council." (emphasis added)

47. It can be discerned from the discussion above that it is always open to courts to deviate from the meaning assigned to words in the definition section of an act of the Parliament, in circumstances where the context so requires, especially in situations, like in the SARFAESI Act wherein the definition of "*debt*" has been imported from the RDB Act. In such a case, it is the duty of the court to suitably apply a meaning to the definitions given and ensure that their application does not do violence to the Act and at the same time does not result in an absurdity or causes undue hardship to any side. In our view, it is imperative to understand the context first before determining the meaning of the expression "*amount of debt due.*"

48. As already noted above, the object of enacting the SARFAESI Act was to ensure speedy recovery of loans and stressed assets, without the intervention of courts. It is for this reason that once a borrower is declared a Non-Performing Asset (NPA), secured creditors have been given sweeping powers to enforce security interests under Section 13. This is evident from

the language used in Sections 13(2), 13(3), 13(4), which are extracted hereinbelow:-

Section 13: Enforcement of security interest

.....

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

¹*[Provided that—*

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee.]

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

.....

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

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

49. The language employed in Sections 13(2) and 13(3) when read together, shows that the secured creditor is required to furnish complete details of the amount of debt owed and the full liability of the borrower. It is this figure which is treated as the debt claimed as on the date of issuing the notice under 13(2). It is noteworthy that a notice under 13(2) is issued by a creditor not merely on account of a default in repayment, but when

such a borrower is also classified as a non-performing asset (NPA). This obviously refers to an entity which is under financial distress and is unable to repay the loan. The notice reflects the amount claimed by the secured creditor to be due as on the date the borrower is classified as a NPA. Therefore essentially, the notice reflects the amount claimed by the secured creditor before the borrower becomes an NPA, an entity which is obviously no longer in a position to pay back its debt.

50. Often, action contemplated under Section 13(4) is taken at a very belated stage, much like the facts of this case. The delay in initiating action under Section 13(4) can only be attributed to the secured creditor and no blame can be laid for this at the door of the borrower. The right to take over the business/possession of the immovable property etc. accrues 60 days after despatching the notice and if the secured creditor does not take timely action against an NPA, it certainly cannot be allowed to take advantage of the delay caused on account of its own lethargy.

51. A sequitor to a decision taken by a secured creditor to enforce its security interest under Section 13(4) of the Act is the initiation of proceedings under Section 17, followed by Section 18 of the SARFAESI Act.

52. A perusal of the scheme under Section 13 of the SARFAESI Act would demonstrate that under Section 13(2), the secured creditor claims the debt which is due to it and this amount includes the principal and the interest accrued thereon. If the borrower fails to pay the said amount within the time stipulated under Section 13, then the secured creditor has got the option of either selling the property, or taking over the management of the borrower. Once possession of the property is taken over or the business is

taken over by the Bank or the ARC, as the case may be, then can it be said that the meter of interest on the principal amount due would continue to run for purposes of entertaining an appeal under Section 18 of the SARFAESI Act ? In our view, once a property is taken over by the secured creditor and the borrower loses control over the same, for it to be sold without there being a determination of the amount due under the RDDB Act, then '*the amount due*' cannot include the interest accrued on the principal amount, after issuance of the Section 13(2) notice for purposes of Section 18 of the SARFAESI Act'.

53. This is not to say that the secured creditor cannot claim the amount due on the principal amount, by referring to the provisions of the RDDB Act. It is made clear that we are only confining ourselves to the interpretation of the words "*amount of debt due*" for purposes of filing an appeal under Section 18 of the SARFAESI Act. The definition of the word "*debt*" under the RDDB Act which has been lifted and applied to the SARFAESI Act, has to be read in the above mentioned context. The purpose of the RDDB Act is to establish tribunals for expeditious and judicious recovery of debts due to Banks and Financial institutions. The definition of "*debt*" under Section 2(g) has to be understood in the above context. On the other hand, the object of the SARFAESI Act is to empower Banks and Financial institutions to take possession of securities and sell them without the intervention of courts. For the said reason, the definition of the word "*debt*" in the RDDB Act can not be imported to the SARFAESI Act more so because there has been no final adjudication of the debt due to the creditor. It is in this contextual background that the expression, "*amount of debt due from him as claimed by the secured*

creditor or determined by the Debt Recovery Tribunal, whichever is lesser”, used in the second proviso to Section 18, must be understood and interpreted.

54. Keeping in mind the above perspective, if the definition of the word "*debt*" as used under Section 2(g) of the RDDB Act is applied to the second proviso of Section 18(1) of the SARFAESI Act, it would cause great hardship to a borrower. In actual practice, such an interpretation is likely to render the entire appeal mechanism as illusory. In the facts of the instant case, if the contention of learned counsel for the petitioner is to be accepted, then the respondent/borrower would be required to deposit Rs.22 crores only to get its appeal heard, as against an original outstanding amount of Rs.16.61 crores, which by no stretch could have been the intention of the legislature.

55. It has been noticed that in some situations, secured creditors may elect to wait for a period of 5 or 6 years after issuing the demand notice under Section 13(2), before taking any steps contemplated under Section 13(4). The interest component if allowed to accumulate, would on occasions, result in becoming larger than the principal amount due. If this interpretation is accepted, by the time the stage of filing of an appeal under Section 18 is arrived at, 50% of the amount of debt due with interest, may exceed the amount of debt claimed in the notice under Section 13(2). Even in the facts of the instant case, according to the petitioner, a sum of Rs. 16.61 crores was owed by it as per the notice issued under Section 13(2). The petitioner did not take any steps to enforce its security interest and waited until 2018 to sell the secured property.

56. We are of the view that if interest is allowed to accumulate on account of any delay on the part of the secured creditor in taking further steps under Section 13(4) and then the said component is permitted to be added to the amount liable to be deposited by a borrower for an appeal to be entertained under Section 18 of the SARFAESI Act, it would render the right of an appeal completely illusory, for the reason that the condition of making the pre-deposit would become too onerous to discharge. Therefore, the meaning of the word, "*debt*" as used in Section 2(g) of the RDDB Act cannot be imported to the SARFAESI Act, as the context herein requires a different interpretation. The court will have to assign a different meaning to the word "*debt*" when used as a part of the phrase "*amount of debt due*" under the second proviso to Section 18(1) of the SARFAESI Act.

57. The view expressed above, is fortified on noting the insertion of the expression, "*whichever is less*" at the end of the second proviso to Section 18. It has evidently been brought in by the legislature with the intention of giving relief to the borrower as regards maintainability of an appeal. The expression "*whichever is less*" is a clear indication of the legislative intention to protect the right of appeal available to a borrower. As has already been held by the Supreme Court and other High Courts, the purpose of pre-deposit of 50% of the amount of debt due is not to secure the interests of the secured creditors, but to dissuade borrowers from filing frivolous appeals.

58. For the aforesaid reasons, we concur with in respectful disagreement with the decisions of the Allahabad High Court and Bombay High Court rendered in Nathi Lal Rathore(supra) and MGR Road Construction (supra), respectively insofar as the definition of the word "*debt*" has been applied to

hold that in order to file an appeal under Section 18(1) of the SARFAESI Act, the expression, "*amount of debt due*" would have to include the future interest claimed by the secured creditor in the notice under Section 13(2) of the SARFAESI Act. Instead, we concur with the view taken by a co-ordinate Bench of this Court in Poonam Manshani's case (supra) and the view expressed by the Bombay High Court in National Polymer (supra).

59. We are of the considered opinion that the net amount of pre-deposit required to be made under Section 18 of the Act, ought to be treated as 50% of the amount claimed by the secured creditor to be due in its notice issued under Section 13(2). Even if the interest is claimed in the Section 13(2) notice, it would not be a relevant consideration for purposes of determining the amount of pre-deposit to be made for the purpose of entertaining an appeal under the second proviso to Section 18 of the SARFAESI Act.

60. For avoidance of all doubts and at the cost of repetition, it is clarified that this court is refraining from commenting on the liability of a borrower to pay interest after issuance of a notice under Section 13(2) of the SARFAESI Act and the observations made above of non-accrual of interest after issuance of the notice under Section 13(2) are only in the context of filing an appeal under Section 18 of the SARFAESI Act and no more.

61. This leaves the last issue which is that in the event a portion of the debt has been recovered by the secured creditor, would that impact the amount of pre deposit required to be made by the aggrieved person under the Act for maintaining an appeal ?

62. To decide this issue, we may first consider some relevant decisions. In Eskays Construction Pvt. Ltd. v. Soma Papers & Industries Ltd., reported

as **2016 SCC OnLine Bom 9827**, the Bombay High Court has held that the amount recovered by the sale of the secured asset cannot be considered to the benefit of the borrower, who challenges the sale by preferring an appeal, as the object of the second proviso to Section 18 is to curb frivolous appeals.

63. On the other hand, in Srishti Arogyadham Pvt.(supra) and in Poonam Manshani (supra), two Division Benches of this court have taken the view that the borrower must be given the benefit of the amount recovered through the sale of the secured asset. In Srishti Arogyadham (supra), noting that the amount recovered from the auction of the secured asset was more than the debt due, the court held that there was no need for the borrower to make any deposit in the facts of that case.

64. We are in complete agreement with the view taken by co-ordinate Benches of this court, while respectfully disagreeing with the view expressed by the Bombay High Court in Eskays Construction Pvt. Ltd (supra). In our opinion, the secured creditor cannot insist that for making a pre-deposit with the Appellate Tribunal, the amounts recovered from the sale of a secured asset of the borrower should be excluded. The borrower ought to be given the benefit of the amount recovered from the sale of the secured asset while computing the "*amount of debt due*", for the purposes of entertaining the appeal, as contemplated in the second proviso to Section 18 of the SARFAESI Act, 2002.

65. Applying the same analogy, any amount that may have been deposited by the borrower with the secured creditor or with the Debt Recovery Tribunal after filing of the petition under Section 17 of the SARFAESI Act, must also be taken into consideration while computing the

"amount of debt due" for purposes of entertaining the appeal, as contemplated under the second proviso to Section 18 of the SARFAESI Act, 2002.

66. Now applying the above position to the facts of this case, learned counsel for the respondent has contended that the secured asset of the respondent has already been auctioned and a sum of Rs.12.65 crores has been recovered as sale proceeds. This amount would come to more than 75% of the amount of debt due to the petitioner, as per the notice issued under Section 13(2) of the Act. Therefore, the appeal filed by the respondent No.1 under Section 18 of the SARFAESI Act, can be entertained without any pre-deposit required to be made.

67. The argument of the counsel for the respondent that since more than 50% of the amount mentioned in the notice under Section 13(2) has been recovered by sale of the secured asset, there is no necessity to deposit any amount, as required under the second proviso to Section 18 of the SARFAESI Act, though attractive at first blush, is untenable and turned down for the reason that the purpose of making the pre deposit is not to secure the amount of debt due to the Bank, but to dissuade defaulting borrowers from choking the Appellate Tribunal by filing frivolous appeals. This is especially true in the facts of cases like the present one. Once the defaulting borrower's property has been put to auction and sold, such a borrower will have nothing further to lose and would be more than willing to continue litigating endlessly. In such circumstances, the requirement of making a pre-deposit with the Appellate Tribunal would act a deterrent and dissuade the borrower from filing, what would have otherwise been a frivolous appeal.

68. Moreover, the law laid down by the Supreme Court in Narayan Chandra (supra), makes it abundantly clear that the Appellate Tribunal is duty bound to accept a minimum of 25% of the debt due, as claimed by the secured creditor or determined by the Debt Recovery Tribunal.

69. Faced with a similar set of facts, in Poonam Mashani's case (supra), while determining the amount of pre-deposit, a co-ordinate Bench had reduced the sale consideration from the amount claimed by the secured creditor. The borrower in that case was required to deposit 25% of the sum of money claimed by the Bank in the notice under Section 13(2), less the amount raised from the sale of the secured asset. The relevant portion of the judgement is extracted below:

8. We have heard the counsel for the parties and are of the view that the DRAT came to the conclusion of requiring a pre-deposit of Rs. 10.21 crores after considering three aspects of the matter. First of all, the Appellate Tribunal ignored the interest component and went by the amount claimed under the notice under Section 13(2). Secondly, the Appellate Tribunal was of the view that only 25% of the demanded amount be deposited by way of pre-deposit under Section 18. The third aspect of the matter, which was considered by the Appellate Tribunal, was that the amount of Rs. 8.60 crores, which was recovered from the borrower, cannot be adjusted in favour of the petitioner, who is a guarantor inasmuch as, according to the Appellate Tribunal, the guarantor (the petitioner herein) would have to stand on her own legs. She cannot claim any advantage of the amount recovered by the Bank by the sale of one property of the borrower.

9. We are not interfering with the first two aspects of the Appellate Tribunal's consideration, but we find that insofar as the third aspect of the matter is concerned,

*the Appellate Tribunal has misdirected itself. After having rightly held in paragraph 10 of the impugned order that the liability of a guarantor is co-extensive with that of the principal debtor, the Tribunal could not have disallowed the advantage of recovery by the bank and the resultant reduction in the amount of debt due from the guarantor which advantage would have, in any event, been available to the principal debtor. When the principal debtor could have claimed advantage of the adjustment, there is no reason as to why a guarantor, whose liability is co-extensive, ought to be denied that advantage. At the same time, we do not agree with the submissions made by Mr. Rawal that the sum of Rs. 8.60 crores ought to be adjusted from the amount of Rs. 10.21 crores. This is so because the expression used in Section 18 is “amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less”. **The amount of debt due, by ignoring the interest component, would be the amount specified in the notice under Section 13(2), less any recovery made by the bank thereafter. Since the respondent No. 1 bank has recovered 8.60 crores in the proceedings under Section 13(4), an adjustment would have to be made to arrive at the amount of debt due. Looked at in this manner, we feel that the amount of debt due would be Rs. 32.27 crores (Rs. 40.87 crores - Rs. 8.60 crores). Twenty Five percent of that amount would come to Rs. 8.07 crores (approximately).*** (emphasis added)

70. We find no reason for taking a different view than that taken above. The money recovered by a secured creditor is not to be treated as the equivalent of a deposit made under Section 18 of the SARFAESI Act. It is only to be considered for reducing the liability of a borrower, which is

exactly what its nature is. Such a view would not only safeguard the interest of the secured creditors, it would also ensure that frivolous appeals are sifted out at the appellate stage.

71. At this juncture, we must also take note of the order dated 26.12.2018 passed in an earlier round of litigation between the same parties in W.P.(C) No.14066/2018 where it was held that since more than 50% of the amount of debt due had been recovered in the auction, no pre-deposit was required. For holding so, the Division Bench had placed reliance on Srishti Arogyadgham (supra), which is completely distinguishable on facts. In the latter case, the amount which was payable as per the auction notice was Rs.6,84,28,157.56/-, but the Bank had recovered Rs. 11.77 crores in the auction sale. As a result, there was no amount due or payable to the secured creditor. In the instant case, against the sum of Rs.16.61 crores mentioned in the Section 13(2) notice, a sum of Rs. 12.25 crores has been recovered and the balance sum of Rs. 4.1 crores is still due and payable to the secured creditor. While passing the order dated 26.12.2018, the earlier judgement of this High Court in Poonam Manshani (supra) and the decision of the Supreme Court in Narayan Chandra (supra) appear to have escaped the attention of the court. Quite evidently, the said order runs contrary to what has been laid down by the Supreme Court and held by a co-ordinate Bench of this court and therefore, the order dated 26.12.2018 will have to be treated as *per incuriam*.

72. In the light of the above discussion, it is held that any amount of debt that has been repaid by the borrower after filing of the Section 17 petition, either through return of money, or on sale/auction of a secured asset shall stand to the benefit of the borrower and while computing the "*amount of*

debt due" under the second proviso to Section 18, the amount stated in the Section 13(2) notice shall be proportionately reduced by any amount recovered by a secured creditor in the above manner. Subject to the limited discretion vested in the Appellate Tribunal, 50% of this amount shall have to be deposited by the aggrieved person for the appeal to be entertained.

73. To sum up, the conclusion drawn is as follows:

- (a) Pre-deposit contemplated under the second proviso of Section 18 of the SARFAESI Act, 2002 is mandatory in nature and cannot be waived by the learned DRAT.
- (b) While computing the "*amount of debt due*", the amount of debt claimed by the secured creditor in its notice issued under Section 13(2) of the Act, shall be relevant and any future interest need not be taken into consideration for purposes of determining, "*the amount of debt due as claimed by the secured creditor*", in cases where the DRT has not determined the liability of a borrower.
- (c) The interest component shall be ignored only for the purposes of Section 18 of the Act. This judgement shall not affect the rights of the secured creditors to claim interest from the borrower, for recovery of amounts due under the RDDB Act.
- (d) Any amount that has been repaid by the borrower and/or recovered by a secured creditor after filing of the petition under Section 17, shall stand to the benefit of the borrower while computing the "*amount of debt due*" under the second proviso to Section 18 of the SARFAESI Act, 2002.

74. Applying the above conclusion to the facts of the instant case, it is held that the learned DRAT could not have completely waived the

requirement of making a pre-deposit under Section 18 of the Act. It did so by relying on the order dated 26.12.2018 passed by the High Court, which has been held as *per incuriam*. Since against an original amount of debt of Rs. 16.61 Crores, Rs. 12.5 Crores has been recovered by the petitioner, it is held that only for the purposes of Section 18 of the Act, the amount of debt due to the petitioner will have to be treated as the remaining sum of Rs. 4.1 Crores. As a result, respondent No.1 shall have to deposit 50% of the said amount to have its appeal heard by the learned DRAT. Needless to state that it shall be open to the learned DRAT to reduce this pre-deposit amount to 25%, after recording reasons in writing for the said reduction.

75. The petition is allowed and disposed of in terms of the aforesaid conclusion, with no orders as to costs.

SUBRAMONIUM PRASAD, J.

HIMA KOHLI, J.

DECEMBER 22, 2020

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