

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SAIDE

Present:
Hon'ble Justice Shampa Sarkar

CO 529 of 2024
M/s PAT International & ors.
Vs.
Indian Overseas Bank & ors

For the petitioners : Mr. Debashis Kundu, ld. Sr. Adv.
Mr. Saumyen Datta,
Mr. Rajendra Nath Barik,
Mr. Md. Arham Reza,
Mr. Shahrukh Raja

For the opposite party Nos.1 & 2 : Mr. Subhankar Nag,
Mr. Onkar Ganguly,
Ms. Ayanabha Raha,
Ms. M. Kaur

For the opposite party No.3 : Mr. Jaydip Kar, ld. Sr. Adv.
Mr. Nimesh Mishra,
Mr. Siddhartha Banerjee,
Mr. Avishek Guha,
Ms. Sonal Agarwal,
Mr. Ankush Majumder

Hearing concluded on : 30.08.2024
Judgment on : 01.10.2024

Shampa Sarkar, J.:-

1. The revisional application arises out of order dated January 31, 2024 passed by the Learned Debts Recovery Appellate Tribunal (DRAT), Kolkata in Appeal Nos. 49 of 2021 and 85 of 2022, both arising out of TSA No. 04 of 2021, from the order of the Learned Debts Recovery Tribunal – II (DRT), Kolkata, dated October 5, 2021, passed in an application for review.

2. Separate appeals were preferred by the secured creditor and the auction purchaser, before the learned DRAT. The said Appeals were disposed of by a common judgment and order which is under challenge in this revisional application. The petitioners were the respondents in the said appeals. They had filed an application under Section 17 of the Securitization and Reconstruction of Financial Interests and Enforcement of Securities Act, 2002 (hereinafter referred to as SARFAESI Act), challenging the action of the opposite party Nos.1 and 2 under Section 13(4) of the SARFAESI Act.

3. The said application was registered as S.A. No. 232 of 2017 and re-numbered as TSA 04 of 2021, after an order of remand by the High Court. The application under Section 17 of the SARFAESI Act was heard on merits and was dismissed by the DRT on August 13, 2021. The sale had been confirmed in favour of the opposite party No.3. After the dismissal of the said application of the petitioners, an application for review was filed and the same was registered as R.A. No. 01 of 2021. The review was allowed and the sale in favour of the opposite party was set aside.

4. Primarily, relying on the decision of the Hon'ble Apex Court, in the matter of **Gourav Hargovindbhai Dave vs. Asset Reconstruction Company, India Ltd.& Anr.**, reported in **(2019) 10 SCC 572**, the DRT held that the steps taken by the bank were barred by limitation. According to the DRT, the Hon'ble Apex Court had clearly held that Article 137 of the Limitation Act, 1963, (hereinafter referred to as the Limitation Act) would be applicable to enforce a debt, and all steps for enforcement of such debt should be taken

within three years from the date when the debt became due. The proceeding before the DRT was not a suit and the period of limitation prescribed for filing a mortgage suit would not be applicable. The DRT held that the action of the bank was contrary to the provisions of the Limitation Act and was barred by law. The bank could not proceed under the SARFAESI Act to enforce the mortgage beyond a period of three years from the date of declaration of the account of the petitioners, as NPA. The account was classified as an NPA on December 31, 2006 and the notice under Section 13(4) was issued on November 11, 2017, which was beyond the period of limitation prescribed under Section 36 of the SARFAESI Act.

5. The said order was challenged before the learned DRAT by the bank as well as the auction purchaser. The appeals were allowed. Hence, the revisional application has been filed by the borrower.

6. Mr. Debashish Kundu, learned Senior Advocate for the petitioners submitted that after the declaration of the account as an NPA on December 31, 2006, the notice under Section 13(2) was issued on August 1, 2017, and the notice under Section 13(4) was issued on November 11, 2017. As per Section 36 of the SARFAESI Act, steps under Section 13(4) should be taken within the period of limitation prescribed under the Limitation Act. Accordingly, steps taken by the bank would be governed by the residuary clause, that is, Article 137 of the Limitation Act. All SARFAESI actions should have been taken by the bank within three years from declaration of the account as NPA.

7. According to Mr. Kundu, the Learned DRT had rightly reviewed the order of dismissal of the TSA 4 of 2021 as the issue of limitation had not been taken into consideration while dismissing the said T.S.A. on merits. The application for review was based on the decision of the Hon'ble Apex Court in **Gourav Hargovindbhai Dave (supra)**. The Learned DRT had also relied on another decision of the Hon'ble Apex Court, viz., **B.K. Educational Services Pvt. Ltd. v. Parag Gupta & Associates, dated October 11, 2018**, reported in **(2019) 11 SCC 653**, in which a similar view was taken as in **Gaurav Hargovindbhai Dave (supra)** According to Mr. Kundu, the learned DRT had rightly held that the order of dismissal of the TSA should be reviewed under the provisions of Rule 5A of the Debts Recovery Tribunal (Procedure) Rules, 1993 (hereinafter referred to as the said Rules of 1993). The relevant decisions relating to the period of limitation to initiate proceedings by the bank, had not been placed before the DRT and such vital question had not been decided.

8. As per Mr. Kundu's submissions, the DRT had rightly observed that it was the duty of the Tribunal to follow the decisions of the Hon'ble Apex Court covering the field, which the said Tribunal had failed to do. The non-consideration of the issue of limitation at the time of dismissal of the TSA 04 of 2021, was an error apparent on the face of record and review was permissible. Any party aggrieved by an order of the DRT, on account of some mistake or error apparent on the face of record, could apply for review of the order. The expression "mistake" or "error apparent on the face of record" had been interpreted in various judgments of the Hon'ble Apex Court, and depending

upon the context and facts of the case, the DRT rightly reviewed the order. The error or the mistake was evident from the discussions and reasonings detailed in the review application. Relying on the decisions of the Hon'ble Apex Court, the DRT had observed that when a point of law was incorrectly decided or was not decided, the order was erroneous on the face of record. When the tribunal disposed of a case either without advertent to or applying its mind to a particular provision of law which gave it jurisdiction to act in a particular way, such failure would amount to an error which was apparent on the face of record, and such failure was sufficient ground for review. In this case, Section 3 of the Limitation Act was overlooked by the DRT. Mr. Kundu submitted that reliance was rightly placed by the DRT on the decision of ***Sri Hari Shankar Pal & Ors, Vs. Anath Nath Mitter and Ors.*** Rule 5A of the Rules, was similarly worded as Order 47 Rule 1 of the Code of Civil Procedure and the DRT had exercised the power of review on a correct appreciation of law, thereby allowing the TSA and setting aside the sale, upon review of its earlier order.

9. Mr. Kundu placed reliance on the decisions of the Hon'ble Apex Court in the matters of ***Gullapalli, Nageswara Rao & Ors, Vs. Andhra Pradesh State Road Transport Corporation & Anr.***, reported in ***AIR 1959 SC 308***, ***Gourav Hargovindbhai Dave (supra)***, and ***Dr. Dipankar Chakraborty vs Allahabad Bank & Ors.*** reported in ***AIR 2017 Cal 289***.

10. Mr. Kundu urged that, the DRAT had wrongly set aside the decision of the DRT. Appeal No.49 of 2021 and Appeal No.85 of 2022, were allowed on a limited interpretation of the scope of review, and misinterpretation of the

provisions of the Limitation Act. The findings of the DRAT were contrary to the law laid down by the Hon'ble Apex Court in the decision of **Gourav Hargovindbhai Dave (supra)**. The Hon'ble Apex Court had held that an application under Section 7 of the Insolvency and Bankruptcy Code (IBC), should be filed within three years from accrual of cause of action and Article 137 of the Limitation Act would apply. Such erroneous exercise of jurisdiction by the DRAT was amenable to the jurisdiction of this Court under Article 227 of the Constitution of India.

11. Mr. Kundu submitted that the DRAT wrongly held that Rule 5A of the said Rules, applied in a limited situation, that is, only when a mistake or error on the face of the record was detected. The DRT could not travel beyond such limited scope of the Rule. Learned Advocate contended that even if the plea of limitation was not raised by the petitioners in the application under Section 17 of the SARFAESI Act, the provisions of Section 3 of the Limitation Act clearly cast a duty upon the DRT to consider the issue of limitation. Limitation was not required to be taken as a ground of defence. The learned DRAT failed to address such legal principle and had wrongly held that the period of limitation would be 12 years from the date of classification of the account as an NPA and not 3 years. The finding of the learned DRAT that the decision of the Hon'ble Apex Court in **Gourav Hargovindbhai Dave (supra)** would not be applicable, inasmuch as, the said decision was confined to a proceeding under Section 7 of the IBC, was also incorrect. Any application or proceeding initiated for claim of

money (debt), according to Mr. Kundu, must be initiated within three years from the date when the cause of action arose.

12. In the instant case, the cause of action arose with the classification of the account as an NPA and the steps taken by the Bank were far beyond the period of three years. In the decision of ***Dr. Dipankar Chakraborty (supra)*** it had been clearly held that pendency of a proceeding before the learned DRT under Section 19 of the Recovery of Debts and Bankruptcy Act, 1993 (hereinafter referred to as the RDB Act), could not protect a time barred proceeding under the SARFAESI Act. The Bank could not take the benefit of the pendency of a proceeding before the DRT, to claim that a proceeding under the SARFAESI Act, which was otherwise barred by limitation, had been validly instituted, i.e., within the period of limitation. Sections 4, 14 and 15 of the Limitation Act, would not assist the Bank in this regard.

13. Section 14 of the Limitation Act permitted exclusion of time taken to proceed bona fide in a court without jurisdiction. The section permitted a plaintiff to present the suit beyond the period of limitation, if the court of first instance returned the plaint either for defect of jurisdiction or other causes of like nature, being unable to entertain it. In the present case, the secured creditor did not withdraw the proceeding which was pending before the DRT under Section 19 of the RDB Act, but had once again invoked the provisions of the SARFAESI Act, beyond the period of three years from the cause of action (declaration as NPA). The secured creditor was proceeding independently, both under the RDB Act and the SARFAESI Act of 2002. The choice to proceed

under the SARFAESI Act was distinct and separate from the pendency of the proceedings under the RDB Act, and thus, when the secured creditor was proposing to take measures under Section 13(4) of the SARFAESI Act, the proceedings should have been initiated within the period of limitation under Article 137 of the Limitation Act, in terms of Section 36 of the SARFAESI Act.

14. When a defect in the order went to the very root of the matter, which touched the jurisdiction of the DRT to entertain such proceeding, the power of review should be invoked and a restricted meaning could not be ascribed to it. The DRAT had wrongly held that the review application of the borrower was not legally maintainable as per the said Rules of 1993. The borrower could never be prevented from raising a question of law even at the stage of appeal. In this case, the petitioners did not invite the DRT to take a second look on merits, with the hope that flaws would be discovered in the second round of hearing and a fresh verdict could be forthcoming in their favour. The error was self-evident and was not required to be detected by a process of reasoning. By merely looking at the records, it would strike any reasonable person that the steps taken under Section 13(4), was barred by the laws of limitation.

15. Learned Senior Advocate further submitted that the proceeding under Section 13 (4) was neither a suit nor an appeal or an application. Under the Limitation Act, the definition of 'suit' did not include appeal and application. Thus, the measures taken by the bank in exercise of power under Section 13(4) of the SARFAESI Act, could not be governed either by Articles 62 or 63(b), of the Limitation Act, which dealt with the period of limitation pertaining to

mortgage suits. The power conferred upon the bank under the said provision of the SARFAESI Act, was only to secure their claim and recover the secured debt by taking possession of the assets of the borrower, including the right to transfer. Whereas, the provisions of Article 62 and Article 63(b) of the Limitation Act applied to filing a suit for enforcement of payment of money secured by mortgage or to take possession of the mortgaged immovable property, respectively.

16. According to Mr. Kundu, the period of limitation prescribed under Articles 1 to 113 of the Schedule to the Limitation Act, applied to suits. Articles 114 to 117 applied to appeals and Articles 118 to 137 applied to applications. The residuary clause under Article 137 provided the period of limitation as three years, in cases where no period of limitation was prescribed for filing applications which were not covered by Articles 118 to 136. Thus, in this case, Article 137 of the Limitation Act would be applicable. A conjoint reading of Articles 62 and 137 of the Limitation Act and Section 36 of the SARFAESI Act, would give rise to the only interpretation that reference to the law of limitation under Section 36 of the SARFAESI Act, was a reference to Article 137, which was a residuary clause applicable in cases where no period of limitation had been prescribed by the statute to initiate any proceeding.

17. Referring to the aims and objects of the SARFAESI Act, it was submitted that the financial sector had been one of the key drivers in India's effort to achieve success in a rapidly developing economy. While the banking industry in India was progressively complying with international prudential norms and

accounting practices, there were certain areas in which the banking and the financial sector did not have a level playing field, as compared to other participants in the financial markets in the world. There was no legal provision for facilitating securitization of financial assets of banks and financial institutions. The banks did not have the power to take possession of the securities and sell them. In the existing legal framework relating to commercial transactions, it was necessary to keep pace with the changing commercial practices and financial sector reforms.

18. Thus, the slow pace of recovery of defaulting loans and enormous mounting levels of non-performing assets of banks and financial institutions were required to be addressed and reforms were required to be introduced in the banking sector. Accordingly, the SARFAESI Act was promulgated to regulate the securitization and reconstruction of financial assets and enforcement of security interest. The Act provided for a speedy remedy to realize the reforms which were necessary in the banking sector. In the instant case, treating the period of limitation prescribed under Section 36 of the SARFAESI Act, as 12 years from the date when the debt became due, would be totally contrary to the purpose behind the enactment. Speedy recovery would be defeated if the bank waited for 12 years before taking steps to enforce the security interest. Mr. Kundu, prayed for setting aside the order passed by the learned DRAT.

19. Mr. Nag, the Learned Advocate for the Bank submitted that the account was declared NPA on December 31, 2006. The second notice under Section

13(2) was issued on August 1, 2017 and the action under Section 13(4) was taken on November 11, 2017. In the instant case, Article 62 would be applicable as the Bank was seeking to enforce a security interest and did not file a suit for recovery of debt. It was contented that the term 'secured asset' would mean the property over which security interest was created and 'security interest' would mean the right, title or interest of any kind upon such property, created in favour of the secured creditor, and included any mortgage, charge, hypothecation, assignment etc., which was retained by the secured creditor, as the owner of the property.

20. It was further contented by Mr. Nag that the decision in ***Gourav Hargovindbhai Dave (supra)*** was delivered in connection with an application under Section 7 of the IBC. The same was not a proceeding to enforce payment of money which was either secured by a mortgage or otherwise charged upon immovable property. An application under Section 7 of IBC would be covered by the residuary clause under Article 137 of the Limitation Act. Under the said provision, an application for realisation of a financial debt had to be filed. Reliance was placed on the decision of the Hon'ble Apex Court in the matter of ***Jignesh Shah & Anr. Vs. Union of India & Anr.*** reported in **(2019) 10 SCC 750**. It was submitted that the application for review could not have been entertained as there was no error apparent on the face of the record. Mr. Nag submitted that the decision in ***Dr. Dipankar Chakraborty (Supra)*** had been noticed with agreement by the Hon'ble Supreme Court in ***Jignesh Shah (Supra)***. In ***Dr. Dipankar Chakraborty (Supra)***, also, the High Court

observed that the period of limitation mentioned under Section 36 of the SARFAESI Act, was 12 years.

21. Reliance was also placed on a decision of this Court in the matter of ***Sri Din Dayal Kayan vs. Canara Bank and anr. decided in WPA No.580 of 2024***. This Court had held that the notice under Section 13(2) was barred under Section 36 of the SARFAESI Act, as the same was issued after 19 years from the date of declaration of NPA. Article 62 of the Schedule of the Limitation Act should be applied, in order to compute the period of limitation.

22. Mr. Jaydip Kar, learned Senior Advocate appeared for the auction purchaser. Mr. Kar submitted that the pleading that the action of the bank under Section 13(4) of the SARFAESI Act was barred by limitation, had not taken in the application under Section 17 of the SARFAESI Act. The Code of Civil Procedure mandated that all points were required to be pleaded. Referring to Section 2(g) of the RDB Act, it was submitted that the term 'debt' meant a liability (inclusive of an interest) which was claimed as due from any person by a bank or financial institution during the course of any business activity under any law for the time being in force, in cash or otherwise, whether secured or unsecured or assigned or whether payable by a decree or order of any civil court or arbitration award or otherwise or under a mortgage and was subsisting on and was legally recoverable on the date of the application. Debt included any liability towards debt securities, which remained unpaid in full or in part. According to Section 2(ha) of the SARFAESI Act, debt was assigned the same meaning as Section 2(g) of the RDB Act. In the instant case, the debt was

a secured one, as the property was mortgaged to the bank. The debt was recoverable upon taking possession of the property and sale thereof.

23. Referring to Section 3(11) of the IBC, Mr. Kar submitted that 'debt' had a different meaning under the said Code. It was a liability or an obligation in respect of a claim which was due from any person and included a financial debt and an operational debt.

24. Referring to Section 7 of the IBC, it was further submitted that a financial creditor, either by itself or jointly with other financial creditors, could file an application for initiating Corporate Insolvency Resolution Process against a corporate debtor before the adjudicating authority, when a default had occurred. Default meant, a default in respect of a financial debt owed not only to the applicant financial creditor, but to any other financial creditor of the corporate debtor.

25. Thus, the decision in ***Gourav Hargovindbhai Dave (supra)***, should be read in the context of Section 3(11) and Section 7(1) of the IBC. In view of the provisions of the IBC, the Hon'ble Apex Court interpreted the period of limitation to be three years in terms of Article 137 of the Limitation Act. The application before the National Company Law Tribunal was filed when there was default in payment of a sum owed either to a financial or an operational creditor.

26. The Hon'ble Apex Court was of the view that a proceeding under Section 7(1) of the IBC was to be initiated by filing an application. Thus Article 62 would not be applicable. Whereas, the SARFAESI Act empowered the bank to

take measures for enforcement of security interest under Section 13. The provisions of Section 13 and sub-Sections 2, 3, 4 etc., were measures to be taken for enforcement of such security interest, which was created by mortgage of a property.

27. Mr. Kar placed the definition of 'security interest' under Section 2(zf) of the said Act, to mean the right, title or interest of any kind, upon a property created in favour of a secured creditor and included any mortgage, charge, hypothecation, assignment etc., retained by the secured creditor, as owner of the property. Section 36 was incorporated to provide the outer limit within which the bank could take steps to recover the secured debt, meaning thereby, the period of limitation should not go beyond the period prescribed under Articles 62 of the Limitation Act, that is, the time frame within which a mortgagee could file a suit against the mortgager, either to enforce payment of money secured by a mortgage, or to take possession of the immovable property mortgaged and sell the same in order to recover the dues.

28. The National Company Law Tribunal,(NCLT) under the provisions of the IBC, did not have the power to enforce payment of money secured by a mortgage. Thus, the residuary clause would not have any manner of application in the present case as the Bank was neither required to file a suit nor an application, but could simply take steps to enforce the security interest by taking possession of the secured asset of the borrower and transfer the same by way of lease, assignment or sale. In this case, the sale certificate was issued on March 20, 2021. The sale certificate was issued. The petitioner also

did not have any right of redemption. Reference in this regard, was made to a decision of the Hon'ble Apex Court in ***Celir LLP vs. Bafna Motor (Mumbai) Pvt. Ltd and ors.*** reported in ***(2024) 2 SCC 1.***

29. Referring to Rule 5A, of the Rules of 1993, Mr. Kar submitted that only an error, or a mistake apparent on the face of record, was subject to review by the DRT. Under the provisions of Order 47 Rule 1 of the Code of Civil Procedure, the power of review was not restricted to a mistake or error apparent on the face of record, but such power could be exercised for any other reason. Inability or the failure of the learned Advocate of the petitioners to urge a point, could not be termed as a mistake or error apparent on the face of record. The DRT was not called upon to answer the point of limitation. Thus, the learned DRAT rightly held that the DRT could not have reviewed its own order, in the absence of any pleadings on the issue of limitation in the application under Section 17 of the SARFAESI Act and in the absence of any submissions in such regard. It was the responsibility of the petitioners to raise the point of limitation before the authority, and call upon the authority to decide such issue. Thus, the issue was barred by the principles of constructive res judicata.

30. Mr. Kar's submission, in fact, was that the proceeding under the SARFAESI Act was to enforce a security interest created in favour of the bank, upon mortgage of the property which was sold to the auction purchaser in accordance with the provisions of Section 13 read with the Security Enforcement Rules, 2002. In case of SARFAESI proceedings, debts included

both secured and unsecured debts. Section 36 was the only provision under the law which was made subject to the law of limitation prescribed under the Limitation Act. The bank was permitted by law to take measures under Section 13(4) to enforce the security interest by taking over possession of the secured debt. Thus, Article 62 of the Limitation Act, which prescribed the period of limitation of 12 years would be applicable.

31. The mandate of Section 36 was that while enforcing the security interest, the bank should be in a position to file a mortgage suit and the measures could not be taken by the bank at its own sweet will and fancy and after inordinate delay. The decision in in ***Gourav Hargovindbhai Dave (supra)***, did not consider the period of limitation prescribed under the SARFAESI Act, for enforcement of any security interest. Although, the sale was concluded on March 20, 2021 and the sale certificate was confirmed by the order of the DRT, the auction purchaser was not made a party in the review application and the review application was allowed. The TSA was allowed upon review of the order dated August 13, 2021 and sale was set aside, in the absence of the auction purchaser. This was also a glaring case of violation of the principle of natural justice. The review in this case, was in the guise of an appeal.

32. Order 47 Rule 1 of the Code of Civil Procedure provided the grounds for review. The scope was wider. Under the Code, review was also permissible for any other sufficient reason, apart from the grounds stated therein. Such ground was consciously not included by the legislature in case of the DRT. The

DRT could review its own order only when there was a mistake or error apparent on the face of record and not for any other sufficient reason.

33. Under such circumstances, while reviewing the order, the DRT proceeded on the misconceived notion that, the measures taken by the bank under Section 13(2) and 13(4) of the SARFAESI Act, were actions taken to recover a money claim and erroneously held that the same should have been filed within three years. Reference was further made to Section 37 of the SARFAESI Act, in support of the contention that the provisions of the SARFAESI Act, were in addition to and not in derogation to the other laws. Thus, even if a proceeding was instituted for recovery of money under the RDB Act, Section 37 allowed the bank to enforce its right by taking possession of the secured asset. Financial asset, as defined under Section 2(l)(ii) of the SARFAESI Act, meant any debt or receivables, secured by mortgage of, or charge on immovable property.

34. The definition of “financial asset” read with Section 13(4) clearly empowered the bank to recover the debt secured by mortgage, by taking possession of the secured asset, and selling the same to realise the secured debt.

35. Reference was made to the following decisions:-

- i) ***Hemanta Kumar Chaudhury vs. Smt. Sumitri Devi*** reported in ***1987 SCC Online Cal187***;
- ii) ***Parison Devi and ors. Vs. Sumitri Devi and ors.*** reported in ***(1997) 8 SCC 715***;

- iii) ***Celir LLP vs. Bafna Motors (Mumbai) Private Limited and ors.***
reported in ***(2024) 2 SCC 1;***
- iv) ***Dipankar Chakraborty vs. Allahabad Bank*** reported in ***(2017) SCC Online Cal 8742;***
- v) ***Sesh Nath Singh vs. Baidyabati Sheoraphuli Coop. Bank Ltd.***
reported in ***(2021) 7 SCC 313;*** and
- vi) ***Akshat Commercial Pvt. Ltd and anr. vs. Kalpana Chakraborty and ors.*** reported in ***(2010) SCC Online Cal 1361.***

36. Having heard the learned Advocates for the respective parties, this court is of the view that the scope of review under Section 5A of the Rules and Order 47 Rule 1 of the Code of Civil Procedure, are not similar. The scope of review under Rule 5A is limited to an error or mistake apparent on the face of record. SA 232 of 2017, re-numbered as TSA No. 4 of 2021 was dismissed on merits, by the learned DRT.

37. The learned DRT found that the petitioner did not file any representation under Section 13 (3A) of the SARFAESI Act, by responding/objection to the notice received under Section 13(2). There was no scope for the secured creditor to consider the objections of the borrower. The plea of the petitioners that in view of filing of OA 3 of 2008 before DRT-I under the RDB Act, the subsequent actions under the SARFAESI Act, were barred, was not accepted by the DRT. The DRT was of the view that the OA was a separate proceeding and both the proceedings could run parallelly. The prayer of the petitioners for an

injunction upon the bank, restraining them from proceeding with the OA, was also refused.

38. The further contention of the petitioners that once the bank had taken effective steps for recovery of the debt by filing the OA, steps under Section 13(4) of the SARFAESI Act, could not be resorted to, was also rejected by the DRT. The DRT found that the possession notice was issued on November 11, 2017. It was affixed on the property and publications were made in the “Business Standard” and “Aaj Kaal” on November 21, 2017. The DRT held that the bank had complied with all necessary statutory formalities under Rules 8 (1) and (2) of the said Rules of 2002. The petitioners had failed to make out a case of irregularity, illegality or infirmity in the SARFAESI proceedings initiated by the bank, in respect of the measures which were initiated under Sections 13(2) and 13(4) of the Act. No evidence in support of the contentions of the petitioners was found by the DRT.

39. Accordingly, TSA 04 of 2021, arising out of SA 232 of 2017, was dismissed. IA 63 of 2021 arising out of SA 232 of 2017, which was filed by the petitioners for an order of status quo and restrain upon the bank from creating third-party interest, was also disposed of. IA 65 of 2021 filed by the petitioners for setting aside the sale certificate issued in favour of the opposite party No.3, was dismissed.

40. The application of the auction purchaser was also disposed of accordingly. It is clear from the order passed by the DRT that the Tribunal upheld the measures taken under Section 13(2) and 13(4) of the SARFAESI

Act. The petitioners could not prove that the steps taken by the bank suffered from any procedural irregularity. Neither in the averments before the DRT nor in the submissions made by the learned Advocate for the petitioners, the issue of limitation had not been raised.

41. Thus, this was not a case of a mistake or error apparent on the face of record. When the parties had not called upon the DRT to consider the point of limitation, the DRT was not required to pass an order with a separate finding as to whether the proceedings initiated by the bank, was within the period of limitation or not. The DRT, upon consideration of the provisions of Section 13(4) and the steps taken by the bank, as were evident from the documents filed with the pleadings by the respective parties, came to the specific conclusion that the proceedings were correctly initiated and were in accordance with law. Meaning, thereby, the DRT did not find any defect with the issuance of the notice under Section 13 (4) of the SARFAESI Act.

42. The DRAT correctly held that, as the point of limitation was not urged before the DRT, the DRT was not required to return a finding on such issue. The DRAT further went on to hold that the scope of review under DRT Rules was limited to only error apparent on the face of record. Limitation was neither set up as a defence nor urged before the DRT. The DRT was not required to review the order in the absence of the pleadings. Had there been a pleading with regard to limitation, the non-consideration of the same could amount to a mistake or error apparent on the face of record. The findings of the DRAT are not erroneous.

43. There is another very important aspect of the matter. The DRT allowed the application for review by setting aside the sale certificate, inter alia, holding that the measures initiated by the bank and the sale conducted, were hit by the laws of limitation. Such order was passed without hearing the auction purchaser. The order passed was reviewed on the ground that the proceeding initiated by the bank beyond three years, was contrary to the decision of the Hon'ble Apex Court in ***Gaurav Hargobindbhai Dave (Supra)*** and ***D K Educational Services (Supra)***.

44. The larger question before this court is whether the learned DRT had acted illegally and with material irregularity in arriving at the conclusion that the period of limitation for initiating any measure by the bank under Section 13(4), was three years and not 12 years.

45. The SARFAESI Act was enacted in 2002. The promulgation of the said Act marked a crucial moment in the Indian banking sector. The Act was designed to tackle the growing issue of non-performing assets. The banks and financial institutions were provided with a robust mechanism to recover dues without court's intervention. Among the several provisions of the said Act, Section 13(4) is of paramount importance. The section empowers lenders to enforce their security interests effectively, by ensuring a more streamlined process for recovering loans. The Act also allowed banks and financial institutions to auction residential or commercial properties of the defaulters, in order to realize the debt. The primary objective was to improve recovery by taking possession of securities, selling them and reducing non-performing

assets by adopting measures for recovery or reconstruction, without intervention of the Court. Section 13(4) empowered the secured creditors, namely, the banks to enforce their security interests, when the borrowers failed to discharge their liabilities in full, within the 60-day notice period.

46. Section 13 under chapter III, deals with enforcement of security interests. The relevant provisions are quoted below:-

“13(1)Notwithstanding anything contained in section 69 or section 69-A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or tribunal, by such creditor in accordance with the provisions of this Act.”

13(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 instalment 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).

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;”

13(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.

47. The definitions of the relevant terms are quoted below:-

“2(zd) ‘secured creditor’ means—

- (i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (l);
- (ii) debenture trustee appointed by any bank or financial institution; or
- (iii) (iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be; or
- (iv) debenture trustee registered with 5 [the Board and appointed] for secured debt securities; or
- (v) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance.”

2(zc) ‘secured asset’ means the property on which security interest is created.”

2(l) “financial asset” means debt or receivables and includes—

- (i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
- (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- (iii) a mortgage, charge, hypothecation or pledge of movable property; or

- (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- (v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- (va) any beneficial right, title or interest in any tangible asset given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of such asset or an obligation incurred or credit otherwise provided to enable the borrower to acquire such tangible asset; or
- (vb) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable the borrower to acquire such intangible asset or obtain licence of the intangible asset; or] (vi) any financial assistance.”

2(zf) ‘security interest’ means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes-

2(zf)(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or”

48. The only provision in the SARFAESI ACT which makes the law of limitation applicable, is Section 36. Section 36 is quoted below:-

“36. Limitation – No Secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963.”

49. Thus, a conjoint reading of the aforementioned provisions would indicate that the bank being a secured creditor, has the power under Section 13 to enforce a security interest which includes mortgage of immovable property, by

taking steps under Section 13(4) in respect of such financial asset, instead of resorting to filing a suit for enforcement of mortgage. The bank could directly proceed under Section 13(4) to take over possession of the secured assets of the borrowers, including the right to transfer by way of lease, assignment or sale in order to realize the secured debt.

50. Secured asset means the property on which the security interest was created. Thus, the property being the secured asset, which was mortgaged to the bank, was taken possession of by the bank and sold in auction. The requirement of Section 36 is that such steps should be taken by the bank in respect of the financial asset, within the period of limitation prescribed under Article 62, i.e., which is the period of limitation for filing a mortgage suit.

51. In my considered view, the period of limitation prescribed under Section 36 must be read in consonance with the ultimate object sought to be achieved by the SARFAESI Act, i.e., enabling the secured creditor (bank) under Section 13 (4), to resort to the measures of taking over possession of the secured asset of the borrower along with the right to sell, transfer or lease the same, in order to realise the money secured by mortgage.

52. Section 13 (4) is the specific provision which empowers the bank to manage or recover non-performing assets efficiently. Thus, the powers given to the bank in the said section is akin to enforcement of payment of money secured by a mortgage and thus, the period of limitation under Article 62 of the Limitation Act will be applicable.

53. The petitioners had wrongly relied on ***Gaurav Hargobindbhai Dave (Supra)***, which is a decision on the period of limitation applicable to filing an application under Section 7 of IBC, with regard to a money claim. The distinguishing features of the decision of ***Gaurav Hargobindbhai Dave (Supra)*** are available from the facts and findings. The relevant portions of the judgment are quoted below :-

“1. In the present case, Respondent 2 was declared NPA on 21-7-2011. At that point of time, State Bank of India filed two OAs in the Debts Recovery Tribunal in 2012 in order to recover a total debt of 50 crores of rupees. In the meanwhile, by an assignment dated 28-3-2014, State Bank of India assigned the aforesaid debt to Respondent 1. The Debts Recovery Tribunal proceedings reached judgment on 10-6-2016, the Tribunal holding that the OAs filed before it were not maintainable for the reasons given therein.

2. As against the aforesaid judgment, Special Civil Application Nos. 10621-622 were filed before the Gujarat High Court which resulted in the High Court remanding the aforesaid matter. From this order, a special leave petition was dismissed on 27-3-2017.

3. An independent proceeding was then begun by Respondent 1 on 3-10-2017 being in the form of a Section 7 application filed under the Insolvency and Bankruptcy Code in order to recover the original debt together with interest which now amounted to about 124 crores of rupees. In Form-I that has statutorily to be annexed to the Section 7 application in Column II which was the date on which default occurred, the date of the NPA i.e. 21-7-2011 was filled up. The NCLT applied Article 62 of the Limitation Act which reads as follows:

“Description of suit	Period of limitation	Time from which period begins to run
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable	Twelve years	When the money sued for becomes due.”

property		
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Applying the aforesaid Article, the NCLT reached the conclusion that since the limitation period was 12 years from the date on which the money suit has become due, the aforesaid claim was filed within limitation and hence admitted the Section 7 application. The Nclat vide the impugned judgment, that the time of limitation would begin running for the purposes of limitation only on and from 1-12-2016 which is the date on which the Insolvency and Bankruptcy Code was brought into force. Consequently, it dismissed the appeal.

4. Mr Aditya Parolia, learned counsel appearing on behalf of the appellant has argued that Article 137 being a residuary article would apply on the facts of this case, and as right to sue accrued only on and from 21-7-2011, three years having elapsed since then in 2014, the Section 7 application filed in 2017 is clearly out of time. He has also referred to our judgment in B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates in order to buttress his argument that it is Article 137 of the Limitation Act which will apply to the facts of this case.

5. Mr Debal Banerjee, learned Senior Counsel, appearing on behalf of the respondents, countered this by stressing, in particular, para 11 of B.K. Educational Services (P) Ltd. [B.K. Educational Services (P) Ltd. v. Parag Gupta and Associates, (2019) 11 SCC 633] and reiterated the finding of the NCLT that it would be Article 62 of the Limitation Act that would be attracted to the facts of this case. He further argued that, being a commercial Code, a commercial interpretation has to be given so as to make the Code workable.

6. Having heard the learned counsel for both sides, what is apparent is that Article 62 is out of the way on the ground that it would only apply to suits. The present case being “an application” which is filed under Section 7, would fall only within the residuary Article 137. As rightly pointed out by the learned counsel appearing on behalf of the appellant, time, therefore, begins to run on 21-7-2011, as a result of which the application filed under Section 7 would clearly be time-barred. So far as Mr Banerjee's reliance on para 11 of B.K. Educational Services (P) Ltd., suffice it to say that the Report of the Insolvency Law Committee itself

stated that the intent of the Code could not have been to give a new lease of life to debts which are already time-barred.”

54. The expression ‘debt’ defined under the IBC is quoted below:-

“3(11) "debt" means a liability or obligation in respect of a claim which is due from any person and includes a financial debt and operational debt;”

55. The expression ‘debt’ defined under the SARFAESI Act, is quoted below:-

2. (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 and includes-

- (i) unpaid portion of the purchase price of any tangible asset given on hire or financial lease or conditional sale or under any other contract;
- (ii) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable any borrower to acquire the intangible asset or obtain licence of such asset;

56. Section 2(g) of the RDB Act is quoted below:-

“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 authority in whose favour security interest is created for the benefit of holders of debt securities].”

57. Under the SARFAESI Act, a bank can proceed against the property which was mortgaged and recover the loan by taking possession and also by selling the mortgaged property.

58. The IBC, does not have a similar provision and the NCLT does not have the power to enforce security interest created by way of mortgage of immovable property.

59. With regard to the applicability of Article 62 of the limitation Act, the relevant portions of the decision in ***Dr. Dipankar Chakraborty (supra)*** are quoted below:-

“14. Section 36 of the Act of 2002, bars a secured creditor from taking all or any measure under Section 13(4), unless the claim of such secured creditor is within the period of limitation prescribed under the Limitation Act, 1963. The provisions of the Limitation Act, 1963 are, therefore, applicable when a secured creditor seeks to initiate a proceeding under the Act of 2002. At least at the time of taking a measure under Section 13(4), the Limitation Act, 1963 would come into operation, that is to say that, the secured creditor is permitted by the Act of 2002 to take a measure under Section 13(4) only and only if, the measure sought to be taken is within the period of limitation as prescribed under the Limitation Act, 1963. The secured creditor is required to make his claim in respect of the financial asset within the period of limitation prescribed under the Limitation Act, 1963. Would lodging a proceeding under Section 19 of the Act of 1993 be construed to be making by a claim in respect of the financial asset within the period of limitation prescribed under Limitation Act, 1963 is another question which arises for consideration.

15. In the facts of the present case, the petitioner has not contended that, the claim made by the secured creditor before the Debts Recovery Tribunal under Section 19 of the Act of 1993 is barred by the laws of limitation. In any event, the issue of limitation of the proceedings under Act of 1993 is an issue which is to be decided by the Debts Recovery Tribunal before which such proceedings are pending. A Writ Court in a collateral proceeding is not required to answer such an issue. Such an issue also does not fall for consideration in the present case. Rather the issue as to whether the lodging of the proceedings under Section 19 of the Act of 1993 continues the period of limitation, or in other words, stops the running of the period of limitation on and from the date of lodging of such proceedings has arisen for consideration in the present case.

16. The issue of limitation in the context of Section 36 of the Act of 2002 was looked at and considered in Somnath Manocha (supra). The Division

Bench of the Delhi High Court in Somnath Manocha (supra) has held that,

“15. The requirement of Section 36 is that the claim in respect of “financial asset” is made within the period of limitation prescribed under the Limitation Act. Claim in respect of “financial asset” is defined as defined by Section 29(1) of the SARFAESI Act means debt or receivables and includes a claim to any debt or receivables or part thereof, whether secured or unsecured, and also any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent. Section 2(1)(t) which defines “property” is also relevant. This definition reads as under:

“(t) “property” means—

- (i) immovable property;
- (ii) movable property;
- (iii) any debt or any right to receive payment of money, whether secured or unsecured;
- (iii) receivables, whether existing or future;
- (iv) intangible assets, being know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature;”

16. So far so good. The question is as to whether in the facts of this case, the claim had become time barred. The property in question is mortgaged with the bank. However, the bank did not file Suit for recovery under Order XXXIV of the CPC. Instead, in para 17 of the plaint, specific averment was made that it was not claiming any relief against the mortgaged immovable property in the said suit and right was reserved to proceed against the said mortgaged property as provided under provisions of Order XXXIV Rule 14 of the CPC.

17. It could not be disputed that under ordinary law, the respondent bank has lost the remedy of enforcing the aforesaid security by way of mortgage as limitation of 12 years as provided in Article 62 of the Schedule to the Limitation Act, 1963 has expired. The bank chose to file only a suit for recovery of money and in spite of averment made in Para 17 of the plaint, it did not file any suit under Order XXXIV of the CPC. No doubt, in terms of order XXXIV Rule 14, the bank was entitled to bring the mortgaged property to sale by instituting a suit for sale in enforcement of the mortgage whereafter obtaining a decree for payment of money, in satisfaction of the claim under mortgage. However, such a suit could be filed within the period of limitation prescribed under Article 62 in the Schedule to the Limitation Act. Thus, under the ordinary law,

the bank is precluded from filing a mortgage suit in respect of the aforesaid property.

18. Thus, on the date of notice issued under Section 13(2) of SARFAESI Act, there was no such existing or subsisting right qua mortgage. We agree with the contention of the appellant that the remedy provided under SARFAESI Act is simply a new means of enforcing a preexisting right, i.e., one that existed before the SARFAESI Act came into existence. That remedy is the right to sell a mortgage property and recover the sum which it secures from the sale proceeds. In the present case, since right to file a suit or proceedings stood extinguished, the SARFAESI Act would not revive this extinguished claim.

19. Position would have been different if the bank had filed mortgage suit and such a suit was pending. In *Ivee Injectaa Ltd. (supra)*, mortgage suit has already been filed and therefore, claim for enforcing mortgage rights was subsisting as it was pending adjudication. If the period of 12 years had not expired under Article 62 in the Schedule to the Limitation Act and there was still time to file the proceedings of mortgage suit, even that would have saved the right of the Bank to enforce the provision of SARFAESI. But even that action has become time barred. In the facts of this case, we hold that the claim is barred under Section 36 of SARFAESI Act and therefore, it was not open to the bank to proceed under this Act. We, thus, allow this appeal and quash the impugned notice under Section 13(2) and 13(4) of SARFAESI Act issued by the bank.”

60. In the matter of ***Sri Din Dayal Kayan vs Canara Bank and Anr.*** ***decided in WPO No. 580 of 2024***, this court held that proceedings initiated by the bank under the SARFAESI Act was to enforce a right to sell a mortgaged property and recover the amount which was due, from the sale proceeds. The notice under Section 13(2) was held to be barred under Section 36 of the SARFAESI Act. Article 62 of the Schedule of the Limitation Act was held to be applicable. Paragraph 4 of the said decision is quoted below.

“4. In this case the notice under Section 13 (2) was issued after 19 years from declaration of the account as NPA. If the law bars a notice under Section 13 (4) beyond 12 years from declaration of the account as NPA, in that event a notice under Section 13 (2) which precedes a notice under Section 13 (4) cannot be issued beyond 12 years. 5. Section 36 of the SARFAESI Act is quoted below:- “36. No secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13,

unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963).” 6. Article 62 of the Limitation Act is quoted below:-

Description of suit	Period of limitation	Time from which period begins to run
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property.	“Twelve years	When the money sued for becomes due.

7. The proceeding under the SARFAESI Act is enforcement of a right to sell a mortgaged property and recover the sum which it secures from the sale proceeds.

61. Under such circumstances, this court is of the view that the period of limitation of three years provided under Article 137 of the Limitation Act, is not applicable to the measures taken by the bank under Section 13(4), in order to enforce a security interest created by way of a mortgage. The right of the banks under the SARFAESI Act under Section 13 (4) is akin to filing a suit. Under the ordinary law the bank could have filed a suit within the period prescribed under Article 62 of the Limitation Act.

62. Under such circumstances, the order passed by the DRT is bad in law. Reliance placed by the DRT on the decision of the Hon’ble Apex Court in **Gaurav Hargobindbhai Dave (Supra)** was also incorrect. The order of the DRAT is upheld.

63. The revisional application is dismissed.

64. The interim order of status quo is vacated.

65. The opposite parties are entitled to proceed in accordance with law.

66. There will be no order as to costs.
67. Parties are directed to act on the server copy of this judgment.
68. Urgent photostat certified copy of this order, if applied for, be given to the parties upon compliance of all formalities.

(Shampa Sarkar, J.)

Later:-

Learned Advocate for the petitioner prays for stay of operation of the order.

The prayer is considered and rejected.

(Shampa Sarkar, J.)