

(2012) 12 GUJ CK 0071

In the Gujarat High Court

Case No : Spl. Civil Application No. 4553 of 2012 with Civil Application No. 5060 of 2012

Corporation Bank

APPELLANT

Vs

Jayshreeben and Others

RESPONDENT

Date of Decision : 12-12-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21
Constitution of India, 1950 — Article 226, 227
Gujarat Agricultural Produce Markets Act, 1963 — Section 27(5)
Limitation Act, 1963 — Section 10, 10, 10, 11, 11, 11
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 22, 24, 5
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(4), 17, 17(1), 17(5)
Telegraph Act, 1885 — Section 16(3)

Citation : (2013) 2 BC 392

Hon'ble Judges : Mohinder Pal, J; Jayant M. Patel, J

Bench : Division Bench

Advocate : Percy Kavina, with Mr. Bharat Jani, for the Appellant; Gaurav Mehta, Advocate for the Respondent No. 1, Mr. R.P. Raval Advocate, party in person for the Respondent No. 2, Mr. Utpal M. Panchal, Advocate for the Respondent Nos. 3 and 5 and Mr. Devnani, AGP For the Respondent No. 6, for the Respondent

Judgement

Jayant Patel, J.—The present petition is directed against the order dated 17.6.2011 passed by the Presiding Officer of the Debts Recovery Tribunal-II, Ahmedabad (hereinafter referred as "the Tribunal") whereby under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as "the Act") the delay has been condoned by allowing the application being Misc. Application No. 8 of 2011. The short facts are that as per the petitioner - Bank, the loan was advanced to respondent No. 2 and security interest was created for the property of flat being Flat No. 301, Silver Colin, Bhojeshwar Plot, Porbandar (hereinafter referred as "the flat/property"). As per the petitioner Bank, since the amount was not paid,

the Bank undertook the action under the Act for realization of security interest. The possession of the flat was taken and thereafter the same has been sold to respondent Nos. 3 to 5. It appears that thereafter respondent No. 1 initiated the proceedings u/s 17 of the Act before the Tribunal. As there was delay in preferring the application u/s 17 of the Act, the application for condonation of delay was made being Misc. Application No. 8 of 2011. The Tribunal, after hearing both the sides, found that the delay deserves to be condoned since security interest is seriously in dispute. Therefore, condoned the delay by exercising discretion. Under the circumstances, the present petition before this Court.

2. We have heard Mr. Percy Kavina, learned Senior Counsel appearing with Mr. Jani for the petitioner, Mr. Gaurav Mehta for respondent No. 1, Mr. R.P. Raval for respondent No. 2, Mr. Utpal Panchal for respondent Nos. 3 to 5 and Mr. Devnani for respondent No. 6.

3. The only contention raised by learned Counsel appearing for the petitioner in the present petition is that Section 5 of the Limitation Act, 1963 (hereinafter referred as "the Limitation Act") is not applicable to the proceedings of the application u/s 17 of the Act and consequently there is no power available with the Tribunal for condonation of delay if such application is filed beyond the prescribed time limit as provided u/s 17 of the Act, Therefore, the order passed by the Tribunal of condoning the delay is without jurisdiction and hence the power of this Court under Articles 226/227 is invoked by the present petitioner.

4. Learned Counsel for the petitioner mainly relied upon the decision of the Calcutta High Court in the case of Akshat Commercial Pvt. Ltd. and Another Vs. Kalpana Chakraborty and Others, and the decision of the Apex Court in the case of Om Prakash Vs. Ashwani Kumar Bassi, and it was submitted that though as such, there is already decision of this Court (learned Single Judge - by one of us - Jayant Patel, J.) in the case of Union Bank of India Vs. Chairperson, The Debts Recovery Appellate Tribunal and Others, , taking the view that the provisions of Section 5 of the Limitation Act are applicable to the proceedings u/s 17 of the Act, the matter requires a fresh look and an attempt was made to submit that this Court may take a view that Section 5 of the Limitation Act is not applicable to the proceedings u/s 17 of the Act and, therefore, the impugned order be struck down.

5. Whereas, learned Counsel appearing for the respondents have supported the order of the Tribunal by submitting that the provisions of Section 5 of the Limitation Act would be applicable and the matter is covered by the decision of this Court in the case of Union Bank of India (supra).

6. Before we further consider relevant case law on the point, we may extract certain provisions of the Act and also of the Limitation Act for considering the aspect as to whether Section 5 of the Limitation Act has applicability to the proceedings u/s 17 of the Act or not. Section 17 of the Act reads as under:

17. Right to Appeal - (1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter [may make an application along with such fee, as may be prescribed], to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation.-- For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in Sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in Sub-section (4) of Section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under Sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under Sub-section (4) of Section 13 to recover his secured debt.

(5) Any application made under Sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time-to-time, extend the

said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under Sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in Sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

7. The aforesaid provisions show that any application as per Section 17(1) of the Act is to be made within 45 days from the date on which such measure has been taken. Section 17(7) of the Act provides for disposal of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Rules made therein (hereinafter referred as "the RDDBFI Act"). It may also be recorded that Section 36 of the Act speaks for limitation for taking measure by the secured creditor under the Limitation Act and Section 37 of the Act expressly provides that the Act has to be read in addition to and not in derogation to any other law for the time being in force. Sections 36 and 37 of the Act for the ready reference can be reproduced as under:

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 (36 of 1963).

37. Application of other laws not barred-- The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force,

8. Since by virtue of Section 17(7) of the Act, there is applicability of the provisions of the RDDBFI Act, Section 24 of the RDDBFI Act may be required to be considered since it speaks for applicability of the Limitation Act. Section 24 of the RDDBFI Act reads as under.

24. Limitation-- The provisions of the Limitation Act, 1963 (36 of 1963), shall, as

far as may be, apply to an application made to a Tribunal.

9. The aforesaid scheme of the Act for the purpose of application and proceeding u/s 17 of the Act shows that the Tribunal constituted under the RDDBFI Act will have jurisdiction to consider the application u/s 17(1) of the Act. Further, as per the scheme of the Act by virtue of the provisions of Section 36 of the Act, for enforcement of security interest, the Limitation Act is made expressly applicable. Further for disposal of the application, the provisions of the RDDBFI Act are to apply and in view of Section 24 of the RDDBFI Act, the provisions of the Limitation Act would apply as far as may be. Section 36 of the Act speaks for application of the Act and the Rules made thereunder in addition to any other law for the time being in force unless the provisions of this Act are inconsistent with any other provisions of any other law for the time being in force since Section 35 of the Act speaks for overriding effect too. It cannot be disputed that filing of the application and the procedure so provided for disposal of the application is by the Act which is a special law. It is also true that there is no express provisions made by the Parliament under the Act for applicability of Section 5 of the Limitation Act to the proceedings u/s 17 of the Act. Therefore, it will have to be considered as to whether by virtue of any provisions of the Limitation Act, Section 5 of the Limitation Act has applicability to the said special law i.e. the Act in question or not which may also include the proceedings u/s 17 of the Act.

10. The Limitation Act provides for limitation of the suit, appeal and application. However, Section 29 of the Limitation Act provides by way of saving clause and as we are concerned in the present matter for application of the Limitation Act to any special law, Section 29(2) of the Limitation Act would be relevant and the same reads as under:

29(2). Where any special or local law prescribed for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which, they are not expressly excluded by such special or local law.

11. The aforesaid provisions show that applicability of the Limitation Act if provided under the special law for the different period than that provided under the Schedule of the Limitation Act, the provisions of the Limitation Act would apply as if Section 3 of the Limitation Act provides for the prescribed period of limitation for such purpose, but it further provides for the purpose of determining any period of limitation prescribed for any suit, appeal or application under any special or local law, the provisions contained in Sections 4 to 24 of the Limitation Act shall apply unless they are expressly not excluded by any such special or local law. The pertinent aspect is that Section 29(2) of the Limitation Act for applicability of Sections 4 to 24 of the Limitation Act to the period prescribed

under any special law, no distinction is made to the proceedings of any suit or appeal or application. It considers all the proceedings of any suit or appeal or application alike if provided by any special or local law for the purpose of applicability of Sections 4 to 24 of the Limitation Act. To say in other words, Sections 4 to 24 of the Limitation Act are made applicable to all the matters specified in special or local law for any suit or appeal or application unless they are expressly excluded by such special or local law. Identical question, of course from different angle, came up for consideration before this Court (learned Single Judge - one of us - Jayant Patel, J.) in the case of Union Bank of India (supra) wherein this Court while considering the contention as to whether Section 5 of the Limitation Act would apply to the proceedings u/s 17 of the Act before the Tribunal or not observed thus:

5. It is undisputed position that DRT while exercising the power u/s 17 of the Securitisation Act, is a Tribunal and not the Court. But the question does not rest there merely because it is not a Court so far as applicability of Section 5 of the Limitation Act is concerned. Section 5 of the Limitation Act for ready reference reads as under--

"5. Extension of prescribed period in certain cases--Any appeal or any application, other than an application under any of the provisions of Order 21 of the Code of Civil Procedure, 1908 (5 of 1908) may be admitted after the prescribed period, if the appellant or the applicant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application within such period."

Explanation -- The fact that the appellant or the applicant was misled by any order, practice or judgment of the High Court in ascertaining or computing the prescribed period may be sufficient cause within the meaning of this section.

6. In order to examine the applicability of Section 5 of the Limitation Act, reference to Section 29(2) of the Limitation Act would be relevant, which reads as under--

"(2) Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 5 to 24 (inclusive) shall apply only in so far, as and to the extent to which, they are not expressly excluded by such special or local law."

7. Therefore, on a plain reading of section of the Limitation Act, it appears that if there is express provision made under special law or in local law, prescribing the limitation for any suit or appeal or application, such shall apply for prescription of such period. However, the provisions contained in Sections 4 to 24 would apply to the extent unless they are expressly excluded by such special law. To say in

other words, if the Limitation Act provides for a particular period during which the application has to be made to any Tribunal or any authority, such would not apply in view of the express provisions u/s 17(1) of the Securitisation Act providing for preferring of application within a period of 45 days. However, so far as further application of the Limitation Act is concerned and more particularly from Sections 4 to 24, which includes Section 5 for condonation of delay, such would apply. Had it been a case where Section 17(1) of the Securitisation Act, worded with the outer period of Limitation for filing of the application or for exercise of the discretion for entertainment of the application after expiry of period of 45 days, the matter would have been different. But it appears that Section 17(1) is silent on the said aspect and to say in other words, the Legislature has not expressed the intention to curtail the further exercise of the power by the Tribunal for entertainment of the application after the expiry of the period of 45 days. In such circumstances, the provisions of Section 5 would apply to the discretion to be exercised by the Tribunal for entertainment of the application after the period of 45 days but taking into consideration the facts and circumstances on the aspects of sufficient cause and to condone the delay or not.

8. As such, the contention of the learned Counsel for the petitioner that Section 5 of the Limitation Act would only apply to the Court and not to the Tribunal or any proceedings before the authority other than the Tribunal is negated by this Court as back as in the year 1982 in the case of Mahesh Harilal Khamar v. B.N. Narasimhan, 1982 GLH 700, wherein this Court at Para 5 observed as under--

5. Under these circumstances, two questions would squarely arise for consideration viz. whether the first respondent could invoke the powers u/s 5 of the Limitation Act, and (2) whether this was a fit case in which he ought to have entertained the appeal on merits by condoning the delay on the part of the petitioner in preferring appeal before him. So far as the first question is concerned, the first respondent has already held in favour of the petitioner namely that Section 5 of the Limitation Act can be pressed in service by the petitioner for getting the delay in preferring appeal condoned. But Mr. Vakharia, the learned Advocate appearing for respondent No. 2 Market Committee, submitted before me that the aforesaid view of the first respondent is patently erroneous. Mr. Vakharia contended that Section 5 of the Limitation Act, 1963 can apply to Courts and Court proceedings as its very language suggests and that the first respondent Director of Agricultural Marketing and Rural Finance though acting as an appellate authority was not a Court *stricto sensu* and consequently Section 5 of the Limitation Act could never apply to the appellate proceedings before him as envisaged in Section 27(5) of the Act. In order to appreciate the aforesaid contention of Mr. Vakharia it is first necessary to have a look at the necessary statutory provisions. Section 29(2) of the Limitation Act, 1963 provides that where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as if such period were the period prescribed by the Schedule and for the purpose of determining any period

of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as, and to the extent to which they are not expressly excluded by such special or local law. For the applicability of Section 29(2) of the Limitation Act what is required to be found out is whether any special or local law prescribes a different period of limitation for any suit, appeal or application. It cannot be gainsaid that Section 27(5) of the Gujarat Agricultural Produce Market Act, 1963 does provide a period of 30 days for preferring appeal and to that extent the Agricultural Produce Market Act, 1963 is a special law providing for different period of limitation. The period of 30 days for preferring appeal u/s 27(5) of the Act is certainly a period different from the one prescribed in the Schedule of the Indian Limitation Act, 1963 which does not provide any period for preferring any such appeal. Therefore, it must be held that special law namely the Gujarat Agricultural Produce Market Act, 1963 does provide a different period of limitation. Once that conclusion is reached, the consequences laid down by Section 29(2) must follow. Accordingly, Section 3 of the Limitation Act would automatically apply as if such period was prescribed by the Schedule of the Limitation Act. Not it is necessary to note that Section 3(1) of the Limitation Act states that subject to the provisions contained in Sections 4 to 24 (inclusive), every suit instituted, appeal preferred, and application made after the prescribed period shall be dismissed, although limitation has not been set up as a defence. Thus the appeal preferred by the petitioner beyond 30 days would be liable to be dismissed on the ground of limitation even though such a defence may not have been urged, as laid down by Section 3(1) of the Act. It is obvious that when special law provides for the period of limitation different from that provided by the Limitation Act and once Section 3 of the Limitation Act gets attracted by virtue of Section 29(2) to the proceedings before the concerned authority acting under the Special Law which has to enforce the period of limitation, said authority will have to apply the provisions of Section 3 of the Limitation Act to the proceedings presented before it under the provisions of the concerned special law or the local law, as the case may be. It cannot be disputed for a moment that 30 days" period of limitation is provided for appeal to the first respondent u/s 27(5). Therefore, it is for the first respondent to apply Section 3 of the Limitation Act and to dismiss the concerned appeal if it is found to be barred by time. If the injunction prescribed by Section 3(1) has to operate by virtue of Section 29(2) the said injunction must necessarily bring in its wake all the rest of the provisions of the said Sub-section (1) of Section 3. As stated above, Section 3(1) of the Limitation Act itself provides that its operation is subject to Sections 4 to 24. Consequently, if the provisions of Sections 4 to 24 are made applicable, they would necessarily override and super-impose themselves upon the operation of Section 3(1) of the Limitation Act. In other words, the legislative mandate u/s 3(1) has to be read subject to Sections 4 to 24 following the said section. Section 5 is necessarily included in the conspectus of Sections 4 to 24. It is trite to say that if Section 3 applies to the first respondent acting u/s 27(5) of the Act then it must follow as a necessary corollary that Section 5 of the

Limitation Act would equally apply by virtue of Section 29(2) read with Section 3(1) of the Limitation Act. It cannot be urged for a moment that Section 3(1) of the Limitation Act would apply but Section 5 thereof would not apply to the first respondent's proceedings because he is not a Court. While Section 29(2) is attracted the entire machinery of Sections 3 to 24 of the Limitation Act gets imported and would automatically apply to the proceedings before the concerned authority under the given special or local law has to enforce the period of limitation for any appeal or application before such authority, implicit in the power would be the power to condone the delay which would get imported as part and parcel of the entire machinery of Sections 3 to 24 of the Limitation Act that would apply by virtue of Section 29(2) of the Limitation Act to such proceedings before the concerned authorities acting under the special or local law. This is the logical effect of the applicability of Section 29(2) of the Limitation Act and hence the question whether the concerned authority is a Court within the strict meaning of the term as envisaged by the Limitation itself, would necessarily pale into insignificance.

9. Therefore, the contention, as such, can be said as having considered and negated by this Court, as already ruled as per the above referred decision that the Section 5 of the Limitation Act would also apply to the statutory authority under the special law when it is not expressly barred or prohibited.

10. If the matter is to be considered in light of the provisions of the Securitisation Act read with the provisions of Non Performing Assets Act and the Limitation Act, taking into consideration that the Securitisation Act is new Act and the DRT is assigned with such power under the Special Act, then also, the position would not be altered for application of Section 5 of the Limitation Act. At this stage, it would be profitable to refer to the decision of the Bombay High Court in the case of UCO Bank v. M/s. Kanji Manji Kothari & Ors. in Writ Petition No. 3566 of 2007 decided on 19.12.2007. The Division Bench of the Bombay High Court in the said decision, inter alia observed at Paras 69 to 77 as under--

69. In this case, we are concerned with a special law which prescribes a different period of limitation so far as application made by the borrower u/s 17(1) is concerned. Section 17(1) reads as under--

17. Right to appeal--(1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taker, by the secured creditor or his authorized officer under this Chapter, (may make an application along with such fee, as may be prescribed) to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measures had been taken.

70. So far as secured creditor is concerned, Section 36 of the SARFAESI Act states that the period of limitation as prescribed in the Limitation Act would be applicable. Section 36 reads as under--

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 (36 of 1903).

71. Therefore, the Legislature has made two different provisions for the borrower and the secured creditor so far as period of limitation is concerned. On a proper reading of the SARFAESI Act and the RDDBFI Act, we are unable to come to a conclusion that this indicates that the Legislature has consciously excluded the application of the Limitation Act to applications made by the borrower or the aggrieved person u/s 17 of the SARFAESI Act.

72. Section 35 of the SARFAESI Act gives it an overriding effect. Section 37 states that application of other laws is not barred. It reads thus--

37. Application of other laws not barred--The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

73. Section 17(7) states that the DRT shall, as far as may be, dispose of the applications in accordance with the RDDBFI Act and the Rules made thereunder. u/s 22 of the RDDBFI Act, the DRT is not bound by the procedure laid down by the Civil Procedure Code, but shall be guided by the principles of natural justice and shall have power to regulate its own procedure. Under the said Section, Debts Recovery Tribunal, Maharashtra and Goa Regulations of Practice, 2003 have been enacted. Under Regulation 3(7), "interlocutory application" inter alia means application for condonation of delay.

74. Section 24 of the RDDBFI Act states that the provisions of the Limitation Act, 1963 shall, as far as may be, apply to an application made to a Tribunal. In Transcore's case (supra), the Supreme Court has, after considering the statement of objects and reasons of the SARFAESI Act, the scheme of the SARFAESI Act and the nature of its provisions, held that the enactment of SARFAESI Act is not in derogation of the RDDBFI Act. Their object is recovery of debts by non adjudicatory process and they provide cumulative remedies to the secured creditor. In fact, Section 37 of the SARFAESI Act states that the provisions of the SARFAESI Act shall be in addition to and not in derogation to the RDDBFI Act. If we examine the relevant provisions of the SARFAESI Act and the observations of the Supreme Court in Transcore's case (supra), the conclusion is irresistible that Section 5 of the Limitation Act is applicable to the SARFAESI Act. There is no express exclusion of the Limitation Act. So far as borrower's applications u/s 17(1) are concerned, a different period of limitation is prescribed. Hence, on a bare reading of Section 29(2), Section 5 of the Limitation Act would be applicable to them. So far as the secured creditor is

concerned, he can take measures u/s 13(4) within the period prescribed under the Limitation Act. Though Section 35 gives overriding effect to the SARFAESI Act, Section 37 states that application of other laws is not barred and the SARFAESI Act is in addition to RDDBFI Act and not in derogation thereof. It is important to note that u/s 17(7), the DRT has to dispose of the applications in accordance with the RDDBFI Act and the rules made thereunder and Section 24 of the RDDBFI Act makes provisions of the Limitation Act applicable to the application before the DRT. Since after considering the scheme, provisions and object of the SARFAESI Act, the SARFAESI Act and the RDDBFI Act are held complementary to each other by the Supreme Court in Transcore's case (supra), we hold that the provisions of Section 5 of the Limitation Act are applicable to the provisions under the SARFAESI Act. This will also lead to even treatment to the secured creditor as well as to the borrower or any aggrieved person. We may quote the observations made by the Supreme Court in Mardia Chemical's case (supra), while disposing of the matter. The Supreme Court observed as under--

Before we part with the case, we would like to observe that where a secured creditor has taken action u/s 13(4) of the Act, in such cases, it would be open to borrowers to file appeals u/s 17 of the Act within the limitation as prescribed therefor, to be counted with effect from today.

75. We are aware that the powers of the Supreme Court are far more extensive and perhaps the above observations were made by the Supreme Court because the matters with which it was concerned were pending for a long time. But we draw some support from these observations to strengthen our view that if Section 5 of the Limitation Act is held to be applicable to the appeal/application u/s 17(1) of the SARFAESI Act that will be in the interest of justice.

76. We are mindful of the fact that expeditious and speedy disposal of proceedings is the essence of the SARFAESI Act. This is seen from Section 17(5) which requires DRT to dispose of an application within 60 days from the date of the application. Under proviso thereof, DRT can extend the said period for reasons to be recorded in writing but the total period of the application shall not exceed four months from the date of the application. If the application is not disposed of by the DRT within four months, any party to the application may make an application to the DRAT for appropriate direction to the DRT for expeditious disposal and the DRAT shall make an order for expeditious disposal. In the light of the settled legal principles as regards applicability of the Limitation Act and in the interest of justice, we have held that Section 5 of the Limitation Act is applicable to the proceedings u/s 17(1) of the SARFAESI Act. However, while dealing with applications for condonation of delay, the DRT must bear the scheme of the SARFAESI Act in mind and should not allow any person to procrastinate the proceedings by making frivolous applications for condonation of delay.

77. The above discussion leads us to the following conclusions--

(a) Forty-five days" period of limitation prescribed u/s 17(1) of the SARFAESI Act starts running from the date when symbolic possession is taken or from the date when actual possession is taken as there is no dichotomy between the two.

(b) The provision of Section 5 of the Limitation Act is applicable to the proceedings u/s 17(1) of the SARFAESI Act.

11. The reference may also be made to the another decision of the Madras High Court in the case of Ponnusamyi & Anr. v. The Debts Recovery Tribunal & Anr., CRP (NPD) No. 253/08 decided on 9.2.2009. In the said decision, the High Court of Madras inter alia observed at paras 36 to 39 as under--

36. Therefore it is clear that Section 5 would apply even to some types of applications, though it may not apply to suits. The proceedings before the Debts Recovery Tribunal u/s 17 of the SARFAESI Act, though original in nature, should be treated as applications and not strictly like suits. Therefore the provisions of Section 5 of the Limitation Act, in my considered view, would apply to applications u/s 17 of the SARFAESI Act. But the same logic cannot be extended to applications filed u/s 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, since Section 24 of the 1993 Act makes the provisions of the Limitation Act, 1963 applicable to an application under the Act, meaning thereby that an application u/s 19 of the 1993 Act is to be treated as a suit.

37. Section 17(1) of the SARFAESI Act, prescribes a period of limitation of just 45 days for filing an application, challenging any of the measures taken by the secured creditor u/s 13(4) of the Act. The remedy u/s 17(1) is virtually a remedy in respect of a right of redemption. Therefore, to hold that Section 5 of the Limitation Act, will not apply to an application u/s 17(1) would virtually defeat the valuable right of redemption available to a mortgagor. This right of redemption normally gets extinguished after the sale of the property. Therefore the apprehension expressed by the learned Counsel for the Bank that the parties may come up with applications after a huge delay and defeat the object of the Act for speedy recovery of dues, may not be well founded for the simple reason that after losing possession of the property u/s 13(4), a debtor cannot afford to wait for long. If he waits for long, the property may get sold and his rights may get extinguished. Hence the application of Section 5 of the Limitation Act, to proceedings u/s 17(1) of the SARFAESI Act, would neither defeat the rights of the secured creditor nor cause irreparable hardship to the secured creditor.

38. In Karnataka State Financial Corporation Vs. N. Narasimahaiah and Others, , the Supreme Court held as follows--

40. Right to property, although no longer a fundamental right, is still a constitutional right. It is also human right. In the absence of any provision either expressly or by necessary implication, depriving a person therefrom, the Court shall not construe a provision leaning in favour of such deprivation.

In a case where a Court has to weigh between a right of recovery and protection

of a right, it would also lean in favour of the person who is going to be deprived therefrom. It would not be the other way round.

39. Viewed in the context of the ratio laid down by the Supreme Court extracted above, it could be seen that the right conferred upon the secured creditor u/s 13(4) of the SARFAESI Act, is a right of recovery. The right conferred upon the debtor or the surety u/s 17 is a right to save one's own property. To hold that the fate of a debtor or surety will be sealed in a period of 45 days from the date of initiation of the measures u/s 13(4) and that he would be left remediless after the said period on account of non-availability of Section 5 of the Limitation Act, would defeat the right to property. Therefore the Court has to choose an interpretation which would lean in favour of the right to property. If so done, the conclusion is irresistible that Section 5 of the Limitation Act, would apply to applications filed u/s 17 of the SARFAESI Act.

12. In view of the above, even if the matter is examined in light of the provisions of the SARFAESI Act for applicability of Section 5 of the Limitation Act, the position would remain the same as was held by this Court in the case of Mahesh Harilal Khamar v. B.N. Narasimhan (*supra*).

13. However, the learned Counsel appearing for the petitioner heavily relied upon the decision of the Apex Court in the case of Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, , and contended that the Tribunal is held to be not a Court, therefore, the provisions of Section 5 of the Limitation Act would not apply. In furtherance to his submission, he also relied upon the another decision of the Apex Court in the case of Consolidated Engg. Enterprises Vs. Principal Secy. Irrigation Deptt. and Others, and contended that as per the view expressed by the Apex Court, (speaking through Hon"ble Mr. Justice Raveendran) the Limitation Act would not apply when there is already a Special Act providing for special limitation for the Tribunal. Therefore, it was contended that when the period of 43 days has been expressly provided under the special law, i.e. SARFAESI Act, provision of Limitation Act would not apply. Therefore, the learned Counsel contended that the error of law is committed by the Tribunal apparent on the record.

14. As observed earlier, even if the contention of the learned Counsel is considered and accepted that it is a Tribunal and not the Court as per the view taken by the Apex Court in the case of Nahar Industrial Enterprises Ltd. (*supra*), then also in view of the observations made hereinabove, it cannot be accepted that Section 5 of the Limitation Act would not apply to the proceedings u/s 17 of the SARFAESI Act before the Debts Recovery Tribunal. The reliance upon the decision of the Apex Court in the case of Consolidated Engineering Enterprises (*supra*) is ill-founded inasmuch the observations of the Apex Court are to be considered and applied to the facts of that case. If such observation are considered, what is being held by the Apex Court that if there is express period prescribed in the special law, such would apply and not the prescription as provided under the Limitation Act, but the same cannot be read in absolute so as

to excluded the applicability of other provisions of the Limitation Act which may apply, more particularly in view of the no express bar provided under the special law. Therefore, such a decision is of no help to the learned Counsel for the petitioner.

15. In view of the above, it cannot be said that the Tribunal has committed any error apparent on the face of the record which may call for interference by this Court in a petition under Article 227 of the Constitution of India.

12. Mr. Kavina, learned Counsel appearing for the petitioner is right in contending that this Court (learned Single Judge) had no occasion to examine the matter in light of the examination of the matter as considered by the Calcutta High Court in the case of Akshat Commercial Private Limited (supra). He submitted that the decision of the Calcutta High Court is broadly based on the distinction that (i) the proceedings u/s 17 of the Act are original in nature like suit, (ii) the proceedings are not before the Court, but are before the Tribunal, and (iii) outer limit has been provided u/s 17 of the Act for disposal of the matter. Therefore, he submitted that if the aforesaid three aspects are considered, different view than as taken by the learned Single Judge of this Court deserves to be taken similar to the view taken by the Calcutta High Court in the case of Akshat Commercial Private Limited (supra). Therefore, we need to examine as to the aspect of applicability of Section 5 of the Limitation Act bearing in mind the aforesaid three aspects and whether any different view deserves to be taken or not.

On 12th December, 2012:

13. As observed earlier, Section 29 of the Limitation Act makes no distinction for any suit or appeal or application provided by the special or local law. It is true that as observed by the Apex Court in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., read with the judgment of the Apex Court in the case of Transcore Vs. Union of India (UOI) and Another, , the proceedings u/s 17 of the Act are not the appellate proceedings and may be termed as the original proceedings, but then also when the special law uses the language of the word "appeal", it cannot be said that the proceedings u/s 17 of the Act can be termed as "suit" for the purpose of applicability of the Limitation Act if one goes by the plain and literal meaning of the language used by the Parliament in the Act. Even, if it is considered that literal meaning cannot be accepted and in view of the above referred decisions of the Apex Court in the case of Mardia Chemicals Limited (supra) and M/s Transcore (supra), the proceedings u/s 17 of the Act may be termed as analogous to the proceedings of any suit, then also in our view, as per the language of Section 29(2) read with the language used under the special law i.e. the Act in the present case, the distinction as considered by the Calcutta High Court in the case of Akshat Commercial Private Limited (supra) cannot be emphasized. At this stage, we may refer to the decision of the Apex Court in the case of The Kerala State Electricity Board, Trivandrum Vs. T.P. Kunhaliumma, , wherein the Apex Court had an occasion to consider applicability of the provisions of the Limitation Act in light of

the provisions of Section 16(3) of the Indian Telegraph Act enabling the owner or occupier of the property to demand compensation by preferring the petition to the District Judge. The Apex Court, in the said decision did observe, inter alia, at Para 18 as under.

.... But it has to be an application to a Court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when Court is closed and extension of prescribed period if applicant or the appellant satisfies the Court that he had sufficient cause for not preferring the appeal or making the application during such period.

14. Therefore, even in case where the proceedings were provided by the special law for a petition which may be termed as original in nature rather at par with the suit, the Apex Court did observe for application of Sections 4 and 5 of the Limitation Act in respect of the special law i.e. Indian Telegraph Act read with the Indian Electricity Act. Hence, in our view, applicability of the Limitation Act by virtue of Section 29(2) of the Limitation Act would not be different merely because if under any special law, the proceedings by way of an appeal or application has been provided which are in the nature of original proceedings.

15. The aforesaid is with the additional circumstance that under the RDDBFI Act whenever any application is made to the Tribunal by the Bank or financial institution for recovery of the amount, it is to be termed as the original proceedings and Section 24 of the RDDBFI Act expressly provides for the application of the provisions of the Limitation Act. Further, as recorded earlier, Section 24 of the RDDBFI Act is imported under the Act for the proceedings u/s 17 of the Act by virtue of the provisions of Section 17(7) of the Act. This shows that the Parliament, while applying the provisions of the Limitation Act to the RDDBFI Act or to the present Act for the purpose of original proceedings, may be at par with the suit proceedings, made no distinction for any applicability of the provisions of the Limitation Act, but it can rather be said that consciously the provisions of the Limitation Act have been provided by the express provisions of Section 24 of the RDDBFI Act which are to apply by virtue of the provisions of Section 17(7) of the Act to the proceedings u/s 17 of the Act.

16. Next aspect is that whether the proceedings before the Court or Tribunal would make any difference for applicability of the provisions of the Limitation Act or not. Again, if special law by express provisions provides for making of any application or appeal before any forum, it is to such forum the provisions of the Limitation Act would be applicable by virtue of the provisions of Section 29(2) of the Limitation Act. Not only that, but the said aspect has been considered in the decision of this Court in the case of Mahesh Harilal Khamar v. B.N. Narasimhan, 1982 GLH 700 which has also been considered in the decision of this Court in the case of Union Bank of India (supra) at Para 8 and relevant observations for ready reference, we may reproduce as under:

.....As stated above, Section 3(1) of the Limitation Act itself provides that its

operation is subject to Sections 4 to 24. Consequently, if the provisions of Sections 4 to 24 are made applicable, they would necessarily override and super-impose themselves upon the operation of Section 3(1) of the Limitation Act. In other words, the legislative mandate u/s 3(1) has to be read subject to Sections 4 to 24 following the said section. Section 5 is necessarily included in the conspectus of Sections 4 to 24. It is trite to say that if Section 3 applies to the first respondent acting u/s 27(5) of the Act then it must follow as a necessary corollary that Section 5 of the Limitation Act would equally apply by virtue of Section 29(2) read with Section 3(1) of the Limitation Act. It cannot be urged for a moment that Section 3(1) of the Limitation Act would apply but Section 5 thereof would not apply to the first respondent's proceedings because he is not a Court."

".....This is the logical effect of the applicability of Section 29(2) of the Limitation Act and hence the question whether the concerned authority is a Court within the strict meaning of the term as envisaged by the limitation itself, would necessarily pale into insignificance.

17. In any case, apart from the above aspect as observed in earlier paragraph, when Section 24 of the RDDBFI Act is imported by virtue of Section 17(7) of the Act for the purpose of applicability of the Limitation Act, we are of the view that whether the proceedings are before the Court or Tribunal would not make any difference for applicability of the Limitation Act by virtue of the provisions of Section 29(2) of the Limitation Act if the forum is so provided by any such special law like the Act in the present case.

18. The third aspect is pertaining to the outer limit as provided by Section 17 of the Act for disposal of the application and enabling any party to approach before the higher forum i.e. DRAT as per the provisions of Section 17(5) read with Section 17(6) of the Act. In our view, initiation of the proceedings at the first instance before any forum which is the Tribunal in the present case would be one aspect, whereas conclusion of the proceedings is another aspect. Both operate with different time limit i.e. for filing of an application u/s 17(1) of the Act, time limit of 45 days has been provided, whereas for conclusion of the proceedings, 60 days time limit has been provided with outer limit of four months. It is by now well settled that outer limit provided for conclusion of any judicial proceedings or proceedings at par with the judicial proceedings cannot be termed as mandatory to oust the jurisdiction of the Tribunal, but such outer limit provided by the statute is to be normally termed as directory. It can all be gainsaid that merely because an application is not decided by the Tribunal within outer limit, the Tribunal would not become functus officio after expiry of the period. If such interpretation is made, it would frustrate very purpose of providing separate inbuilt mechanism and may also result into further complication which may be irreversible. Therefore, merely because the outer limit is provided by the Parliament u/s 17(5) with a right given to a party to the proceedings to move appropriate application before the higher forum i.e. DRAT, it is not possible for us

to take view that the Parliament has impliedly provided for no application of the Limitation Act for the purpose of time limit provided u/s 17(1) of the Act.

19. Hence, we find that in view of the aforesaid observations and discussions, with respect, we are unable to agree with the view taken by the Calcutta High Court in the case of Akshat Commercial Private Limited (supra) and we find that even if distinctions as were borne in mind by the Calcutta High Court in the case of Akshat Commercial Private Limited (supra) are considered, it is not possible for us to take a view that Section 5 of the Limitation Act would not be applicable to the proceedings u/s 17(1) of the Act for the purpose of condonation of delay in making the application.

20. In the case of Om Prakash (supra), the Apex Court was considering the question for exercise of the power for condonation of delay in filing the application for leave to contest the eviction petition which is not the facts situation in the present case. It is hardly required to be recorded that filing of the proceedings before any forum at the first instance is one thing and the application for leave to defend or leave to contest is another thing. Since such question does not arise at all as to whether there is any power to condone the delay in filing any application for leave to contest the eviction proceedings, we find that the decision upon which reliance is placed is ill-founded. Hence, no help to the petitioner.

21. In view of the aforesaid observations and discussion, we find that the provisions of Section 5 of the Limitation Act as are applicable, the Tribunal had power to condone the delay. Under the circumstances, the contention raised on behalf of the petitioner cannot be accepted.

22. On the aspect of exercise of discretion, as such, no argument is raised whether it was a case for condonation of delay or not, even, if Section 5 of the Limitation Act would be applicable, but we find it proper to record that the Tribunal cannot be said to have committed any error for exercise of discretion for condonation of delay since serious disputes were raised of the ownership of the property by the petitioner before the Tribunal and security interest created by her brother in favour of the petitioner - Bank. If the owner of the property had no knowledge, it could be said that there was sufficient ground for condonation of delay.

23. Learned Counsel Mr. Kavina, lastly, contended that this Court may examine the matter further in light of the interim order passed by this Court on 9.11.2012 whereby the Court had observed for refund of the money to the auction purchaser if the original petitioner before the Tribunal or borrower-respondent No. 2 herein pays or agrees to pay the amount of Rs. 4.96 lacs to the petitioner-Bank. He also submitted that in case if this Court is not inclined to consider the said aspect being outside the scope of the present matter as the Tribunal has not examined the merits of the case, this Court may observe that the Tribunal will be at liberty to examine the matter in accordance with law without being in any

manner influenced by the observations made by this Court in the interim order.

24. Whereas, Mr. Gaurav Mehta for the original petitioner before the Tribunal - respondent No. 1 herein and Mr. Raval for the borrower-respondent No. 2 herein stated that they are not agreeable to deposit the amount at a time, but they may consider the said aspect if the amount of Rs. 1 lac is deposited and possession is handed over to them and remaining amount be deposited within some time without prejudice to their rights and contentions before the Tribunal. Whereas, Mr. Utpal Panchal, learned Counsel appearing for respondent Nos. 3 to 5 submitted that since respondent Nos. 3 to 5 did not remain present after the process was served by this Court in the present petition, in pursuance of the interim order passed by this Court, seals have been applied by the District Collector for securing the presence of respondent Nos. 3 to 5. He submitted that, thereafter, respondent Nos. 3 to 5 have appeared and he is representing them. He submitted that, even if the matter is to be further considered by the Tribunal on merit in accordance with law, the seals applied be removed and respondent Nos. 3 to 5 who are purchasers of the property should be in a position to enjoy the property and he submitted that if the interim order is passed by this Court for maintenance of status quo qua transfer or alienation by respondent Nos. 3 to 5 until the Tribunal considers the matter, they have no objection for such purpose, but of course, the same would be without prejudice to the rights and contentions of respondent Nos. 3 to 5 as may be available in law before the Tribunal.

25. It is an admitted position that the Tribunal has not examined the merit of the application u/s 17 of the Act, but the present petition is at the stage of condonation of delay inasmuch as when the Tribunal condoned the delay, the petitioner - Bank has approached to this Court. Therefore, even if the contention of the petitioner is not accepted, consequence would be that the proceedings before the Tribunal would remain and the matter may be required to be examined on merits. Hence, it appears that it would be premature to consider the merit of the matter in the present proceedings unless the parties to the proceedings are in agreement for any settlement. The proposal as submitted by respondent Nos. 1 and 2 is not acceptable to respondent Nos. 3 to 5 for handing over of the possession, etc., therefore, we find that the matter does not deserve to be considered now in light of disagreement on the part of the parties to the proceedings for any settlement. Further, as the Tribunal has yet not examined the matter on merit, the parties should be at liberty to raise all the contentions as may be available in law before the Tribunal on merit.

26. It is true that respondent Nos. 3 to 5 did not respond at one point of time in the present proceedings after the process was received by them and, therefore, this Court in the interim order, to secure the presence, had observed for application of seal and the seals have been applied, but now when the respondent Nos. 3 to 5 have appeared through the Advocate and if, ultimately, the matter is to be considered by the Tribunal, the seals applied by the District

Collector deserve to be lifted and the reason being that there cannot be further adverse situation than as it has existed at the time when the Tribunal disposed of the application for condonation of delay. Hence, it is directed that respondent No. 6-District Collector shall remove the seals applied on the flat in question and respondent Nos. 3 to 5 shall be at liberty to enjoy the property, but with further direction that they shall not transfer possession or title of the flat in any manner whatsoever until the Tribunal further considers the matter on the aspect of the grant of interim relief or otherwise and such direction shall be subject to further order which may be passed by the Tribunal when the application is considered on merit. Mr. Devnani, learned AGP shall communicate the order to the District Collector.

27. In any case, the interim order or any observation made in the interim order would no more remain in operation once the final order is passed and the interim order, if any, would merge into the final order. The Tribunal, since, has not examined the merit of the matter and the present petition is at the stage of condonation of delay, naturally, the Tribunal will be at liberty to take an independent view of the matter on the basis of the evidence available before it without in any manner influenced by any observation made by this Court in the interim order.

28. Hence, we find that the petition deserves to be dismissed. Therefore, dismissed, but with observation that the Tribunal shall be at liberty to take an independent view of the matter on the basis of the evidence available before it. Rule is discharged.

29. On the aspect of cost, we find that considering the facts and circumstances, appropriate cost deserves to be imposed. Hence, the petitioner - Bank shall pay the cost of Rs. 2500/- to respondent No. 1, Rs. 2500/- to respondent No. 2, Rs. 2500/- to respondent Nos. 3 to 5 in one set and Rs. 1000/- to respondent No. 6, in all Rs. 8500/-. The amount cost shall be paid by the petitioner - Bank to the respondents within two weeks from today.

30. In view of the order passed in the main matter, the Civil Application would not survive and stands disposed of. After pronouncement of the order, Mr. Jani, learned Counsel for the petitioner Bank, prays that interim order granted by this Court for staying the proceedings before the Tribunal be stayed for some time so as to enable his client to approach before the higher forum. Considering the facts and circumstances, as the matter is at the stage of condonation of delay and the Tribunal is yet to examine the matter on merit, the said prayer is declined.

Section