

(2019) 11 BOM CK 0063
In the Bombay High Court
Case No : Writ Petition No. 5204 Of 2019

M/s. Coverntry Springs And Engineering Company Limited APPELLANT
And Ors

Vs

M/S. Assets Reconstruction Company Of India Limited RESPONDENT
(ARCIL) And Ors

Date of Decision : 20-11-2019

Acts Referred:

Securitisation And Reconstruction Of Financial Assets And Enforcement Of Securities Interest Act, 2002 — Section 2(zd), 13(1), 13(2), 13(4), 13(10), 14, 17, 17(1), 18, 18(1), 18(2), 19(1)
Transfer Of Property Act, 1882 — Section 52
Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 — Section 2(g), 11, 12, 13(2), 17, 17A, 18, 19
Code Of Civil Procedure, 1908 — Order 47 Rule 1(1)
Debts Recovery Tribunal (Procedure) Rules, 1993 — Rule 7
Constitution Of India, 1950 — Article 136, 141, 226

Citation : (2019) 11 BOM CK 0063

Hon'ble Judges : Sunil B. Shukre, J;Milind N. Jadhav, J

Bench : Division Bench

Advocate : S.S. Sitani, S.V. Purohit, S.N. Kumar, M.G. Bhangde, R.S. Sundaram, U.R. Tanna

Final Decision : Dismissed

Judgement

Milind N. Jadhav, J

1. Heard. Rule. Rule made returnable forthwith. Heard finally by consent of the parties.

2. By the present Petition, the Petitioners are challenging the order dated 30.05.2018 passed by Debt Recovery Appellant Tribunal, Mumbai (hereinafter referred to as 'the DRAT') in Misc. Application No. 626/2011 in Appeal No. 135/2011. The Petitioners are the Appellants in the appeal filed before the DRAT. The order directs the Petitioners to deposit 50% of the amount stated in the

notice issued under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Act, 2002 (in short 'the SARFAESI Act'). The Petitioners are called upon to deposit a sum of Rs. 4.57 crores in addition to Rs. 1.75 crores already deposited by the Petitioners on 12.07.2017. Respondent no. 1 is the assignee in whose favour State Bank of India has assigned the debt of Petitioner No. 1 perpetually. Respondent no. 2 is the purchaser of the two properties belonging to Petitioner No. 1 viz. Alampur property (Land admeasuring 12.1875 acres situated at Village Alampur, National Highway No. 6, Andul, District Hawraha, West Bengal, Mouza Alampur (land under JL No. 25) and Nagpur property (Plot no. D2, in Nagpur Industrial Area of M.I.D.C., Village Wadi, Tah. Wadi, District Nagpur, admeasuring 60,905 sq. meters alongwith building and construction standing therein.) in the proceedings before the DRAT.

3. Shri Purohit, learned counsel appearing on behalf of the Petitioners submitted that Respondent no. 1 could not have taken any steps under the SARFAESI Act pertaining to execution of claim of assignment dated 17.08.2007 whereby Respondent no. 1 had assigned its debt to B.M.W. Industries Ltd. for a sum of Rs. 8.1 crores (approximately) with a further fee of Rs. 3 crores admittedly paid to Respondent no. 1 for acting as Resolution Advisory Officer to B.M.W. Industries Ltd. He emphatically submitted that by virtue of the aforesaid agreement of assignment, Respondent no.1 no longer remained a secured creditor and thus had no claim whatsoever against the Petitioners. According to him, the provisions of Section 18(1) of the SARFAESI Act would therefore not apply to the present case. He submitted that the impugned order directing the Petitioners to deposit 50% of the amount of debt due as claimed by the secured creditor, inter alia, under the second proviso to Section 18(1) of SARFAESI Act would not apply to the Petitioners.

4. Shri Purohit submitted that Respondent no. 1 did not produce any computation/calculation of debt due in the entire proceedings and thus there was no reason for the DRAT to accept "debt due" as claimed by Respondent no. 1. He submitted that Respondent No. 1 filed Application No. 168/2004 to implead and substitute itself in place of State Bank of India. According to him, since this application came to be dismissed without giving an opportunity to Respondent no. 1 to substitute itself in place of State Bank of India, the "debt due" as per the second proviso to Section 18(1) of the SARFAESI Act is required to be considered as Nil. He submitted that there was no debt due which could be claimed by the secured creditor and more importantly since there was no secured creditor, no debt could be determined by DRAT and therefore, applicability of the second proviso to Section 18(1) of the SARFAESI Act could not have been done in the present case while passing the impugned order and directing the Petitioners to deposit the sum of Rs. 4.57 crores.

5. Shri Purohit vehemently submitted that DRAT ought to have taken into account and appreciated the fact that Respondent no. 1 by a deed of Assignment

of debt dated 18.01.2008 (which was (preceded by agreement to assign the financial assets dated 17.08.2007) had entirely assigned the debt owed by the Petitioner to Respondent no. 1 to a third party viz. B.M.W. Industries Ltd. He submitted that this was an admitted position and never disputed by Respondent no. 1. He submitted that the Deed of Assignment dated 18.01.2008 was never produced by Respondent no. 1 before the DRAT. He submitted that w.e.f. the date of execution of deed of assignment on 18.01.2018, Respondent no. 1 ceased to be a secured creditor and thus there was no subsisting debt which was recoverable by Respondent no. 1 from the Petitioners. He submitted that the condition for 50% amount as pre-deposit stated in the impugned order ought not to have been considered in view of the fact that the secured creditor had already recovered by way of public auction, more than 50% of the amount claimed in the statutory notice issued under Section 13(2) of the SARFAESI Act in the present case. He submitted that on 25.08.2007 and 29.08.2007, Respondent no. 1 took physical possession of two immovable properties belonging to Petitioner no. 1 viz. Nagpur property/land admeasuring 60,905 sq. meters alongwith building and structure standing thereon and Alampur property/land admeasuring 12.1875 acres situated at Howrah in Kolkatta. He submitted that both the above properties were sold by Respondent no. 1 to Respondent no. 2 by private treaty for a total consideration of Rs. 7,60,50,000/-.

6. Shri Purohit submitted that Respondent no. 1 received a sum of Rs. 7,60,50,000/- pursuant to sale of properties which has been held by Respondent no. 1 from 17.08.2007. He submitted that if a secured creditor has recovered more than 50% of the amount claimed in the Notice issued under Section 13(2) of the SARFAESI Act, then there was no requirement of any pre-deposit for the purpose of appeal proceedings. He submitted that adding the accrued interest to the debt due was not permissible as has been done in the present case. He submitted that in the first place there was no claim by the secured creditor since Respondent no. 1 had assigned the debt way back in the year 2007-08. Therefore, according to him in the year 2011 when the appeal came to be filed, there was no secured creditor subsisting at that point of time. He submitted that the appeal filed by Petitioners before DRAT was allowed on merits by its order dated 13.01.2014. However, the said order came to be set aside by this Court in Writ Petition Nos. 1006/2014 and 3574/2014 filed by Respondent nos. 2 and 1 respectively. The Petitioners desired waiver of the condition of pre-deposit as sought by them under the proviso to Section 13(1) of the SARFAESI Act. He submitted that the order of remand dated 25.01.2018 passed by the High Court was made to enable DRAT to give reasons, but DRAT chose to completely change the context of the previous order and passed a wholly new order disallowing any waiver to the Petitioners and directing the Petitioners to deposit the additional sum of Rs. 4.75 crores after adjusting Rs. 1.75 crores which was already deposited. He submitted that the impugned order was not a speaking order in as much as no reasons were given by DRAT with respect to grant of waiver of pre-deposit in terms of the third proviso to Section 18(1) of the SARFAESI Act and

deserved to be set aside.

7. Shri Purohit submitted that Respondent no. 1 took forcible possession of the aforementioned two immovable properties belonging to Petitioner No. 1 i.e. at Nagpur and Kolkata even without obtaining any order under Section 14 of the SARFAESI Act. Being aggrieved by such action on behalf of Respondent no. 1, the Petitioners filed original Securitisation Application being SA No. 71/2007 on 08.10.2007. Despite pendency of the said application, Respondent no. 1 sold both the above immovable properties on 23.10.2007 and 24.10.2007 by way of private treaty without consent of the Petitioners for a total consideration of Rs. 7,60,50,000/-. The Securitisation Application no. 71/2007 came to be dismissed by the DRT on 03.06.2011. The Petitioners filed Appeal bearing no. 135/2011 before the DRAT, Mumbai alongwith Waiver Application bearing no. 626/2011. Waiver Application came to be initially allowed by DRAT by order dated 04.07.2011 and complete waiver of pre-deposit was granted to the Petitioners as requirement of deposit was dispensed owing to secured assets being sold and the secured creditor having recovered the amount claimed. He submitted that the order of waiver was recalled due to objections raised by Respondent no. 2. DRAT after hearing the parties, passed fresh order dated 11.04.2012, once again holding that requirement of pre-deposit under Section 18(1) stood satisfied. Respondent no. 2 filed Writ Petition No. 5005/2012 before this Court challenging the order dated 11.04.2012. The order of the High Court dated 01.11.2012 admitted the Petition and directed that outcome of the proceedings before DRAT would be subject to result of the Petition. Respondent no. 2 being aggrieved, approached the Hon'ble Apex Court and filed S.L.P. No. 35012/2012 against order dated 01.11.2012. The S.L.P. came to be dismissed as not pressed by Respondent no. 2. On 07.08.2013, this Court passed additional order in Writ Petition No. 5005/2012 directing Respondent no. 2 to take appropriate steps within a period of two weeks failing which Writ Petition would stand dismissed. Since Respondent no. 2 did not taken any steps within the aforesaid period of two weeks, Writ Petition No. 5005/2012 came to be dismissed automatically. DRAT in the meanwhile proceeded with final hearing of Appeal no. 135/2011 filed by the Petitioners and finally judgment dated 13.01.2014 came to be passed allowing the appeal filed by the Petitioners. Respondent nos. 1 and 2 being aggrieved by the above judgment filed two separate Writ Petitions in this Court being Writ Petition No. 3574/2014 and Writ Petition No. 1006/2014. By common order dated 15.04.2019, this Court allowed the Writ Petitions on the grounds of jurisdiction and remanded the case back to DRAT.

8. Shri Purohit submitted that in the meanwhile, Respondent no. 2 moved an application for restoration of the dismissed Writ Petition no. 5005/2012 which related to challenge of complete waiver order passed by DRAT. Writ Petition No. 5005/2012 came to be restored by this Court on 09.03.2015. Writ Petition No. 5005/2012 challenging the order of complete waiver by DRAT came to be allowed by this Court. However, on 13.01.2014, DRAT had already allowed the appeal filed by the Petitioners. Therefore, the order granting complete waiver was

quashed and set aside and parties were directed to appear before the DRAT for redressal of grievances as pre-condition for admission of appeal under Section 18(1) of the SARFAESI Act. The Petitioners filed S.L.P. no. 10625/2015 before the Hon'ble Apex Court challenging the order dated 09.03.2015. The S.L.P. came to be dismissed on 24.08.2016. Petitioners thereafter filed Review Application No. 1653/2016 for review of order dated 09.03.2015 which was also disposed of by this Court on 04.10.2016 keeping the contentions of the parties open for consideration. This order in review was also challenged by the Petitioners in the Hon'ble Apex Court which dismissed the S.L.P. on 27.02.2017 granting liberty to the Petitioners to make submissions before DRAT. The Hon'ble Apex Court modified its earlier order dated 27.02.2017 and by a fresh order dated 06.03.2017 held that in view of the order passed by DRAT in principal appeal no. 135/2011 pending before itself and other issues which were pending before this Court in Writ Petition No. 1006/2014, nothing survived in the matter.

9. Shri Purohit submitted that on 28.06.2017, DRAT gave a fresh hearing of the waiver application and directed the Petitioners to deposit 25% of the amount demanded by Respondent no. 1 in its statutory Notice dated 26.07.2006 issued under Section 13(2) of the SARFAESI Act. Respondent no. 1 in its statutory notice had claimed a sum of Rs. 6,96,58,955/- as outstanding debt and thus accordingly 25% of the said amount was computed at Rs. 1,75,00,000/-. The Petitioners deposited this amount with DRAT. Shri Purohit submitted that in the proceedings filed before DRAT-1, Kolkata, Original Application No. 168/2004 filed by State Bank of India against the Petitioners came to be dismissed. In the said O.A., the Petitioners had filed its counter-claim. The counter-claim filed by the Petitioners was kept pending for adjudication and still subsists as on date. He submitted that Respondent no. 2 challenged the order dated 20.06.2017 directing the Petitioners to deposit 25% of the amount demanded under Section 13(2) notice by filing Writ Petition No. 4683/2017 before this Court. On 25.01.2018, this Court disposed of the Writ Petition directing that Waiver Application would be decided by DRAT in accordance with law. He submitted that in the said Writ Petition, there was a specific prayer of mandamus seeking a direction to DRAT to direct the Petitioners to deposit 50% of the total debt due with interest thereon. According to him, since this specific prayer was not granted and the Writ Petition was partly allowed, it now did not require DRAT to enhance the amount of pre-deposit to 50% which has been done by the impugned order. He submitted that the Petitioners challenged the order dated 25.01.2018 before the Hon'ble Apex Court which dismissed the S.L.P. on 23.02.2018.

10. Shri Purohit submitted that thereafter Waiver Application was taken up for hearing by DRAT on 27.04.2018 and 04.05.2018 resulting in passing of the impugned order dated 30.05.2018, interalia, directing the Petitioners to deposit the 50% of the amount due as on 30.06.2011.

11. Shri Purohit summed up his submissions by submitting that Petitioners had

challenged the sale conducted by Respondent no. 1 in favour of Respondent no. 2 on important and critical grounds in as much as the said private treaty of sale was without consent of the borrower and was conducted by the secured creditor without giving the mandatory 30 days notice for sale. He submitted that sale of Petitioner no. 1's properties was carried out without valuing the said property situated at Nagpur and Kolkatta. He submitted that the combined value of the two properties was more than 40 crores on the date of sale whereas the sale had fetched Rs. 7,60,50,000/- only. He submitted that statutory Rules framed under Security Interest Enforcement Rules, 2002 were not followed, publication of possession notice and sale notice was not given, forcible possession of the two properties was taken without any order under Section 14 from the District Magistrate and several such grounds which go to the root of the matter have been taken by the Petitioners in their challenge to the sale, which is pending as on date.

12. In support of his submissions, Shri Purohit referred to and relied upon the following judgments on the proposition that if a secured creditor has recovered its debt or part of it by sale of secured assets the sale proceeds can be taken into account as pre-deposit under the provisions of Section 18 of the SARFAESI Act.

i) Judgment of Hon'ble Delhi High Court in Poonam Manshani Vs. J&K Bank Ltd. [2010 (1) DRTC 527];

ii) Judgment of Hon'ble Delhi High Court in Shrishti Arogyadham Pvt. Ltd. Vs. Punjab National Bank & Anr. [MANU/DE/4444/2018];

iii) Judgment of Hon'ble Allahabad High Court in Gopalji Gupta Vs. Debts Recovery Appellate Tribunal [CMWP No. 46314 of 2013, dated 09.07.2013];

iv) Judgment of Hon'ble Allahabad High Court in Gopalji Gupta Vs. Debts Recovery Appellate Tribunal [CMWP No. 46314 of 2013 dated 09.07.2013];

v) Judgment of Hon'ble Allahabad High Court in Smt. Sarla Devi Mishra Vs. DRAT, Allahabad [Writ C No. 45995 of 2015 dated 20.08.2015]; and

vi) Judgment of Hon'ble Punjab and Haryana High Court at Chandigarh in M/s. S. R. Forging Ltd. Vs. UCO Bank [CWP No. 10957 of 2012 dated 19.02.2013].

13. Shri Purohit submitted that judgment of the Division Bench of Gujrat High Court in the case of Pritesh Meghaji Penthani Vs. Union of India, reported in 2014 SCC Online Gujrat 9175 was rendered in Writ Petition challenging the constitutionality of the provisions of Section 18(1) of the SARFASI Act. He submitted that the law declared in the above judgment would be applicable and was required to be taken into account by this Court.

14. Shri Purohit referred to and relied upon the judgment in the case of Ramnik Vallabhdas Madhvani and others Vs. Taraben Pravinlal Madhvani, reported in (2004) 1 SCC 497 on the proposition that the scope of power of the Hon'ble Apex Court under Article 136 of the Constitution of India was arbitrarily considered in

the case of Kunhay Ammed and others Vs. State of Kerala, reported in (2000) 6 SCC 359 on the premise that any disposal of S.L.P. against a judgment of the High Court does not amount that the said judgment has got affirmed by the said dismissal. He specifically referred to paragraph nos. 19 and 20 of the said judgment which reads thus:-

"19. In *Rup Diamonds and others Vs. Union of India and others* AIR 1989 SC 674, the law declared by this Court is that it cannot be said that the mere rejection of special leave petition could, by itself, be construed as the imprimatur of this Court on the correctness of the decision sought to be appealed against.

20. In *Wilson Vs. Colchester Justices* 1985 (2) All England Law Reports 97, the House of Lords stated;

"There are a multitude of reasons why, in a particular case, leave to appeal may be refused by an Appeal Committee. I shall not attempt to embark on an exhaustive list for it would be impossible to do so. One reason may be that the particular case raises no question of general principle but turns on its own facts. Another may be that the facts of the particular case are not suitable as a foundation for determining some question of general principle.

. . Conversely the fact that leave to appeal is given is not of itself an indication that the judgments below are thought to be wrong. It may well be that leave is given in order that the relevant law may be authoritatively restated in clearer terms."

15. Shri Bhangde, learned Senior Counsel for Respondent no. 2 interjected with the leave of the Court and drew our attention to the conclusion arrived at by the Hon'ble Apex Court in paragraph no. 44 of the judgment in the case of Kunhay Ammed (*supra*) which reads thus:-

"44. To sum up our conclusions are:-

(i) Where an appeal or revision is provided against an order passed by a court, tribunal or any other authority before superior forum and such superior forum modifies, reverses or affirms the decision put in issue before it, the decision by the subordinate forum merges in the decision by the superior forum and it is the latter which subsists, remains operative and is capable of enforcement in the eye of law.

(ii) The jurisdiction conferred by Article 136 of the Constitution is divisible into two stages. First stage is upto the disposal of prayer for special leave to file an appeal. The second stage commences if and when the leave to appeal is granted and special leave petition is converted into an appeal.

(iii) Doctrine of merger is not a doctrine of universal or unlimite application. It will depend on the nature of jurisdiction exercised by the superior forum and the content or subject-matter of challenge laid or capable of being laid shall be determinative of the applicability of merger. The superior jurisdiction should be

capable of reversing, modifying or affirming the order put in issue before it. Under Article 136 of the Constitution the Supreme Court may reverse, modify or affirm the judgment-decree or order appealed against while exercising its appellate jurisdiction and not while exercising the discretionary jurisdiction disposing of petition for special leave to appeal. The doctrine of merger can therefore be applied to the former and not to the latter.

(iv) An order refusing special leave to appeal may be a non-speaking order or a speaking one. In either case it does not attract the doctrine of merger. An order refusing special leave to appeal does not stand substituted in place of the order under challenge. All that it means is that the Court was not inclined to exercise its discretion so as to allow the appeal being filed.

(v) If the order refusing leave to appeal is a speaking order, i.e. gives reasons for refusing the grant of leave, then the order has two implications. Firstly, the statement of law contained in the order is a declaration of law by the Supreme Court within the meaning of Article 141 of the Constitution. Secondly, other than the declaration of law, whatever is stated in the order are the findings recorded by the Supreme Court which would bind the parties thereto and also the court, tribunal or authority in any proceedings subsequent thereto by way of judicial discipline, the Supreme Court being the apex court of the country. But, this does not amount to saying that the order of the court, tribunal or authority below has stood merged in the order of the Supreme Court rejecting special leave petition or that the order of the Supreme Court is the only order binding as *res judicata* in subsequent proceedings between the parties.

(vi) Once leave to appeal has been granted and appellate jurisdiction of Supreme Court has been invoked the order passed in appeal would attract the doctrine of merger; the order may be of reversal, modification or merely affirmation.

(vii) On an appeal having been preferred or a petition seeking leave to appeal having been converted into an appeal before Supreme Court the jurisdiction of High Court to entertain a review petition is lost thereafter as provided by sub-rule (1) of Rule (1) of Order 47 of the C.P.C."

Thereafter he referred to and relied upon paragraphs nos. 19 and 20 in the case of Ramnik Madhvani (cited *supra*) which reads thus :-

"19. The learned counsel for respondent tried to draw our attention to the limitations in exercise of jurisdiction by this Court under Article 136 of the Constitution of India. In our view, the argument advanced by the learned counsel for the respondent has no substance. The scope of powers of this Court under Article 136 of the Constitution of India was elaborately considered in a recent decision of this Court in *Kunhayammed and Ors. v. State of Kerala*, [2000] 6 SCC 359. The following observation are worth noting.(SCC p.383, para 43)

"The Supreme Court cannot and does not reverse or modify the decree or order appealed against while deciding the petition for special leave to appeal. What is

impugned before the Supreme Court can be reversed or modified only after granting leave to appeal and then assuming appellate jurisdiction over it. If the order impugned before the Supreme Court cannot be reversed or modified at the SLP stage obviously that order cannot also be affirmed at the SLP stage."

20. It follows that disposal of SLP against a judgment of the High Court does not mean that the said judgment is affirmed by such dismissal. The order on a special leave petition is also never res judicata. In the present case we are at a stage where we are hearing appeals i.e. leave to appeal has already been granted and these are full-fledged appeals against the judgment of the High Court before us. Therefore, we are entitled to go into the question of legality and correctness of the impugned judgment."

16. On the basis of the aforesaid judgments, Shri Purohit submitted that though the Petitioners had approached the Hon'ble Apex Court on more than one occasion in respect of challenge to the orders passed by this Court and the said S.L.P's. having been dismissed without reasons, the ratio of the above judgments would apply in as much as in none of the Special Leave Petitions leave to appeal came to be granted and the said petitions got converted into an appeal. According to him the doctrine of merger would not apply, since the order refusing Special leave to Appeal merely meant that the Hon'ble Apex Court was not inclined to exercise its discretion so as to allow the appeal to be filed.

17. Shri Purohit thereafter brought to our notice an unreported judgment dated 27.11.2018 passed by the Division Bench of the Delhi High Court in the case of Srishti Arogyadham Pvt. Ltd. Vs. Punjab National Bank in Writ Petition No. 12299/2018. He submitted that the facts of the said case were identical to the facts of the present case in as much as that once a substantial amount is received in pursuance of auction conducted under the provisions of the SARFAESI Act, requirement of pre-deposit in terms of the second proviso to Section 18 of the Act stands satisfied as substantial amount has already been received. According to him the insistence on the condition of pre-deposit in such circumstances will in fact lead to undue enrichment in the hands of the receiver when substantial amount of the loan stood liquidated by virtue of money received after the auction. He drew our attention to paragraphs nos. 9, 14, 17 to 24 of the judgment which read thus:-

"9. Mr. Mehra, learned Senior Counsel appearing for the petitioner submits that the DRAT fell in error in rejecting the MA filed by the petitioner for waiver of pre-deposit as according to him, the issue is no more res integra as the Supreme Court in Civil Appeal No. 2074-2078/2011 in Persn Medicinal Plants Pvt. Ltd. & Anr. vs. Indian Bank & Ors.(supra) decided on February 25, 2011, dealing with the question of pre-deposit under Section 18 of the SARFAESI Act allowed Indian Bank to appropriate the amount which is already with the Bank, as a condition precedent for hearing of the appeal filed by the appellant therein.

* * * *

14. Having heard the learned counsel for the parties, the admitted facts are that the property in question has been auctioned by the Bank and purchased by the respondent No.2 for an amount of 11.77 crores, whereas the notice under Section 13(2) to be recovered from the borrower / petitioner was 9,25,11,879.56 (page 507 of the paper book). Pursuant to the sale, as seen from the reply filed by the respondent No.1 Bank (at page 507 of the paper book), the sale certificate has been issued in favour of the respondent No.2, and even a sale deed has been executed in favour of respondent No.2. Physical possession of the property has also been given to the said respondent. The petitioner has challenged the auction sale. The ground is also that the amount for which the property has been sold is very less. The ground for seeking waiver of pre-deposit is that the Bank has recovered the debt due and in fact excess money is lying with it and the amount received / recovered can be considered towards the requirement of pre-deposit envisaged under Section 18 of the SARFAESI Act. The issue that needs to be decided in the facts of this case is whether for entertaining the appeal by the Appellate Tribunal, the petitioner is required to deposit 50% of the amount of debt due from the petitioner as claimed by the secured creditors or determined by the Recovery Tribunal, in terms of second proviso to Section 18 of the SARFAESI Act.

* * * *

17. It is a conceded case of the respondents that none of the eventualities exist as the amount due to the Bank has been recovered. The application has been opposed by the respondents and decided by the DRAT primarily on an apprehension that since, the petitioner has challenged the auction, the same may be set aside. In other words, the sale remains in a nebulous stage and the sale will achieve finality / confirmed only when the legal proceedings come to an end.

18. Surely such an apprehension as noted above, cannot govern the interpretation of Section 18 of the SARFAESI Act, 2002. The Section is clear and contemplates a situation stated in the earlier paragraph and the same has to be interpreted in the manner it exist, by giving a plain meaning.

19. We are conscious of the fact that the amount of pre-deposit has to be made in DRAT and not in the Bank. But still when no amount is due from the petitioner whether the pre-deposit can still be insisted upon. The argument can be made that the condition of pre-deposit is to discourage frivolous litigation which if permitted, would defeat the very purpose of the enactment of early settlement of the disputes. The argument is appealing but the same shall not hold good in the facts of the case with which we are concerned. Otherwise, the provision of appeal for persons / entities like the petitioner, shall become otiose / illusory. In fact, the insistence of pre-deposit shall be inequitable in the facts. Nothing precludes DRAT while deciding the appeal, if it finds that the appeal filed by the petitioner is frivolous, to impose such cost as deemed fit, to be recovered from the excess amount already lying deposited with the Bank.

20. Further, the Supreme Court in *Axis Bank (supra)*, has clearly held that pre-deposit is not a secured asset and on the disposal of the appeal either on merits or on withdrawal or on being rendered infructuous in case the appellant makes a prayer for refund of the pre-deposit, the same has to be allowed. This conclusion of the Supreme Court also signifies that even if the auction is set aside, and the Bank has to return the money to the auction purchaser, the pre-deposit cannot be appropriated by the Bank. It shall go to the borrower.

21. The judgment of *Eskays Construction Pvt. Ltd. (supra)* as relied upon by Mr. Rajinder Wali, and more particularly para 15, to contend that on a similar issue the Bombay High Court has inter alia held that the pre-deposit is mandatory except that the Tribunal has a discretion to reduce the pre-deposit to 25%. We find that in the said judgment the High Court was of the view that the provision of pre-deposit is to secure the debt due from the borrower / guarantor. This conclusion of the High Court is at variance with the ratio of the judgment of the Supreme Court in *Axis Bank case (supra)*.

22. The DRAT in the impugned order has referred to the judgment of the Supreme Court in *Indian Bank vs. Blue Jaggers Estates Ltd.* reported in 2010(3) *Banker's Journal* 9(SC), wherein a similar issue arose before the Supreme Court. In the said case, it has come on the record that even though, the mortgaged property was put to auction, the appellant i.e. Indian Bank had not been able to realise the amount because the sale was yet to be confirmed by the Appellate Tribunal. In fact, the Supreme Court rejected the contention raised on behalf of the respondent i.e. Blue Jaggers Estate Ltd. by stating that the sale was yet to be confirmed by the Appellate Tribunal as per the directions of the High Court.

23. In other words, in the said case, the sale had taken place, but the same had not been confirmed. In such a situation, it can be said that the sale remains in a nebulous stage whereas in the case in hand, as noted above, after the sale has taken place, the sale deed has been executed in favour of the respondent No.2 purchaser and the possession of the property has also been handed over. To that extent the judgment in the case of *Indian Bank vs. Blue Jaggers Estates Ltd. (supra)* is distinguishable.

24. Mr. Mehra in support of his submission has relied upon the judgment of the Allahabad High Court in the case of *M/s Akash Ganga Airlines Ltd. vs. Debt Recovery Appellate Tribunal, Allahabad and Others* 2015 SCC OnLine All 8084, wherein the facts are identical to the facts of this case and the Court by noting the position of law as referred to above has allowed the petition and directed the DRAT to reconsider the application of waiver of the petitioner therein by setting aside the earlier order of the DRAT insisting on the pre-deposit. We concur with the view taken by the Allahabad High Court and a similar view as also taken by the Division Bench of Punjab and Haryana High Court in *S.R. Forging Limited vs. UCO Bank* 2013 SCC OnLine P&H 3902, wherein it was held as under:

"Challenge in the present petition is to the orders passed by the Debts Recovery

Appellate Tribunal Delhi (for short the 'Tribunal') dated 30.4.2012 (Annexure P-14) and dated 13.7.2012 (Annexure P- 15), whereby the appeal filed by the petitioners- herein was not entertained for failure to comply with the requirement of law i.e. the deposit of 50% of the due amount before entertainment of the appeal.

Challenge in the appeal was to the sale proceedings whereby a bid of Rs. 17.75 crores as against the reserved price of Rs. 17.17 crores was received in respect of the property of the petitioners herein. It is the case of the petitioners that the total amount due and payable by the petitioners was Rs. 18.24 crores. Once, the substantial amount has been received by the Bank in pursuance of the auction conducted, the requirement of pre-deposit in terms of the proviso to Section 18 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the 'Act') stands satisfied as the substantial loan amount has already been received by the Bank. The condition of pre-deposit in these circumstances, over and above the sale price received by the Bank, will in fact lead to undue enrichment in the hands of the Bank when substantial amount to the loan amount stands liquidated by virtue of the auction.

At this stage, we find that out of total due amount of Rs. 18.24 crores, Rs. 17.75 crores have been received by the Bank in a public auction. Therefore, the deposit of 50% of the amount due prior to sale from the petitioner would be wholly unjustified. The proviso to Section 18 of the Act restricts the entertainment of the appeal unless the borrower deposits 50% of the amount of the debt claimed by the secured creditors. Once Rs. 17.75 crores have been received by the secured creditors, that is more than 50% of the debt due from the petitioners, the purpose of the proviso stands satisfied.

Consequently, we set aside the orders dated 30.4.2012 and 13.7.2012 passed by the Tribunal and direct the Tribunal to decide the appeal on merits.

Disposed of."

18. PER CONTRA Shri M.G. Bhangde, learned Senior Counsel appearing for Respondent no. 2 in his reply submitted that the submission made on behalf of the Petitioners that Respondent no. 1 was no longer a secured creditor was not correct in the facts and circumstance of the present case. He submitted that the agreement of assignment dated 17.08.2007 referred to by the Petitioners at Exh.-'C' (page no.140) to the Petition between Respondent no. 1 and B.M.W. Industries Ltd. was never brought on record of the present proceedings before the DRT or the DRAT. He took us through the Securitisation Application bearing no. 71/2007 (at page no. 335 of the paper book) filed by the Petitioners under the provisions of Section 17(1) of the SARFAESI Act and submitted that the aforesaid agreement of assignment dated 17.08.2007 did not find mention or form part of the pleadings therein at all. He drew out attention to paragraph no. 5.39 of the application which narrates all events except referring to the above agreement. He therefore submitted that the Petitioners could not now rely upon the said

agreement for the first time before this Court.

19. Shri Bhangde thereafter attempted to dissect the submissions made on behalf of the Petitioners with reference to the deed of assignment dated 18.01.2008. He submitted that according to the Petitioners, Respondent no. 1 had assigned its right to B.M.W. Industries Ltd.. He submitted that the Petitioners had taken a specific pleading in the securitisation application before the DRT in paragraph no. 5.56E at page no. 417 which reads thus:-

"5.56E. It transpired from the said applications filed by added Defendant No. 6 and Parash Goods Private Limited, the defendant no. 1 through the Defendant No. 2 as its constituted attorney have sold the said properties to one Galvanotek Industries Private Limited, the defendant No. 6 herein (added Party) on one hand and on the other hand has unlawfully assigned its rights to BMW Industries Ltd. Who in turn have again assigned its right to one Paras Goods Pvt. Ltd. And all such actions have been illegally carried out by the defendant No. 1 and 2 during the pendency and in violation of section 17 of the said Act, 2002."

20. Shri Bhangde submitted that DRT was thus seized of the said facts and the stand of the Petitioners that the assignment was illegal and incorrect. He submitted that the Petitioners had argued it thoroughly before the DRT as can be seen from the aforesaid pleadings and having taken a stand that the assignment was illegal, the Petitioners cannot now argue for the first time in the present Writ Petition that Respondent no. 1 was not a secured creditor.

21. Shri Bhangde submitted that the aforesaid deed of assignment was executed during the pendency of litigation before DRT on 18.01.2008. The date of filing of the Securitisation application was 08.10.2007, therefore according to him *lis pendens* prevailed in view thereof and Respondent no. 1 was bound by the securitisation proceeding. In support of this proposition, he referred to and relied upon the judgment in the case of *Guruswamy Nadar Vs. P. Lakshmi Ammal (Dead)* through L.R.s reported in (2008) 5 SCC 796.

He submitted that in litigation pending between parties, any decision of the Court in the suit is binding not only upon the litigating parties but also upon those who derived title under them by alienation made pending the suit, where such alienees had or had no notice of the pending proceedings. He referred to paragraph nos. 10 to 13 of the judgment, which reads thus -

"10. The principle of *lis pendens* is still settled principle of law. In this connection, the Full Bench of the Allahabad High Court in *Smt. Ram Peary (supra)* has considered the scope of Section 52 of the Transfer of Property Act. The Full Bench has referred to a decision in *Bellamy v. Sabine*[(1857) 44 ER 842 at p.843] wherein it was observed as under:

" 4. . . . It is scarcely correct to speak of *lis pendens* as affecting a purchaser through the doctrine of notice, though undoubtedly the language of the Courts often so describes its operation. It affects him not because it amounts to notice,

but because the law does not allow litigant parties to give to others, pending the litigation, rights to the property in dispute, so as to prejudice the opposite party.

Where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind required that the decision of the Court in the suit shall be finding, not only on the litigant parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end."

11. Similarly the Privy Council in *Faiyaz Husain Khan v. Munshi Prag Narain* [(1907) 34 Ind App 102] where the Court lay stress on the necessity for final adjudication and observation that otherwise there would be no end to litigation and justice would be defeated.

12. The Full Bench of Allahabad High Court further referred to the work of Story on Equity IIIrd Edition,(para 406) which expounded the doctrine of *lis pendens* in the terms as follows:

" 6. . . . Ordinarily, it is true that the judgment of a court binds only the parties and their privies in representations or estate. But he who purchases during the pendency of an action, is held bound by the judgment that may be made against the person from whom he derives title. The litigating parties are exempted from taking any notice of the title so acquired; and such purchaser need not be made a party to the action. Where there is a real and fair purchase without any notice, the rule may operate very hardly. But it is a rule founded upon a great public policy; for otherwise, alienations made during an action might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim *pendente lite, nihil innovetur*; the effect of which is not to annul the conveyance but only to refer it subservient to the rights of the parties in the litigation. As to the rights of these parties, the conveyance is treated as if it never had any existence; and it does not vary them."

13. Normally, as a public policy once a suit has been filed pertaining to any subject matter of the property, in order to put an end to such kind of litigation, the principle of *lis pendens* has been evolved so that the litigation may finally terminate without intervention of a third party. This is because of public policy otherwise no litigation will come to an end. Therefore, in order to discourage that same subject matter of property being subjected to subsequent sale to a third person, this kind of transaction is to be checked. Otherwise, litigation will never come to an end."

22. Shri Bhangde thereafter referred to the order dated 06.09.2016 passed by DRT-1, Kolkatta in O.A. No. 168/2004 between State Bank of India and the Petitioners. He submitted that this application was originally filed in the year 2004 by State Bank of India. Thereafter, State Bank of India assigned its debt to Respondent no. 1 by giving notice under the SARFAESI Act when the O.A. was still pending. He submitted that dismissal of the O.A. by DRT-1, Kolkatta would

have no impact on the present proceedings in as much as abandonment of the proceedings by a secured creditor is permissible in law which has happened in the present case. In support of this proposition, he referred to and relied upon the judgment passed in the case of Transcore Vs. Union of India and another, reported in (2008) 1 SCC 125. He referred to paragraph no. 37 with respect to points for determination and paragraph nos. 68 and 69 in support of the same which reads thus:-

"37. Three points arise for determination in these cases. They are as follows:

(i) Whether the banks or financial institutions having elected to seek their remedy in terms of DRT Act, 1993 can still invoke the NPA Act, 2002 for realizing the secured assets without withdrawing or abandoning the O.A. filed before the DRT under the DRT Act.

(ii) Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

(iii) Whether ad valorem court fee prescribed under Rule 7 of the DRT (Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the said Act."

* * * *

68. The object behind introducing the first proviso and the third proviso to Section 19(1) of the DRT Act is to align the provisions of DRT Act, the NPA Act and Order XXIII CPC. Let us assume for the sake of argument, that an O.A. is filed in the DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account. After filing of O.A., on account of non disposal of the O.A. by the tribunal due to heavy backlog, the bank finds that one of the three accounts has become sub-standard/ loss, in such a case the bank can invoke the NPA Act with or without the permission of the DRT. One cannot lose sight of the fact that even an application for withdrawal/ leave takes time for its disposal. As stated above, with inflation in the economy, value of the pledged property/ asset depreciate on day to day basis. If the borrower does not provide additional asset and the value of the asset pledged keeps on falling then to that extent the account becomes non-performing. Therefore, the bank/ FI is required to move under NPA Act expeditiously by taking one of the measures by Section 13(4) of the NPA Act. Moreover, Order XXIII CPC is an exception to the common law principle of non-suit, hence the proviso to Section 19(1) became a necessity.

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

circumstances which we do not wish to spell out herein.

(ii) On Point No. 2 on question of possession:"

He further submitted that abandonment of the proceeding by a secured creditor would not have any effect on the right of Respondent no. 1 in the present proceeding.

23. Shri Bhangde thereafter made his submissions on the "debt due" which was argued extensively by the Petitioner. He drew our attention to paragraph no. 17 of the impugned order which reads thus:-

"17. Respondents produced a statement showing calculation of interest which is filed along with compilation of documents and no objections are raised on behalf of the borrower with regard to said calculation. According to this calculation the amount due as on 30.06.2011 is 13,14,17,939.45. According to Respondents Appeal is filed on 24.06.2011, which fact is not disputed by the Appellants, and period is to be rounded till end of month, therefore, interest calculated till end of June 2011 has to be taken for purpose of calculation in determining the pre-deposit amount. In view of the decision of Bombay High Court in MRB Roadconst. Pvt. Ltd., contention of Respondents have to be accepted."

24. Shri Bhangde submitted that the Respondents had produced the detailed statement showing computation of interest and it has been recorded that no objection was raised on behalf of the borrower with regard to the said calculation and the said calculation as on 30.06.2011 stood at Rs. 13,14,17,939.45. He said that in view of this fact which came to be recorded in the impugned order, there is no reason for the the Petitioners to now raise a grievance with respect to the "debt due" which was placed by the Respondents before the DRAT. He referred to the judgment of the Bombay High Court in the case of MRB Roadconst. Pvt. Ltd. Vs. Rupee Co-Operative Bank, reported in 2016 (3) Mh.L.J. 589 which also finds a mention in paragraph no. 17 of the impugned order and drew our attention to paragraph no. 18 of the judgment which reads thus:-

"18. On a plain reading of the 2nd proviso to section 18(1) of the SARFAESI Act read with the definition under the word "debt" as defined in section 2(g) of the RDDB Act, it is clear that before an appeal can be entertained by the DRAT, the borrower has to deposit 50% of the amount of debt due from him as claimed by the secured creditors or as determined by the DRT whichever is less. If there is no determination of the debt by the DRT under the provisions of the RDDB Act, then the borrower would have to deposit 50% of the amount of debt due from him as claimed by the secured creditors. The provision on a plain reading does not in any way exclude taking into consideration the future interest that is accrued on the debt owed by the borrower to the secured creditor. In fact, the definition of the word "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution. Therefore, if the claim made by the secured creditor in the section 13(2) notice includes future interest, the same would certainly be included in the "amount of the debt

due" from the borrower to the secured creditor as contemplated under the 2nd proviso to section 18(1) of the SARFAESI Act. There is therefore no justification to hold that it is only the figure that is mentioned in the section 13(2) notice that is to be taken into consideration and not the future interest accrued on the said sum, whilst determining the deposit amount under the 2nd proviso to section 18 of the SARFAESI Act. The amount of deposit would have to be determined on the basis of the amount of debt due by the borrower to the secured creditor on the date when the appeal is filed in DRAT. This would not only include the amount mentioned in the section 13(2) notice but also interest accrued thereon till the date of filing of the appeal under section 18 of the SARFAESI Act. To our mind, this is the only interpretation that is possible of the 2nd proviso to section 18 of the SARFAESI Act. If we were to accept the contention of the Petitioner that the amount to be deposited by the borrower [under the 2nd proviso to section 18(1)] would be only on the basis of the sum/figure as mentioned in the section 13(2) notice and not the interest accrued thereon after the date of the said notice, the same would be violating the plain language of the statute. To interpret the 2nd proviso to section 18(1) in this fashion, to our mind, would clearly violate the plain and unambiguous language of the said section."

25. For sake of reference, the definition of debt under Section 2(g) of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (in short 'RDB Act') and Section 18 of the SARFAESI Act is also reproduced herein.

"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;

18. Appeal to Appellate Tribunal.-

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal 1[under section 17, may prefer an appeal along with such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.-(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal 2[under section 17, may prefer an appeal along with such fee, as may be prescribed] to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal." 2[Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:] 3[Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less: Provided also that the Appellate Tribunal may, for the reasons to be

recorded in writing, reduce the amount to not less than twenty- five per cent. of debt referred to in the second proviso.]

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

18A. Validation of fees levied.-Any fee levied and collected for preferring, before the commencement of the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004, an appeal to the Debts Recovery Tribunal or the Appellate Tribunal under this Act, shall be deemed always to have been levied and collected in accordance with law as if amendments made to sections 17 and 18 of this Act by sections 11 and 12 of the said Act were in force at all material times.

18B. Appeal to High Court in certain cases.-Any borrower residing in the State of Jammu and Kashmir and aggrieved by any order made by the Court of District Judge under section 17A may prefer an appeal, to the High Court having jurisdiction over such Court, within thirty days from the date of receipt of the order of the Court of District Judge: Provided that no appeal shall be preferred unless the borrower has deposited, with the Jammu and Kashmir High Court, fifty per cent. of the amount of the debt due from him as claimed by the secured creditor or determined by the Court of District Judge, whichever is less: Provided further that the High Court may, for the reasons to be recorded in writing, reduce the amount to not less than twenty- five per cent. of the debt referred to in the first proviso."

26. Shri Bhangde submitted that the proviso to Section 18(1) of the SARFAESI Act is required to be read alongwith the definition of the word "debt" as appearing in Section 2(g) of the RDDB Act. He submitted that the deposit of 50% amount of debt due in the event of non-determination of the debt by DRT would not exclude taking into consideration the future interest accrued on the debt owed by the borrower to the secured creditor. He stressed upon the words that definition of the word "debt" means any liability to be calculated inclusive of interest and if any claim is made by a secured creditor in the statutory notice issued under Section 13(2) for future interest, the same would certainly be included in the amount of debt due from the borrower to the secured creditor. He submitted that 50% of the amount of debt due would be inclusive of future interest on the amount of debt as on the date of deposit.

27. Shri Bhangde submitted that the calculation of debt due as on 30.06.2011 was challenged by filing of appeal before the DRAT. He submitted that as on date an amount of Rs. 13,14,28,939.45 was due and payable and condition for pre-deposit of 25% of the sum came to Rs. 3,28,58,484.36. He submitted that as on 12.07.2017 i.e. date of deposit by the Petitioners, the total debt due was Rs. 28,26,29,289.81 (inclusive of interest) and thus 25% of the said amount came to

Rs. 7,06,57,322.45. He submitted that the Petitioners had deposited an amount of Rs. 1,75,00,000/- and therefore there was still a deficit of Rs. 5,31,57,322.45.

28. Shri Bhangde referred to and relied upon following cases in support of his submissions.

(i) In the case of R. N. Gosain Vs. Yaspal Dhir, reported in (1992) 4 SCC 683, he referred to and relied upon paragraph no. 10 of judgment which reads thus:-

"10. Law does not permit a person to both approbate and reprobate. This principle is based on the doctrine of election which postulates that no party can accept and reject the same instrument and that "a person cannot say at one time that a transaction is valid any thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage". [See: *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Co. Ltd.*, (1921) 2 R.B. 608, at p.612, Scrutton, L.J]. According to Halsbury's Laws of England, 4th Edn., Vol. 16, "after taking an advantage under an order (for example for the payment of costs) a party may be precluded from saying that it is invalid and asking to set it aside". (para 1508).

(ii) In the case of Nagubai Ammal and others Vs. B. Shama Rao and others, reported in AIR 1956 SC 593, he referred to and relied upon paragraph no. 23 which reads thus "-

"23. But it is argued by Sri Krishnaswami Ayyangar that as the proceedings in O. S. No. 92 of 1938-39 are relied on as barring the plea that the decree and sale in O. S. No. 100 of 1919-20 are not collusive, not on the ground of resjudicata or estoppel but on the principle that a person cannot both approbate and reprobate, it is immaterial that the present appellants were not parties thereto, and the decision in *Verschures Creameries Ltd. v. Hull and Netherlands Steamship Company Ltd.*(1), and in particular, the observations of Scrutton, L.J., at page 611 were quoted in support of this position. There, the facts were that an agent delivered goods to the customer contrary to the instructions of the principal, who thereafter filed a suit against the purchaser for price of goods and obtained a decree.

Not having obtained satisfaction, the principal next filed a suit against the agent for damages on the ground of negligence and breach of duty. It was held that such an action was barred. The ground of the decision is that when on the same facts, a person has the right to claim one of two reliefs and with full knowledge he elects to claim one and obtains it, it is not open to him thereafter to go back on his election and claim the alternative relief. The principle was thus stated by Bankes, L. J.:

"Having elected to treat the delivery to him as an authorised delivery they cannot treat the same act as a misdelivery. To do so would be to approbate and reprobate the same act".

The observations of Scrutton, L. J. on which the appellants rely are as follows:

"A plaintiff is not permitted to 'approve and reprobate'. The phrase is apparently borrowed from the Scotch law, where it is used to express the principle embodied in our doctrine of election-namely, that no party can accept and reject the same instrument: *Ker v. Wauchope*(1): *Douglas-Menzies v. Umphelby*(2). The doctrine of election is not however confined to instruments. A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approve and reprobate the transaction".

It is clear from the above observations that the maxim that a person cannot 'approve and reprobate' is only one application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are parties thereto. The law is thus stated in *Halsbury's Laws of England*, Volume XIII, page 454, para 512:

"On the principle that a person may not approve and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it".

The plaintiff obtained no advantage against the appellants by pleading in O. S. No. 92 of 1938-39 that the proceedings in O. S. No. 100 of 1919-20 were collusive; nor did they acting on those pleadings acquire rights to the suit properties. Nor is there any question of election, because the only relief which the plaintiff claimed in O. S. No. 92 of 1938-39 and which he now claims is that he is entitled to the suit properties. Only, the ground on which that relief is claimed is different and, it is true, inconsistent. But the principle of election does not forbid it, and there being no question of estoppel, the plea that the proceedings in O. S. No. 100 of 1919-20 are not collusive is open to the plaintiff."

Shri Bhangde submitted that the Petitioners had to elect one position because the law does not permit a person to approve or reprobate at the same time. He submitted that once the Petitioners had taken a stand in the O.A. before the DRT that the assignment was illegal, the Petitioners now cannot argue and submit that Respondent no. 1 was not a secured creditor. He submitted that the ratio quoted in the aforesaid two judgments clearly prohibited and precluded the Petitioners for taking diametrically opposite stand in the present proceeding that Respondent no. 1 was not a secured creditor.

29. Shri Bhangde submitted that the decision in the case of *Srishti Arogyadham* (cited supra) referred to and relied upon by the Petitioners in its submissions

with respect to the second proviso to sub-Section (1) of Section 18 of the SARFAESI Act could be specifically distinguished if the facts of the said case are juxtaposed with the facts of the case in hand. He referred to and relied upon paragraph nos. 4 to 6 of the said judgment and paragraph nos. 16 to 21 which read thus :-

"4. It is noted by the DRAT that the property in dispute already stands auctioned in favour of the respondent No.2 for a sum of Rs.11.77 crores whereas the amount shown in the auction notice to be recoverable from the petitioner was 6,84,28,157.56/-. The case of the petitioner before the DRAT for waiver of pre-deposit was that since the property in dispute has already been sold and the bank has recovered `11.77 crores from the respondent No.2, the auction purchaser, there remains no requirement of pre-deposit at all and in fact the bank is liable to pay interest on the excess amount received and withheld by it. In other words, the auction money recovered by the bank is liable to be considered towards the compliance of the pre-deposit.

5. Reliance was placed on the judgment of this Court in W.P. (C) No. 13042/2009 decided on November 10, 2009 and two decisions of Punjab and Haryana High Court in CWP No. 9131/2012 and 10957/2012 decided on February 19, 2013. Some judgments of the Allahabad High Court were also relied upon by the learned counsel for the petitioner on the aspect of adjustment of sale proceeds of mortgaged property while calculating the amount of pre-deposit. There was one order by consent passed by the Supreme Court on February 25, 2011 in Civil Appeal No.2074-2078/2011 which was also relied upon.

6. The respondent No.1 i.e. bank and the auction purchaser have opposed the application for waiver of pre-deposit. The DRAT observed that the Tribunal has already taken a view, relying upon a judgment of the Supreme Court in the case of Indian Bank vs. Blue Jagers Estates Ltd. reported in 2010(3) Banker's Journal 9(SC), that auction money received by a bank from the successful auction purchaser of the mortgaged property cannot be considered towards compliance of the mandatory condition of pre-deposit when the defaulting borrower is not accepting the auction of his property and is challenging its legality in legal proceedings before the DRT. According to the DRAT, the pre-deposit has to be made with the DRAT and that pre-deposit has to be returned back to the depositor only irrespective of the fact whether the appeal is allowed or rejected. When no deposit has been made with the DRAT then nothing would be there to be returned to the appealing borrower and the borrower would have succeeded in getting entertained his appeal and disposal of appeal on merits also without making a pre-deposit. It was held that in case the borrower challenges the auction sale in legal proceedings the sale remains in a nebulous stage and the sale will get finality / confirmed only when the legal proceedings come to an end. In other words, there is no confirmation of the sale of its property so far. The DRAT was of the view the aforesaid aspects were not considered in the judgments relied upon on behalf of the petitioner.

* * * *

16. On a perusal of the second proviso to Section 18, it is clear that the same pre-supposes two eventualities; (i) that debt is due from the petitioner as claimed by the respondent No.1 Bank or; (ii) debt has been determined by the Debt Recovery Tribunal, and the same is liable to be paid / recovered on the date when the appeal is entertained by the DRAT. In either of the eventualities 50% of the amount of debt need to be made as pre-deposit. We may state here that the Supreme Court in *Narayan Chandra Ghosh vs. UCO Bank and Others* reported as (2011) 4 SCC 548, has inter alia held that the requirement of pre-deposit is a mandatory provision and need to be complied with. There cannot be any dispute on the said proposition and the same is binding upon this Court. In the said case, the argument of the petitioner therein was, that the debt has not been determined by the DRT. The Supreme Court rejected the plea by holding, if the debt has not been determined by the DRT, the borrower is liable to pay 50% of the debt due from him as claimed by the secured creditors. The facts being at variance, as there is no amount due from the borrower i.e. petitioner herein when more than due amount has already been realized by the Bank the judgment has no applicability.

17. It is a conceded case of the respondents that none of the eventualities exist as the amount due to the Bank has been recovered. The application has been opposed by the respondents and decided by the DRAT primarily on an apprehension that since, the petitioner has challenged the auction, the same may be set aside. In other words, the sale remains in a nebulous stage and the sale will achieve finality / confirmed only when the legal proceedings come to an end.

18. Surely such an apprehension as noted above, cannot govern the interpretation of Section 18 of the SARFAESI Act, 2002. The Section is clear and contemplates a situation stated in the earlier paragraph and the same has to be interpreted in the manner it exist, by giving a plain meaning.

19. We are conscious of the fact that the amount of pre-deposit has to be made in DRAT and not in the Bank. But still when no amount is due from the petitioner whether the pre-deposit can still be insisted upon. The argument can be made that the condition of pre-deposit is to discourage frivolous litigation which if permitted, would defeat the very purpose of the enactment of early settlement of the disputes. The argument is appealing but the same shall not hold good in the facts of the case with which we are concerned. Otherwise, the provision of appeal for persons / entities like the petitioner, shall become otiose / illusory. In fact, the insistence of pre-deposit shall be inequitable in the facts. Nothing precludes DRAT while deciding the appeal, if it finds that the appeal filed by the petitioner is frivolous, to impose such cost as deemed fit, to be recovered from the excess amount already lying deposited with the Bank.

20. Further, the Supreme Court in *Axis Bank (supra)*, has clearly held that pre-

deposit is not a secured asset and on the disposal of the appeal either on merits or on withdrawal or on being rendered infructuous in case the appellant makes a prayer for refund of the pre-deposit, the same has to be allowed. This conclusion of the Supreme Court also signifies that even if the auction is set aside, and the Bank has to return the money to the auction purchaser, the pre-deposit cannot be appropriated by the Bank. It shall go to the borrower.

21. The judgment of Eskays Construction Pvt. Ltd. (supra) as relied upon by Mr. Rajinder Wali, and more particularly para 15, to contend that on a similar issue the Bombay High Court has inter alia held that the pre-deposit is mandatory except that the Tribunal has a discretion to reduce the pre-deposit to 25%. We find that in the said judgment the High Court was of the view that the provision of pre-deposit is to secure the debt due from the borrower / guarantor. This conclusion of the High Court is at variance with the ratio of the judgment of the Supreme Court in Axis Bank case (supra)."

He submitted that the Petitioners were not entitled to claim benefit of the money recovered through auction because the Petitioners have specifically challenged the auction proceedings. The proceedings pertaining to challenge were pending before the DRT and thus the Petitioners would be precluded from contending that the amount realized from auction ought to be considered/adjusted as amount towards pre-deposit. He submitted that in view of the above judgment, the Petitioners could not claim that the money realized from auction of the Petitioners' properties ought to be considered/adjusted towards pre-deposit amount and hence the said amount was not available to the Petitioners for pre-deposit under Section 18(2) of the SARFAESI Act.

30. Shri Bhangde further referred to and relied upon the following two judgments in support of his case delivered by the Madras High Court and Bombay High Court as under :-

(i) 2009 SCC Online Madras 1904, M/s. E.I.D. Parry (India) Ltd. Vs. Debts Recovery Appellate Tribunal. The relevant paragraph no. 5 to 10 are reads thus:-

"5. From the impugned order dated 1.10.2009, it would be evident that the DRAT, Mumbai, has noticed that the secured asset has been sold for a sum of Rs.50.20 crores. Taking into consideration the same, it was observed by the DRAT, Mumbai, that the amount claimed by the borrowers (appellants therein) is less than the sale consideration and on that ground, it was held that the borrowers were not liable to pay any further amount under the second proviso to Section 18(1).

6. Learned counsel appearing on behalf of the borrowers rightly pointed out that the amount of Rs.50.20 crores has not been deposited by the borrowers. The said amount has been deposited by the third party-auction purchaser and the sale is under challenge before the DRT/DRAT.

7. In the above background, the sale amount of the secured asset cannot be

taken into consideration to determine as to whether any amount is due from the borrowers.

8. Learned Senior Counsel for the borrowers referred to one or other order, including the impugned order passed by the DRAT, Mumbai, to suggest that the due amount has already been determined by the DRT, which is challenged before the DRAT, but it is accepted that the order has been passed by the DRT under Section 17 of the SARFAESI Act.

9. The second proviso to Section 18(1) of the SARFAESI Act, mandates the appellate Tribunal not to entertain the appeal, unless the borrower has deposited with the appellate Tribunal 50% of the amount of debt due from him, as claimed by the secured creditor or determined by the DRT, whichever is less. The appellate Tribunal is empowered to waive and reduce the amount under the third proviso to Section 18(1), but such amount cannot be reduced below 25% of the debt referred to in the second proviso.

10. The debt amount can be determined by the DRT under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, 'the DRT Act, 1993'). Under Section 13(10) of the SARFAESI Act, if the dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application before the DRT or a competent Court, for recovery of the balance amount from the borrower, and in such a case also, the balance amount can be determined by the DRT by following the procedures prescribed under Section 19 of the DRT Act, 1993. There is no other provision made either under the DRT Act, 1993 or under the SARFAESI Act, empowering the DRT to determine the debt due to the secured creditor from the borrower."

(ii) Unreported Writ Petition(Lodging) No. 2361/2014 in the case of R. Dalpatrai & Company Vs. Bank of Baroda and others delivered on 09.10.2014 by Principal Seat of Bombay High Court. The relevant paragraph no. 5 reads thus:-

"5. In our view, it will not be possible for us to interfere with the impugned order passed by the DRAT while exercising our writ jurisdiction under Article 226 of the Constitution of India. It is a well settled position in law that the amount which is received by the Bank in the sale of the immovable property cannot be adjusted in the application for waiver of pre-deposit, unless the sale is accepted and confirmed by the borrower. In the present case, Petitioner has challenged the said sale after taking out separate application. We are, therefore, not inclined to entertain this Petition. Petition is dismissed in limine."

31. Shri Bhangde submitted that the amount received from a third party on sale/ auction of the properties cannot be counted to be amount paid by the borrower in order to reduce the amount of pre-deposit particularly when the sale is under challenge. He submitted that in the present case also the Petitioners have challenged the same and the said proceedings are pending.

32. Shri Bhangde while concluding his submissions relied upon the judgment in the case of Eskays Constructions Pvt. Ltd. Vs. Soma Papers and Industires Ltd. And others, reported in AIR 2017 Bom. 10 and decided by the Bombay High Court at its principal seat at Mumbai. Paragraph no. 18 of the said judgment reads thus:-

" 18. Faced with this situation, Ms Vyas submitted that DRAT has granted full waiver of deposit in peculiar facts and circumstances of the present case. She submitted that considering the fact that the Respondent Banks had already sold the subject properties (secured assets) for a consideration that fully secured their claim, there was no requirement for the 1st Respondent -borrower to deposit any amount as contemplated under Section 18 of the SARFAESI Act. We are unable to accept this submission. In our view it would be ludicrous to suggest that the money realised by the Respondent banks from sale of their secured assets could be used by the borrower to fulfill the condition of pre-deposit under Section 18. We must hasten to add that it would be a different matter if the sale is accepted and confirmed by the borrower. In the facts of the present case, the 1st Respondent - borrower wants to use the sale proceeds received from sale of the subject properties to be adjusted/ given credit for in the application for waiver of deposit and at the very same time challenges the sale of very same subject properties. This is to our mind, would be defeating the very purpose for which Section 18 was enacted, which is to curb unnecessary and frivolous litigation. We, therefore, have no hesitation in rejecting this argument. We must mention here that an identical argument was canvassed before another Division Bench of this Court in the case of R.G. Dalpatrai Pg 30 of 37 wp.1315.2014.dated.18.11.2016 .doc and Co. Vs Bank of Baroda² and the same was emphatically repelled. Paragraph 5 of the said decision reads thus:

"5. In our view, it will not be possible for us to interfere with the impugned order passed by the DRAT while exercising our writ jurisdiction under Article 226 of the Constitution of India. It is a well settled position in law that the amount which is received by the Bank in the sale of the immovable property cannot be adjusted in the application for waiver of pre-deposit, unless the sale is accepted and confirmed by the borrower. In the present case, Petitioner has challenged the said sale after taking out separate application. We are, therefore, not inclined to entertain this Petition. Petition is dismissed in limine." (emphasis supplied)

Shri Bhangde submitted that if the sale was not accepted and confirmed by the Petitioners as is the present case, the Petitioners cannot get benefit of the well settled position of law that any amount received by sale of immovable property be adjusted in the application for waiver of pre-deposit. He submitted that this judgment decided on 13.11.2016 was carried to the Hon'ble Apex Court by the defendant therein in S.L.P. No. 13214/2017 and the Hon'ble Apex Court dismissed the same, interalia, upholding the above judgment.

33. Shri S. Kumar and Shri R. S. Sundaram, learned counsels appearing on behalf of Respodnent nos. 1 and 3 adopted the submissions made by Shri

Bhangde. Shri Sundaram submitted that there were certain outstanding claims of Respondent no. 3 against the Petitioners which were due and payable, however Respondent no. 3 had not filed any reply nor details of the said claim on pleadings before the Court.

34. Shri Purohit in his brief rejoinder with the leave of the Court submitted that the debt which was due was never determined at any stage in the proceedings before the DRAT or the DRT and therefore the question of 25% of pre-deposit would not arise in the present case. He repeated and reiterated that Respondent no. 1 was no longer a secured creditor once it had assigned its debt to Respondent no. 2. He submitted that DRAT did not give any ruling on the aforesaid issue that Respondent no. 1 had ceased to be a secured creditor. He referred to and relied upon the definition of "secured creditor" under the provision of Section 2(zd) of the SARFAESI Act which reads thus:-

"2(zd). "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes-

- (i) debenture trustee appointed by any bank or financial institution; or
- (ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or
- (iii) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance;"

35. Shri Purohit submitted that Respondent no. 2 did not fall within the definition of secured creditor as it had assigned its right to a third party. He however fairly admitted that the Petitioners had challenged the sale of the two properties to Respondent No. 2, which belonged to Petitioner no. 1 and the same was pending, as also the counterclaim of the Petitioners in the O.A. filed by State Bank of India before the DRT-1, Kolkatta against State Bank of India was also pending adjudication. He submitted that the judgment in the case of M/s. Shivalik Fibers (P) Ltd. And others Vs. The Authorized Officer, Punjab National Bank (in CWP No. 1368/2019, decided on 09.07.2019) given by Division Bench of Himachal Pradesh High Court and cited by Respondent no. 1 was pending challenge in the Hon'ble Apex Court and therefore the same cannot be considered as settled law. He wound up his submission in case by submitting that "debt due" had never been determined in the present case and the immovable properties belonging to Petitioner No. 1 were sold wrongly by Respondent no. 1 and challenge to the same was pending and therefore taking an overall view of the matter, the impugned order deserved to be set aside and the Petitioners were entitled for grant of waiver of the pre-deposit amount in Appeal No. 135/2011 before the DRAT.

36. We have heard the learned counsels appearing for the parties and minutely

perused the pleadings and the various proceedings in the Writ Petition and the paper-book alongwith annexures thereto.

37. Section 18(1) of the SARFAESI Act clearly stipulates that any person aggrieved by any order made by the DRT under Section 17, may prefer an appeal to DRAT within 30 days from the date of receipt of the order of the DRT. The second proviso to Section 18(1) stipulates that no appeal shall be entertained by the DRAT unless the borrower has deposited with it 50% of the amount of debt due from him, as claimed by the secured creditor or as determined by the DRT, whichever is less. The third proviso to Section 18(1) gives a discretion to DRAT to reduce the aforesaid amount to not less than 25%, provided that DRAT gives reasons for the same which are to be recorded in writing. What becomes clear from the aforesaid provisions is that there is a jurisdictional bar from entertaining an appeal filed by the borrower from an order passed under Section 17, unless the borrower deposits 50% of the amount of debt due from him, as claimed by the secured creditor or as determined by the DRT, whichever is less. There is also a discretion granted to the DRAT to reduce this amount to 25% provided it finds adequate reasons for doing so and gives reasons, that are recorded in writing. If this deposit is not made, then DRAT has no jurisdiction to entertain the appeal of the borrower. The crucial words "debt due from him" are to be interpreted in consonance with the object and purpose sought to be achieved by the SARFAESI Act. Unless the debt due is secured, the borrower cannot be allowed the luxury of litigation. If that is permitted, the secured creditor would be engaged in a continuous and futile litigation. On a plain reading of the section it is clear that DRAT has no power or jurisdiction to reduce the deposit amount to less than 25%. This is ex-facie clear from the plain and unambiguous language of Section 18 of the SARFAESI Act.

38. The submissions made on behalf of the Petitioners that as the amount of debt due had not been determined by DRT, the appeal entertained by the DRAT without insisting of pre-deposit is erroneous. Under the second proviso to sub-Section (1) of Section 18 of the SARFAESI Act, the amount of 50% which is required to be deposited by the borrower is computed either with respect to the debt due as claimed by secured creditor in his statutory notice or as determined by the DRT whichever is less. This means that if the amount of debt is yet to be determined by DRT then the borrower while preferring an appeal would be liable to deposit 50% of the debt due from him as claimed by the secured creditor in his statutory notice. Since the condition of pre-deposit is mandatory, complete waiver of pre-deposit cannot be granted and it is beyond the jurisdiction of the Tribunal to do so as is evident from the second and third proviso to Section 18(1).

39. In the present case, the Petitioners have challenged the sale of its two properties at Nagpur and Kolkatta before the DRT and therefore the amount that has been realized pursuant to sale of the aforesaid two properties would not be available to the Petitioners for considering it towards the pre-deposit amount. Had the Petitioners not challenged the sale, then in that event the amount of

Rs.7,60,50,000/- would have been available to the Petitioners. But, having challenged the same, the same would now not be counted. Further the counterclaim of the Petitioners as against State Bank of India with whom the properties of the Petitioners were mortgaged originally is still pending and therefore in such circumstances wherein the Petitioners' substantive right in respect of the two specific and important proceedings is yet to be adjudicated, the same would have absolute bearing upon their claim and entitlement in the respective proceedings. Thus, the Petitioners cannot be entitled to any benefit for considering their application of waiver of pre-deposit that they should be granted a complete waiver. If the Petitioners ultimately succeed they would be entitled to all the claims along with interest and therefore in so far as application for waiver of pre-deposit is concerned, we would have to determine that as of now the amount of debt due which is required to be interpreted and determined in the present case would be the debt which is claimed by the secured creditor in its notice under Section 13(2) of the SARFAESI Act. Hence, we have no hesitation in holding that the debt due would be debt which would be outstanding under the statutory notice issued by Respondent no. 1 under the SARFAESI Act. This debt would be debt due as on 2006. Further in addition to this debt due, an amount of interest and future interest that would be added from 2006 onwards until 2017 would escalate the "debt due" to a higher sum. The Petitioners would therefore be liable to deposit 25% of this amount as condition precedent under the provisions of the said Act in the appeal proceedings as pre-deposit, in view of the challenge made by the Petitioners to the sale of its properties as well as due to the pendency of the counter-claim of the Petitioners. We therefore, fail to see as to how the Petitioners can make a grievance and seek complete waiver of the pre-deposit amount.

40. In the facts of the present case, we find considerable force in the submissions made by Shri Bhangde. The facts clearly show that the Petitioners had challenged the assignment by Respondent no. 1 in the O.A. filed before the DRT and therefore now the Petitioners cannot claim to argue that Respondent no. 1 was not a secured creditor. This fact goes against the Petitioners' claim in the present petition. We do not agree with the submissions made by Shri Purohit that the debt due was never determined and therefore computation of the amount by DRAT was incorrect. Even if the debt due was never determined by the DRT or DRAT, the debt which is reflected in the statutory notice issued under Section 13(2) of the SARFAESI Act is required to be considered and the same has been considered by the DRAT correctly.

41. We find no reasons to disturb the order dated 13.05.2018 passed by the DRAT, Mumbai directing the Petitioners to deposit the remaining part of the 50% amount out of the "amount due" (Rs. 13,14,17,739.45) as condition precedent to entertain their appeal.

42. In view of the above, the Petition is therefore dismissed.

43. Rule is discharged. Parties to bear their own costs.

JUDGE JUDGE

Later on :-

After judgment was pronounced, Shri S. V. Purohit, learned counsel for the petitioners makes a request for continuing the interim relief for a further period of eight weeks in order to enable the petitioners to approach the Hon'ble Apex Court in the matter. The request is objected to by Shri Mayank Agnihotri h/f. Shri M. G. Bhangde, learned Senior Advocate for respondent no. 2 and Shri S. N. Kumar, learned counsel for respondent no. 1.

However, considering the fact that interim relief is continued till this date, we see no difficulty in extending the same for a further period of time, to enable the petitioners to avail of remedy available in law to them.

Accordingly, interim relief to continue for a further period of six weeks.