

**(2006) 08 GUJ CK 0041**

**In the Gujarat High Court**

**Case No : Special Civil Application No. 12108 of 2006**

Shree Rama Multi-Tech Ltd. and Another

APPELLANT

Vs

Asset Reconstruction Company (India) Ltd.

RESPONDENT

**Date of Decision : 23-08-2006**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1, Order 23 Rule 1(3), 11  
Constitution of India, 1950 — Article 14, 226, 227  
Criminal Procedure Code, 1973 (CrPC) — Section 195  
Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 — Section 10  
Penal Code, 1860 (IPC) — Section 193, 196, 228  
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 19, 19(1), 22, 24  
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3A), 13(4), 13(9)  
Transfer of Property Act, 1882 — Section 69, 69A

**Citation : (2007) 2 GLR 1230**

**Hon'ble Judges : Akil Kureshi, J**

**Bench : Single Bench**

**Advocate : K.S. Nanavati and R.S. Sanjanwala, for the Appellant; K.B. Trivedi, General and Darshan M. Parikh, for the Respondent**

**Final Decision : Dismissed**

## Judgement

Akil Kureshi, J.—The petitioners herein have challenged a notice dated 25-1-2006 issued by the respondent u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act of 2002"). The petitioners have also challenged a communication dated 15-5-2006 by which the respondent-Company disposed of the objections of the petitioners to the notice dated 25-1-2006 u/s 13(2) of the Act of 2002.

2. Short facts leading to the present petition are as follows:

2.1 The petitioner No. 1 is a Company registered under the provision of the

Companies Act. The petitioner No. 2 is a whole time Director of petitioner No. 1-Company. The respondent is also a Company registered under the Companies Act.

2.2 The respondent-Company is a Securitisation and Reconstruction Company registered with Reserve Bank of India u/s 3 of the Act of 2002.

2.3 It is not in dispute that the respondent-Company acquired under various agreements, financial assistances -- together with all underlined securities and interest -- in the petitioner No. 1-Company.

2.4 It is virtually undisputed that substantial outstanding amount has not been paid up by the petitioners to the respondent-Company. To ensure recovery of such debts, the respondent-Company had issued a notice dated 25-1-2006 under Sub-section (2) of Section 13 of the Act of 2002.

2.5 At that stage, the petitioners had approached this Court by filing Special Civil Application No. 4901 of 2006 and raised several contentions challenging the said notice dated 25-1-2006. Learned single Judge of this Court disposed of the said petition by an order dated 21-3-2006. In the said order, learned Judge was pleased to turn down the contention of the petitioners that respondent-Company not enjoying consent of more than 75% of the creditors could not have initiated proceedings under the Act of 2002. It was held that as the stage u/s 13(4) of the Act of 2002 has not been reached, the petition based on such contention is premature. Additionally, learned single Judge also rejected the contention raised on behalf of the petitioners that respondent-Company was required to elect its remedies and could not initiate proceedings under the Act of 2002 when application before Debt Recovery Tribunal for recovering the dues was still pending.

2.6 Aggrieved by the rejection of the petition, the petitioners herein preferred Letters Patent Appeal No. 441 of 2006 before the Division Bench of this Court. Appeal came to be disposed of by an order dated 18-4-2006. Division Bench upheld the view of learned single Judge with respect to the non-requirement of consent of more than 75% of creditors before issuance of notice under Sub-section (2) of Section 13 of the said Act. It was, however, provided that the petitioners shall file reply to the notice to the concerned authority and all the arguments put forth before the Bench can be taken in the reply. It was further provided that such a reply shall be considered in accordance with law and if the petitioners are aggrieved, then they will have liberty to approach this Court again within a week. It was also provided that no action be taken under Sub-section (4) of Section 13 of the Act within a week from the date of final order of the learned single Judge on a petition. With these directions, Letters Patent Appeal was disposed of.

2.7 Pursuant to the said decision of the Division Bench, the petitioners replied to the notice u/s 13(2) of the said Act of 2002 under a communication dated 9-5-2006. In the said reply mainly two contentions were raised. Firstly, it was suggested that the respondent does not have consent of more than 75% of the

creditors to permit it to take further action under Sub-section (4) of Section 13 of the Act of 2002. The respondent was called upon to obtain consent of 3/4th of secured creditors in value of the total outstanding due and payable by the petitioner, and only thereafter, to issue a fresh notice. In this regard, it was pointed out that under Sub-section (9) of Section 13 of the said Act of 2002 unless and until the respondent has such a consent, steps as provided under Sub-section (4) of Section 13 of the Act of 2002 cannot be taken. Additionally, it was also contended that proceedings initiated by the respondent against the petitioners for recovery of dues are pending before the Debt Recovery Tribunal. Unless and until such proceedings are withdrawn, no action under the Act of 2002 can be taken by the respondent. Incidentally, it was also suggested that in a Company petition filed before the High Court, scheme for compromise is being contemplated.

2.8 The respondent replied to the objections of the petitioners under its communication dated 15-5-2006. Insistence of the petitioners for being served with fresh notice after fulfilling the requirements under Sub-section (9) of Section 13 of the Act of 2002, was not countenanced. Regarding insistence for election of remedies also, the respondent felt that there is no such requirement under the law and two parallel proceedings could be maintained.

2.9 It was at this stage that the petitioners approached this Court again and have challenged the notice issued by the respondent under Sub-section (2) of Section 13 of the Act of 2002 as well as communication dated 15-5-2006 by which the objections of the petitioners came to be turned down by the respondent-Company.

3. In this factual background, there are two legal contentions raised on behalf of the petitioners to sustain the challenge to the impugned action initiated by the respondent-Company.

4. First contention raised on behalf of the petitioners is that as per the provisions contained in Sub-section (9) of Section 13 of the Act of 2002, no action under Sub-section (4) of Section 13 of the Act of 2002 can be taken, unless and until the respondent-Company has consent of not less than 3/4th of the creditors in value. It is contended that respondent-Company does not have such consent and in any case the petitioners must have an opportunity to demonstrate before the respondent-Company that such a consent to the necessary extent does not exist.

5. Second contention sought to be pressed in service in support of the petition is that considering the provisions of the Act of 2002 as well as rules contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as "the Act of 1993"), the respondent-Company cannot maintain two parallel proceedings, one before the Debt Recovery Tribunal under the Act of 1993 and another under the Act of 2002. In other words, it is contended that respondent-Company must elect between the two parallel remedies and before taking action under the Act of 2002, proceedings before

Debt Recovery Tribunal must be withdrawn.

6. Entire focus of arguments of both sides has been on these legal contentions. Considering the importance of the issues and considering that such issues arise in many similar cases, both sides have made detailed submissions for final disposal of the petition at the admission stage.

7. Learned senior Advocate Shri K.S. Nanavati appearing with Shri R.S. Sanjanwala for the petitioners submitted that the action initiated by the respondent under the provisions of the Act of 2002 is illegal and unlawful. He submitted that as per Sub-section (9) of Section 13 of the Act of 2002 in the case of financing of a financial asset by more than one secured creditors or joint financing of financial asset by secured creditors, no secured creditor is entitled to exercise any or all of the rights conferred on him under Sub-section (4) of Section 13 of the Act of 2002 unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date. He submitted that respondent-Company does not have such consent. No action under Sub-section (4) of Section 13 of the Act of 2002, therefore, can be taken. He submitted that before any of the steps as envisaged under Sub-section (4) of Section 13 of the Act of 2002 are taken by the secured creditor, consent of more than 75% of the creditors must be secured. He submitted that the petitioners would have a right to verify at that stage whether the claim of the secured creditor is valid or not. The petitioners would also have a simultaneous right to point out to the secured creditor that it does not enjoy the consent of 75% of the creditors as required under Sub-section (9) of Section 13 of the Act of 2002.

7.1 It is, therefore, the contention of learned senior Advocate Shri Nanavati that it is at the stage after the secured creditor replies to the objections of the borrower, in response to notice under Sub-section (2) of Section 13 of the Act of 2002 but before any of the stages envisaged under Sub-section (4) of Section 13 of the Act of 2002 are taken, that the borrower should have an opportunity to represent before the secured creditor that condition laid down under Sub-section (9) of Section 13 is not fulfilled and that therefore, for want of satisfaction of necessary condition, further steps as provided under Sub-section (4) of Section 13 may not be taken.

7.2 In this regard it was further contended that the petitioners whose assets are at stake and are liable to be taken possession of or even may be sold or management of the Company taken over by the secured creditor, would therefore, have a right to make representation. It is contended that principles of natural justice and the requirement of hearing need to be read in the provisions of Section 13 of the Act of 2002. He contended that there is no express bar against granting hearing to such a party and in that view of the matter as held by the Hon'ble Supreme Court in several decisions, principles of natural justice and requirement of hearing can be read into the provisions.

7.3 It was urged on behalf of the petitioners that granting no hearing to the borrower in a given case may result into gross injustice. It was submitted that the secured creditor not having necessary permission of other secured creditors at least to the extent of 3/4th majority in value may precipitate an extreme action under Sub-section (4) of Section 13 of the Act of 2002. It was, therefore, urged that even after disposal of the objections by the borrowers in response to the notice under Sub-section (2) of Section 13 of the Act of 2002, either a show-cause notice by the secured creditor be insisted upon or at least a hearing be permitted. Only then the borrower would be in a position to demonstrate before the secured creditor that conditions precedent as laid down under Sub-section (9) of Section 13 of the Act of 2002 before taking any of the measures as provided in Sub-section (4) of Section 13 thereof, are not fulfilled. It was contended that in the present petition the respondent-Company does not enjoy such consent.

8. With respect to the election of remedy, it was contended that under the ordinary law also, it is necessary that a party cannot pursue two parallel remedies. When more than one remedy is available under the law, the party must elect one out of such several remedies, but cannot pursue simultaneous parallel proceedings before different forums.

8.1 He further contended that permitting the petitioners to pursue two parallel proceedings is not only impermissible under the law, but same would lead to multiplicity of proceedings and would put the petitioners to harassment.

8.2 It was also contended that by virtue of the amendment made in the Act of 1993, by Enforcement of Security Interest and Recovery of Debt Laws (Amendment Act of 2004) (hereinafter referred to as "the Amending Act of 2004"), the legislature has further clarified the position. He submitted that Section 19 of the Act of 1993 has been amended by the Amending Act of 2004 by virtue of which the Bank or financial institution has been given an opportunity to seek withdrawal of the proceedings before Debt Recovery Tribunal in order to pursue remedy under the Act of 2002. He submitted that this provision introduced in the Act of 1993 by the Amending Act of 2004 further clarifies the situation and true interpretation of such provision would only mean that the legislature also recognizes the requirement of election of remedies.

9. In support of his contentions, learned Senior Advocate Shri Nanavati relied on the decision of Hon'ble Supreme Court in the case of *Km. Nelima Misra Vs. Dr. Harinder Kaur Paintal and others*, wherein the Hon'ble Supreme Court observed that the administrative order which involves civil consequences must be made consistently with the rule expressed in the Latin maxim *audi alteram partem*. It means that the decision maker should afford to any party to a dispute an opportunity to present his case.

9.1 Pointing out to the decision of Hon'ble Supreme Court in the case of *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, , learned senior

Advocate Shri Nanavati submitted that in the said decision, Hon''ble Supreme Court was not considering the question of requirement of consent as provided under Sub-section (9) of Section 13 of the Act of 2002. He submitted that this issue was not before the Hon''ble Supreme Court in the case of Mardia Chemicals Ltd. v. Union of India (supra). It was contended that therefore, ratio laid down in the said decision does not shut out the right of the borrowers to urge that hearing would be necessary, before the secured creditor takes steps as envisaged under Sub-section (4) of Section 13 of the Act of 2002 in a case wherein financial asset has been financed by more institutions than one.

9.2 Pointing out to the decision of learned single Judge of this Court in the case of Apex Apex Electricals Ltd. Vs. ICICI Bank Ltd., , learned senior Advocate Shri Nanavati submitted that the said decision was rendered at the time when the legislature had not made amendments in the Act of 1993. By virtue of amendments, in Section 19 of the Act of 1993, brought in statute book by the Amending Act of 2004, situation has undergone material change. He submitted that in case of Apex Electricals Ltd. and Ors. v. I.C.I.C.I. Bank Ltd and Ors. (supra) learned single Judge did not consider the ratio laid down by the Supreme Court in the case of Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, in proper perspective.

9.3 Referring to the decision dated 29-4-2006 of learned single Judge of this Court in the case of Bhishma N. Thakore v. Dena Bank Through Authorised Officer rendered in Special Civil Application No. 2104 of 2006 and connected matters, it was submitted that the said decision requires reconsideration and this Court, should therefore, refer the petition before the Division Bench to examine the question of election of remedies. In this regard it was also pointed out that Division Bench of this Court has admitted Letters Patent Appeal No. 831 of 2006 and connected appeals against the decision of learned single Judge in the case of Bhishma N. Thakore v. Dena Bank Through Authorised Officer (supra) by an order dated 14-6-2006 and stay has also been granted against dispossession of the appellants therein.

9.4 Reliance was placed on the decision of Hon''ble Supreme Court in the case of A.P. State Financial Corporation v. Gar Re-rolling Mills and Anr. (supra). In particular, my attention was drawn to the observations made in Paragraph 13 of the said decision wherein the Hon''ble Supreme Court held that the party cannot simultaneously initiate and take recourse to two different remedies.

9.5 Reliance was also placed on the decision of Hon''ble Supreme Court in the case of State of Orissa and Others Vs. Md. Illiyas, wherein Hon''ble Supreme Court observed that the ratio laid down in a decision has to be appreciated in facts of the case and that reliance on the decision without looking into its factual background is not permissible. In the said decision, it was further observed that what is of essence in a decision is its ratio and not every observation found therein. The said proposition was pressed in service to contend before this Court that in the case of Mardia Chemicals Ltd. v. Union of India (supra) the Hon''ble

Supreme Court had not ruled that no hearing can be envisaged or provided for before the Bank or financial institution takes recourse to any of the measures envisaged under Sub-section (4) of Section 13 of the Act of 2002 in a case where situation as envisaged under Sub-section (9) of Section 13 arises.

10. On the other hand learned senior Advocate Shri K. B. Trivedi appeared for the respondent-Company with learned Advocate Shri Darshan Parikh and resisted the petition. It was contended that there is no stage of giving hearing to the petitioners before taking action under Sub-section (4) of Section 13 of the Act of 2002 once the objections raised by the petitioners in response to notice u/s 13(2) have been considered and disposed of. It was contended that no stage of such a nature has been envisaged under the provisions of the Act of 2002, none can be provided for.

10.1 It was contended that the Act of 2002 was enacted to ensure speedy recovery of the loans and other debts of Bank and other financial institutions from the borrowers. Providing for any such stage though not envisaged under the Act would frustrate the purpose of ensuring speedy recovery.

10.2 It was contended that in case of *Mardia Chemicals Ltd. v. Union of India* (supra) Hon''ble Supreme Court considered several facets of the Act of 2002 while examining the constitutional validity of the provisions contained therein. The Hon''ble Supreme Court except for striking down the requirement of deposit of 75% of the amount claimed while filing the proceedings u/s 17 of the Act of 2002, upheld all other provisions of Act of 2002. It was contended that the observations made by the Hon''ble Supreme Court in the said decision and conclusion reached therein would necessarily show that no additional stage of giving hearing to the borrower as sought to be suggested can be provided for.

10.3 Reliance was placed on the decision of learned single Judge of this Court in the case of *Bhishma N. Thakore v. Dena Bank* through Authorised Officer (supra) wherein learned single Judge turned down the contention regarding the election of remedies even after the amendments in the Act of 1993 were made by the Amending Act of 2004.

10.4 It was further pointed out that in the case of petitioners also in the earlier round of litigation, learned single Judge of this Court in the order dated 21-3-2006 passed in Special Civil Application No. 4901 of 2006 was pleased to reject such a contention. He submitted that Division Bench in appeal has not disturbed these findings of the learned Judge. He, therefore, submitted that when two learned single Judges of this Court have independently found that election of remedy is not necessary even after the amendment of Act of 1993, this Court should not take a different view.

10.5 It was also pointed out that number of High Courts of the country have also similarly turned down such a contention. Basing reliance on the decision of learned single Judge in the case of *Apex Electricals Ltd. and Ors. v. I.C.I.C.I. Bank Ltd. and Ors.*, (supra) it was pointed out that by a detailed judgment,

learned Judge had turned down the contention regarding election of remedy. This Court, therefore, should reject the contention of the petitioners in this regard.

10.6 Basing reliance on the observations made by the Hon''ble Supreme Court in the case of *The State of West Bengal Vs. Subodh Gopal Bose and Others*, and drawing my attention to the Clause-6 to the object and reasons for enactment of Amendment Act of 2004, learned senior Advocate Shri Trivedi submitted that the intention of the legislation should be gathered from the plain language of the Section used. He submitted that amended provisions of Section 19 of the Act of 1993 leave no scope for debate. The language used is not possible of any meaning except that bank or financial institution concerned, has been given an opportunity of withdrawing the proceedings before the Debt Recovery Tribunal and to pursue remedy under the Act of 2002 exclusively. However, by no stretch of imagination, legislation can be stated to have envisaged situation where by such Bank or financial institution is compelled to elect one out of two remedies.

10.7 Drawing my attention to the reply of the petitioners to the notice of respondent-Company under Sub-section (2) of Section 13 of the Act of 2002, learned senior Advocate Shri Trivedi pointed out that the petitioners have no bona fide or genuine defence. It is not the case of the petitioners that sum demanded by the respondent-Company is not due and payable and outstanding as on date. It is not the stand of the petitioners that the petitioners have either made provision for payment of such amounts in near future or that additional securities have been offered. He submitted that the petitioners only raised legal contentions to delay the proceedings and to prevent the respondent from seeking legal remedies.

11. It is on the basis of these contentions that the legal controversies are required to be resolved.

12. Before attempting to decide the said questions, few relevant statutory provisions need to be noted.

Section 2(1) of the Act of 2002 defines the term "financial asset" as follows:

2(1) "financial asset" means debt or receivables and includes -

(i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or

(ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or

(iii) a mortgage, charge, hypothecation or pledge of movable property; or

(iv) any right or interest in the security, whether full or part underlying such debt or receivables; or

(v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional

or contingent; or

(vi) any financial assistance;

Section 2(zc) of the Act of 2002 defines the term "secured asset" as follows:

2(zc) "secured asset" means the property on which security interest is created;

Section 2(zd) of the Act of 2002 defines the term "secured creditor" as follows:

2(zd) "secured creditor" means any bank or financial institution or any consortium of 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;

Section 2(ze) of the Act of 2002 defines the term "secured debt" as follows:

Section "2(ze) "secured debt" means a debt which is secured by any security interest;

2(zf) of the Act of 2002 defines the term "security interest" as follows:

2(zf) "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31;

Section 13 of the Act of 2002 provides for Enforcement of security interest. Section 13 insofar as is relevant for the purpose of the present petition is reproduced herein below:

13. Enforcement of Security Interest :- (1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (IV of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of this Act.

13(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

13(3) The notice referred to in Sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

13(3A) If, on receipt of the notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debt Recovery Tribunal u/s 17 or the Court of District Judge u/s 17A.

13(4) In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

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

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

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

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

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

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

xxx xxx xxx

13(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time

before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

13(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to Sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors.

Section 17 of the Act of 2002 in its original form provided for an appeal before the Debt Recovery Tribunal to any person aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer. The term "appeal" has since being substituted by the term "application" by virtue of Section 10(a)(i) of the Amending Act of 2004. Section 17 of the Act of 2002 reads as follows:

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 Sub-section (1) or Section 17.

(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 secured assets 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 assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets 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 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.

Under Section 18 of the Act of 2002. any person aggrieved, by any order made by the Debts Recovery Tribunal u/s 17, is permitted to prefer an appeal before the Appellate Tribunal within the time prescribed.

Section 35 of the Act of 2002 gives overriding effect to the provisions contained in the Act notwithstanding anything inconsistent therewith contained in any other law for the time-being in force or any instrument having effect by virtue of any such law. Section 35 of the Act of 2002 reads as follows:

35 The provisions of this Act to override other laws :- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by

virtue of any such law.

Section 36 of the Act of 2002 provides inter alia that 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. Section 36 of the Act of 2002 reads as follows:

36. Limitation :- No secured creditor shall be entitled to take all or any of the measures under sub-sec, (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).

Section 37 of the Act of 2002 provides that the provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of other laws. Section 37 of the Act of 2002 reads as follows:

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.

13. Certain provisions of the Act of 1993 also need to be noted.

Section 2(g) of the Act of 1993 defines the term "debt" and it reads as follows:

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;

Section 17 of the Act of 1993 lay down the jurisdiction, power and authority of the Tribunal. Sub-section (1) of Section 17 of the Act of 1993 provides inter alia that the Tribunal shall exercise the jurisdiction, power and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions. Section 17 of the Act of 1993 reads as follows:

17. Jurisdiction, powers and authority of Tribunals :- (1) A Tribunal shall exercise, on and from the appointed day, the jurisdiction, powers and authority to entertain and decide applications from the banks and financial institutions for recovery of debts due to such banks and financial institutions.

(2) An Appellate Tribunal shall exercise, on and from the appointed day, the

jurisdiction, powers and authority to entertain appeals against any order made, or deemed to have been made, by a Tribunal under this Act.

Section 19 of the Act of 1993 pertains to application to the Tribunal. Provisions of Section 19 of the Act of 1993 insofar as same are relevant for the present litigation read as follows:

19(1) Application to the Tribunal:- (1) Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within the local limits of whose jurisdiction -

(a) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or

(b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or

(c) the cause of action, wholly or in part, arises:

Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 for the purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), if no such action had been taken earlier under that Act:

Provided further that any application made under first proviso for seeking permission from the Debts Recovery Tribunal to withdraw the application made under Sub-section (1) shall be dealt with by it as expeditiously as possible and disposed of within thirty days from the date of such application:

Provided also that in case the Debts Recovery Tribunal refuses to grant permission for withdrawal of the application filed under this sub-section, it shall pass such orders after recording the reasons therefor.

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19(6) Where the defendant claims to set-off against the applicant's demand any ascertained sum of money legally recoverable by him from such applicant, the defendant may, at the first hearing of the application, but not afterwards unless permitted by the Tribunal, present a written statement containing the particulars of the debt sought to be set-off.

19(7) The written statement shall have the same effect as a plaint in a cross-suit so as to enable the Tribunal to pass a final order in respect both of the original claim and of the set-off.

19(8) A defendant in an application may, in addition to his right of pleading a set-

off under Sub-section (6), set up. by way of counter-claim against the claim of the applicant, any right or claim in respect of a cause of action accruing to the defendant against the applicant either before or after the filing of the application but before the defendant has delivered his defence or before the time limited for delivering his defence has expired, whether such counter-claim is in the nature of a claim for damages or not.

19(9) A counter-claim under Sub-section (8) shall have the same effect as a cross-suit so as to enable the Tribunal to pass a final order on the same application, both on the original claim and on the counter-claim.

It may be noted that three provisos attached to Sub-section (1) of Section 19 of the Act of 1993 have been enacted by the legislation and added to the Act of 1993 by Amending Act of 2004.

Section 22 of the Act of 1993 lays down the procedure and powers of the Tribunal and the Appellate Tribunal. Section 22 of the Act of 1993 reads as follows:

22(1) Procedure and Powers of the Tribunal and the Appellate Tribunal :-(1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (V of 1908), but shall be guided by the principles of natural justice, and subject to the other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

(2) The Tribunal and the Appellate Tribunal shall have, for the purpose of discharging their functions under this Act, the same powers as are vested in a Civil Court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

- (a) summoning and enforcing the attendance of any person and examining him on oath;\
- (b) requiring the discovery and production of documents;
- (c) receiving evidence on affidavits;
- (d) issuing commissions for the examination of witnesses or documents;
- (e) reviewing its decisions;
- (f) dismissing an application for default or deciding it ex parte;
- (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte;
- (h) any other matter which may be prescribed.

(3) Any proceeding before the Tribunal or the Appellate Tribunal shall be deemed

to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196 of the Indian Penal Code (45 of 1860) and the Tribunal or the Appellate Tribunal shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

Section 24 of the Act of 1993 provides that provisions of the Limitation Act, shall, as far as may be, apply to an application made to a Tribunal. Section 24 of the Act of 1993 reads as follows:

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.

14. With these statutory provisions in mind, contentions raised on behalf of the petitioners need to be examined.

15. First adverting to the question of right of hearing before the respondent-Company can take any of the measures under Sub-section (4) of Section 13 of the Act of 2002. It can be seen that admittedly under the Act of 2002, no such express provision has been made giving an opportunity of being heard or making of a representation before any such action can be taken.

16. Prior to the decision of *Mardia Chemicals Ltd. v. Union of India* (supra), even the requirement of disposing of the objections that may be raised by the borrowers in response to the notices issued under Sub-section (2) of Section 13 of the Act of 2002 was not codified. In the case of *Mardia Chemicals Ltd. v. Union of India* (supra), the Hon'ble Supreme Court recognized the need for a fair disposal of the objections "that may be raised by the borrowers in response to the notices under Sub-section (2) of Section 13 of the Act. In this regard, it was observed that underlining purpose of serving a notice upon the borrowers under Sub-section (2) of Section 13 of the Act of 2002 is that the reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under Sub-section (4) of Section 13 in case of non-compliance with notice within 60 days. It was observed that the creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under Sub-section (4) of Section 13 of the Act of 2002. Once, a duty is envisaged on part of the creditor, it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reasons for not accepting the objections or points raised in reply to the notice under Sub-section (4) of Section 13 of the Act of 2002. Such reasons overruling the objections must also be communicated. It will only be in fulfilment of a requirement of reasonableness and fairness. Simultaneously, the Hon'ble Supreme Court also made it clear that the communication of reasons for not accepting objections taken may not be taken to give an occasion to resort to

such proceedings which are not permissible under the provisions of the Act of 2002.

17. It can thus be seen that in case of *Mardia Chemicals Ltd. v. Union of India* (supra), the Hon''ble Supreme Court recognized the limited right of the borrower to be informed of the reasons for rejection of his objections. Since delivery of the decision, legislation has also suitably amended the provisions of Section 13 of the Act of 2002 by introducing Sub-section (3A). Sub-section (3A) of Section 13 thus codifies the conclusions of the Hon''ble Supreme Court regarding the requirement of communication of reasons of rejecting of the objections raised by the borrowers in response to the notices under Sub-section (2) of Section 13 of the Act of 2002. Proviso to Sub-section (3A) of Section 13 of the Act of 2002 also gives statutory flavour to (he observations of the Hon''ble Supreme Court by providing that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the Court of District Judge u/s 17A.

17.1 It is well settled that the principles of natural justice and requirement of hearing can be curtailed or debarred by express statutory provisions or also by necessary implications.

17.2 In the Act of 2002, proviso to Sub-section (3A) of Section 13, clearly debars any further application to the Debt Recovery Tribunal u/s 17 or to the District Judge u/s 17A against the communication of reasons by the secured creditors rejecting the objections of the borrowers. It is in consonance with the observations made by the Hon''ble Supreme Court in the case of *Mardia Chemicals Ltd. v. Union of India* (supra).

18. In *Mardia Chemicals* (supra), the Hon''ble Supreme Court considered at length various provisions of the Act of 2002 to judge its constitutional validity. Some of the observations made in the said decision would have direct bearing on the issue on hand. It would, therefore, be necessary to advert to the said decision at some length.

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18.1 In Paragraph 18 of the said decision, the contention on behalf of the creditors was noted in following manner:

On the other hand, Section 34 bars the jurisdiction of the Civil Court to entertain any suit in respect of any matter which a Debts Recovery Tribunal or the appellate Tribunal is empowered to determine. It also provides that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Section 35 gives an overriding effect to the provisions of the Act over the provisions contained under any other law. The submission, therefore, is that before any

action is taken u/s 13, there is no forum or adjudicatory mechanism to resolve any dispute which may arise in respect of the alleged dues or the N.P.A.

18.2 Further contention with respect to the requirement of 75% pre-deposit for filing proceedings u/s 17 of the Act of 2002 was noted in Paragraph 19 of the decision as follows:

It is also submitted that once the secured assets are taken over there is hardly any occasion for deposit of 75% of the claim since it is already secured and the management and the possession of the secured assets moves into the hands of the creditor. The position thus is that the borrower is gagged into a helpless position where he cannot ventilate his grievance against the drastic steps taken against him. The doors of the Civil Court are closed for him and no adjudicatory mechanism is provided before steps are taken under Sub-section (4) of Section 13. Such a law, it is submitted, is arbitrary and suffers from the vice of unreasonableness.

18.3 In Paragraph 20 of the said decision, Hon"ble Supreme Court also noted the contention on behalf of the borrowers that remedy provided u/s 19 of the Act of 2002 for payment of compensation by the Tribunal is hardly a consolation after harsh steps as provided under Sub-section (4) of Section 13 have been taken.

18.4 Questions which the Supreme Court considered in the said decision were formulated in Paragraph 33 of the judgment as follows:

33. Taking an overall view of the rival contentions of the parties, we feel the main questions which broadly fall for consideration by us are:

(i) Whether it is open to challenge the statute on the ground that it was not necessary to enact it in the prevailing background particularly when another statute was already in operation?

(ii) Whether provisions as contained under Sections 13 and 17 of the Act provide adequate and efficacious mechanism to consider and decide the objections/ disputes raised by a borrower against the recovery, particularly in view of bar to approach the Civil Court u/s 34 of the Act?

(iii) Whether the remedy available u/s 17 of the Act is illusory for the reason it is available only after the action is taken u/s 13(4) of the Act and the appeal would be entertainable only on deposit of 75% of the claim raised in the notice of demand?

(iv) Whether the terms or existing rights under the contract entered into by two private parties could be amended by the provisions of law providing certain powers in one-sided manner in favour of one of the parties to the contract?

(v) Whether provision for sale of the properties without intervention of the Court u/s 13 of the Act is akin to the English mortgage and its effect on the scope of the bar of the jurisdiction of the Civil Court?

(vi) Whether the provisions under Sections 13 and 17(2) of the Act are unconstitutional on the basis of the parameters laid down in different decisions of this Court?

(vii) Whether the principle of lender's liability has been absolutely ignored while enacting the Act and its effect?

18.5 In Paragraph 34 of the decision, following observations have been made which are relevant for our purpose:

34. Some facts which need be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through Courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill-effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the Governments in creating Debt Recovery Tribunals and appointing Presiding Officers, for a long time. Even after leaving that margin, it is to be noted that things in the concerned spheres are desired to move faster. In the present-day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards securitisation of the debts and to evolve means for faster recovery of the N.P. As. was not called for or that it was superimposition of undesired law since one legislation was already operating in the field namely the Recovery of Debts Due to Banks and Financial Institutions Act.

18.6 In Paragraphs 35 and 36 of the decision, the Hon"ble Supreme Court took note of the recommendations made by the Narasimhan Committee relating to financial system prevailing in the country. It was observed in Paragraph 36 that:

Considering the totality of circumstances, the financial climate world over, if it was thought as a matter of policy, to have yet speedier legal method to recover the dues, such a policy-decision cannot be faulted with nor it is a matter to be gone into by the Courts to test the legitimacy of such a measure relating to financial policy.

18.7 The question of remedies available to the borrowers to ventilate their grievances were considered in Paragraph 45 of the decision in following manner:

45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under Sub-section (2) of Section

13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under Sub-section (4) of Section 13 in case of non-compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under Sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under Sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under Sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the Court. Such a person in respect of whom steps u/s 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided u/s 17 of the Act matures on any measure having been taken under Sub-section (4) of Section 13 of the Act.

18.8 Having thus found it necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to the notice u/s 13(2) of the Act of 2002, the Hon"ble Supreme Court in Paragraph 48 of the said decision made following observations:

48. The next safeguard available to a secured borrower within the framework of the Act is to approach the Debt Recovery Tribunal u/s 17 of the Act. Such a right accrues only after measures are taken under Sub-section (1) of Section 13 of the Act.

18.9 The Hon''ble Supreme Court thereafter, proceeded to examine the question of bar of remedy under the ordinary civil law and after finding that limited scope for civil action is still open to the borrowers, in Paragraph 54 of the decision negated the contention on behalf of the borrowers that by virtue of the provisions contained in Sub-section (4) of Section 13 of the Act of 2002, the borrowers lose their right of redemption of the mortgage. It was held that it cannot be said that right of redemption of property is completely lost. Considering the provisions of Sub-section (8) of Section 13 of the Act of 2002, it was observed that in case where there is no dispute about the difference of amount the right can be exercised and in other cases the question of difference in amount can be kept open and got decided before sale of the property.

18.10 In Paragraph 59 of the decision, the Hon''ble Supreme Court observed that proceedings u/s 17 of the Act of 1993 though so titled are not appellate proceedings and the description is a misnomer. It is the stage of initial proceeding like filing a suit in Civil Court. The proceedings u/s 17 are in lieu of a Civil suit which remedy is ordinarily available for the bar u/s 34 of Act of 2002. It may be noted that provisions of Section 17 have since been suitably amended by the Amending Act of 2004 to substitute the term "appeal" by that of term "application".

18.11 The Hon''ble Supreme Court thereafter, proceeded to consider the legality of the requirement of 75% pre-deposit for availing of remedy u/s 17 of the Act of 2002. Such requirement was held to be unconstitutional and accordingly struck down.

18.12 In Paragraph 68 of the decision, it was observed that the main thrust of the petitioners to challenge the validity of the impugned enactment is that no adjudicatory mechanism is available to the borrower to ventilate the grievance through an independent adjudicatory authority. The contention that the remedy of appeal available u/s 17 of the Act of 2002 can be availed only after measures have already been taken by the secured creditor under Sub-section (4) of Section 13 of the Act of 2002 which includes sale of secured assets, taking over its management and all transferable rights thereto was noted. It was also contended before the Hon''ble Supreme Court that the remedy under Article 226 of the Constitution of India may not be always available since the dispute may be only between two private parties.

18.13 After considering several aspects of the matter, issues of constitutional validity of the provisions of the Act of 2002 were concluded by the Hon''ble Supreme Court in the following manner:

75. In relation to the argument on behalf of the petitioners that they are entitled to be heard before a notice under Sub-section (2) of Section 13 is issued failing which there is denial of principles of natural justice, a reference has been made to certain decisions to submit that in every case, it is not necessary to make a provision for providing a hearing. For example, in the case of a licensing statute,

See Kishan Chand Arora Vs. Commissioner of Police, Calcutta, - Kishan Chand Arora (supra). The other decisions referred to are : Lachhman Das on Behalf of Firm Tilak Ram Ram Bux Vs. State of Punjab and Others, - Lachman Das v. State of Punjab 1911 (2) SCC 256(P&H) at 262 - Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, - Haryana Financial Corporation v. Jagdamba Oil Mills to submit that concept of natural justice is not a strait-jacket formula. It, on the other hand, depends upon the facts of the case, nature of the enquiry, the rules under which the Tribunal is acting and what is to be seen that no one should be hit below the belt. Relationship between the creditor and the debtor, it is submitted, is essentially in the realm of a contract.

76. In regard to the submission made by the parties as indicated in preceding Paragraphs, we would like to make it clear that issue of a notice to the debtor by the creditor does not attract the application of principles of natural justice. It is always open to tell the debtor what he owes to repay. No hearing can be demanded from the creditor at this stage. So far the provision of appeal is concerned, we have already discussed in the earlier part of the judgment that proceedings u/s 17 of the Act have been wrongly described as appeal before the Debt Recovery Tribunal. It is in fact a forum where proceedings are originally initiated in case of any grievance against the creditor in respect of any measure taken under Sub-section (4) of Section 13 of the Act. Hence, the decisions on the point as to whether provision for an appeal is essential or not are not of any assistance in the facts of the present case.

77. It is also true that till the stage of making of the demand and notice u/s 13(2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of Court with a bar to approach the Court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated. So as to demonstrate that the reply of the borrower to the notice u/s 13(2) of the Act has been considered applying mind to it. The reasons howsoever brief that may be for not accepting the objections, if raised in the reply, must be communicated to the borrower. True, presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest, but while resorting to such legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery.

79. Some submissions have been made pointing out that in certain circumstances it would not be clear as to in what manner the provisions of the Act would be workable. We feel the objections pointed out are not such which render the statute invalid or unconstitutional. Such problems about working of any particular provision of the Act in any particular factual situation, may be considered as and when it may arise. We, therefore, do not think it necessary to

go into those questions.

80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures u/s 13(4) of the Act have been taken, a mechanism has been provided u/s 17 of the Act to approach the Debt Recovery Tribunal. The above-noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

(1) Under Sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under Sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion, we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal u/s 17 of the Act, at that stage.

(2) As already discussed earlier, on measures having been taken under Sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) u/s 17 of the Act before the Debt Recovery Tribunal.

(3) That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

(4) In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) u/s 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

(5) As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in Civil Court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the Court.

18.14 In the concluding portion of decision in Paragraph 81, it was observed that:

81. In view of the discussion held in the judgment and the findings and directions contained in the preceding Paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debt Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of

the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as N.P. As. and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest.

18.15 Eventually, the validity of the Act of 2002 and its provisions except that of Sub-section (2) of Section 17 which was held to be ultra vires of Article 14 of the Constitution, were upheld.

19. It can thus be seen that the Hon'ble Supreme Court had considered the validity and application of all provisions contained in the Act of 2002 and by a detailed examination come to the conclusion that barring Sub-section (2) of Section 17 of the Act of 2002, rest of the provisions are constitutionally valid. Significantly in Paragraph 81 of the said decision, it was observed that the effect of some of the provisions may be a bit harsh for some of the borrowers, but on that ground the impugned provisions of the Act of 2002 cannot be said to be unconstitutional in view of the fact that the object of the Act of 2002 is to achieve speedier recovery of the dues declared as N.P. As. and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest.

19.1 While dealing with the question of remedies available to the borrower, it was found that the secured creditors shall have to dispose of all the objections raised by the borrower in response to notice under Sub-section (2) of Section 13 of the Act of 2002 and communicate the reasons for not accepting the objections to the borrowers. The said requirement was found in tune with the requirement of reasonableness and fairness in dealing with the financial institutions. At this stage, however, it was made explicitly clear that communication of reasons for not accepting the objections taken by borrowers may not be taken to give occasion to resort to such proceedings which are not permissible under the provisions of Act of 2002. It was observed that communication of reasons would be for the purpose of knowledge of borrower since the person in respect of whom steps u/s 13(4) of the Act of 2002 are likely to be taken, cannot be denied the right to know the reasons for non-acceptance of his objections. However, he would not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach Debts Recovery Tribunal as provided u/s 17 of the Act of 2002 matures on any measure having been taken under Sub-section (4) of Section 13 of the Act of 2002. In this context, it was further observed in Paragraph 48 of the decision that the next safeguard available to a secured borrower within the framework of the Act is to approach the Debts Recovery Tribunal u/s 17 of the Act and such a right accrues only after measures are taken under Sub-section (4) of Section 13 of the Act.

20. Considering the entire decision of *Mardia Chemicals Ltd. v. Union of India* (supra), the strong underlying philosophy as emerging from the said decision would be that though some of the provisions of Act of 2002 may be harsh

against some borrowers, such provisions cannot be declared unconstitutional considering the object with which the Act has been formulated namely to achieve speedier recovery of dues declared as N.P. s. and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest.

20.1 Significant observations of Hon''ble Supreme Court in Paragraphs 45 and 48 of the decision are that though it would be necessary for a secured creditor to consider the objections of the borrowers in response to notice under Sub-section (2) of Section 13 of the Act of 2002 and communicate the reasons for non-acceptance of the objections, such communication would not give occasion to resort to such proceedings which are not permitted under the Act of 2002, and that thereafter, the next safeguard available to a secured borrower under the Act of 2002 would be that of approaching the Debts Recovery Tribunal u/s 17 that too only after measures under Sub-section (4) of Section 13 of the Act of 2002 have been taken.

21. Reading entire decision as a whole and in particular the combined effect of the above-noted observations of Hon''ble Supreme Court would lead this Court to the conclusion that neither any stage is envisaged under the Act of 2002 to give hearing to the borrower before further steps can be taken under Sub-section (4) of Section 13 of the Act of 2002 nor any such additional stage can be supplied through judicial interpretation.

22. As noted earlier, learned senior Advocate Shri Nanavati for the petitioners had contended that the borrowers whose assets are being taken possession of or management of whose factory is being taken over, would have a right to be heard before such drastic steps can be taken. This requirement according to him would arise specially when situation as envisaged under Sub-section (9) of Section 13 of the Act of 2002 is emerging in which it would be necessary that the secured creditor who intends to take any of the measures permitted under Sub-section (4) of Section 13 of the Act of 2002 must enjoy consent of at least 3/4th of the secured creditors.

23. It is doubtful whether the principles of natural justice can be pressed in service against the body which is not the State. The principles of natural justice and requirement of hearing emanate from equality clause enshrined under Article 14 of the Constitution of India and is found to be a necessary requirement before any judicial or quasi-judicial order is passed or even before any administrative action resulting into adverse civil consequences taken by the State.

24. In any case as noted earlier, the principles of natural justice cannot be put in a straight-jacket and can be curtailed or even dispensed with by express provisions of law or even by necessary implication.

25. In the case of Dr Rash Lal Yadav Vs. State of Bihar and Others, , the Hon''ble Supreme Court noting the earlier decision in the case of Swadeshi Cotton Mills Vs. Union of India (UOI), and in case of Mohinder Singh Gill and Another Vs. The

Chief Election Commissioner, New Delhi and Others, observed that what emerges from the discussion is that unless the law expressly or by necessary implications excludes the application of the rule of natural justice, Courts will read the said requirement in enactments that are silent and insist on its application even in cases of administrative action having civil consequences. In the said case however, Hon''ble Supreme Court found that legislative history unmistakably reveals the legislature''s intendment to exclude the rule of giving an opportunity to be heard before the exercise of power of removal.

25.1 In the case of Assistant Excise Commissioner and Others Vs. Issac Peter and Others, , Hon''ble Supreme Court observed the doctrine of fairness and reasonableness cannot be evolved to alter expressed terms of contract of statutory nature.

25.2 In the case of Dr Umrao Singh Choudhary Vs. State of M.P. and Another, in Paragraph 4 the Hon''ble Supreme Court observed that the principles of natural justice does not supplant the law, but supplements the law. Its application may be excluded, either expressly or by necessary implication. Considering the provision of statute under the Constitution, in the said case, it was held that obvious inference is that the principle of natural justice stands excluded.

25.3 In case of S.N. Mukherjee Vs. Union of India, a in Paragraph 39 while finding that requirement of recording of reasons by an administrative authority exercising quasi-judicial functions, achieves the object of excluding chances of arbitrariness and ensuring a degree of fairness in the decision making process, the Hon''ble Supreme Court observed that principles of natural justice can be dispensed with either by express provisions of law or by necessary implications from the nature of the subject-matter, the scheme and the provisions of enactment. It was observed that public interest underlying such a provision would outweigh the salutary purpose served by the requirement to record the reasons. Such requirement, therefore, cannot be insisted upon in such as case.

25.4 In the case of R.S. Dass Ors. Vs. Union of India (UOI) and Others, , the Hon''ble Supreme Court made following observations in Paragraph 25:

25. It is well established that rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of statutory provision, nature of the right which may be affected and the consequences which may entail, its application depends upon the facts and circumstances of each case. These principles do not apply to all cases and situations. Applications of these uncoded rules are often excluded by express provision or by implication. In Union of India and Another Vs. Tulsiram Patel and Others, a Constitution Bench of this Court considered the scope and extent of applicability of principles of natural justice to administrative actions. Madon J. summarised the position of law on this point and observed as follows:

So far as the audi alteram partem rule is concerned, both in England and in India, it is well established that where a right to a prior notice and an opportunity

to be heard before an order is passed would obstruct the taking of prompt action such a right can be excluded. This right can also be excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion; nor can the audi alteram partem rule be invoked if importing it would have the effect of paralysing the administrative process or where the need for promptitude or the urgency of taking action so demands, as pointed out in *Maneka Gandhi's case* 1978 (2) SCR 621 : AIR 1978 SC 597.

In the instant cases statutory regulations do not expressly or by implication apply the rule of audi alteram partem in making the selection. On the other hand the scheme contained under the regulations exclude the applicability of the aforesaid rule by implication. Select list is prepared each year which ordinarily continues to be effective for a year or till the fresh select list is prepared. If during the process of selection a senior officer is proposed to be superseded by virtue of not being included in the select list, and if opportunity is afforded to him to make representation and only thereafter the list is finalised, the process would be cumbersome and time consuming. In this process it will be difficult for the committee to prepare and finalise the select list within a reasonable period of time and the very purpose of preparing the select list would be defeated. Scheme of the regulations, therefore, clearly warrants exclusion of principle of audi alteram, partem. No vested legal right of a member of the State Civil Service who after being considered is not included in the select list, is adversely affected. Non-inclusion in the select list does not take away any right of a member of the State Civil Service that may have accrued to him as a Govt, servant, therefore, no opportunity is necessary to be afforded to him for making representation against the proposed supersession.

25.5 In the case of *Swadeshi Cotton Mills Vs. Union of India (UOI)*, in Paragraph 28, it was observed that earlier though it was generally thought that the rules of natural justice will apply only to judicial or quasi-judicial proceedings, in India the Courts have held that even an administrative order or decision in matters involving civil consequences, has to be made consistently with the rules of natural justice. This supposed distinction between quasi-judicial and administrative decisions was rubbed out to a vanishing point in the case of *A.K. Kraipak v. Union of India* (ibid) reported in AIR 1969 (2) SCC 262. It was, however, further held in Paragraph 31 of the said decision that the rules of natural justice can operate only in areas not covered by any law validly made. They can supplement the law but cannot supplant it. If a statutory provision either specifically or by inevitable implication excludes the application of the rules of natural justice, then the Court cannot ignore the mandate of the Legislature. Whether or not the application of the principles of natural justice in a given case has been excluded, wholly or in part, in the exercise of statutory power, depends upon the language and basic scheme of the provision conferring the power, the nature of the power, the purpose for which it is conferred and the effect of exercise of that power.

26. Considering the above judicial pronouncements and reverting back to the facts of the case, I find that there is no possibility of adding a stage of hearing the borrowers after notice under Sub-section (2) of Section 13 of the Act of 2002 has been issued by a secured creditor and considered and disposed of the objections of the borrower in response to the notice and communicated the same as provided u/s 13(3A). Considering the background under which the Act of 2002 has been enacted as noted by the Hon''ble Supreme Court in the case of Mardia Chemicals Ltd. v. Union of India (supra) and also considering the observations made in Paragraphs 45, 48 and 81 of the said decision, I have no hesitation in coming to the conclusions that no such stage has been envisaged or can be provided for. Adding such a stage before permitting the secured creditors to take any of the measures provided under Sub-section (4) of Section 13 of the Act of 2002, would run counter to the purpose of enactment of the Act of 2002 namely "to achieve speedier recovery of the dues declared as N.P. As. and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest" as observed by the Hon''ble Supreme Court.

27. Considering the totality of the provisions contained in the Act of 2002 as examined by the Hon''ble Supreme Court in the case of Mardia Chemicals Ltd. v. Union of India (supra), I am afraid the said contention cannot be upheld. After disposal of the objections as provided under Sub-section (3) of Section 13 of the Act of 2002, no further remedy is envisaged under the said Act till the secured creditor resorts to any of the measures provided under Sub-section (4) of Section 13. Only thereafter, the borrowers would be in a position to approach the Debts Recovery Tribunal u/s 17 of the Act of 2002. In case of glaring injustice and extreme hardship, writ jurisdiction would be available in a given case to obviate the difficulties of the borrowers. However, such individual case of possible misuse of power conferred under the Act would not justify a general presumption that such powers would be exercised arbitrarily or without fulfilment of pre-condition for exercising of such power. It is observed by the Hon''ble Supreme Court in Mardia Chemicals Ltd. v. Union of India (supra), that some of the provisions may act harshly in some individual cases, but validity of the provisions cannot be doubted only on that basis. In the present case, the respondent has made it clear through the pleadings that no action under Sub-section (4) of Section 13 of the Act of 2002 shall be taken without necessary agreement of the other secured creditor as required under Sub-section (9) of Section 13 of the Act of 2002.

28. This brings me to the next legal issue arising in the petition.

29. As noted earlier, it was urged before this Court that before the secured creditor can initiate any action under the provisions of Act of 2002, it must elect its remedy. In other words, it was contended that secured creditor cannot pursue two parallel remedies in the form of proceedings before the Debts Recovery Tribunal or any other competent Court while initiating the proceedings under the

Act of 2002. It was, therefore, contended that before any action under the Act of 2002 can be initiated, the secured creditor must elect its remedy and withdraw the pending proceedings from other forums.

30. As already noted, learned single Judge of this Court in the case of Apex Electricals Ltd. and Ors. v. I.C.I.C.I Bank Ltd. and Ors. (supra) had an occasion to consider the contention regarding necessity of election of remedies. By detailed decision, learned single Judge found that considering the provisions made in the Act of 2002, it would not be necessary for the secured creditor to make a choice before initiating the action under the Act of 2002. At the outset, it may be noted that the said decision of the learned single Judge is not at large before this Court. By law of judicial precedence, I am bound by the decision of Co-ordinate Bench. Though a faint attempt was made on behalf of the petitioners to urge before this Court that the decision of this Court in the case of Apex Electricals Ltd. and Ors. v. ICICI Bank Ltd. and Ors. (supra) requires reconsideration, I am not inclined to accept such a contention. Only ground pressed in support of the said contention was that the decision of the Hon"ble Supreme Court in the case of A.P. State Financial Corporation v. Gar Re-Rolling Mills and Anr. (supra) was not properly considered by the learned single Judge in the case of Apex Electricals Ltd. and Ors. v. ICICI Bank Ltd. and Ors. (supra). I am afraid this would not be a ground to permit me to take a view different from the learned Judge. It is not in dispute that the decision of the Hon"ble Supreme Court in the case of A.P. State Financial Corporation v. Gar Re-Rolling Mills and Anr. (supra) was pointed out to the learned Judge and was taken into consideration. That being so, I see no possibility of departing from the view adopted by the learned Judge in the case of Apex Electricals Ltd. and Ors. v. ICICI Bank Ltd. and Ors. (supra) insofar as the question of election of remedy is concerned. Another facet of the question of election, however, is that since the learned single Judge of this Court delivered the judgment in the case of Apex Electricals Ltd. and Ors. v. ICICI Bank Ltd. and Ors. (supra) there have been some amendments in the Act of 1993 which have reopened the controversy about the necessity of election of remedies.

31. Provisions contained in Section 19 of the Act of 1993 have been reproduced hereinabove.

32. It may be recalled that proviso and the further proviso to Sub-section (1) of Section 19 of the Act of 1993 have been added by the legislature through the Amending Act of 2004. It is this amendment in the Act of 1993 which was debated by both the sides as to the true interpretation of the said provision and its implication regarding the question of election of remedies.

33. Before appreciating the rival submissions and attempting to interpret the statutory provisions, it may be noted that learned single Judge of this Court in the case of Bhishma N. Thakore v. Dena Bank through Authorised Officer (supra) had an occasion to consider the effect of the said amendments on the question of election of remedies by the secured creditor. In the said decision learned single

Judge was pleased to turn down the contention in this regard raised on behalf of the borrowers finding that accepting such a contention would lead to multiplicity of proceedings since in case the entire dues are not satisfied, the secured creditor would have to approach Debts Recovery Tribunal or the Court of competent Court as provided in Sub-section (10) of Section 13 of the Act of 2002. It was found that same would also raise various other questions such as lapsing of attachment if made under Sub-section (15) of Section 19 of the Act of 1993. It was observed that if the legislation intended the provision to be mandatory, the legislation would have provided for extension of limitation as has been done in other statutes.

33.1 It was, however, urged before this Court on behalf of the petitioners that the decision of *Bhishma N. Thakore v. Dena Bank* through Authorised Officer (*supra*) requires the reconsideration and this Court, therefore, should refer the matter before the large Bench for reconsideration of issues.

34. It may be noted that Division Bench of Kerala High Court in the case of *Mr. Sahir Shah and Ors. v. Bank of India and Ors.* by decision dated 23-6-2005 was pleased to hold that it is not mandatory on part of the Bank or financial institution to make an application before the Tribunal or to seek permission before invoking the provisions of the Act of 2002. It was observed that power conferred on the Tribunal under the third proviso to Section 19(I)(c) is only to refuse or grant permission for withdrawal. No power is conferred on the Tribunal to prevent the Bank or financial institution from invoking the provisions of the Act of 2002.

34.1 In the case of *Digivision Electronics Ltd. Vs. Indian Bank*, Division Bench of Madras High Court also held that despite the provisions contained in Sub-section (1) of Section 19 of the Act of 1993 as amended by the Amending Act of 2004, there is no requirement that Bank or financial institution must first withdraw the proceedings from Debts Recovery Tribunal before initiating action under the Act of 2002.

34.2 Division Bench of Nagpur Bench of Bombay High Court in the case of *Wardhaman Samjibhai Dharamsi and Another Vs. Bank of Maharashtra*, also expressed a view that despite the amendment in Section 19 of the Act of 1993, it is not necessary for the bank or financial institution to elect the remedy. It was observed that liberty is given to the financial institution or the Bank to move Debts Recovery Tribunal to withdraw the application whether made before or after the amendment in the Act of 2002, if no such action have been taken earlier. It was found that this is only the enabling power.

34.3 Learned single Judge of Andhra Pradesh High Court in the case of *Hotel Rajahamsa International and Ors. v. Authorised Officer, Indian Overseas Bank and Anr.* reported in 2005 (128) Comp. Cases 431, also took a similar view.

35. On the other hand it is pointed out that Division Bench of Punjab and Haryana High Court in the case of *Kalyani Sales Co. and Anr.* reported in 2006 BC

1, has taken a view that considering the provisions made in Section 19 of the Act of 1993, by virtue of the Amending Act of 2004, it would be necessary for the Bank or financial institution to elect its remedy. In paragraph 38, it was observed that first proviso to Section 19 gives statutory recognition to the Doctrine of election which contemplates that one remedy can be taken in respect of one action. It was, therefore, held that though it was discretionary for the Bank to proceed under the Act of 2002, but if such a course is chosen, it is mandatory for the Bank or financial institution to withdraw its application made to the Debts Recovery Tribunal.

36. Clause 6 of the Statement of Objects and Reasons for introduction of Bill which ultimately culminated into the Amending Act of 2004 reads as follows:

Chapter III of the Ordinance amends the Recovery of Debts to Banks and Financial Institutions Act so as to enable the Bank or financial institution to withdraw with the permission of the Debts Recovery Tribunal, the application made to it and thereafter take action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

37. First proviso to Sub-section (1) of Section 19 of the Act of 1993 provides inter alia that bank or financial institution may with the permission of Debts Recovery Tribunal withdraw the application filed under Sub-section (1) thereof whether made before or after amending the Act of 2004 for the purpose of taking action under the Act of 2002, if no such action had been taken earlier.

37.1 Second proviso to Sub-section (1) of Section 19 of the Act of 1993 provides that such an application shall be dealt with expeditiously and disposed of within 30 days from the date of such application.

37.2 Third proviso in turn provides that in case Debts Recovery Tribunal refuses to grant permission for withdrawal of the application, it shall pass such order after recording the reasons therefor.

38. It was on the basis of these provisions that it was urged before this Court that only intention that can be attributed while enacting the provisions by the legislation would be that the Bank or financial institution must elect its remedy before initiating or pursuing its action under the Act of 2002. It was urged that right to withdraw the proceedings initiated by a litigant is an unlimited right and in absence of the said provisions also, it was always open for the Bank or financial institutions to withdraw the application made before the Debts Recovery Tribunal under Sub-section (1) of Section 19 of the Act of 1993. It was, therefore, urged that only reason that can be assigned for enactment of the said provision would be that the Bank or financial institution must elect its remedy. It was urged that word used "may" signifies the intention of the legislature inasmuch as though it is not compulsory for the Bank or financial institution to withdraw such an application and it would be open for the Bank or financial institution to maintain this application before the Debts Recovery Tribunal, nevertheless it must choose one of the two remedies and must withdraw the

proceedings before initiating the Act under the Act of 2002.

39. Before testing the said contention, it would be necessary to notice the nature of right of a litigant to withdraw the proceeding once initiated.

40. Order 23 Rule 1 of CPC pertains to withdrawal of suit or abandonment of part of claim. Rule 1 of Order 23 of CPC reads as follows:

Withdrawal of Suit or abandonment of part of claim:

1.(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to Sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied -

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff -

(a) abandons any suit or part of claim under Sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in Sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under Sub-rule (1), or to withdraw, under Sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

40.1 Sub-rule (1) of Rule 1 of Order 23 recognizes the general power of the plaintiff to abandon the entire suit or part of the claim. Sub-rule (3) of Rule 1 of Order 23 permits the Court on such terms as found appropriate to allow the plaintiff to withdraw the suit or part of the claim with liberty to institute a fresh

suit in respect of the subject-matter of such suit or part of the claim.

40.2 Sub-rule (4) of Rule 1 of Order 23 further provides that plaintiff who abandons the suit or part of the claim under Sub-rule (1) or withdraw the suit or part thereof without the permission referred to in Sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

41. These provisions contained in CPC codify the general principles governing withdrawal of the litigation. When no specific provisions have been made to govern the situation, the Courts have adopted analogous principles and applied them with necessary modifications. In case of writ jurisdiction, though the provisions of CPC do not have strict applicability, provisions contained in Rule 1 of Order 23 of CPC are applied for considering the question of withdrawal of the proceedings.

42. It may be noted that as per the Act of 1993 though the Debts Recovery Tribunal or the Appellate Tribunal are not bound by the rigid principles contained in CPC and are to be guided by the principles of natural justice, for conducting the proceedings in certain respects such as issue and service of summons, necessitating the attendance of the parties, examining any person on oath, requiring discovery and production of documents, receiving evidence on record etc. enjoy same power as are vested in Civil Court under the Civil Procedure Code.

43. In the case of *Rekha Mukherjee Vs. Ashis Kumar Das and Others*, the Hon''ble Supreme Court observed that if a party intends to withdraw a review application that too at the appellate stage, it must make out proper grounds to enable the Court to apply its own mind thereupon. It was observed that in the meantime third party interest might have been created.

43.1 Though the withdrawal of writ petition by the Court are normally freely granted, departure is made in case of Public Interest Litigation and the person initiating the litigation may be allowed to withdraw from the proceeding, Courts always examine the request for withdrawal of the Public Interest Litigation with caution. Reference in this regard can be made to the decision of the Hon''ble Supreme Court in the case of *Sheela Barse Vs. Union of India (UOI) and Others*,

43.2 In the case of *Sarguja Transport Service Vs. State Transport Appellate Tribunal, M.P., Gwalior and Others*, the Hon''ble Supreme Court held that where the petitioners withdraw a petition filed before High Court under Articles 226 and 227 of the Constitution of India without the permission to institute a fresh petition, remedy under Articles 226 and 227 should be deemed to have been abandoned in respect of cause of action. It was observed that principles underlining Rule 1 of Order 23 of CPC should be extended in the interest of administration of justice to cases of withdrawal of writ petition also. In Paragraph 7 of the decision, Hon''ble Supreme Court made following observations:

The Code as it now stands thus makes a distinction between "abandonment" of a suit and "withdrawal" from a suit with permission to file a fresh suit. It provides that where the plaintiff abandons a suit or withdraws from a suit without the permission referred to in Sub-rule (3) of Rule 1 of Order 23 of the Code, he shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim. The principle underlying Rule 1 of Order 23 of the Code is that when a plaintiff once institutes a suit in a Court and thereby avails of a remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject-matter again after abandoning the earlier suit or by withdrawing it without the permission of the Court to file fresh suit. *Invito beneficium non datur*. The law confers upon a man no rights or benefits which he does not desire. Whoever waives, abandons or disclaims a right will lose it. In order to prevent a litigant from abusing the process of the Court by instituting suits again and again on the same cause of action without any good reason the Code insists that he should obtain the permission of the Court to file a fresh suit after establishing either of the two grounds mentioned in Sub-rule (3) of Rule 1 of Order XXIII. The principle underlying the above rule is founded on public policy, but it is not the same as the rule of *res judicata* contained in Section 11 of the Code which provides that no Court shall try any suit or issue in which the matter directly or substantially in issue has been directly or substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court. The rule of *res judicata* applies to a case where the suit or an issue has already been heard and finally decided by a Court. In the case of abandonment or withdrawal of a suit without the permission of the Court to file a fresh suit, there is no prior adjudication of a suit or an issue is involved, yet the Code provides, as stated earlier, that a second suit will not lie in Sub-rule (4) of Rule 1 of Order 23 of the Code when the first suit is withdrawn without the permission referred to in Sub-rule (3) in order to prevent the abuse of the process of the Court.

43.3 In the case of *Hulas Rai Baij Nath Vs. Firm K.B. Bass and Co.*, the Hon''ble Supreme Court observed in Paragraph 2 that:

The short question that, in those circumstances, falls for decision is whether the respondent was entitled to withdraw from the suit and have it dismissed by the application dated 5th May, 1953 at the stage when issues had been framed and some evidence had been recorded, but no preliminary decree for rendition of accounts had yet been passed. The language of Order 23, Rule 1, Sub-rule (1), C.P.C., gives an unqualified right to a plaintiff to withdraw from a suit and if no permission to file a fresh suit is sought under Sub-rule (2) of that Rule, the plaintiff becomes liable for such costs as the Court may award and becomes precluded from instituting any fresh suit in respect of that subject-matter under Sub-rule (3) of that Rule. There is no provision in the CPC which requires the Court to refuse permission to withdraw the suit in such circumstances and to

compel the plaintiff to proceed with it. It is, of course, possible that different considerations may arise where a set-off may have been claimed under Order 8, C.P.C. or a counter-claim may have been filed, if permissible by the procedural law applicable to the proceedings governing the suit.

44. In the case of K.S. Bhoopathy and Others Vs. Kokila and Others, , the Hon"ble Supreme Court observed that before granting permission to withdraw the suit with leave to file fresh suit, the Court is duty bound to satisfy itself that proper grounds exist for granting such a permission.

45. It can thus be seen that ordinarily a litigant who has initiated a judicial proceeding would have right to abandon such proceedings unconditionally. Such a general principle has certain limitations. In a given case if the Court finds that the proceedings were frivolous or vexatious, permission for withdrawal may be accompanied by awarding of costs. If the litigant wishes to reserve the liberty to file fresh proceedings, same has to be done with the permission of the Court on the Court being satisfied that such a permission is required to be granted. In case the provisions of law permit filing of set-off or counter claim and such set-off or counter-claim is made, request for withdrawal of the proceedings would stand on a different footing.

46. It is, therefore, not correct to suggest that the Bank or financial institution which had filed an application u/s 19(1) of the Act of 1993 always had unlimited right to withdraw such proceedings. Such right was qualified and hedged with certain limitations. By virtue of amendments in Sub-section (1) of Section 19 of the Act of 1993, therefore, all that has been done by the legislature is to provide for filing of an application by the Bank or financial institution for withdrawal of the proceeding and for its expeditious consideration by the Tribunal and for recording of reasons if such an application was being rejected.

47. To my mind the amended provisions of Section 19(1) of the Act of 1993 cannot be construed as requiring the Bank or financial institution to first withdraw the proceedings initiated before the Debts Recovery Tribunal, and thereafter, only, to pursue the action under the Act of 2002. Any other view is froth (sic. fraught) with number of complications. Firstly as noted earlier, Sub-section (10) of Section 13 of the Act of 2002 provides that where dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application before the Debts Recovery Tribunal or competent Court for recovery of the balance amount from the borrower. It is not difficult to envisage that during the time secured creditor is pursuing its options under the Act of 2004, the period of limitation for recovery of the dues may come to an end. In such a case, remedy under the Act of 1993 or even before the Civil Court would be lost. As noted earlier, Section 2(g) of the Act of 1993 defines the term "debt" as to mean any liability claimed by the Bank or financial institution which is legally recoverable on the date of application. Any debt which has become time-barred would not be legally recoverable liability. Sub-section (1) of Section 19 of the Act of 1993 permits the Bank or financial

institution to file an application to recover any debt which in turn would be a debt as defined under Clause (g) of Section 2 of the Act of 1993 which must be a legally recoverable liability and not one which has become time-barred. Section 24 of the Act of 1993 provides that provisions of Limitation Act may be applied to an application made to the Tribunal. Combined effect of these provisions would be that Debts Recovery Tribunal would be in a position to entertain the application of Bank or financial institution only with respect to such debts which have not become time-barred. Accepting the interpretation of the provisions of Sub-section (1) of Section 19 of the Act of 1993 as amended by the Amending Act of 2004 as suggested by the petitioners would lead to incongruous situation whereby on one hand the Bank or financial institution would be required to at least temporarily defer the proceedings u/s 17 of the Act of 1993 in order to pursue its remedies under the Act of 2004, and thereafter, to bring about a situation whereby the Bank or financial institution would not be in a position to recover its debts against the borrower through the machinery of the Debts Recovery Tribunal since by that time debt would have become time-barred. Such an interpretation would lead to a situation whereby the Bank or financial institution would have to pursue only the remedy under the Act of 2004. The Bank or financial institution would be in a position to approach the Debts Recovery Tribunal as provided in Sub-section (10) of Section 13 of the Act of 2002 only after the sale of secured assets and to the extent dues are not recovered. Period of limitation would have lapsed by that time. Legislation could not have been intended to bring about a situation whereby a party is left without remedy. In order to save limitation, the Bank or financial institution would have to abandon its remedies under the Act of 2002 and concentrate only on the remedies under the Act of 1993. This would completely destroy the efficacy of the Act of 2002 which was enacted by the legislature for the purpose of ensuring speedier recovery of debts due to banks and financial institutions.

48. It is not in dispute that even if the application is withdrawn by the Bank or financial institution from the Debts Recovery Tribunal as provided for in proviso contained under Sub-section (1) of Section 19 of the Act of 1993 with permission, to institute fresh proceedings in future, the same would not save the period of limitation. Nothing has been pointed out in the Limitation Act to suggest that fresh proceedings at a future point of time even with the leave of the Tribunal could be instituted without reference to the limitation period.

49. I am unable to accept the contention of the learned senior Advocate Shri Nanavati for the petitioners that any application that may be filed by the Bank or financial institution as provided under Sub-section (10) of Section 13 of the Act of 2002 would be for pursuing fresh cause of action and that therefore, the question of limitation would not arise. Provisions contained under Sub-section (10) of Section 13 of the Act of 2002 appear to be clarificatory in nature and the same do not give a cause of action to the Bank or financial institution to recover its dues. Right to seek recovery of the debt due would stand on facts of each case. Such a right does not arise upon happening of an event as envisaged under

Sub-section (10) of Section 13 of the Act of 2002. No fresh cause of action can be stated to have been arising in favour of the bank or financial institution in the eventuality envisaged under Sub-section (10) of Section 13 of the Act of 2002. In such a case the Bank or financial institution would be faced with serious question of its debt getting time-barred, making proceedings before the Debts Recovery Tribunal or Court of competent jurisdiction barred by limitation by the time action u/s 13 of the Act of 2002 is finalised.

50. One more situation of incongruence would be wherein the entire debt of the Bank or financial institution may not be secured. Part of the debt may be secured and part may be unsecured. Only qua the debt which is secured can the bank or financial institution proceed against the borrower under the Act of 2002. Pending the application before the Debts Recovery Tribunal would cover both the debts. Requiring the Bank or financial institution to withdraw such an application would bring about another complicated situation whereby the Bank or financial institution would not be in a position to pursue its remedies before the Debts Recovery Tribunal even against the unsecured debts and under the Act of 2004, in any case, the Bank has no such remedy.

51. As per Sub-section (9) of Section 13 of the Act of 2002, in case of financing of a financial asset by more than one secured creditor, no secured creditor is entitled to exercise any or all of the rights conferred on him under Sub-section (4), unless exercise of such right is agreed upon by the secured creditors representing not less than 3/4th in value of the amount outstanding. Such action if taken is made binding on all secured creditors.

51.1 Provisions contained in Sub-section (9) of Section 13 of the Act of 2002 would also bring about an incongruent situation if contentions raised on behalf of the petitioners are accepted. Let us envisage a situation whereby a secured creditor representing less than 25% in value of amount outstanding (let us call him a minority stake holder) has instituted proceedings before the Debts Recovery Tribunal to recover its dues from the borrower. Remaining secured creditors may combine together and seek to pursue remedies under the Act of 2002. Sub-section (9) of Section 13 of the Act of 2002 gives such a power to majority of the secured creditors and action taken by them would bind even the minority stake holder. The minority stake holder may not wish to withdraw the proceedings initiated before the Debts Recovery Tribunal. In such a case there would be a deadlock. On one hand the action taken by the remaining secured creditors would bind the minority stake holder also. On the other hand minority stake holder would be steadfast in its refusal to withdraw the proceedings from Debts Recovery Tribunal. Inevitably, therefore, there would be two parallel proceedings pending before the Debts Recovery Tribunal as well as under the Act of 2002. In such a situation, if it is construed that unless and until application filed by minority stake holder is withdrawn before initiation of action under the Act of 2002, then the provisions contained in Sub-section (9) of Section 13 of the Act of 2002 would completely frustrate.

52. It may also be noted that legislature has thought it fit to make amendments in the provisions of Act of 1993 and not in the Act of 2002. Quite apart from the remedy before the Debts Recovery Tribunal, there are several other parallel remedies that can be envisaged in different situations. A Co-operative Bank may have remedy under the Cooperative Law and may pursue its remedies before the Board of Nominees or Co-operative Tribunal. Under ordinary Civil jurisdiction, parties may have opportunity to approach Civil Court for seeking recovery of debts. If the legislation had intended that the Bank or financial institution must elect its remedies, there was no apparent reason to make amendments only in the Act of 1993 and leave other situations open to different interpretations. Obvious course open to the legislature was to make amendments in the Act of 2002 to leave no scope of ambiguity and to put the matters beyond the pale of doubt.

53. It is, however, true that legislature could not have enacted provisions without any specific purpose in mind. The legislation cannot be attributed to have enacted redundant provisions in law. The amendments made in Sub-section (1) of Section 19 of the Act of 1993, therefore, had some specific purpose when the legislature enacted the said provisions.

54. As noted earlier to withdraw any proceedings once having initiated in the Court of law is not a matter of unlimited right of the litigant. Such an application has to be examined by the Court and in a given situation, it may be open for the Court either to permit withdrawal upon costs or even to refuse withdrawal. One such situation would be when as per the provisions contained in law, set-off is claimed or counter-claim made. Second situation would be where the party concerned wishes to institute fresh proceedings after withdrawal of the existing proceedings. It may be that in a given case the Bank or financial institution does not wish to invite an order from the Debts Recovery Tribunal and would wish to pursue its remedies under the Act of 2002 without the aid of any machinery of the Court. If the application of the Bank or financial institution in such a case to withdraw the proceedings is not decided expeditiously or is rejected without assigning any reasons, Bank or financial institution would be in a disadvantageous position. Though law permits the Bank or financial institution to resort to the remedy under the Act of 2002, the decision of the Debts Recovery Tribunal in such a case would bind the parties. In case of adverse decision, the Bank or financial institution would be left with no further possibility of pursuing the remedy under the Act of 2002. This could be one of the situations in the mind of the legislature while amending the provisions of Sub-section (1) of Section 19 of the Act of 1993. This provision primarily provides for an application to be filed by the Bank or financial institution for withdrawal of the proceedings from Debts Recovery Tribunal, expeditious consideration of such an application and for recording of reasons if the application is being rejected by the Tribunal. Nothing contained therein would suggest that the purpose of enactment of the said provision was to enforce the choice of the remedy on the bank or financial institution.

55. Considering all these aspects of the matter, quite apart from the law of precedence which would bind me by the decision of learned single Judge of this Court, independently also I find that by virtue of amendments in the Act of 1993 by the Amending Act of 2004, no material change has been brought about regarding the question of election of remedy. Despite such amendments, it is not necessary that in every case before initiating or pursuing remedy under the Act of 2002, the Bank or financial institution concerned must withdraw its proceedings from the Debts Recovery Tribunal or any other competent Court.

56. I am conscious of the fact that Division Bench of this Court has admitted the appeal against the decision of learned single Judge in the case of Bhishma N. Thakore v. Dena Bank through Authorised Officer, (supra). However, implementation of the judgment has not been stayed. What has been stayed is physical dispossession of the appellants of their residential house by permitting the Bank to take symbolic possession thereon finding that the appellants were guarantors and the Bank was seeking to take physical possession of their residential house. In this view of the matter, I have considered the submissions made on behalf of both the sides and given my decision thereon.

57. In the result, the petition fails, is hereby rejected.