

(2015) 05 DEL CK 0101

In the Delhi High Court

Case No : LPA 254/2015 and CM No. 7754 of 2015

Yashwant Singh and Others

APPELLANT

Vs

Indian Bank and Others

RESPONDENT

Date of Decision : 21-05-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3), 13(3A), 13(4)

Citation : (2015) 6 AD 81 : (2015) 220 DLT 667

Hon'ble Judges : G. Rohini, C.J.;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Mohit Chaudhary and Damini Chawla, for the Appellant; Brijesh Kumar Tamber, Arshad Choudhary and Quaisar Ali, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—This intra court appeal impugns the judgment dated 23rd April, 2015 of the learned Single Judge of this Court of dismissal of W.P.(C) No. 4021/2015 filed by the two appellants.

2. The writ petition from which this appeal arises was filed impugning inter alia the decision of the respondent No. 1 Bank (respondent No. 2 is the authorized officer of the said Bank) under Section 13(3A) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) dismissing / rejecting the representation filed by the appellants against the notice under Section 13(2) of the SARFAESI Act. It was the contention of the appellants that the respondent Bank has taken recourse to the provisions of the SARFAESI Act, without "jurisdictional facts" obtaining in the matter. It was the argument of the counsel for the appellants before the learned Single Judge that the mechanism under Section 13 of the SARFAESI Act could not be triggered till such time as the loan account of the appellants with the respondent Bank was classified as a Non-Performing Asset (NPA) and which, in

the facts and circumstances of the case it could not have been classified.

3. The learned Single Judge, giving detailed reasons and analysing the loan account of the appellants with the respondent Bank, has not accepted the contention that the classification by the respondent Bank of the said loan account as NPA was faulty. It has further been held that the said pleas could be taken before the Debts Recovery Tribunal (DRT) in a proceeding under Section 17 of the SARFAESI Act.

4. When the appeal came up before us on 1st May, 2015, it was the contention of the counsel for the appellants that the High Courts of Andhra Pradesh and Jharkhand had held that a writ petition at the stage of Section 13(3A) of the SARFAESI Act was maintainable, though a contrary view had been taken by the High Courts of Orissa, Madhya Pradesh and Chennai and that this Court needs to take a view on the matter. We however drew the attention of the counsel for the appellants to the judgment of this Bench in *Sigma Generators Pvt. Ltd. Vs. Oriental Bank of Commerce* and on the request of the counsel for the appellants, the matter was adjourned.

5. We further heard the counsel for the appellants on 7th May, 2015 and reserved judgment.

6. We, in *Sigma Generators Pvt. Ltd. supra* were concerned with a challenge to the notice under Section 13(2) of the SARFAESI Act. The learned Single Judge, in that case, relying on *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, AIR 2004 SC 2371 : (2004) 2 BC 397 : (2004) 120 CompCas 373 : (2004) 2 CompLJ 209 : (2004) 2 CTC 759 : (2004) 4 JT 308 : (2004) 138 PLR 271 : (2004) 4 SCALE 338 : (2004) 4 SCC 311 : (2004) 51 SCL 513 : (2004) 3 SCR 982 : (2004) 2 UJ 980 : (2004) AIRSCW 2541 : (2004) 3 Supreme 243 , had dismissed the writ petition holding that the notice under Section 13(2) is a pre-condition to an action under Section 13(4) of the Act and the remedy available to a borrower can be availed only after the measures under Section 13(4) of the Act had been taken. The writ petitioner/appellant before us in that case pegged its case on *Sravan Dall Mill P. Limited Vs. Central Bank of India and Another*, AIR 2010 AP 35 : (2009) 6 ALD 615 : (2010) 1 ALT 321 : (2010) 2 BC 96 where a Division Bench of the High Court of Andhra Pradesh has held that the remedy of judicial review under Article 226 of the Constitution of India is available with respect to a decision of a creditor declaring the debtor's account as an NPA by issuing a notice under Section 13(2) of the Act. We however held--

"(i) that the High Court of Andhra Pradesh in *Sravan Dall Mill Pvt. Ltd. supra* held the remedy of Article 226 of the Constitution of India to be available as the creditor in that case, after issuing notice under Section 13(2) and inspite of the debtor representing /objecting under Section 13(3A) there against, neither passed any order on the said representation/objection nor took any measure under Section 13(4) of the Act; it was in view thereof that it was held that declaring an account as NPA by itself leads to serious consequences and when

measures under Section 13(4) are not taken by the creditor, the debtor is also deprived of seeking redressal under Section 17 of the Act;

(ii) per contra, the creditor in Sigma Generators Pvt. Ltd. had already taken measures under Section 13(4) of the Act and where against the remedy under Section 17 was available to the writ petitioner/appellant;

(iii) that by rushing to the High Court immediately after a notice under Section 13(2) and challenging the same, a person cannot be allowed to interfere with the scheme of the SARFAESI Act;

(iv) Supreme Court in *Devi Ispat Limited and Another Vs. State Bank of India and Others*, (2014) 2 BC 532 : (2014) 5 SCALE 123 : (2014) 5 SCC 762 : (2014) 5 SCJ 424 has held that the remedy of a writ petition under Article 226 is not available against the notice under Section 13(2) owing to the alternative remedy of making a representation under Section 13(3A) being available and that upon the debtor availing of the remedy under Section 13(3A), nothing survived;

(v) Supreme Court prior thereto in *Punjab National Bank and Another Vs. Imperial Gift House and Others* also, finding that the debtor had filed a representation under Section 13(3A) and which had been rejected by the creditor held, that the writ petition filed immediately thereafter was not maintainable;

(vi) Division Bench of the High Court of Madras in *M/s. N.A.K.G. Cotfibres Private Ltd. Vs. The Zonal Manager and UCO Bank 328, Thambu Chetty Street Chennai - 600001 and The Authorised Officer UCO Bank 806-A, Thenkasi Road Rajapalayam* had also taken a view that if the bank has not followed the procedures contemplated under Section 13(2) or under Section 13(3A) or Section 14 of the SARFAESI Act, appropriate course open to the person aggrieved is to approach the DRT under Section 17 and not to rush to the High Court with a writ petition;

(vii) though the High Court of Orissa in *Krushna Chandra Sahoo Vs. Bank of India and Others*, AIR 2009 Ori 35 : (2008) 106 CLT 713 : (2008) 2 OLR 789 and the High Court of Jharkhand in *Jayant Agencies Vs. Canara Bank and Others*, AIR 2011 Jhar 68 : (2011) 3 BC 297 : (2011) 2 JCR 27 had entertained the writ petition but on their own peculiar facts and that there were judgments to the contrary of the High Court of Jharkhand;

(viii) that where a statute lays down a procedure comprising of successive steps for action there under and has also provided a remedy against such action, after the final step is taken, the rule of availability of such remedy being a bar to the exercise of jurisdiction under Article 226 cannot ordinarily be defeated by invoking the remedy under Article 226 against the intermediary step and by contending that there against no alternative remedy is provided; reliance in this regard was placed on *Avtar Singh Hit Vs. Delhi Sikh Gurdwara Management Committee and Others*, (2006) 9 JT 111 : (2006) 10 SCALE 271 : (2006) 8 SCC 487 : (2006) 7 SCR 316 Supp : (2006) 2 UJ 1375 and on *Cadre Estate Pvt. Ltd.*

Vs. Salochna Goyal and Others, (2010) 119 DRJ 457 "

7. The counsel for the appellants however sought to distinguish our judgment in Sigma Generators Pvt. Ltd. by contending--

"(a) that in Sigma Generators Pvt. Ltd., the creditor had already taken action under Section 13(4) of the Act and it was this factor which influenced the decision of this Court; herein no action under Section 13(4) has been taken;

(b) that an action under Section 13(4) of taking over possession, even if not actual, physical and only notional, has serious consequences and thus the remedy against an action under Section 13(4) is not a remedy against the rejection of objections/representations under Section 13(3A) and before any action under Section 13(4) is taken;

(c) that the Supreme Court in Avtar Singh Hit (supra) was concerned with an election matter and law with respect thereto is a special law and the principle laid down therein that where the statute lays down a procedure comprising of successive steps for action there under and has also provided a remedy against such action after the final step is taken, the rule of availability of such remedy being a bar to the exercise of jurisdiction under Article 226 cannot ordinarily be defeated by invoking the remedy under Article 226 against the intermediary step where against no alternative remedy is available, cannot be made applicable to the SARFAESI Act the provisions whereof affect the property rights of the debtors;

(d) that classification of an account as a NPA is a jurisdictional fact and the Supreme Court in Arun Kumar and Others Vs. Union of India (UOI) and Others, (2006) 205 CTR 193 : (2006) 111 ECC 308 : (2006) 137 ECR 308 : (2006) 286 ITR 89 : (2006) 12 JT 121 : (2006) 9 SCALE 320 : (2006) 6 SCR 290 Supp has held that if a Court or Authority wrongly assumes the existence of a jurisdictional fact, the order can be questioned by a writ of certiorari; the underlying principle is that by erroneously assuming existence of such jurisdictional fact, no Authority can confer upon itself jurisdiction which it otherwise does not possess;

(e) similarly, Supreme Court in

(i) Raza Textiles Ltd. Vs. Income Tax Officer, Rampur, AIR 1973 SC 1362 : (1973) 87 ITR 539 : (1973) 1 SCC 633 has held that the question whether the jurisdictional fact has been rightly decided or not is a question that is open for examination by the High Court in a writ of certiorari;

(ii) Godrej Sara Lee Ltd. Vs. Asst. Commissioner (AA) and Another, (2009) 236 ELT 425 : (2009) 7 JT 1 : (2009) 4 SCALE 666 : (2009) 14 SCC 338 : (2009) 4 SCR 1183 : (2009) 3 UJ 1550 : (2009) 25 VST 271 : (2009) AIRSCW 4243 has held that when an order of statutory authority is questioned on the ground that the same suffers from lack of jurisdiction, alternative remedy may not be a bar;

(iii) State of Madhya Pradesh and Others Vs. Sardar D.K. Jadav, AIR 1968 SC

1186 : (1968) 2 SCR 823 has held that it is the duty of the High Court to decide the jurisdictional fact and if the High Court reaches the conclusion that the jurisdictional fact does not exist, it would be open to the High Court to grant a writ under Article 226 of the Constitution of India.

(f) The judgement in Sigma Generators Pvt. Ltd. (supra) is per incuriam to the aforesaid extent."

8. We have weighed the aforesaid contentions and are of the considered opinion, for the reasons following, that neither is there any need for reconsideration of the view taken in Sigma Generators Pvt. Ltd. called for nor is there any merit in the arguments urged:

"(A) SARFAESI Act, as per its statement of objects and reasons, was enacted as a result of slow pace of recovery of defaulting loans under the existing legal framework and resultant mounting levels of NPAs of the banks and financial institutions and to fulfil the need for change in the legal system in respect of these areas and for facilitating securitisation of financial assets of banks and financial institutions by taking possession and sale thereof without the intervention of the Court.

(B) When a new law is brought to fill the gaps in the earlier law on the subject, the Courts are not entitled to allow their vision and interpretation of the new law to be coloured by the principles evolved in the implementation and working of the old law and finding fault wherewith the new law was enacted. An interpretation which promotes the purpose underlying the Act needs to be preferred over that which defeats or impedes the same. The Supreme Court, in the context of SARFAESI Act itself, in *United Bank of India Vs. Satyawati Tondon and Others*, AIR 2010 SC 3413 : (2010) 3 BC 495 : (2010) 3 CompLJ 585 : (2010) 7 SCALE 696 : (2010) 8 SCC 110 : (2010) 9 SCR 1 : (2010) 9 UJ 4395 : (2010) AIRSCW 7049 : (2010) AIRSCW 5267 held that the High Court should not ordinarily entertain a petition under Article 226 if an effective remedy is available and that this rule applies with greater rigour in matters involving recovery of dues of banks and other financial institutions; it was further held that while dealing with the petitions involving challenge to the action taken for recovery of public dues, the High Court must keep in mind the legislations enacted for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievances of aggrieved persons; therefore, the High Court must insist that before availing remedy under Article 226, a person must exhaust the remedies available under the statute. The Supreme Court also expressed concern, at the High Courts notwithstanding such a clear position in law, continuing to entertain writ petitions and passing orders therein having serious adverse impact on the right of banks and financial institutions to recover their dues and expressed hope that High Courts in future will exercise greater caution, care and circumspection.

(C) SARFAESI Act, by Section 13(2) thereof, empowers a secured creditor to, upon finding that the borrower has made a default in repayment of secured debt or any instalment thereof and that his account in respect of such a debt is classified as a NPA, 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 empowers the secured creditor to exercise all or any of the rights under sub-Section (4) i.e. of taking possession of the secured assets and sale/transfer thereof etc.

(D) Section 13(3) of the said Act requires the notice to be issued under Section 13(2) to contain the details of the amount payable and the secured assets intended to be enforced in the event of non payment of secured debt by the borrower.

(E) SARFAESI Act in its original form did not provide for any consideration by the secured creditor of the response, if any, made by the borrower to the notice under Section 13(2).

(F) Supreme Court however in *Mardia Chemicals Ltd. supra* observed that the purpose of serving a notice upon the borrower under section 13(2) is that a reply maybe submitted by the borrower explaining the reasons as to why the measures under section 13(4) need not be taken and that the creditor must apply its mind to the objections raised in response to such notice and an internal mechanism must be evolved to consider such objections. It was further held that once such a duty is envisaged on the part of the creditor, it would only be conducive to the principles of fairness that the borrower be apprised of the reasons for not accepting the objections in the reply to the notice under section 13(2), before the creditor proceeds under section 13(4). The Supreme Court however hastened to add that the communication of the reasons for not accepting the objections be not taken to give an occasion to the borrower to resort to such proceedings which are not permissible under the act. It was held that the communication of the reasons not to accept the objections raised in the representation by the borrower was only for the purposes of knowledge of the borrower. It was further held that issue of notice under section 13(2) to a borrower by a creditor does not attract the principles of natural justice and, no hearing can be demanded by the borrower at this stage. It was yet further held that the communication of reasons for not accepting the objections in the representation was only for purposes of knowledge/information of the borrower, without giving rise to any right to approach the DRT under section 17 at that stage and which right is available after measures under section 13(4) have been taken. Such a person against whom steps under Section 13(4) are likely to be taken, cannot be denied the right to know the reason for non-acceptance of his objection, even though he may not be entitled to challenge the said reasons until the action under Section 13(4) is taken.

(G) The same led to the amendment w.e.f. 11th November, 2004 of the SARFAESI Act and Section 13(3A) was introduced providing that if the borrower

makes any representation or raises any objection under Section 13(2), the secured creditor shall consider such representation or objection and if the secured creditor does not find any merit therein he shall communicate so to the borrower within 15 days of receipt of such representation/objection. The proviso to Section 13(3A) expressly provides that the rejection of the representations/objections or the reasons given therefor will not confer any right upon the borrower to prefer an application to the Debt Recovery Tribunal under Section 17 of the Act.

(H) It is significant that Supreme Court in *Mardia Chemicals Ltd.* did not hold that the remedy of judicial review would be available against a notice under Section 13(2). On the contrary the decision on the objections/representations if any, to the notice under Section 13(2) was left to the secured creditor who has further been obliged to communicate the reasons for rejection thereof but without vesting in the borrower any remedy there against at that stage.

(I) It would thus be seen that Supreme Court in *Mardia Chemicals Ltd.* has expressly ruled that the scheme of SARFAESI act does not envisage any remedy between the 13(2) and 13(4) stage. The Supreme Court has further held that the borrower does not even have any right of hearing at the stage of Section 13(3A). Once that is so, there can possibly be no right in favour of the borrower to seek judicial review of the decision of the creditor on the objections in the reply to the notice under Section 13(2). The purpose of communicating the reasons for rejection of the objections, we re-iterate, as per *Mardia Chemicals Ltd.*, is only to furnish to the borrower the basis for the challenge under Section 17 against the action at the Section 13(4) stage.

(J) The entire case of the appellant is premised on the argument that the decision of the secured creditor classifying the account of the borrower as NPA, is a "jurisdictional" one and the remedy of judicial review is available there against. The counsel for the appellants has however though picked up the term "jurisdictional decision" but not even attempted to argue how a jurisdictional decision is different from any other decision pursuant where to an authority under a statute is entitled to take action as provided therein. We have wondered whether all decisions, on the making whereof an action under a statute is predicated, would be jurisdictional decisions.

(K) We, at the outset only are unable to agree with such a proposition. If every decision on the taking whereof a statutory provision were to get invoked / activated, the need for the Supreme Court in the judgments relied upon by the counsel for the appellants to label the fact / decision as jurisdictional one would not have arisen.

(L) Moreover, if it was to be said that every fact upon the happening/existence whereof an action under a statute can be taken or an administrative authority is entitled to take action were to be held to be a jurisdictional fact and a writ to the High Court upon the same being challenged were to be maintainable, it would

imply that a writ can be filed in all cases.

(M) At least in the context of the SARFAESI Act, the same would totally nullify the purpose of enactment thereof. We therefore hold that every such fact / decision cannot be a jurisdictional one.

(N) Section 13(2) permits a secured creditor to issue the notice provided there under to the borrower if (a) the borrower has made a default in repayment of secured debt or any instalment thereof; and, (b) the borrower's account in respect of such debt is classified by the secured creditor as an NPA.

(O) It thus follows that a mere default in payment of the debt or any instalment thereof does not ipso facto make the borrowers account an NPA.

(P) "NPA" is defined in Section 2(o) of the Act as an asset or account of a borrower which has been classified by a bank or financial institution as substandard, doubtful or loss asset in accordance with the directions or guidelines relating to assets classifications by the Reserve Bank of India (RBI) or by any other authority or body which is administering or regulating the bank or financial institution concerned.

(Q) The appellants have alongwith the appeal filed a copy of the letter dated 2nd July, 2012 of the RBI to all commercial banks enclosing therewith the updated "Master Circular relating to Prudential Norms on Income Recognition, Assets Classification and Provisioning pertaining to Advances". Clause 2.1.1 thereof provides that asset become a non performing asset when it ceases to generate income for the bank and clause 2.1.2 thereof defines NPA as a loan or an advance where the interest and / or the instalment of principal remains overdue for a period of more than 90 days in respect of a term loan (which the appellants admitted to have taken from the respondent bank). Clause 2.1.3 thereof provides that bank should classify an account as NPA only if the interest due and charged during any quarter is not serviced fully within 90 days from the end of the quarter. Thus as per the said circular of the RBI, read with Section 13(2), the notice under Section 13(2) can be issued not immediately on default in payment or any instalment thereof but on such default remaining overdue for more than 90 days.

(R) What emerges thus is, whether a decision of the bank that the default on the part of the borrower in repayment has remained over due for more than 90 days or not, can be called a jurisdictional decision / fact.

(S) At this stage the plea of the appellants in this respect may be noticed. The appellants do not dispute that they availed of secured credit from the respondent bank. Their case is, (i) that as per the order dated 23rd October, 2013 of the DRT in an earlier proceeding between the parties, the loan account was ordered to be restructured and was restructured on 10th September, 2014; (ii) that the quarter in which the loan account was so restructured ended on 31st December, 2014; (iii) that even if the appellants were in default of payment for the said quarter, 90

days there from ended on 31st March, 2015 and thus the action of the respondent bank of declaring account as a NPA prior thereto on 9th February, 2015 was wrong.

(T) The respondent bank in its decision on the objections/representations of the appellants to the notice under Section 13(2) of the Act has reasoned--

(a) That the term loan had remained unpaid and was classified as a NPA on 1st December, 2009 and thereafter action under Section 13(2) and 13(4) was initiated;

(b) there against the proceeding aforesaid in the DRT under Section 17 was filed;

(c) that in compliance with the order of the DRT, the loan account was restructured and the revised Statement of Account was communicated on 1st September, 2014 and again on 10th September, 2014;

(d) that the appellants though raised objections thereto but failed to respond with any specific error in the Statement of Account and instead filed an application in the disposed of proceedings in the DRT for recalculation of the interest and which application was dismissed on 31st January, 2015;

(e) the DRT in the said order itself directed the appellants to pay the admitted debt of Rs.19,49,043/- within 45 days;

(f) that no payment was made in the said loan accounts since 1st September, 2014 and the amount of Rs.4,63,84,456.88 had fallen due with a principal amount of Rs.3,97,34,719.77 was outstanding in one loan account and a principal amount of Rs.24,97,556.55 was outstanding in another loan account;

(g) that thus the loan account of the appellant had correctly been classified as a NPA.

(U) The learned Single Judge in the impugned judgment has held-

(a) that amounts were due and payable by the appellants to the respondent Bank with effect from October, 2014 and the challenge by the appellants to the Statement of Accounts had already been rejected by the DRT.

(b) that the respondent bank in the said proceedings before the DRT itself had informed that the subject accounts had once again become a NPA and that the bank had therefore recalled the loan.

(c) that the DRT in the concluding part of the order dated 30th January, 2015 had also recorded that the bank had already recalled the loans.

(d) that thus the amounts were due and payable by the appellants as on October, 2014 could in accordance with the Master Circular of the RBI be declared as NPA on 31st December, 2014.

(V) We see no reason to, in letters patent jurisdiction, interfere with the decision

of the learned Single Judge on the challenge by the appellants to the accounts being classified NPA in accordance with RBI circular on 31st December, 2014 and fully concur with the same.

(W) A jurisdictional fact is one on existence of which depends the jurisdiction of a Court, Tribunal or an Authority. If the jurisdictional fact does not exist, the Court or Tribunal cannot act (see *Ramesh Chandra Sankla Etc. Vs. Vikram Cement Etc.*, AIR 2009 SC 713 : (2008) 8 JT 1 : (2008) 10 SCALE 112 : (2008) 14 SCC 58 : (2009) 1 SCC(L&S) 706 .

(X) Supreme Court in *Smt. Shrisht Dhawan Vs. M/s. Shaw Brothers*, AIR 1992 SC 1555 : (1991) 5 JT 378 : (1991) 2 SCALE 1386 : (1992) 1 SCC 534 : (1991) 3 SCR 446 Supp : (1992) 1 UJ 346 explained that error in assumption of jurisdiction should not be confused with mistake, legal or factual in exercise of jurisdiction. Applying the said fact, we hold that it is not as if it is not within the jurisdiction of the Bank to determine whether the account of the Bank is a NPA or not. The mistake if any by the Bank in holding the account to be an NPA would thus be a mistake in exercise of jurisdiction and not a mistake in assuming jurisdiction.

(Y) We draw strength for the aforesaid proposition from Section 2(o) of the SARFAESI Act which vests the secured creditor with the power to classify an account as an NPA. The authority of the secured creditor in this regard cannot be questioned. Such authority of the secured creditor to classify the account of a borrower as an NPA has been recognized in *Mardia Chemicals Ltd. and in Transcore Vs. Union of India (UOI) and Another*, AIR 2007 SC 712 : (2007) 1 BC 33 : (2007) 135 CompCas 1 : (2007) 1 CompLJ 1 : (2006) 5 CTC 753 : (2006) 12 SCALE 585 : (2008) 1 SCC 125 : (2007) 73 SCL 11 : (2006) 10 SCR 785 Supp . All that was observed in *Mardia Chemicals Ltd.* was that there must exist a specified internal channel which should settle the doubts in asset classification. The introduction of Section 13(3A) has fulfilled the said requirement also. We find a Single Judge of the Calcutta High Court in *Core Ceramics Ltd. and Others Vs. Union of India (UOI) and Others*, AIR 2008 Cal 88 also to have taken a view that once the bank authorities have classified an account as NPA, the writ Court would have little or no role to play in deciding such an issue in view of the complete autonomy of the Banks and financial institutions in asset classification under the SARFAESI Act and upheld in *Mardia Chemicals Ltd. and Transcore*. Similarly, a Division Bench of Madras High Court in *Gain-N-Nature Food Products Vs. Union of India (UOI) and Others* has held that if a Bank or financial institution forms an opinion that an account of a borrower has become an NPA, such opinion is not justiciable in a Court exercising jurisdiction under Article 226 of the Constitution because Section 13(2) does not use the expression "and his account in respect of such debt has become a Non-Performing Asset" but uses the expression "and his account in respect of such debt is classified by the secured creditor as Non Performing Asset".

(Z) The question, whether declaration of an account as an NPA is a jurisdictional

fact is no longer *res integra*. A Division Bench of this Court in *Triton Corporation Limited Vs. Karnataka Bank Limited* held that a jurisdictional fact is one on the existence of which depends the jurisdiction of a Court, tribunal or an authority and which fact if does not exist, the Court or tribunal cannot act. In contradiction, it was further held that the determination by the Bank whether the account of a borrower is a NPA or not, cannot be classified as jurisdictional fact but would fall in the category of adjudicatory facts relating to the merits.

(ZA) As far as the judgments cited by the counsel for the appellants are concerned, they all relate to adjudicatory authorities. *Arun Kumar* as well as *Raza Textile Ltd. supra* were with respect to the jurisdiction exercised by the income tax officers; *Godrej Sara Lee Ltd. supra* was again with respect to the assessment by the authorities concerned under the Kerala Value Added Tax Act, 2003 and *Sardar D.K. Jadav supra* was with respect to the proceedings before the Jagir Commissioner under the Abolition of Jagirs Samvat, 2008. In all the said cases the adjudicatory authorities, only if having jurisdiction, were required to adjudicate the respective claims. It was in this context held that if the authority had no jurisdiction it could not proceed with the adjudication. However the creditor bank / financial institutions in exercise of powers under Section 13 of the SARFAESI Act does not exercise any adjudicatory function and after an account has been classified as NPA is not required to adjudicate anything further and is only required to take over the asset. The process under Section 13(3A) can by no stretch of imagination be said to be adjudicatory. Moreover the question whether a borrower has committed any default in repayment and whether the account has been correctly classified as a NPA or not is a factual dispute which even otherwise ordinarily in writ jurisdiction is not to be entertained particularly when the fora for adjudication thereof in the event of the bank taking further action, is prescribed.

(ZB) The Supreme Court in the judgments relied upon by the counsel for the appellant held that the proceedings before an authority which had no jurisdiction would not serve any purpose. However as aforesaid there are no proceedings before a bank after classifying borrower account as NPA and forum for appeal there against, if any, shifts to the DRT. Thus the judgment cited by the counsel for the appellants have no application.

(ZC) The matter may be looked from another point of view. Even vis-à-vis jurisdictional fact the Supreme Court in *D.P. Maheshwari Vs. Delhi Administration and Others*, AIR 1984 SC 153 : (1983) 2 LLJ 425 : (1983) 2 SCALE 313 : (1983) 4 SCC 293 : (1983) 3 SCR 949 : (1983) 2 SLJ 542 has held that the writ High Court should refrain from entertaining writ petitions against decisions on preliminary issues inasmuch as the same holds up the decision on the final stage and the challenge if any could be made after the final decision has been made. The said aspect was not argued and considered in the judgments cited by the counsel for the appellants."

9. We accordingly do not find any merit in the appeal which is dismissed. We also

find the conduct of the appellants to be litigious. Though the appellants earlier invoked the jurisdiction of the DRT but inspite of DRT in its order dated 30th January, 2015 directing the appellants to pay the admitted amount within 45 days the appellants did not pay the same. The reasons for the appellants having filed the present proceedings are clearly dilatory and vexatious. The appellants before the DRT had recovered substantial cost from the respondent Bank. Having regard to the same, while dismissing this writ petition we impose costs of Rs.1 lakh on the appellants payable to the respondent bank within 30 days hereof.