2025 INSC 765

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7110 OF 2025

(Arising out of Special Leave Petition (Civil) No. 16735 of 2022)

BANK OF INDIA **...APPELLANTS(S)**

VERSUS

M/S SRI NANGLI RICE MILLS PVT. LTD. & ORS. **...RESPONDENT(S)**

J U D G M E N T

Signature Not Verified
Digitally signed by VISHAL ANAND
Date: 2025.05.23 15:02:57 IST
Reason:

J.B. PARDIWALA, J.:

For the convenience of the exposition, this judgment is divided in the following parts: -

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1. Leave granted.

2. This appeal arises from the judgment and order passed by the High Court of Punjab and Haryana at Chandigarh dated 07.10.2020 in CWP No. 13538 of 2020 (O&M) (hereinafter referred to as the "**Impugned Order**") by which the High Court upheld the decision of the Debt Recovery Tribunal-I, Delhi (for short, the "**DRT**") which *inter-alia* held that since the dispute in the present is between two banks, the DRT has no jurisdiction to adjudicate the same and accordingly directed the parties herein to resolve the dispute through arbitration under Section 11 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the "**SARFAESI Act**") and thereby dismissed the writ petition filed by the appellant herein.

3. For the sake of convenience, we clarify that the appellant herein, 'Bank of India' is a nationalized bank (hereinafter referred to as the "**appellant bank**"), the respondent no. 1 herein, 'M/s Sri Nangli Rice Mills Pvt. Ltd. is a manufacturing unit dealing in rice and other allied products and the borrower herein (hereinafter referred to as the "**borrower**"), the respondent no. 2 herein, 'Punjab National Bank' is also a nationalized bank, (hereinafter referred to as the "**respondent bank**") and the respondent no. 3 herein, 'National Bulk

Handling Corporation' is the collateral manager of the respondent bank (hereinafter referred to as the "**collateral manager**").

A. FACTUAL MATRIX

4. It appears from the material on record that the borrower herein on 31.07.2003 had availed credit facility from the appellant bank herein by hypothecating stocks of paddy and other assets. Pursuant thereto, a Credit Facility Agreement dated 23.09.2006 was executed between the borrower company and the appellant bank, with the following relevant terms and conditions: -

> *"**CREDIT FACILITY AGREEMENT***
>
> *[...]*
>
> ***4.6 BORROWER NOT TO BORROW MONIES FROM OTHER BANKS AND FINANCIER WITHOUT CONSENT' OF THE BANK:***
>
> *The Borrower confirms that he has not borrowed any monies from any other Bank or financier and further agrees that so long as the Borrower continues to be indebted or liable to Bank in respect of Sanctioned Credit Facilities, the Borrower shall not without the previous written consent of the Bank borrow any monies from any other Bank or Financier.*
>
> *[...]*
>
> ***4.15 SECURITIES TO BE FREE FROM ANY ENCUMRBACE:***
>
> *The Borrower hereby declares and assures that the Borrower' has not created in favour of any person (other than the Bank) any lien, charge, pledge, mortgage or other encumbrance over all or any of the Securities which are hypothecated or charged by the Borrower to the Bank and have not borrowed any monies against the said Securities from any such persons. The Borrower further undertakes that so long as the Borrower continues to be indebted or liable to the Bank under any of the*

Sanctioned Credit Facilities, the Borrower will not without the previous written consent of the Bank create or attempt to create in favour of any other person, lien, charge, pledge or .encumbrance over all or any of the Securities' whatsoever and further undertakes not to create any lien, charge or other encumbrance over all or any of the properties the Borrower may acquire hereafter, ranking either in priority to or pari passu with or subsequent to the Security in favour of the Bank, arid will not borrow at monies against such subsequently acquired without the previous consent in writing with the Bank.

4.16 BORROWER NOT TO REMOVE THE SECURITY WITHOUT BANK'S CONSENT:

So long as any money remains due in respect of Sanctioned Credit Facilities, the Borrower shall not remove or cause or permit to be removed the goods or properties charged to the Bank from the Borrower's premises, where the same are represented to have been kept, without the consent in writing of the Bank or the same may be removed except in the manner and to the extent permitted by the Bank. The Bank shall be entitled to put up and the Borrower consents to the Bank to put up the Bank's name Board at the place where the goods and properties of the Borrower given as Security to Bank are kept or stored, for such period and in such manner as the Bank may deem proper.

4.17 BORROWER TO KEEP THE GOODS CHARGED IN MARKETABLE CONDITIONS:

The Borrower shall, at all times keep goods or stock or other properties hypothecated or charged to the Bank as Security for the Sanctioned Credit Facilities in a marketable state and in good and substantial repair and condition and in thorough working order and will not make any alteration therein without previous written consent of the Bank.

4.23 BORROWER NOT TO CREATE THIRD PARTY RIGHTS ON THE SECURITY (IES):

Borrower confirms that no lien, charge, pledge, mortgage or other encumbrance or interest or right has been created over all or 'my of the Security(ies) offered to the Bank as a Security for Sanctioned credit facilities nor shall the Borrower create in'favour of any other person, any lien, charge, pledge, mortgage or other encumbrance or interest or right over all or

any of the Security(ies) or other properties either in priority to or pari passu with the Bank's rights and interests. The Borrower shall not borrow any monies from any other person against the Security given to the Bank.
[...]"

5. As per clause 4.6 of the aforesaid credit facility agreement it was stipulated that the borrower shall not avail any credit facility or loan from any other bank or financier until the borrower amount in respect of the credit facility sanctioned by the appellant bank herein is repaid. Furthermore, clause 4.15 of the aforesaid credit facility agreement that the securities hypothecated in favour of the appellant bank shall be free from any encumbrances and the borrower shall not create any charge, lien or pledge in respect of the same without the prior consent of the appellant bank herein. Clause 4.16 stipulated that the borrower shall not remove or cause to be removed the securities that have been hypothecated to the appellant bank. Clause 4.23 stipulated that no third-party rights or interest shall be created over the securities hypothecated with the appellant bank, until the amount borrowed against the aforesaid credit facility sanctioned by the appellant bank is repaid.

6. It appears that while the loan amount under the aforesaid credit facility earlier sanctioned by the appellant bank was still outstanding and yet to be discharged, the borrower, on 22.11.2013 by way of a loan application proceeded to simultaneously avail one another credit facility from the

respondent bank. Pursuant thereto, an Agreement of Advance / Pledge Agreement dated 06.12.2013 was executed between the borrower and the respondent bank, by which the warehouse receipts of certain goods including stocks of paddy and rice, were pledged in favour of the respondent bank as security, with the respondent no. 3 acting as the collateral manager.

7. As per the aforesaid Agreement of Advance, various stocks of paddy and rice of the borrower herein were deposited in the godown of the respondent no. 3 herein and the loan amount was sanctioned by the respondent bank herein against the warehouse receipts issued by the respondent no. 3 in respect of the aforesaid goods as security. As per the terms and conditions of the said Agreement of Advance, the sale proceeds realized from the said stock of paddy and rice were required to be credited directly to the borrower's loan account, in discharge of the instalments due thereunder.

8. Between 2006 and 2014, the credit facilities sanctioned by the appellant bank to the borrower were enhanced from time to time. In connection therewith, the borrower submitted monthly statements reflecting the securities that had been hypothecated. Notably, these statements made no reference either to the aforesaid Agreement of Advance or to the factum of the second charge over the said security by way of pledge in favour of the respondent bank.

9. On 08.09.2014, the borrower herein filed a loan application for seeking enhancement of the credit facilities sanctioned by the respondent bank. Pursuant thereto, the respondent bank addressed one letter dated 16.09.2014 to the appellant bank, asking for the credit information report in respect of the said warehouse receipts. The said letter reads as under: -

> *To,*
> *The Chief Manager,*
> *Bank of India*
> *Library Chowk Gurdaspur*
>
> *16.09.2014*
>
> *Reg: Account of M/s Sri Nangli Rice Mill Pvt. Ltd.*
>
> *With reference to the above subject the party has approached us for sanction of Cash Credit Limit against Warehouse Receipts of Rs. 20.00 Crores. As per guidelines we require Customer Information report on EBA format (enclosed) of the unit. You are requested to provide the data on urgent basis within 7 days from the date of receipt of this letter otherwise it will be construed that there is noting adverse to report from your side.*
>
> *Thanking You*
> *Sd/-*
> *CHIEF MANAGER*

10. However, since no response was elicited from the appellant Bank, the Respondent Bank proceeded to enhance the credit facility sanctioned by it to the borrower *vide* one another Agreement of Advance / Pledge Agreement dated 22.11.2014 against the warehouse receipts issued by the respondent no. 3 as the collateral manager in respect of the same stocks of rice and paddy that

had been earlier pledged with the respondent bank and leased for storage with the respondent no. 3 herein.

11. Sometime in 2015, the borrower herein defaulted in repayment of the loan amount sanctioned by the appellant bank herein, whereupon an inspection was undertaken by the appellant bank of the stocks of paddy and rice that were hypothecated to it with a view to realize the outstanding dues. It is the case of the appellant bank that during the course of this inspection, it discovered for the first time that pledge tags of the respondent bank had been affixed on the said security.

12. Accordingly, the appellant bank addressed a letter dated 02.04.2015 to the Chief Manager of the respondent bank, requesting details of the credit facilities against which the said stocks of paddy and rice had purportedly been pledged, along with the balance outstanding in the accounts of the borrower, in order to ascertain whether the pledging of securities was anterior or posterior to the credit facility agreement 23.09.2006 that was executed by it with the borrower herein. In response, the respondent bank vide its letter dated 20.04.2015 furnished the details of the various Agreement of Advance / Pledge Agreements that were executed with the borrower for sanction of loans, along with the credit information report relating to the warehouse receipts in respect of the said pledged goods.

13. Upon perusal of the information furnished by the respondent bank, the appellant bank addressed one another letter dated 23.05.2015 to the respondent bank, *inter-alia* stating that in all previous stock audits conducted by the appellant bank, no pledge tags of the respondent bank were found affixed on the said security and that as per the records even the charge created by the appellant bank over the said stocks of rice and paddy, by way of hypothecation, was prior in time to the pledge created in favour of the respondent bank. Accordingly, the appellant bank asserted that all credit proceeds from the sale or disposal of the said hypothecated goods ought to be remitted to the appellant bank in satisfaction of its prior and subsisting charge. The said letter reads as under: -

> *Gurdaspur Branch* *Phone No.:01874-240050*
> *1- Library Road*
> *Gurdaspur*
> *Punjab 143251*
>
> *Ref. No. GSP:ADV/2015-16/06* *Date: 23.05.15*
>
> *Private and Confidential*
> *The Chief Manager,*
> *Punjab National Bank,*
> *G.T. Road,*
> *Gurdaspur.*
>
> *Sir,*
> *Re:- Credit Facilities of M/s Nangali Rice Mills Pvt. Ltd.*
>
> *We refer to your letter No Nil dated 20.04.2015 on the captioned matter. During inspection, we observe that all our stock hypothecated to our bank is pledged in your favour in the*

godowns in the factory premises through NBHC. Earlier, we have not noted any tags on the attacks which could raise any doubt of your pledged stock. Please reply us the following immediately.

1. *Details of Original as well as latest sanction of the limit(s).*
2. *Our charge has been duly registered with ROC on all hypothecated stocks / assets and covered under insurance duly assigned in our favour by Insurance Company.*
3. *Stock audit has recently been carried out by statutory auditors and all hypothecated stocks lying at premises / godowns of borrower company have been verified by them and found to be in order, it is pertinent to note that during stocks audit no such tags were seen affixed indicating the stocks as a pledged security of your bank and it is nothing sort of afterthought exercise from you.*
4. *Whether the NBHC and your bank take permission from our bank for storing the pledged stock in the factory premises to store pledged stocks.*
5. *Whether you have obtained status reports/ NOC from us before considering credit limit(s) to our borrower(s).*
6. *You have never intimated the details of credit limit(s) extended by you to our borrower(s).*
7. *It has come to our notice that you have affixed pledge tags to our hypothecated attacks lying at premises of borrower company where bank's name board. Also being displayed fully knowing well that the stocks are hypothecated to Bank of India. In this process, you have connived with the borrower(s) with an intention to deceive Bank of India and indulge in breach of trust and also took action to deprive us from our right with an intention to put us to suffer probable loss.*
8. *You are hereby put to notice that our hypothecation charge is prior to your pledge and hence all credit proceeds should be routed through company cash credit account maintained at our branch. Please send us the whole credit proceeds since inception immediately to us failing which we shall take up the matter with Reserve Bank of India and also it is fit case of initiating filing of FIR with concerned authority.*

You are requested to reply us immediately.

Thanking you,
Yours faithfully,
Sd/-

14. In response to the above, the respondent bank sent a letter dated 04.06.2015 *inter-alia* denying that its pledge tags had not been affixed at the time of sanctioning the credit facilities and stated that the stocks of rice and paddy pledged with it were duly tagged and earmarked all throughout. It further clarified that the credit facilities extended by it, sometime in 2013, were against the warehouse receipts of the stock of rice and paddy pledged in its favour, and that the said security had no concern or connection with the goods allegedly hypothecated to the appellant bank. The respondent bank also stated that it had, vide letter dated 16.09.2014, duly intimated the appellant bank of its intention to extend additional credit facilities to the borrower against the said warehouse receipts which was ignored by the appellant bank. The said letter reads as under: -

Punjab National Bank
G.T. Road Gurdaspur (018700) Punjab
Tel.: 01874-221860, Fax: 01874-221878
Email: bo01870 @pnb.co.in

To, *Dt: 04-06-2015*
The Chief Manager,
Bank of India
Library Road
Gurdaspur

Dear Sir,

Reg: Credit Facilities of M/s Nangali Rice Mills Pvt. Ltd.

With reference to your letter No. GSP: ADV/2015-16/6 dt. 23.05.2015 on the above captioned subject we may advise as under:

We have already shared the credit information with you vide CIR sent under the cover of our letter 20.04.2015. further we ay inform you we have financed the party under WHR scheme since 2013 and every time during the checking we have found our pledge stock intact with stock card attached along with board of our collateral Manager NBHC displaying the name of our Bank.

1. *The details has already been shared with you vide CIR & our letter dt. 20.04.2015 conveying detail of limit sanctioned and balance outstanding. The details has also been already conveyed to you time to time during your visit along with Sh. Sham Lal Sr. Mgr (Credit) to our office in month of Oct/Noc 2014 and January 2015.*
2. *We are only concerned with the stock pledged to us under the custody of National Bulk handling Corporation Ltd (nominated as collateral manager under the tripartite agreement with Bank) also is taking care pledge & release of stock) Bank is financing on the basis of WHR issued by collateral management company. Further as per New company law, we have also got ROC registered for pledge limit of Rs. 20.00 crores.*
3. *Our stock is a pledged stock under the management of NBHC (Collateral Manager. We are checking our stock through various officials at irregular interval. The stock of all the parties including Sri Nagali has also been checked only by our Sr. functioning from controlling office, where we found that all the stock in order with proper stacking and stack card attached along with display board of NBHC confirming stock pledged to our Bank.*
4. *It is the party/borrower who offer the godown for pledge. Then the godowns are surveyed by collateral manager and after it is found in order. the godown is considered to be handed over to collateral Manager on*

lease. This is the duty of borrower to share the information if any is to provided to you.

5. *We have given you a letter dt. 16.09.2014 for our intension to provide finance to party advising you to send your observation. The limit is considered against WHR as pledge. CIR from the CIBIL & Equifax are checked for getting status of party. This is for you to respond within stipulated time. However, the information of our finance/intended finance has been freely shared with your goodself and also with Sh. Sham Lal Sr. Manager, during visit of these officials to our office in Oct/Nov/Jan. to pay that you have no knowledge of our finance is not acceptable. The sanctioned limit might also be checked from the CIBIL, Experian, Equifax but you have ignored all these online information.*
6. *The information of our limits was always shared with you when ever you visited our office. Also CIR was sent you on 20.04.2015 in response to your letter. Further, if appears that you have never checked CIR available online and also the stock was not checked seriously by you officials and the information shared with Sh. Harjinder Singh & Sh. Sham Lal Sr. Manager during their visit to our office was not taken for consideration.*
7. *Your use of baseless and intemperate language only suggest that your officials has performed the duty casually. When we have always found our stock duly stacked with stack card displaying thee each commodity and board of collateral manager showing our charge/pledge of stock, we have also found the signature of collateral manager officials on stock card & stock register.*

Further we have always found stock in order and properly stacked with signature of official of NBHC.

It is pertinent to mention again stock was always found in order while checking by one of our Sr. official from controlling office.

8. *We are only dealing with WHR of pledge stock (Pledge under tripartite agreement). The party is dealing with us since 2013. The conduct of a/c is satisfactory.*

For your hypothecation limit you can pursue with party. Our charge is legitimate charge under pledge scheme. However we have advised the party to satisfy your authorities for proper conduct of account. You may also explore the possibility to go into multiple Banking to sale your account.

Yours Faithfully,
Sd/-
CHIEF MANAGER

B. PROCEEDINGS UNDER THE SARFAESI ACT.

15. Since, the borrower defaulted in repayment of the loan amount sanctioned by the appellant bank herein, the loan account was classified a s Non-Performing Asset (NPA) on 31.09.2015 and the appellant bank issued a demand notice dated 17.10.2015 under Section 13 sub-section (2) of the SARFAESI Act to the borrower herein for repayment of the principal amount along with interest, cost, charges etc. As per the aforesaid demand notice, an aggregate sum of Rs. 62.10 crore was due and payable by the borrower to the appellant bank herein.

16. Owing to the failure of the borrower in repaying the outstanding amount referred to above, the appellant bank proceeded to take symbolic possession of the factory premises, plant and machinery along with the stocks of rice and paddy that were hypothecated to it as security, and sealed the godown of the respondent no. 1 that had been leased to the respondent no. 3 in relation to the Agreement of Advance / Pledge Agreement with the respondent bank.

17. It also appears from the material on record that, several joint meetings were convened between the directors of the borrower herein along with the officials of both the appellant and respondent banks. Two such meetings were convened on 30.04.2015 and 12.08.2015, respectively, i.e., prior to the appellant bank classifying the loan account of the borrower as NPA, and one another meeting thereafter on 22.08.2015. During the course of these joint meetings discussions were held in respect of the credit facilities extended to the borrower by both banks, the outstanding liabilities thereunder, the revenue streams of the borrower and the total value of the stocks of rice and paddy lying with it including those that were pledged in favour of the respondent bank.

18. It is the case of the respondent bank herein that during the course of the aforementioned joint meetings, the appellant bank did not raise any dispute in respect of the stocks of rice and paddy that had been hypothecated and simultaneously also pledged with the appellant and respondent bank, respectively, and that the said issue was raised for the first time only after the borrower defaulted in repayment of the loan dues and the account was classified as NPA by the appellant bank herein.

19. On 14.10.2015, the appellant bank herein instituted a suit being CS No. 127 of 2015 against the respondent bank *inter-alia* seeking a decree of permanent injunction to restrain the respondent bank from selling the stock of paddy and rice allegedly pledged with it, by contending that the said goods in question had already been hypothecated in its favour under a pre-existing charge prior to the pledge. It is pertinent to mention that the said suit ultimately came to be dismissed as infructuous by the judgment and order dated 11.11.2021 passed by the Civil Judge, Senior Division, Gurdaspur in view of the subsequent joint sale and auction of the secured asset carried out by the appellant and respondent bank pursuant to the directions issued by the DRT.

20. In the interregnum, the appellant bank herein preferred an application under Section 14 of the SARFAESI Act seeking assistance of the District Magistrate for taking physical possession of the secured assets of the borrower herein with the aid of the police. The respondent bank in turn also filed an application lodging its objections thereto and contending that certain stocks of paddy and rice had already been pledged to it. The District Magistrate upon consideration of the material on record and in view of the objections raised by the respondent bank, partly allowed the appellant bank's application vide its order dated 12.10.2016, permitting the appellant bank to take physical possession of the secured assets, save and except the stocks of paddy and rice pledged with the respondent bank are concerned, and further directed the appellant to not

interfere with or take possession thereof. The relevant paragraphs of the said reads as under: -

> *"After going through file and record available and further after hearing the parties, the application under section 14 of the Securitisation and Reconstruction of Financial Asset and Enforcement of Security Interest Act 2002 for taking possession of secured assets as well as for police assistance is allowed subject to following conditions that there should not be any6 stay granted by any competent court of law or higher authorities, In case of violation of any legal order than the authorized officer is responsible. Further, the stock of Punjab national Bank should be not touched and the Naib Tahsildar is deputy as Duty Magistrate."*

21. Aggrieved by the aforesaid, the appellant bank preferred a writ petition being CWP-COM No. 177 of 2017 before the High Court, assailing the aforesaid order dated 12.10.2016 passed by the District Magistrate insofar as it restrained the appellant bank from taking physical possession of the secured assets purportedly pledged with the respondent bank. The High Court vide its order dated 26.05.2017 directed the appellant bank to approach the DRT instead, and thereby dismissed the writ petition as withdrawn.

i. <u>First round of proceedings before the DRT</u>.

22. Accordingly, the appellant bank filed a securitization application being S.A. No. 285 of 2017 before the DRT-I, Chandigarh challenging the aforesaid order dated 12.10.2016 passed by the District Magistrate.

23. The Debts Recovery Tribunal, vide its interim order dated 14.06.2017, observed that although a dispute subsists between the appellant and respondent banks regarding their respective claims over the security comprising of stocks of paddy and rice, yet there is no dispute insofar as the selling of the secured asset is concerned against the outstanding dues. Furthermore, in view of the perishable nature of the said secured asset the DRT held that the same should be disposed expeditiously notwithstanding the dispute to eschew any risk of depreciation or monetary loss to the public funds. Accordingly, the DRT permitted the appellant and respondent banks to conduct a joint sale of the secured assets to facilitate maximum realization towards the outstanding dues and further directed them to deposit the sale proceeds with the State Bank of India in the from of a fixed deposit, which shall then be apportioned after the final adjudication of the *inter-se* rights of the two banks. The relevant observations read as under: -

> *"Before this dispute is resolved as whose charge is the first and better than the other, the first priority at this stage before this Court is, as during the course of arguments the Ld. Counsel for the parties have also stated that since the adjudication of the matter will take little more time, the goods in the shape of paddy being perishable item may perish or because of rainy season it will diminish in value causing not only personal loss but national loss too, therefore, the same shall be sold out. Both the counsel for the parties and their respective officers have made a statement on previous date that they have no objections if they were allowed to sell stocks and both have shown their inclination to sell on their respective side and to keep the sale proceeds with them. Meaning thereby that there is no dispute for selling the stocks to get maximum at the earliest and which*

in turn will reduce the liability of the borrower ultimately. But who will sell and keep the sale process is the question of hour. Therefore, till the pleadings are complete and the matter is adjudicated upon finally qua rights and interest of each of the claimants after adducing the evidence and giving them fair chance to defend, being guarded by Sec. 19(25) of RDDBI & FI Act, the directions should have to be issued to give effect to its order and to prevent misuse of process and to secure ends of justice. Hence, at this stage the following order is passed:

> *"The concerned AGM of Applicant Bank as well Resp. Bank No. 1 and one officer from National Bulk Handling Corporation Ltd. are hereby directed to jointly start the process of selling stocks immediately by taking joint exercise under the authority of all three to get the stocks released as well as sold in the open market as per rules. The Authorised Officer of the Applicant Bank, i.e. Bank of India, shall reopen the premises which they claim to have been in their physical possession and mortgaged with them and allow access to the above officers to get the stocks transferred for the purpose of selling as per their own procedure. Except with the joint written permission of these officers, no one shall be allowed access or to sell the stocks for which full inventory shall be made in details and be kept preserved. The whole process shall be completed within 45 days from the date of receipt of this order.*
>
> *It is made clear that the process of disposing of these stocks will be maintained by all three parties jointly under their signatures and the sale proceeds received shall be deposited with the main Branch of State Bank of India, Gurdaspur in the shape of FDR with accruing maximum interest and the in charge of the concerned SBI Branch shall keep the same in its custody till the adjudication of the matter or as directed by this Tribunal."*

The Applicant as well as Resp. Bank No.1 shall supervise all these actions and shall undertake necessary formalities to be completed keeping national interest over Institutional Interest,

and expenses incurred shall be borne equally by both of the Banks, i.e. Applicant Bank and Resp. No.1 Bank.

Thus the interim prayer is disposed of."

(Emphasis supplied)

24. Thereafter, the DRT vide its final order dated 10.11.2017 allowed the S.A. No. 285 of 2017 filed by the appellant bank herein and held that that the charge created in its favour by way of hypothecation over the stocks of paddy and rice was prior in time and, consequently, would take precedence over any subsequent charge that may have been created in favour of the respondent bank by way of pledge. It observed that the appellant bank had extended the credit facilities against the said stocks of paddy and rice as early as 2003 whereas the respondent bank had extended the credit facility only in 2013 and failed to undertake any meaningful verification as to whether an existing encumbrance or charge subsists over the said stocks. It found that the appellant bank had duly established that the stocks in question were lying the properties mortgaged with them and had been hypothecated in their favour, and thus, held that any charge or encumbrance created in favour of the respondent bank would be subservient to the charge in favour of the appellant bank herein. The relevant observations read as under: -

7. [...] In fact after going through the pleadings and the documents/evidence produced by the parties, who have diagnosed the epicentre that both financial Institutions are claiming their right of hypothecation/pledge on the moveable stocks of rice, paddy which are lying in the premises of Resp.

No.2. So far as mortgage of immoveable property is concerned; there is no controversy but the stocks which are perishable in nature and moveable are under the controversy of charge being hypothecated and pledge.

[...] Now after going through the scheme, terms and condition of agreement, it transpired that NHBC has taken some warehouse on rent which was already mortgaged with the Applicant Bank along with stocks lying in the premises being hypothecated to the Applicant Bank. The said stocks were shown to the NHBC who verified the quantity without verification of charge over stocks over which now the Applicant Bank and Resp. No.1 are claiming to have their right being hypothecated and pledged with them respectively. Meaning thereby that Resp. No.3 was aware that the warehouse godowns which were given on rent to the NHBC itself were built on the property which was mortgaged with Applicant Bank in violation of terms and conditions of agreements executed between Resp. No.3 and the Applicant, certainly which are prior to the pledge. It also transpired that no proper verification has been carried out either by Resp. No.1 PNB or Resp. No.3 NHBC for non-encumbrance of immoveable property and nothing is placed on record to prove that except few letters being exchanged between the Banks.

[...] Further, it seems that Resp. No.2 and 3 using their good office has managed and manipulated by getting the stocks pleadged with Resp. No.1 which were duly hypothecated with the Applicant Bank. The involvement of officers of both the Banks along with handiwork of NBHC and Resp. No.2 cannot be ruled out. The Scheme under which the Resp. No.1 Bank has financed has been found to be defective and there is nothing on record produced by the Resp. Bank that they had verified the encumbrance/ charge upon the stocks and the properties where these stocks were kept.

[...] Once the Applicant Bank has duly proved that the stocks are lying in the properties mortgaged with them and are hypothecated whatever Resp. No.1 has claimed by tagging through NHBC but kept on changing stance is "subsequent" to "hypothecation" since it had not verified the encumbrance on both immoveable and moveable stocks.

The Applicant Bank at the very first instance had asked information from the Resp. No.1 vide letter dt. 02.04.2015 which was replied on 20.04.2015. It has been observed that both the banks were exchanging incomplete information. Thereafter in a Joint Lenders Meeting held on 30.04.2015 which was attended by GM/ZM of both the Banks as well as SBOP, nothing was discussed over such controversy rather it seems that they were helping the defaulters at one stage. Further, letter dt. 23.05.2015 itself reflects that Bank of India verified its stocks which are duly hypothecated and had conveyed the same to the Resp. No.1 PNB that there was no such tags seen or affixed on the security [...]

(Emphasis supplied)

25. Accordingly, the DRT vide its final order dated 10.11.2017 in S.A. No. 285 of 2017 set aside the order dated 12.10.2016 passed by the District Magistrate and allowed the appellant bank to sell the stocks of rice and paddy hypothecated in its favour for the purpose realizing the outstanding dues from the sale proceeds thereof. The operative portion of the said order reads as under: -

[...] since the prayer of the Applicant Bank is for setting aside of orders of DM which is otherwise creating hindrance in the sale of perishable goods, is allowed and order dt. 12.10.2016 is set aside. The Bank is at liberty to sell the produce immediately by any means so that foodgrains, which is perishable item and national assert as each grain of crop is property of every human of this nation, should not go waste in the hands of irresponsible officers of banks and delinquent defaulters who played a fraud with banks.

8. Accordingly SA is allowed to that extent. Any application pending stands disposed of.

26. Aggrieved by the aforesaid, the respondent bank preferred an appeal bearing no. 500 of 2017 before the Debt Recovery Appellate Tribunal (for short, the "**DRAT**"). The DRAT vide its order dated 04.11.2019 held that the DRT whilst passing its order dated 10.11.2017 failed to take into consideration the preliminary objection that was raised by the respondent bank herein to the effect that the application filed by the appellant bank under Section 17 of the SARFAESI Act was not maintainable; ***first,*** because the remedy under the said provision is available only against measures taken in terms of Section 13 of the SARFAESI Act which the respondent bank had never initiated and ***secondly,*** because Section 17 of the SARFAESI Act cannot be invoked for claiming any reliefs against another bank. Accordingly, the DRAT remanded the matter to the DRT for deciding the matter afresh after considering the preliminary objections of the respondent bank. The relevant observations read as under: -

> *"6. The main grievance of PNB raised by its learned counsel and also in his written submissions and which grievance, in my view, is well justified is that the learned DRT has not focussed himself on the objection raised by PNB whether respondent no.1 bank could invoke Section 17(1) of SARFAESI Act at all for claiming the reliefs sought for in the S.A. against another bank which was claiming itself to be a pledgee/pawnee of some of the rice/paddy/wheat stocks stored in some godowns which respondent no.3, PNB's collateral manager, had taken on lease from the bank's borrower. Learned counsel for PNB had submitted that Section 17(1) of SARFAESI Act can be invoked by a person including a borrower who is aggrieved by any of the measures taken by a secured creditor under Section 13 of SARFAESI Act which while in the present case the Bank of India had not even claimed in its S.A. that PNB had initiated*

any measures under SARFAESI Act in order to recover its dues from respondent no.2 herein and PNB was aggrieved with those measures. The S.A. was filed by Bank of India simply on the allegations that PNB was claiming itself to be having a charge over stocks of rice/wheat etc. kept in the godowns of respondent no.3 in respect of which Bank of India was also claiming its charge as a hypothecated and to have a declaration to that effect in its favour Bank of India had already filed a civil court which was pending and which fact had been concealed in the S.A. and for these reasons also the S.A. was liable to be rejected. The DRT has, however, not even examined these objections raised by PNBwhich ought to have been done. Similarly the DRT as not considered the objection that in the S.A. Bank of India had challenged the correctness of the order of the District Magistrate passed on the application moved by this Bank itself under Section 14 of SARFEASI Act whereby a direction was given that PNB's stocks will not be touched meaning thereby it was accepted and recognised that stocks pledged with PNB were also stored in the godowns as had been claimed by PNB before the District Magistrate. Against that direction of the District Magistrate, counsel for PNB submitted, no S.A. could be filed but even that aspect was not considered by the DRT.

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9. This appeal, therefore, deserves to be allowed and matter needs to be sent back to DRT for fresh disposal in accordance with law and keeping in mind the observations made hereinabove.

10. This appeal is accordingly allowed and impugned order is set aside with a direction to the learned DRT-I, Chandigarh to pass a fresh order of disposal of the S.A. No.285/2017 of Bank of India keeping in mind the observations made in this order by this and giving fresh hearing to the parties and at the same time to pass fresh order uninfluenced by anything said in its impugned order which now stands set aside. The S.A. shall accordingly be now taken up for 'directions' by the DRT on 23.11.2019 at 2.p.m. and efforts should be made to pass the fresh order as far as possible within two months from the date of receipt of this order. While disposing of the S.A. afresh DRT also be at liberty to pass appropriate order concerning the

appropriation/disbursement/utilisation of the sale proceeds of stocks of rice/paddy etc. which were sold during the pendency of the present appeal."

(Emphasis supplied)

ii. <u>Second round of proceedings before the DRT</u>.

27. On remand, the DRT-I, Chandigarh vide its order dated 12.02.2020, held that it has no jurisdiction to adjudicate the dispute since the controversy pertained to competing claims between two banks over the same secured asset. Placing reliance on the decision of the DRAT in ***Oriental Bank of Commerce & Anr. v. Canara Bank & Ors.*** reported in **(2011) SCC OnLine DRAT 8**, it held that where the dispute in respect of the secured asset is *inter-se* between two banks or creditors, the same must be adjudicated by way of arbitration in terms of Section 11 of the SARFAESI Act by approaching the competent authority for seeking appointment of arbitrator by way of an application under Section 11 of the Arbitration and Conciliation Act, 1996 (for short, the ("**Act, 1996**"). In light of the foregoing, the DRT directed the parties to approach the High Court for the same and further ordered that until final adjudication of the dispute the sale proceeds from the sale and auction of the security shall remain in deposit with the SBI. The relevant observations read as under: -

"I have heard the arguments on maintainability of this SA. And as per Counsel for respondent this Tribunal has no jurisdiction to resolve the disputes between the banks by way of filing SA by one Bank against the other Bank.

Along with this issue counsel for respondent has placed on record the citation "OBC Vs. Canara Bank 2011 BC 14 (DRAT) Delhi" in which Hon'ble DRAT, Delhi has propounded a principle that disputes between Banks cannot be entertained by Tribunal by way of filing SA and Banks will approach the High Court for resolution of their disputes.

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I have perused the relevant provision under Section 144 CPC in this Section if any decision is reversed in appeal against any decree then the benefit taken by that party out of the decree will have to be restored to the other party after the reversal of appeal. Since in this case no such order has been set aside in any appeal, therefore Principles of Restitution under Section 144 CPC do not apply here and the amount which is lying with the SBI will remain with the SBI till the dispute between the Banks is decided by the Competent Court of jurisdiction and accordingly this SA is dismissed as being not maintainable."

C. IMPUGNED ORDER

28. Aggrieved with the aforesaid, the appellant bank herein approached the High Court by way of writ petition being CWP No. 13538 of 2020 (O&M), wherein the High Court vide its final impugned judgment and order, finding no fault in the decision of the DRT, dismissed the writ petition and affirmed the order dated 12.02.2020 passed by the DRAT, in view of the mandate of Section 11 of the SARFAESI Act. The relevant observations read as under: -

"OBC Vs Canara Bank 2011 BC 14 (DRAT Delhi)" has been relied upon in the said order. The petitioner is having a remedy under Section 11 of the SARFEASI Act, 2002 (here-in-after referred to as `the Act, 2002) as the dispute can be settled by resorting the said remedy. Section 11 of the Act, 2002 [...]

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> *Accordingly, by considering the provisions of Section 11 of the Act, 2002, we do not find any merit in the contention raised by learned counsel for the petitioner. The remedy is available to petitioner under Section 11 of the Act, 2002. The petitioner is at liberty to avail that remedy before the appropriate Forum.*

29. In view of the aforesaid, the appellant bank being aggrieved and dissatisfied with the impugned order passed by the High Court is here before this Court with the present appeal.

D. SUBMISSIONS OF THE PARTIES

i. Submissions on behalf of the Appellant Bank.

30. Mr. Dhruv Mehta, the learned senior counsel appearing for the appellant bank submitted that Section 11 of the SARFAESI Act is inapplicable to the present case, as there is no legitimate dispute between the appellant and the respondent bank in view of Section 31(b) of the SARFAESI Act. It was submitted that the appellant bank's charge over the secured asset in question was created by way of hypothecation, whereas the respondent bank's charge was purportedly created through pledge. Since, Section 31(b) of the SARFAESI Act explicitly excludes 'pledge' from the scope and purview of the Act, the respondent bank herein possesses no rights in terms of the SARFAESI Act that may be decided under Section 11 thereof.

31. It was submitted that the appellant bank holds a prior charge as, the said security was created by way of credit facilities sanctioned to the borrower in 2003 and thereafter duly registered by way of the Credit Facility Agreement dated 23.09.2006, executed between it and the borrower. Whereas the respondent bank had purportedly created a charge over the said security through pledge only in 2013 by way of the Agreement of Advance / Pledge Agreement dated 06.12.2013.

32. It was further submitted that the stocks of rice and paddy that were pledged in favour of the respondent bank is null and void, in view of the terms and conditions of the Credit Facility Agreement dated 23.09.2006, more particularly clauses 4.6, 4.15 to 41.7 and 4.23, whereby it was stipulated that the borrower shall not create any rights, interests, charge or encumbrances over the said security until the loan sanctioned by the appellant bank was satisfied in full.

33. He would submit that, the High Court was not correct in holding that the DRT will have no jurisdiction to adjudicate dispute between two banks under Section 17 of the SARFAESI Act. It was contended that both the High Court and the DRT fell in error by placing reliance on the decision of ***Oriental Bank of Commerce*** (supra) as the said decision is contrary to a previous decision of the DRAT in ***Federal Bank Ltd. v. LIC Housing Finance Ltd. & Ors.*** reported in **2010 SCC OnLine DRAT 138** wherein it was held that Section

11 of the SARFAESI Act would only apply when there is an arbitration agreement subsisting between the parties to resolve any dispute. He submitted that in the present case, no such arbitration agreement exists either between the appellant and the respondent banks or between them and the borrower individually to attract the provisions of Section 11 of the SARFAESI Act.

34. In the last, Mr. Dhruv Mehta submitted that Section 11 of the SARFAESI Act is confined to Chapter II of the said Act which deals with the functioning and powers of banks, financial institutions and asset reconstruction companies in respect of securitization and reconstruction, and that the said provision has no application to enforcement of security interest provided in Chapter III of the SARFAESI Act. He further submitted that where the dispute pertains to enforcement of borrower's assets given as security, such dispute must be addressed in terms of Section(s) 17 and 18 of the SARFAESI Act, respectively, and Section 11 would be inapplicable in such disputes, notwithstanding whether such dispute is between two or more secured creditors such as two banks, financial institutions etc.

35. In such circumstances referred to above, the learned Senior Counsel prayed that there being merit in his appeal, the same be allowed and the impugned judgment and order of the High Court be set aside.

ii. <u>Submissions on behalf of the Respondent Bank</u>.

36. Ms. Ekta Choudhary, the learned counsel appearing for the respondent bank also placed reliance on Section 31(b) of the SARFAESI Act, however to contend that since the said provision stipulates that the SARFAESI Act shall not apply to the pledge of movable goods as defined under Section 172 of the Indian Contract Act, 1872 (for short, the "**Contract Act**"), as a natural consequence, Section 11 of the SARFAESI Act would be inapplicable to such cases. She submitted that since in the present case, the charge in favour of the respondent bank was created through pledging of the security in the form of stocks of rice and paddy, the same falls beyond the scope and purview of the SARFAESI Act, and such dispute can neither be adjudicated under Section 11 or 17 of the SARFAESI Act.

37. In the alternative she submitted that if Section 11 of the SARFAESI Act is found to be applicable, then no error not to speak of any error of law could be said to have been committed by the High Court whilst passing the impugned order. She would submit that, although Chapter II of the SARFAESI Act primarily deals with securitization and reconstruction, yet the provision of Section 11, more particularly the expression "*any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest*" is of wide import and would include disputes that pertain to recovery

of outstanding loan dues and by extension, the enforcement of security interest in lieu thereof.

38. To make good her submission, reliance was placed on the decisions of this Court in ***CIT v. Hindustan Bulk Carriers***, reported in **(2003) 3 SCC 57** and ***East India Hotels vs Union of India*** reported in **(2001) 1 SCC 284**, to contend that a statute must be read as a whole and one provision of the statute must be construed harmoniously with reference to the other provisions so as to make a consistent construction of the whole statute.

39. She further submitted that Section 11 of the SARFAESI Act would extend to include within its ambit even those disputes regarding non-payment of amounts due, including interest, that arise amongst banks, financial institutions, Non-Banking Financial Companies (NBFCs) etc.

40. In the last, she invited the attention of this Court to Office Memorandum No. 05.0003/2019-FTS-10937 dated 14.12.2022 titled the 'Settlement of commercial disputes between Central Public Sector Enterprises (CPSEs) *inter se* and CPSE(s) and Government Department(s)/Organization(s) - Administrative Mechanism for Resolution of CPSEs Disputes (AMRCD)' (for short, the "**AMRCD Memorandum**"), issued by the Ministry of Finance, Department of Public Enterprises, Government of India. She submitted that the AMRCD Memorandum has been formulated with a view to provide a

structured mechanism for resolution of disputes *inter se* CPSEs. through arbitration, in accordance with the procedure outlined therein. Placing reliance on the said guidelines, she contended that, since the dispute in the present matter is between two public sector banks, it ought to be resolved under the framework of the AMRCD Memorandum.

41. In such circumstances referred to above, it was prayed on behalf of the respondent bank that there being no merit in the appeal, the same may be dismissed.

E. ISSUES FOR DETERMINATION.

42. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration: -

I. What is the scope of Section 11 of the SARFAESI Act? In other words, what is the meaning of the expression "*any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest*" occurring in Section 11 of the SARFAESI Act?

II. What is the significance of the expression "*arises amongst any of the parties, namely, the bank or financial institution or asset reconstruction*

company or qualified buyer" used in Section 11 read with Section 2 of the SARFAESI Act? What is the underlying object behind prescribing arbitration for the adjudication of disputes between a bank, financial institution, asset reconstruction company or qualified buyer, in Section 11 of the SARFAESI Act?

III. Whether the existence of a written arbitration agreement between the parties is required for the purpose of resolution of disputes under Section 11 of the SARFAESI Act, 2002? In other words, is there any conflict between the decisions of ***Oriental Bank of Commerce*** (supra) and ***Federal Bank*** (supra)?

IV. Whether Section 11 of the SARFAESI Act, 2002 should be construed as mandatory or directory in its nature?

F. ANALYSIS

i. Legislative History and Scheme of the SARFAESI Act.

43. Till early 1990s, the civil suits were being filed for recovery of the dues of banks and financial institutions under the Act 1882 and the Code of Civil Procedure, 1908 (CPC). Due to various difficulties the banks and financial institutions had to face in recovering loans and enforcement of securities, the

Parliament enacted the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short, the "**RDBFI Act**").

44. On account of lack of infrastructure and manpower, the regular civil courts were not in a position to cope up with the speed in the adjudication of recovery cases. In the light of recommendations of the Tiwari Committee the special tribunals came to be set up under the provisions of the RDBFI Act referred to above for the recovery of huge accumulated NPA of the Bank loans.

45. On the continuing rise in number of Non-Performing Assets (NPA) at banks and other financial institutions in India; a poor rate of loan recovery and the failure of the existing legislation in redressing the difficulties of recovery by banks; the Narasimham Committee I & II and Andyarujina Committee were constituted by the Government for examining and suggesting banking reforms in India. These Committees in their reports observed that one out of every five borrower was a defaulter, and that due to the long and tedious process of existing frame work of law and the overburdening of existing forums including the specialised tribunals under the 1993 Act, any attempt of recovery with the assistance of court/tribunal often rendered the secured asset nearly worthless due to the long delays. In this background the Committees thus, proposed new laws for securitisation in order to permit banks and financial

institutions to hold securities and sell them in a timely manner without the involvement of the courts.

46. On the recommendations of the Narasimham Committee and Andyarujina Committee, the SARFAESI Act was enacted to empower the banks and financial institutions to take possession of the securities and to sell them without intervention of the court.

47. The statement of objects and reasons for which the Act has been enacted reads as under: -

"STATEMENT OF OBJECTS AND REASONS

The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These

Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction."

48. This Court in ***Mardia Chemicals Ltd. & Ors. v. Union of India & Ors.*** reported in ***(2004) 4 SCC 311***, examined the history and legislative backdrop that ultimately led to the enactment of the SARFAESI Act as under: -

"34. Some facts which need to 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 Debts Recovery Tribunals and appointing presiding officers, for a long time. Even after leaving that margin, it is to be noted that things in the spheres concerned 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 NPAs 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. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and the Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another Expert Committee was constituted, then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth-oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved.

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36. In its Second Report, the Narasimham Committee observed that NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed:

> *"8.1. A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries…."*

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances and 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 is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy."

49. In this regard, reference may also be made to the following observations of this Court in ***Union Bank of India v. Satyawati Tondon & Ors.*** reported in **(2010) 8 SCC 110**. The relevant observations read as under: -

"1. [...] With a view to give impetus to the industrial development of the country, the Central and State Governments encouraged the banks and other financial institutions to formulate liberal policies for grant of loans and other financial facilities to those who wanted to set up new industrial units or expand the existing units. Many hundred thousand took advantage of easy financing by the banks and

other financial institutions but a large number of them did not repay the amount of loan, etc. Not only this, they instituted frivolous cases and succeeded in persuading the civil courts to pass orders of injunction against the steps taken by banks and financial institutions to recover their dues. Due to lack of adequate infrastructure and non-availability of manpower, the regular courts could not accomplish the task of expeditiously adjudicating the cases instituted by banks and other financial institutions for recovery of their dues. As a result, several hundred crores of public money got blocked in unproductive ventures.

2. In order to redeem the situation, the Government of India constituted a committee under the Chairmanship of Shri T. Tiwari to examine the legal and other difficulties faced by banks and financial institutions in the recovery of their dues and suggest remedial measures. The Tiwari Committee noted that the existing procedure for recovery was very cumbersome and suggested that special tribunals be set up for recovery of the dues of banks and financial institutions by following a summary procedure. The Tiwari Committee also prepared a draft of the proposed legislation which contained a provision for disposal of cases in three months and conferment of power upon the Recovery Officer for expeditious execution of orders made by adjudicating bodies."

ii. <u>Scope of Section 11 and expression "dispute" thereunder</u>.

a. Various Decisions on the subject.

50. Before proceeding with the analysis of the scope and ambit of the provision of Section 11 of the SARFAESI Act, it would be apposite to refer to the decisions of various DRTs, DRATs and High Courts and the cleavage of

opinion that have been expressed as regards the nature and kind of disputes that would fall within the said provision.

51. In ***Anand Rathi Global Finance Limited v. Aavas Financiers Limited***, (Arb. P. No. 1308 of 2024), the dispute in the said case arose when the petitioner therein, an NBFC, advanced a loan to the borrower, against a property mortgaged as security. The borrower's account was declared as NPA, prompting the petitioner therein to initiate proceedings under Section 13(2) of the SARFAESI Act. While attempting symbolic possession under Section 13(4), the petitioner therein discovered that the same property was also mortgaged to the respondent, another NBFC. The Delhi High Court held that since the dispute was between two NBFCs regarding priority of claims over a mortgaged property under the SARFAESI Act, the same must be resolved through arbitration as mandated by Section 11 thereof. The relevant observations read as under: -

> *"6. In view of the fact that disputes have arisen between the parties, this Court is inclined to appoint an Arbitrator to adjudicate upon the disputes between the parties."*

52. In ***Bank of India v. Development Credit Bank Ltd.*** reported in **2012 SCC OnLine AP 71** it was the case of the petitioner therein that a prior mortgage over a house, had been created in its favor to secure loans. Although possession proceedings were initiated under Section 13(4) of the SARFAESI

Act, it was discovered that the respondent therein, had also taken possession of the same property under Section 13(4), pursuant to a subsequent mortgage suppressed by the borrowers. The Andhra Pradesh High Court held that the dispute between the two banks admittedly concerning priority of claims fell within the ambit of Section 11 of the SARFAESI Act, which mandates resolution through arbitration or conciliation. The relevant observations read as under: -

> *"Any dispute among the bank, or financial institution, or securitization company or reconstruction company or qualified institutional buyer, shall have to be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996. For doing so, the parties to the dispute have to consent in writing for reference to the conciliation or arbitration. Under Section 17(3) of the Act, if the DRT comes to the conclusion that the action taken under Section 13(4) of the Act by the secured creditor is not in accordance with the provisions of the Act, DRT may require restoration of the management of the business to the borrower or restoration of possession of the secured asset to the borrower by declaring the recourse to any of the measures under Section 13(4) of the Act is invalid and "pass such other order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor". Therefore, in our considered opinion, it is always open to the petitioner or the first respondent to submit consent in writing for resolution of dispute by conciliation or arbitration. This can as well be done before the DRT and a Writ Petition ordinarily may not be proper remedy."*

53. In ***Central Bank of India v. UCO Bank (MA No. 26/2022 in SA No. 3/2013)***, there was a dispute between two banks; Central Bank of India and UCO Bank respectively, both of whom claimed security interest over the same mortgaged

property. The borrowers therein had availed financial assistance from Central Bank of India and created equitable mortgage over their immovable property. On default in repayment, Central Bank of India issued a demand notice under Section 13(2) of the SARFAESI Act and thereafter took symbolic possession under Section 13(4) thereof. However, it was later discovered that UCO Bank, which also claimed a mortgage over the same property, had issued a sale notice and conducted auction sale of the mortgaged property, and adjusting the sale proceeds against its own dues with the surplus being kept in a no lien account. Central Bank of India filed a Miscellaneous Application seeking release of excess auction proceeds in its favour. However, the DRT, Guwahati whilst dismissing the same as not maintainable *inter-alia* on the ground of jurisdiction, placed reliance on the decision of ***Oriental Bank of Commerce*** (supra) and observed that since the dispute pertained to overlapping security interests and competing claims between two banks over the same property, such *inter-se* disputes between banks are to be resolved through arbitration and not before the DRT as per Section 11 of the SARFAESI Act.

54. In ***CFM Asset Reconstruction (P) Ltd. v. Tamilnad Mercantile Bank Ltd.***, reported in **2022 SCC OnLine DRAT 305**, the dispute in the said was between an asset reconstruction company and a bank over competing security interests in the same property. The appellant held 96.25% of the total secured interest, while the respondent bank claimed 3.75% and thus, filed a

securitization application under Section 17 of the SARFAESI Act challenging the private treaty sale conducted by the appellant therein. The appellant in turn contended that such an *inter-se* dispute over apportionment of proceeds between secured creditors is governed by Section 11 of the SARFAESI Act and ought to be referred to arbitration. The DRAT held that since both the parties were secured creditors under the SARFAESI Act, the dispute squarely fell within the scope of Section 11, which provides for resolution of such disputes through conciliation or arbitration in terms of the Act, 1996, even in the absence of a specific arbitration agreement. It was further held that the SARFAESI Act contemplates statutory arbitration and that in such cases and the DRT would have no jurisdiction to entertain the dispute under Section 17. The relevant observations read as under: -

> *"16. Unfortunately, the Learned PO has not discussed the scope of section 11 or its purport… The said section which is extracted above provides for a statutory arbitration. It raises a presumption of the existence of an arbitration agreement in respect of a dispute relating to securitisation or reconstruction on non-payment of any amount including interest between bank or financial institution or asset reconstruction company… When both parties to the dispute are secured creditors, there is no option for them but to resolve the dispute except by resorting to arbitration under the provisions of section 11 of the SARFAESI Act. It is not an arbitration by choice. It is a statutory arbitration contemplated under the provisions of the Act which binds the parties to a dispute referred to therein."*
>
> *"17. In view of the above, I am of the opinion that the Learned Presiding Officer has gone wrong in finding that the DRT has jurisdiction to entertain an application filed by the 1 Respondent under section 17 of the SARFAESI Act. The securitization application is also bad for the reason stated in*

sub-section (9) of section 13 of the SARFAESI Act since the decision to proceed with the sale under a private treaty was exercised by the Appellant financial institution which has more than 60% of the amount provided as loan to the borrower. However, in case there is a dispute between the Appellant and the 1 Respondent, it needs to be resolved by an arbitrator agreed upon by the parties or by resorting to the provisions of the Arbitration and Conciliation Act, 1996."

55. In ***D. Dhanamjaya Rao v. Bank of India, Kothapeta Branch, Guntur***, reported in **2004 SCC OnLine AP 962**, the applicant therein was a borrower who had availed a cash credit loan from the respondent bank. He alleged that the bank had made illegal mis-adjustments and wrongful debits from his loan account to discharge the liability of another borrower introduced by him, and thereafter issued a notice under Section 13(2) of the SARFAESI Act for recovery of dues. The applicant approached the Andhra Pradesh High Court under Section 11(6) of the Arbitration and Conciliation Act, 1996, for initation of arbitration in terms of Section 11 of the SARFAESI Act. The Andhra Pradesh High Court dismissed the application holding that the applicant being a borrower did not fall within the class of parties covered under Section 11 of the SARFAESI Act, which permits arbitration only among specified financial entities such as banks, financial institutions, ARCs, or qualified institutional buyers. It was further held that Section 11 of the SARFAESI Act envisages a statutory arbitration only among those enumerated parties and not between a bank and a borrower. The relevant observations read as under: -

"13. Therefore, such of those parties, who fall within the definition of parties mentioned in Section 2(c), (m), (za), (v) and (u) of the Securitization Act, namely the "bank" or "financial institution" or "securitization company" or "reconstruction company" or "qualified institutional buyer", as appearing in Section 11 of the Securitization Act, are entitled to invoke the provisions of Section 11 of the Arbitration Act, for resolution of disputes by an Arbitrator… The applicant, according to his own admission, is a borrower and a loanee of the Bank, and he, not being a "bank" nor "financial institution" nor "securitization company" nor "reconstruction company" nor "qualified institutional buyer", is not entitled to invoke the provisions of Section 11 of the Securitization Act and consequently the provisions under Section 11 of the Arbitration."

56. In ***Bell Finvest India Ltd. v. AU Small Finance Bank Ltd*.,** reported in **2002 DHC 004654**, the petitioner therein, an NBFC, sought appointment of an arbitrator under Section 11 of Act, 1996, in terms of Section 11 of the SARFAESI Act to argue that the said provision stipulated a statutorily mandate arbitration between financial institutions. The Delhi High Court, while dismissing the petition, held as under: -

(i) **First,** that Section 11 of the SARFAESI Act is intended to provide a statutory arbitration mechanism only in cases where disputes arise inter se between financial institutions, securitisation or reconstruction companies or qualified institutional buyers, and not between a lender and a borrower. The relevant observations read as under: -

"7.10 … the SARFAESI Act does not deal with disputes between a secured creditor and a borrower; but deals

with the rights of the secured creditors inter-se ... claims covered by the RDB Act are non-arbitrable, with a prohibition against waiver of jurisdiction under those statutes by necessary implication. Accordingly, disputes that would be covered by section 11 of the SARFAESI Act are those which deal with the rights of secured creditors inter-se, since the SARFAESI Act proceeds on the basis that the liability of the borrower has been crystallized and the borrower's account has been classified as a non-performing asset in the hands of the financial institution."

(ii) **Secondly,** that even if the borrower happens to be a financial institution, once it has availed a credit facility from another bank or financial institution, it dons the character of a borrower under Section 2(1)(f) of the SARFAESI Act and cannot claim the benefit of Section 11. The relevant observations read as under: -

"7.11 Though petitioner No. 1 is a financial institution, for the purposes of the present lis between the parties, petitioner No. 1 dons the hat of a borrower within the meaning of section 2(1)(f) of the SARFAESI Act ... section 11 conspicuously omits the word borrower from its text, which is a clear indication ... that a financial institution which happens to be a borrower vis-a-vis the institution with which a dispute arises, cannot resort to arbitration as a remedy."

(iii) **Lastly,** that disputes concerning enforcement of security interests, which are governed by special legislations such as the SARFAESI Act and the RDB Act, are non-arbitrable, and the special remedy provided therein cannot be overridden by any statutory or consensual arbitration. The relevant observations read as under: -

> *"7.13 ... matters covered by special laws, which create special rights, to be adjudicated and enforced by special forums, under special procedures, in this case the DRT, are non-arbitrable; and therefore, the remedies available to a lender for enforcing a security interest cannot be encroached upon by any arbitral mechanism."*

57. In ***Diamond Entertainment Technologies (P) Ltd. v. Religare Finvest Ltd.*** reported in **2023 SCC OnLine Del 95**, the dispute in the said case arose between two financial entities pursuant to the restructuring of a loan under a facility agreement. The petitioner borrower had defaulted on repayments, leading to measures being initiated by the respondent lender under the SARFAESI Act, 2002 including issuance of demand and possession notices. While the lender sought to proceed under SARFAESI, the borrower invoked arbitration under the same facility agreement. In this backdrop, a review petition was filed by the lender seeking recall of the order passed under Section 11 of the Act, 1996, on the ground that the disputes were non-arbitrable being governed exclusively by the framework of the SARFAESI Act. The Delhi High Court whilst dismissing the review petition, held as under: -

(i) **First,** that Section 11 of the SARFAESI Act, which provides a statutory recognition of arbitration as a mode of dispute resolution under SARFAESI where any dispute relating to securitization, reconstruction or non-payment of any amount due arises amongst any of the parties;

namely the bank, financial institution, asset reconstruction company or qualified buyer. Thus, the same indicates that not all disputes under the SARFAESI Act are necessarily barred from arbitration, especially when initiated by the borrower.

(ii) **Secondly,** that while actions taken by financial institutions under Section(s) 13 and 14 of the SARFAESI Act, respectively are actions *in rem* and thus, may not be arbitrable, disputes arising *inter se* between two financial creditors of non-payment, reconciliation of accounts, or challenge to recovery measures, can still nevertheless be referred to arbitration if the statutory framework permits and especially where the dispute is initiated by the borrower and not the lender.

(iii) **Thirdly,** that once a borrower raises a *bona fide* dispute on the amounts claimed and invokes arbitration under a prior agreement, the mere fact that proceedings have been initiated under SARFAESI by the lender would not *ipso facto* bar arbitration. It was held that the statutory bar on arbitration applies where special rights and remedies under the SARFAESI framework are being exercised by banks, and not where a borrower seeks resolution of disputes regarding the lender's claim or conduct.

58. In ***Encore Asset Reconstruction Company Pvt. Ltd. v. Universal Journeys India Pvt. Ltd***., (Arb. P. No. 1226 of 2024), the Delhi High Court was

considering a petition under Section 11 of the Act, 1996 for seeking appointment of an Arbitrator for disputes arising out of a loan transaction. The dispute pertained to non-payment of dues under a loan agreement entered into between the respondent and one Riviera Investors Private Limited, which was later assigned to the petitioner therein who was an Asset Reconstruction Company. The respondent objected to the arbitration, contending that it had not consented to the assignment and that the arbitration clause was not effectively transferred. The High Court held that Section 11 of the SARFAESI Act expressly provides for arbitration of disputes "*relating to securitisation or reconstruction or non-payment of any amount due including interest*" amongst a bank, financial institution, asset reconstruction company or qualified buyer, once the parties have consented in writing. As the dispute arose on account of non-payment by the borrower post-assignment, and the assignment deed carried over the arbitration clause in the original loan agreement, the High Court held that such assignment binds the borrower to the same arbitration mechanism.

59. In ***Federal Bank*** (supra) the DRAT held that in the absence of a written consent for arbitration, Section 11 of the SARFAESI Act will not apply even if a dispute is between two financial institutions concerning competing security interests in the same immovable property. The relevant observations read as under: -

> *"7. I am unable to subscribe to the view propounded by the Counsel for the respondents. There is no agreement between the parties. The appellant does not want that this matter to be decided by arbitration. The provisions of Section 11 of the SRFAESI Act have a crystalline clarity. It clearly, specifically, unequivocally mentions that parties to dispute must have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly. There is no such written consent.*

60. In ***Oriental Bank of Commerce*** (supra) the dispute therein was between three banking institutions, in respect of competing claims over the same mortgaged property. The controversy stemmed from non-payment of loans and priority of charges created over the said property. While Canara Bank had taken possession under the SARFAESI Act, both Oriental Bank and Andhra Bank filed securitisation applications claiming prior mortgage interests. The DRAT, held that *inter-se* disputes between secured creditors under the SARFAESI Act cannot be adjudicated by the DRT and ought to be resolved by way of arbitration as mandated by Section 11 of the SARFAESI Act. The relevant observations read as under: -

> *"6. Since there is a dispute between the Banks inter se, therefore, I am of the considered view that the learned DRT did not have the jurisdiction to try the Securitisation Application under the SRFAESI Act. Recently, the attention of the Court was invited towards Section 11 of the SRFAESI-Act which runs as follows:*
>
> > *'11. Resolution of disputes.—Where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely, the Bank, or financial institution, or securitisation*

> *company or reconstruction company or qualified institutional buyer, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 ... as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.'"*
>
> *"7. Consequently, it is clear that the previous view taken in this regard that DRT has the jurisdiction to try such disputes appears to be incorrect. The order passed by the learned DRT under the SRFAESI Act in this case is without jurisdiction."*

61. In ***Reliance Commercial Finance Limited v. Axis Bank Limited***, **(AP No. 361 of 2019)** the petitioner, a financial institution under the SARFAESI Act, 2002, sought arbitration under Section 11 of the Act, 1996, relying on the statutory arbitration provision enshrined in Section 11 of the SARFAESI Act. The dispute arose from the petitioner's takeover of a loan from the respondent bank, and subsequent claims regarding mortgage documents and related transactions. The respondent argued there was no privity of contract or written arbitration agreement thus, there could be no reference to arbitration as the statutory conditions of existence an arbitration agreement under Section 7 of the Act, 1996 was not fulfilled. However, the Calcutta High Court held that Section 11 of the SARFAESI Act creates a statutory fiction of an arbitration agreement, negating the need for a written agreement under Section 7. It further observed that since *prima facie*, the jural relationship between the parties based on the payment and correspondence was one as contemplated

under Section 11 of the SARFAESI Act, the High Court proceeded to refer the dispute to arbitration and appoint an arbitrator. The relevant observations read as follows: -

> *"Section 11 of the Act of 2002 raises a deemed statutory fiction of the existence of an arbitration agreement, provided the other parameters are fulfilled, and does not require an agreement in writing to be entered into between the parties in terms of Section 7 of the Act of 1996. The deeming provision for existence of an arbitration agreement will appear from the user of the words 'as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly' in Section 11 of the Act of 1996."*

b. Scope and ambit of Section 11 of the SARFAESI Act.

62. Section 11 of the SARFAESI Act deals with resolution of disputes relating to securitisation or reconstruction or non-payment of any amount due including where such dispute is between the bank or financial institution or asset reconstruction company or qualified buyer and stipulates that such disputes i.e., those pertaining to the subject-matter provided therein and involves the parties stipulated thereto, shall be resolved by arbitration, as if such parties to the dispute had consented to resolve it by arbitration in terms of the Act, 1996. The said provision reads as under: -

> *"**11. Resolution of disputes.—***
> *Where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely, the bank or financial institution or asset reconstruction company or qualified buyer,*

such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 (26 of 1996), as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly."

63. From the plain language of Section 11 of the SARFAESI Act, it is manifest that the scope and ambit of the said provision have been limited or confined by the twin conditions laid therein, that have to be satisfied in order to attract the said provision being as under: -

(i) Where the dispute arises between: -

a. any bank;
b. any financial institution;
c. any asset reconstruction company;
d. any qualified buyer; and

(ii) Where the dispute relates to: -

a. securitization of financial assets;
b. reconstruction of assets;
c. non-payment of any amount due and / or interest

64. The object underlying Section 11 of the SARFAESI Act insofar as it mandates arbitration or conciliation as the only mechanism for resolution of disputes between a bank, financial institution, ARC etc., and ousts the jurisdiction of the DRTs under Section 17 for adjudicating such disputes is to ensure that ancillary or collateral disputes that may arise between competing secured

creditors do not hinder the larger purpose of the SARFAESI Act of facilitating recoveries of dues from the borrowers expeditiously by enforcement of secured assets or other means provided thereunder. It is to ensure that discord among secured creditors should not impede, derail, or stall the recovery proceedings under the SARFAESI Act, which are designed with the idea of time-bound adjudication with minimal interference.

65. In the absence of any such mandate as enshrined in Section 11 of the SARFAESI Act, every conflict between secured creditors over a security interest would ultimately just prolong the recovery proceedings against the borrower and thwart any possibility of a meaningful recovery of bad debts. By requiring such disputes to be referred to arbitration, the legislature has effectively sought to avoid a situation where squabbles between secured creditors obstruct or delay the realization of the value of the secured assets. Both the RDBFI Act and the SARFAESI Act envision the DRTs and DRAT as specialized forum for or facilitating and effectuating recovery against defaulting borrowers, and not for resolving disputes *inter se* secured creditors. Their jurisdiction is primarily directed toward the adjudication of recovery certificates, enforcement of security interest, and addressing borrower objections under Section 17. The nature of proceedings before the DRT is largely summary, intended to enthuse efficiency in recovery of dues save such proceedings from the perils of pendency. This is the very reason why the

legislature consciously omitted the term "borrower" in Section 11 of the SARFAESI Act.

66. The category of disputes contemplated under Section 11 of the SARFAESI Act are those which pertain to the rights and entitlements of secured creditors *inter se*, in relation to the enforcement of security interest independent of the borrower's liability. The entire scheme of the SARFAESI Act is premised on the liability of the borrower being crystallized by virtue of its classification as a non-performing asset by the secured creditor. The kind of disputes that may arise from the scheme SARFAESI Act, broadly fall into two categories being; **(i)** disputes in relation to the recovery proceedings or measures taken under the said Act and **(ii)** disputes pertaining to any rights or claims in respect of the secured asset. The former disputes concern only the secured creditor and the borrower, although such disputes have a bearing on the security interest or secured asset, yet such proceedings are more concerned with the manner of recovery and the measures thereto and thus, encompass disputes between the borrower and secured creditor(s) alone. However, the latter disputes are specifically in respect of the secured asset or security interest, the nature of dispute is not in relation to the manner of recovery but rather the manner of apportionment of the recovery proceeds either directly or indirectly, and thus, such disputes arise and concern the secured creditors that are covered under the SARFAESI Act, namely banks, financial institutions, asset reconstruction

companies and qualified buyers. The legislature keeping the aforesaid distinction in mind, incorporated the provisions of Section(s) 11 and 17 of the SARFAESI Act, for resolution of disputes pertaining to any rights or claims in respect of the secured asset and disputes in relation to the recovery proceedings or measures taken thereunder, respectively.

67. The Black Law Dictionary (5th ed. 1979) defines "dispute" as "*A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other. The subject of litigation; the matter for which a suit is brought and upon which issue is joined, and in relation to which jurors are called and witnesses examined*."

68. The High Court of Madhya Pradesh in its decision in ***Dilip Construction Company v. Hindustan Steel Ltd***., reported in **1973 SCC OnLine MP 22** was called upon to examine the question of existence of a dispute in order to raise the jurisdiction of arbitration. In the case, a contractual dispute arose between appellant and respondent therein under a contract which included an arbitration clause. The appellant therein completed part of the contracted work but raised a claim for additional payment, which the respondent contested. The respondent argued that no dispute existed as the claims were still under examination, and certain claims fell outside the contract's purview. Despite

this, both parties nominated arbitrators, and the matter proceeded to an umpire, who made an award in favour of the appellant therein. The core issue was whether a genuine 'dispute' existed at the time of invoking the arbitration clause, as its pre-existence was a condition precedent for invoking arbitration in terms of the contract. The High Court held that: -

> *"10. There was no jurisdiction either in the arbitrators or the umpire to make an award in this case. The pre-existence of a difference or dispute is a condition precedent to the invoking of the arbitration clause. On a plain construction of its terms, the right to arbitration under Clause 61 of the agreement only arises, if a difference or dispute exists, at the tine when a notice of submission is served by a party seeking to enforce the arbitration clause. In the present case, there was, in fact, no such difference or dispute. If there is no dispute, there can consequently be no right to demand arbitration. The Court must, therefore, be satisfied that there was some real point of difference which had to be submitted to arbitration.*
>
> *11. The law on the subject is lucidly stated in Russel on Arbitration, Seventeenth Edn. p. 28:*
>
> *"To constitute a submission proper, there must be a difference. If there is no difference there is nothing for an arbitrator to arbitrate about, and in the case of an agreement to refer future disputes to arbitration, the arbitrator's jurisdiction does not arise until a dispute has arisen. It might seem, therefore, that if the agreement between the parties is in effect an agreement to prevent disputes from arising and not an agreement as to how they are to be settled, then it is neither an agreement to refer to arbitration nor a submission to arbitration, and it is not within the Act."*
>
> *12. The existence of a dispute is an essential condition for the jurisdiction of an arbitrator. If there is no dispute, there can be no right to demand arbitration at all. This was clearly laid down by Rankin, J., as he then was, in Uttam Chand Saligram v. Jewa Mamooji, ILR 46 Cal 534 : (AIR 1920 Cal 143). A point as to which there is no dispute cannot be referred to*

arbitration. Failure to pay does not necessarily constitute a difference or dispute. A dispute implies an assertion of right by one party and repudiation thereof by another. In tide instant case, there was; merely an assertion of a claim made by the appellant for payment of Rupees 16,77,197.28 P., but there was no repudiation of that claim by the respondent and, therefore there could be no dispute which could be referred to arbitration. The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action, but upon the existence of a dispute. (See Balmukund Ruia v. Gopiram Bhotica, 24 Cal WN 775 : (AIR 1920 Cal 808 (2)).

18. In Dawoodbhai Abdulkader v. Abdulkader Ismailji, AIR 1931 Bom 164 the plaintiff was the sub-partner of the defendant in a certain business. The deed of sub-partnership incorported all the articles, covenants, conditions and obligations contained in the principal partnership agreement between the defendant and his partner which were not inconsistent with the terms of the agreement. There was a clause in the deed of principal partnership which provided, inter alia, that any dispute or difference arising between partners with regard to the construction of any of the articles contained in the agreement or to any divisions of goods or things, related to the said Partnership or the affairs thereof, shall be referred to arbitration in the manner therein mentioned. The plaintiff called upon the defendant to make up the accounts and to pay him the amount found due at the foot thereof. The defendant did not pay and the plaintiff filed a suit praying that the defendant may be ordered to render a true and complete account of the profits earned by the partnership business and of the amount due to the plaintiff, and to pay the same to him. The defendant thereupon took out a summons for an order to stay further proceedings to enable the parties to refer to arbitration. It was held by Wadia, J., that as there was no dispute between the parties but mere failure to pay, the suit was maintainable and could not be stayed. The principles deducible from these authorities are—

(i) The existence of a difference or dispute is an essential condition for the arbitrator's jurisdiction to act under an arbitration clause in an agreement;

(ii) The jurisdiction of an arbitrator depends not upon the existence of a claim or the accrual of a cause of action,

but upon the existence of a dispute. A dispute implies an assertion of a right by one party and repudiation thereof by another;

(iii) A failure to pay is not a difference, and the mere fact that a party could not or would not pay does not in itself amount to a dispute unless the party who chooses not to pay raises a point of controversy regarding, for instance, the basis of payment or the time or manner of payment."

(Emphasis supplied)

69. This Court in ***Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority***, reported in **(1988) 2 SCC 338** again explained the meaning of the term "dispute". In the said case, the appellant therein had contracted with the respondent therein for constructing of 240 flats. The appellant therein repeatedly requested the respondent authority to finalize the pending bills. However, due to the inaction of the respondent, the appellant therein issued a notice for seeking the release of the sum offered as security and for invoking arbitration. When the respondent authority failed to respond, the appellant therein filed an application for initiation of arbitration, alleging the existence of a 'dispute' regarding the unsettled bills and withheld security. This Court held as under: -

"4. There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."

(Emphasis supplied)

70. The *ratio* of the decision of ***Inder Singh Rekhi*** (supra) was examined in ***McDermott International Inc. v. Burn Standard Co. Ltd.***, reported in **(2006) 11 SCC 181**, wherein this Court clarified and held that the term "dispute" does not necessarily imply that a claim asserted by one of the party must be followed by a denial from the other party. A "dispute" would said to exist where the other party has denied or disputed his claim or in instances where it has feigned ignorance or is not otherwise interested in resolving it. The relevant observations read as under: -

> *"117. In Major (Retd.) Inder Singh Rekhi v. Delhi Development Authority [(1988) 2 SCC 338] , whereupon Mr Mitra placed strong reliance, an award made under the old Act was in issue. A dispute had arisen whether there was a claim and denial or repudiation thereof. In that context, it was held: (SCC p. 340, para 4)*
>
> > *"There should be dispute and there can only be a dispute when a claim is asserted by one party and denied by the other on whatever grounds. Mere failure or inaction to pay does not lead to the inference of the existence of dispute. Dispute entails a positive element and assertion of denying, not merely inaction to accede to a claim or a request. Whether in a particular case a dispute has arisen or not has to be found out from the facts and circumstances of the case."*
>
> *118. <u>There is no dispute about the aforementioned principle but the same would not mean that in every case the claim must be followed by a denial. If a matter is referred to any arbitrator within a reasonable time, the party invoking the arbitration clause may proceed on the basis that the other party to the contract has denied or disputed his claim or is not otherwise interested in referring the dispute to the arbitrator</u>."*

(Emphasis supplied)

71. The word "dispute" used in Section 11 of the SARFAESI Act does not take into account "any dispute" that arises out of "any reason whatsoever". The scope and meaning of the said term has been qualified and limited by the provision itself, more particularly, the expression "*relating to securitisation or reconstruction or non-payment of any amount due including interest*". Hence, Section 11 would be attracted only where the dispute arises in relation to (i) securitisation, or (ii) reconstruction, or (iii) non-payment of any amount due (including interest).

72. Section 2(z) of the SARFAESI Act defines 'securitisation' as "*acquisition of financial assets by any asset reconstruction company from any originator, whether by raising of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise*".

73. Section 2(b) of the Act defines 'asset reconstruction' as "*acquisition by any asset reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance*".

74. It is manifest from the foregoing discussion that the present case at hand, more particularly dispute between the appellant and respondent banks does not pertain to either securitisation or reconstruction. It does not involve any acquisition of financial assets or rights by an asset reconstruction company (ARC). Rather, the crux of the issue is whether the controversy involving the competing claims of rights over the stocks of goods by hypothecation or pledge and the dispute therein falls within the scope of Section 11 of the SARFAESI Act, more particularly the third category of disputes delineated thereunder pertaining to "*non-payment of any amount due including interest*".

c. Meaning of the expression "*non-payment of any amount due including interest*".

75. The scope and meaning of the phrase "*non-payment of any amount due including interest*," used in Section 11 of the SARFAESI Act warrants careful examination. It is pertinent to note that the statute employs the term "any" amount, thereby refraining from limiting its application to a specific category of amounts that may be owed to a party mentioned in the provision. The expression "*any amount due, including interest*," must be construed in light of the purpose of the Act and the provisions contained therein. The plain meaning of the term "*any amount due*" encompasses amounts that remain unpaid beyond the due date. However, the aforesaid is only one element of the meaning of the said expression.

76. In ***Nanalal M. Varma and Co. Ltd. v. Alexandra Jute Mills Limited***, reported in **1987 SCC OnLine Cal 100**, the Calcutta High Court whilst discussing the scope and meaning of the expression "*non-payment of price*" held that non-payment may arise from a myriad of reasons. It may be due to one's inability to pay while not disputing liability thereof or it may be due to repudiation or denial of its liability to pay. It may so happen, that even a failure to fulfil ones obligation to pay within the time stipulated may amount to non-payment. However, it held that when there is no repudiation or denial of liability a simpliciter non-payment or default in payment may not give rise to a dispute. It is only when there is non-payment as explained aforesaid, accompanied by a denial of liability and by reason thereof payment is not made, would the same tantamount to a dispute. The relevant observations read as under: -

> *"7. [...] A non-payment may arise by reason of one's inability to pay while not disputing liability thereof. A non-payment, on the other hand, may be the result of repudiation or denial of its liability to pay. Thirdly, a non-payment of price may mean failure to fulfil ones obligation under the contract to pay within the time stipulated. When there is no repudiation or denial of liability a simpliciter non-payment or default in payment may not give rise to a dispute which can be referred to arbitration. On the other hand, when there is denial of liability and by reason thereof payment is not made by a party from whom demand is made by the other party, the same would be a case of repudiation. In our view the third kind of case mentioned by us, that is, failure to pay within the time provided in the contract resulting in breach of terms of the contract depending upon the terms of the particular arbitration clause could be validly the subject-matter of a reference to arbitration. In this connection we may refer to the observation of Rankin J. as his Lordship then was, in the case of Uttam Chand Saligram v.*

Jewa Mamooji, ILR 46 Cal 534 : AIR 1920 Cal 143 to the effect that the existence of a dispute was an essential condition for the Arbitrator's jurisdiction, the dispute may be either in the acknowledgment of debts or as regards the mode and time of satisfying it [...]"

(Emphasis supplied)

77. A situation of "non-payment of any amount" or an overdue arises when one party fails to fulfil their obligation to pay the party they are indebted to. For the purposes of the present case at hand, we will be focusing on the scope of Section 11 of the SARFAESI Act specifically in the context of disputes between two banks, excluding financial institutions, asset reconstruction companies (ARCs), or qualified buyers, as otherwise contemplated under the provision. In cases, involving two banks acting as creditors, a dispute may not arise directly between the banks due to the "*non-payment of any amount*" they owe to each other. Instead, disputes typically emerge because of the borrower's failure to discharge their debt obligations. For instance, if a borrower defaults on repayment after availing of credit facilities extended by two banks, issues of non-payment of loan amounts (including interest) owed by the borrower, the same may lead to a dispute. Such a dispute is likely to concern the priority of charges over the borrower's assets, especially in situations where the borrower has secured loans from both banks by mortgaging the same property. In the present case, the question of priority arises due to the simultaneous loans extended by the appellant and respondent banks and the creation of charges over the same security.

78. In cases such as the present one, the authority to determine which bank holds the prior charge over the borrower's assets becomes a significant issue for consideration. There have been instances where such disputes have been referred to the DRT or civil courts for adjudication. The question of determining the priority of charge typically arises after the borrower defaults on their obligations and their assets are classified as NPAs. In such scenarios, two or more banks may assert competing claims over the same secured asset.

79. The dispute stems from the borrower's failure to discharge their debt obligations, including the amounts they were bound to pay to the banks. This non-payment gives rise to a conflict between the creditors regarding the hierarchy of their respective charges over the borrower's assets. Consequently, the issue of priority of charge is inherently and intrinsically linked to the borrower's "*non-payment of any amount due*" as contemplated under Section 11 of the SARFAESI Act. This provision, therefore, would undoubtedly bring such disputes within its ambit, and thereby mandate resolution of such disputes through conciliation or arbitration as prescribed under the Act, 1996.

80. It is imperative to carefully examine the bare text of Section 11 of the SARFAESI Act. The said provision does not stipulate that the "*amount due*" must be owed directly between the two banks, financial institutions, ARCs etc.. The language of the provision is clear and discernible: "*Where any*

dispute relating to [...] *non-payment of any amount due, including interest, arises amongst any* [...]". The broad phrasing of the aforesaid expression signifies a wide import of its meaning which would include a various range of scenarios where disputes are connected to unpaid amounts, including those arising due to third-party defaults, such as indirect defaults of the borrowers.

81. For illustration, a borrower may owe a certain amount to Bank A and another amount to Bank B, after both of these banks have hypothecated the borrower's property. If the borrower defaults and fails to repay these loans, a dispute may arise between Bank A and Bank B regarding their respective claims over the borrower's mortgaged assets. This dispute is inherently and intrinsically linked to the borrower's "*non-payment of any amount due including interest*", which the borrower was obligated to pay under the terms of their respective loan agreements with the banks.

82. Thus, it follows that where the dispute between the banks is fundamentally related to the "*non-payment of any amount due including interest*", which may be triggered by the actions of a borrower, Section 11 of the SARFAESI Act would apply. Consequently such, disputes being those which fall squarely within the ambit of the said provision, would mandate the resolution of such disputes through the mechanisms of conciliation or arbitration as provided under the Act, 1996. This interpretation aligns with both the language, the

legislative intent behind Section 11 and the avowed object and spirit of the SARFAESI Act.

83. In the present case, a dispute has arisen between the appellant and the respondent banks regarding their respective claims over the stocks of the borrower company. The controversy primarily on the surface entails the method of creation of charge on the stocks. The appellant bank asserts its claim based on a hypothecation agreement, whereby the stocks of the borrower company were hypothecated in its favour. On the other hand, the respondent bank claims a superior right by virtue of a pledge created over the same security, in terms of Section 172 of the Contract Act. It is pertinent to note that, Section 31(b) of the SARFAESI Act, stipulates that the provisions of the SARFAESI Act will not apply to movables that have pledged.

84. However, a closer look would reveal, that the dispute in substance, is not merely concerned with whether the rights of either the appellant or the respondent banks are enforceable by virtue of the manner in which they have been created. Rather, the dispute pertains to the priority of charge between two banks than the mode of its creation. The contention that the charge, being created by way of pledge, falls outside the ambit of the Act under Section 31(b) is misplaced. This is because the exclusion under Section 31(b) applies to disputes between the borrower and the lender concerning the pledge of movables, where such dispute is purely in regard to enforcement of such right

qua the borrower. However, the present dispute between the appellant and the respondent banks is regarding their respective rights over the stocks. The manner in which the charge was created, be it by pledge or hypothecation, is irrelevant to the determination of priority between the two banks. The said issue will only assume importance, once the rights of each of the banks are crystalized, and thereafter enforcement of security on the strength of such rights is sought. Hence, the present case falls under the ambit of Section 11 of the SARFAESI Act.

d. Section 11 will not apply to disputes between Bank(s), Financial Institution(s), ARC(s) or Qualified Buyer(s), who are otherwise a Borrower.

85. At this stage we may clarify one another pertinent aspect regarding Section 11 of the SARFAESI Act, and whether the said provision could said to be applicable where one of the parties although is a bank, financial institution or ARC etc., yet its jural relation to another such entity is that of a borrower and lender? In this regard, we must look into the decisions of this Court in ***M/s. Transcore v. Union of India & Anr.*** reported in **(2008) 1 SCC 125** and the Delhi High Court in ***Bell Finvest India*** (supra).

86. In ***Transcore*** (supra) this Court held that that Section 11 of the SARFAESI Act is applicable to financial institutions for their inter-se disputes but not to a dispute with a borrower. The relevant observation reads as under: -

> *"21 [...] Section 11 deals with resolution of disputes relating to securitisation, reconstruction or non-payment of any amount due between the bank or FI or securitisation company or reconstruction company. It further states that such disputes shall be resolved by conciliation or arbitration. It is important to note that the dispute contemplated under Section 11 of the NPA Act is not with the borrower [...]*
>
> *30. The point to be noted is that the scheme of the NPA Act does not deal with disputes between the secured creditors and the borrower. On the contrary, the NPA Act deals with the rights of the secured creditors inter se. The reason is that the NPA Act proceeds on the basis that the liability of the borrower has crystallised and that his account is classified as non-performing asset in the hands of the bank/FI."*

87. In ***Bell Finvest India*** (supra), the petitioner therein an NBFC and a financial institution had entered a rupee facility agreement with the respondent therein who was a bank for taking a loan, against which a security interest was created in favour of the respondent bank therein. Under the said agreement, the petitioner therein was defined as that of a 'borrower' and the respondent as the 'lender'. The petitioner therein had defaulted in repayment of loan to the respondent therein under the said agreement and the account of the petitioner was classified as NPA. The petitioner therein moved an application for seeking appointment of arbitrator under the Act, 1996 before the High Court, contending that since dispute is between a NBFC and a bank, Section 11 of

the SARFAESI Act would be applicable, and the dispute would be amenable to arbitration. Per contra, the respondent therein argued that the dispute is a straightforward debtor-creditor matter, and that although the petitioner therein is a financial institution under Section 2(1)(m)(iv) of the SARFAESI Act, yet because it is also a borrower in terms of Section 2(1)(f) of the SARFAESI Act, he falls outside the scope of Section 11 of the SARFAESI Act, which excludes borrowers and intends arbitration only for disputes between lenders. The Delhi High Court placing reliance on ***Transcore*** (supra) held that Section 11 of the SARFAESI Act is intended to provide a statutory arbitration mechanism only in cases where disputes arise *inter se* between financial institutions, securitisation or reconstruction companies or qualified institutional buyers, and not between a lender and a borrower. A borrower that happens to be a financial institution, would still for the purposes of the SARFAESI Act be considered a borrower and thus would be disentitled to claim the benefit of Section 11 of the SARFAESI Act. The relevant observations read as under: -

> *"7.10 [...] the SARFAESI Act does not deal with disputes between a secured creditor and a borrower; but deals with the rights of the secured creditors inter-se ... claims covered by the RDB Act are non-arbitrable, with a prohibition against waiver of jurisdiction under those statutes by necessary implication. Accordingly, disputes that would be covered by section 11 of the SARFAESI Act are those which deal with the rights of secured creditors inter-se, since the SARFAESI Act proceeds on the basis that the liability of the borrower has been crystallized and the borrower's account has been classified as a non-performing asset in the hands of the financial institution.*

> *7.11 Though petitioner No. 1 is a financial institution, for the purposes of the present lis between the parties, petitioner No. 1 dons the hat of a borrower within the meaning of section 2(1)(f) of the SARFAESI Act ... section 11 conspicuously omits the word borrower from its text, which is a clear indication ... that a financial institution which happens to be a borrower vis-a-vis the institution with which a dispute arises, cannot resort to arbitration as a remedy."*

88. In appeal, this Court in ***M/s Bell Finvest India Ltd. v. A.U. Small Finance Bank Ltd.,*** [**Special Leave Petition (C) No. 24101 of 202**] observed that the interpretation of the Delhi High Court in ***Bell Finvest India*** (supra) that the disputes between two financial institutions relating to "payment of any amount due including interest", would not include borrowed and loan amount may not be correct. However, this Court in view of the peculiar facts and circumstances of the case therein deemed it unnecessary to decide the aforesaid issue.

89. We have already clarified that a dispute relating to the "*non-payment of any amount due, including interest*" may arise following a default in loan repayment by a common borrower. Such default can indirectly lead to a conflict between two banks that have extended loans to the same borrower. This type of dispute falls within the ambit of Section 11 of the SARFAESI Act, as it involves competing claims over the recovery of dues. Hence, Section 11 of the SARFAESI Act does include borrowed loan amount under the "non-payment of any amount due including interest". However, when a lender assumes the role of a borrower, the legal relationship between the parties

undergoes a shift. In such circumstances, the entity that typically extends credit now becomes obligated to fulfil the borrowed amount as per the contractual arrangements between the bank and the lender-turned-borrower. This changes the traditional lender-borrower relationship, requiring the lender-turned-borrower to adhere to the same obligations that may in the usual circumstances apply to any other borrower.

90.'Borrower' has been defined in Section 2(f) of the SARFAESI Act as follows:

> *(f) "borrower" means any person who, or a pooled investment vehicle as defined in clause (da) of section 2 of the Securities Contracts (Regulation) Act, 1956 (42 of 1956) which, has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who, or a pooled investment vehicle which, becomes borrower of a asset reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through issue of debt securities;*

91. It is clear from the above definition that the Act defines 'borrower' in broad terms, meaning "any person" or pooled investment vehicle that has received financial assistance from a bank or financial institution. The definition explicitly includes those who have provided guarantees or created security interests, as well as those whose debt has been acquired by the ARC. It also extends to entities that have raised any funds through the issuance of debt securities. lender-turned-borrower will also fall within the scope of a

borrower. The use of the phrase "any person" in this provision makes it clear that it does not leave out such entities who are banks but taking the loans in the capacity of a borrower. When a lender avails a loan from another bank or institution in its capacity of being a borrower, then it steps into the position of a borrower and shall be governed by the same statutory framework as a borrower is. The classification of a borrower shall be determined by the nature of the transaction rather than the inherent status of such party.

92. We do not find any reasoning as to why a lender-turned-borrower should not be kept under the same scrutiny as that of a traditional borrower, including the potential classification of its account as NPA. A bank taking a loan from another bank is taking the loan in the capacity of a borrower rather than acting in its usual capacity as a lender, unless expressly modified and specified by the terms of the facility agreement between parties governing such transaction where they take into account the position of the lender-turned-borrower leading to any consequential advantages or disadvantages to such lender-turned-borrower. In such regard, it is important to see the purpose for which the loan and the functioning capacity of both the parties in which the loan is extended. The roles in financial transactions are thus defined by the terms of the agreement and the capacity in which a parties act, rather than their inherent nature as a lender. If every dispute between a lender and a lender-turned-

borrower becomes arbitrable under Section 11 of the SARFAESI Act, then it would render the entire mechanism of the SARFAESI Act otiose.

iii. <u>There is no requirement of existence of a written arbitration agreement under Section 11 of the SARFAESI Act</u>.

93. As discussed in the foregoing paragraphs, Section 11 stipulates that any dispute between a bank or financial institution or asset reconstruction company or qualified buyer shall be resolved by way of arbitration.

94. The Act, 1996, more particularly Section 7 stipulates that a dispute shall be resolved by way of arbitration, where there exists an arbitration agreement between the parties. The said provision reads as under: -

> ***7. Arbitration agreement.—***
> *(1) In this Part, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.*
>
> *(2) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.*
>
> *(3) An arbitration agreement shall be in writing.*
>
> *(4) An arbitration agreement is in writing if it is contained in—*
>
> *(a) a document signed by the parties;*
>
> *(b) an exchange of letters, telex, telegrams or other means of telecommunication including*

communication through electronic means which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of the agreement is alleged by one party and not denied by the other.

(5) The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

95. Similarly, Section 8 of the Act, 1996 which empowers a judicial authority to refer the parties to arbitration also stipulates that such reference shall be made if the judicial authority finds that *prima-facie* a valid arbitration agreement exists. The said provision reads as under: -

"8. Power to refer parties to arbitration where there is an arbitration agreement.—
(1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists.

(2) The application referred to in sub-section (1) shall not be entertained unless it is accompanied by the original arbitration agreement or a duly certified copy thereof: Provided that where the original arbitration agreement or a certified copy thereof is not available with the party applying for reference to arbitration under sub-section (1), and the said agreement or certified copy is retained by the other party to that agreement, then, the party so applying shall file such application along with a copy of the arbitration agreement and a petition praying the Court to call upon the other party to produce the original

arbitration agreement or its duly certified copy before that Court.

(3) Notwithstanding that an application has been made under sub-section (1) and that the issue is pending before the judicial authority, an arbitration may be commenced or continued and an arbitral award made."

96. However, Section 11 of the SARFAESI Act, apart from stipulating that any dispute between a bank or financial institution or asset reconstruction company or qualified buyer shall be resolved by way of arbitration further uses the expression "*as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration*", which is of vital significance. The legislature in its wisdom has not only prescribed and mandated the resolution of disputes covered under the said provision by way of arbitration, but by consciously using the aforesaid expression, has gone one step ahead by providing a deeming fiction whereby, an arbitration agreement is presumed to exists between the parties falling under the said provision for the resolution of any 'dispute' between them that is specified thereunder. Thus, Section 11 of the SARFAESI Act, creates a legal fiction as regards the existence of an arbitration agreement notwithstanding whether such agreement exists or not in actuality.

97. This Court in ***Rajasthan State Industrial Development & Investment Corpn. v. Diamond & Gem Development Corpn. Ltd.***, reported in **(2013) 5 SCC 470**

extensively dealt with the interpretation of the expression "as if" in any given provision. The relevant observations read as under: -

> *"26. The expression "as if" is used to make one applicable in respect of the other. The words "as if" create a legal fiction. By it, when a person is "deemed to be" something, the only meaning possible is that, while in reality he is not that something, but for the purposes of the Act of legislature he is required to be treated that something, and not otherwise. It is a well-settled rule of interpretation that, in construing the scope of a legal fiction, it would be proper and even necessary to assume all those facts on the basis of which alone such fiction can operate. The words "as if" in fact show the distinction between two things and, such words must be used only for a limited purpose. They further show that a legal fiction must be limited to the purpose for which it was created. [Vide Radhakissen Chamria v. Durga Prosad Chamria [(1939-40) 67 IA 360 : (1940) 52 LW 647 : AIR 1940 PC 167] , CIT v. S. Teja Singh [AIR 1959 SC 352] , Ram Kishore Sen v. Union of India [AIR 1966 SC 644] , Sher Singh v. Union of India [(1984) 1 SCC 107 : AIR 1984 SC 200] , State of Maharashtra v. Laljit Rajshi Shah [(2000) 2 SCC 699 : 2000 SCC (Cri) 533 : AIR 2000 SC 937] , Paramjeet Singh Patheja v. ICDS Ltd. [(2006) 13 SCC 322 : AIR 2007 SC 168] (SCC p. 341, para 28) and CIT v. Willamson Financial Services [(2008) 2 SCC 202] .]*
>
> *xxx xxx xxx*
>
> *28. In Industrial Supplies (P) Ltd. v. Union of India [(1980) 4 SCC 341 : AIR 1980 SC 1858] this Court observed as follows : (SCC p. 351, para 25)*
>
> > *"25. It is now axiomatic that when a legal fiction is incorporated in a statute, the court has to ascertain for what purpose the fiction is created. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion. The court has to assume all the facts and consequences which are incidental or inevitable corollaries to giving effect to the f iction. The legal effect of the words 'as if he were' in the*

definition of 'owner' in Section 3(n) of the Nationalisation Act read with Section 2(1) of the Mines Act is that although the petitioners were not the owners, they being the contractors for the working of the mine in question, were to be treated as such though, in fact, they were not so."

(Emphasis supplied)

98. Hence, it is crystal clear, that the use of the words "as if" in conjunction with the expression "*parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration*" stipulates a legal deeming fiction whereby it shall be 'presumed' that there existed an arbitration agreement and a written arbitration agreement between the bank or financial institution or asset reconstruction company or qualified buyer is not required. By eliminating the necessity of an actual agreement between the concerned parties, effectively binds them to arbitration or conciliation and the provisions of the Act, 1996 apply accordingly.

99. At this stage we may address ourselves on one of the contentions vehemently canvassed on behalf of the appellant bank herein. It was submitted that there exists a conflict between the decisions of the DRAT in ***Oriental Bank of Commerce*** (supra) and ***Federal Bank*** (supra), insofar as the requirement of existence of an arbitration agreement is concerned for attracting the provision of Section 11 of the SARFAESI Act.

100. In ***Federal Bank*** (supra), the DRAT while interpreting Section 11 of the SARFAESI Act, held that unless there is a written consent by the parties for determination of a dispute as mentioned in the said provision by way of arbitration, the said provision will not apply. In other words, Section 11 of the SARFAESI Act would only apply when there is an arbitration agreement subsisting between the parties to resolve a dispute as stipulated in the said provision. The relevant observations read as under: -

101. On the contrary, the DRAT in ***Oriental Bank of Commerce*** (supra) while deciding a similar question, simpliciter held that where there is a dispute *inter-se* two banks, or financial institutions or securitisation/reconstruction companies or qualified institutional buyers, the same shall be resolved by way of arbitration in terms of Section 11 of the SARFAESI Act. The relevant observations read as under: -

> *"6. Since there is a dispute between the Banks inter se, therefore, I am of the considered view that the learned DRT did not have the jurisdiction to try the Securitisation Application under the SARFAESI Act*
>
> > *Recently, the attention of the Court was invited towards Section 11 of the SRFAESI-Act which runs as follows: '11. Resolution of disputes.—Where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely, the Bank, or financial institution, or securitisation company or reconstruction company or qualified institutional buyer, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 ... as if the*

parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.'"

7. Consequently, it is clear that the previous view taken in this regard that DRT has the jurisdiction to try such disputes appears to be incorrect. The order passed by the learned DRT under the SARFAESI Act in this case is without jurisdiction. I, therefore, set aside the order to that extent. It is made clear that the Banks will approach the Hon'ble High Court and make a request to the Hon'ble High Court to appoint an arbitrator for the adjudication of this case."

102. It was submitted by the appellant bank that, the aforesaid decision of ***Oriental Bank of Commerce*** (supra) neither referred to the earlier decision of ***Federal Bank*** (supra) nor adverted to the issue of whether there must exists a written arbitration agreement between the parties in order to attract Section 11 of the SARFAESI Act. In such circumstances, it was contended that, the impugned order passed by the High Court directing the parties to undergo arbitration in terms of Section 11 by relying upon ***Oriental Bank of Commerce*** (supra) was erroneous as there was no arbitration agreement subsisting between the appellant and respondent banks, and that the decision of ***Federal Bank*** (supra) still holds field insofar as the requirement of existence of an arbitration agreement for the purpose of Section 11 of the SARFAESI Act is concerned and that the ratio of ***Oriental Bank of Commerce*** (supra) is subject to the ratio of ***Federal Bank*** (supra).

103. In ***Standard Chartered Bank v. LIC Housing Finance Ltd.***, reported in **2011 SCC OnLine DRAT 112**, it was reiterated that Section 11 of the SARFAESI Act, postulates the requirement of both parties having consented in writing for determination of such dispute by conciliation or arbitration. The relevant observations read as under: -

> *"4. [...] Section 11 of the Act. 2002 clearly reveals that both the parties must have consented in writing for determination of such dispute by conciliation or arbitration [...]"*

104. On the other hand, the High Court of Andhra Pradesh in ***D. Dhanamjaya Rao*** (supra) held that there is no need for any agreement in writing between the parties for determination of a dispute contemplated in Section 11 of the SARFAESI Act, and that by virtue of the said provision, it is deemed that the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration in terms of the said provision. The relevant observations read as under: -

> *"12. From a reading of the above provision, it becomes clear that if any dispute amongst the bank or financial institution or a securitization company or reconstruction company or qualified institutional buyer, as regards Securitization or reconstruction or non-payment of any amount due including interest arises, then such dispute shall be settled by conciliation or arbitration as provided under the Arbitration Act, as if the parties to the dispute had consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly. In that, the invocation of the provisions of Section 11 of the Securitization Act, for arbitration is limited only to those parties, namely the "bank" or "financial institution" or "securitization company" or "reconstruction company" or*

"qualified institutional buyer", and that too if any dispute arises with regard to securitization or reconstruction or non-payment of any amount due including interest amongst them, and there need not be any agreement in writing, for it is deemed that the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration as per the provisions of the Arbitration Act."

(Emphasis supplied)

105. Thus, it appears from the aforesaid that there are divergent views expressed by various decisions as regards the necessity of an arbitration agreement under the Section 11 of the SARFAESI Act.

106. We are of the considered view that there is a "deemed agreement" between the parties specified in Section 11 of the SARFAESI Act, insofar as the dispute relates to the matters so mentioned and is between the parties so specified thereunder. Thus, there is no need for an explicit written agreement between the parties. Section 11 of the SARFAESI Act creates a legal fiction by using the word "as if," which presumes the existence of an arbitration agreement among the designated parties, namely a bank or financial institution or asset reconstruction company or qualified buyer. This provision negates the requirement for a formal written arbitration agreement, as it assumes consent for arbitration or conciliation concerning disputes related to securitization, reconstruction, or non-payment of amount due, including interest. The term "as if" must be given a meaningful effect, whereby the parties are to be treated

as if they had willingly provided written consent. Consequently, the legal presumption under Section 11 of the SARFAESI Act exists independently of a formal arbitration agreement.

107. The view expressed in ***Oriental Bank of Commerce*** (supra) and ***D. Dhanamjaya Rao*** (supra) insofar as it holds that there is no requirement of a formal written arbitration agreement for the purpose of Section 11 of the SARFAESI Act, lays down the correct position of law. The view taken in ***Federal Bank*** (supra) and ***Standard Chartered Bank*** (supra) does not lay down the correct position of law insofar as the aforesaid proposition is concerned.

iv. <u>Section 11 of the SARFAESI Act is mandatory in nature</u>.

108. The next issue which falls for our consideration is, what is the meaning and significance of the term "shall" used in Section 11 of the SARFAESI Act? Whether, the legal import of the term "shall" used in Section 11 denotes that the provision is mandatory in nature thereby compelling recourse to arbitration in all disputes of the nature specified in the said provision if it is between the parties enumerated therein, or could the said provision be said to be "directory" particularly in light of the fact that arbitration is generally understood to be an alternative dispute resolution mechanism.

109. This Court in ***Delhi Airtech Services (P) Ltd. v. State of U.P.*** reported in **(2011) 9 SCC 354** held that the general rule of interpretation requires that the word "shall" be read as "must". It observed that the term "shall" only be read as "may" where doing so would achieve the ends of legislative intent behind the substantive provision and the scheme of the entire statute in question. The relevant observations read as under: -

> *"122. The distinction between mandatory and directory provisions is a well-accepted norm of interpretation. The general rule of interpretation would require the word to be given its own meaning and the word "shall" would be read as "must" unless it was essential to read it as "may" to achieve the ends of legislative intent and understand the language of the provisions. It is difficult to lay down any universal rule, but wherever the word "shall" is used in a substantive statute, it normally would indicate mandatory intent of the legislature.*
>
> *123. Crawford on Statutory Construction has specifically stated that language of the provision is not the sole criterion; but the courts should consider its nature, design and the consequences which could flow from construing it one way or the other.*
>
> *124. Thus, the word "shall" would normally be mandatory while the word "may" would be directory. Consequences of non-compliance would also be a relevant consideration. The word "shall" raises a presumption that the particular provision is imperative but this prima facie inference may be rebutted by other considerations such as object and scope of the enactment and the consequences flowing from such construction."*
>
> (Emphasis supplied)

110. Similarly in ***State of Haryana v. Raghubir Dayal***, reported in **(1995) 1 SCC 133**, this Court held that the use of the word 'shall' ordinarily be construed as mandatory except where such an interpretation would be anathema to either

the scope of the enactment, or where the consequences that would flow from such construction would not demand such interpretation. The relevant observations read as under: -

> *"5. The use of the word 'shall' is ordinarily mandatory but it is sometimes not so interpreted if the scope of the enactment, on consequences to flow from such construction would not so demand. Normally, the word 'shall' prima facie ought to be considered mandatory but it is the function of the court to ascertain the real intention of the legislature by a careful examination of the whole scope of the statute, the purpose it seeks to serve and the consequences that would flow from the construction to be placed thereon. The word 'shall', therefore, ought to be construed not according to the language with which it is clothed but in the context in which it is used and the purpose it seeks to serve. The meaning has to be ascribed to the word 'shall' as mandatory or as directory, accordingly. Equally, it is settled law that when a statute is passed for the purpose of enabling the doing of something and prescribes the formalities which are to be attended for the purpose, those prescribed formalities which are essential to the validity of such thing, would be mandatory. However, if by holding them to be mandatory, serious general inconvenience is caused to innocent persons or general public, without very much furthering the object of the Act, the same would be construed as directory."*
>
> (Emphasis supplied)

111. In ***Mardia Chemicals*** (supra) this Court underscored that although the effect of some of the provisions may be a bit harsh, yet the same had been incorporated with a view to achieve speedier recovery of the dues declared as NPAs. It further observed that the purpose of DRTs were two folds; *first,* to facilitate the aforesaid object of speedier recovery and *secondly,* to ensure that the borrowers also get a fair opportunity to get their matters adjudicated before

the DRT within the time-bound framework of the SARFAESI Act. The relevant observations read as under: -

> *"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 Debts 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 NPAs 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."*

112. Similarly, in ***Satyawati Tondon*** (supra) this Court observed that the primary object of that Act was to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions. It further observed that the entire purpose of establishment of DRTs and DRATs was to ensure that defaulting borrowers are not able to invoke the jurisdiction of the civil courts for frustrating the proceedings initiated by the banks and other financial institutions, by providing a one-stop forum to make summary adjudication and facilitate recovery of NPAs of the borrowers. The relevant observations read as under: -

> *"5. An analysis of the provisions of the DRT Act shows that primary object of that Act was to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions. This is the reason why the DRT Act not only provides for establishment of the Tribunals and the Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks*

or f inancial institutions and specifies the modes of recovery of the amount determined by the Tribunal or the Appellate Tribunal but also bars the jurisdiction of all courts except the Supreme Court and the High Courts in relation to the matters specified in Section 17. The Tribunals and the Appellate Tribunals have also been freed from the shackles of procedure contained in the Code of Civil Procedure.

6. To put it differently, the DRT Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of banks and financial institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of the civil courts for frustrating the proceedings initiated by the banks and other financial institutions."

(Emphasis supplied)

113. From the above, it is clearly that the DRTs were established for the recovery of debts due to banks and financial institutions from the defaulting borrowers. Neither the statute nor any interpretation thereof suggests that DRTs were established even for the purpose of any dispute that arises amongst the banks, financial institutions, ARCs or qualified buyers etc., relating to securitization, reconstruction or non-payment of any amount due including interest. For the same, a remedy has been provided under Section 11 of the SARFAESI Act, when such dispute would arise *inter se* the mentioned parties relating to securitization, reconstruction or non-payment of any amount due including interest. For the remedy of recovering the dues from the borrowers, the banks and the financial institutions are provided for a remedy under the SARFAESI Act. It was in this context, that ***Mardia Chemicals*** (supra) held that the borrower can challenge the action taken under Section 13(4) of the

SARFAESI Act by filing an application under Section 17 thereof. Hence forums like DRT and DRAT are available for the resolution of disputes between the lender and the borrower with the remedies provided under Sections 13, 17 and 18 of the SARFAESI Act, respectively. The conscious omission of the word 'borrower' from the ambit of Section 11 of the Act is another indication of its mandatory nature. The remedy under Section 11 is only available to the banks, financial institutions, ARCs and the qualified buyers, and not to a borrower.

114. The decision of ***Satyawati Tandon*** (supra) is particularly significant in this regard. While interpreting the provision of the SARFAESI Act, this Court observed that the primary object of the Act was to bring about "*special machinery for speedy recovery of the dues of banks and financial institutions*." If disputes that fall specifically under the ambit of Section 11 of the SARFAESI Act are permitted to get their disputes through DRT proceedings, it would go against the express language of the statute thereby diluting the special procedural mechanisms designed for the borrower-lender disputes under the scheme of the SARFAESI Act. Such an approach would create unnecessary litigation, frustrate the avowed object of the SARFAESI Act and undermine the efficiency of the prescribed process of resolution by arbitration or conciliation. Disputes amongst the specified financial entities related to securitization, reconstruction or non-payment of any amount due including

interest must be resolved by the way of Section 11 of the SARFAESI Act in order to maintain the financial stability in the economy in furtherance of the larger public interest.

115. The aforesaid may be looked at from one another angle, through the doctrine of election. This Court in ***Vidya Drolia v. Durga Trading Corpn.,*** reported in **(2021) 2 SCC 1**, explained the interplay between the doctrine of election and arbitration as a dispute resolution mechanism. It held that the choice to select arbitration as a dispute resolution mechanism by virtue of doctrine of election exists only if the law accepts existence of arbitration as an alternative remedy and freedom to choose such alternative mechanism. Where there is any when there is repugnancy and inconsistency, the right of choice and election to arbitrate would be denied. The relevant observations read as under: -

> *"54. Implicit non-arbitrability is established when by mandatory law the parties are quintessentially barred from contracting out and waiving the adjudication by the designated court or the specified public forum. There is no choice. The person who insists on the remedy must seek his remedy before the forum stated in the statute and before no other forum. In Transcore v. Union of India [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] , this Court had examined the doctrine of election in the context whether an order under proviso to Section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 ("the DRT Act") is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the NPA Act"). For analysing the scope and remedies under the two Acts, it was held that the NPA Act is an additional remedy which is not inconsistent with the DRT Act, and reference was made to the*

doctrine of election in the following terms : (Transcore case [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] , SCC p. 162, para 64)

55. Doctrine of election to select arbitration as a dispute resolution mechanism by mutual agreement is available only if the law accepts existence of arbitration as an alternative remedy and freedom to choose is available. There should not be any inconsistency or repugnancy between the provisions of the mandatory law and arbitration as an alternative. Conversely, and in a given case when there is repugnancy and inconsistency, the right of choice and election to arbitrate is denied. This requires examining the "text of the statute, the legislative history, and "inherent conflict" between arbitration and the statute's underlying purpose" [Jennifer L. Peresie, "Reducing the Presumption of Arbitrability" 22 Yale Law & Policy Review, Vol. 22, Issue 2 (Spring 2004), pp. 453-462.] with reference to the nature and type of special rights conferred and power and authority given to the courts or public forum to effectuate and enforce these rights and the orders passed. When arbitration cannot enforce and apply such rights or the award cannot be implemented and enforced in the manner as provided and mandated by law, the right of election to choose arbitration in preference to the courts or public forum is either completely denied or could be curtailed. In essence, it is necessary to examine if the statute creates a special right or liability and provides for the determination of each right or liability by the specified court or the public forum so constituted, and whether the remedies beyond the ordinary domain of the civil courts are prescribed. When the answer is affirmative, arbitration in the absence of special reason is contraindicated. The dispute is non-arbitrable.

56. In M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd. [M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805] , and following this judgment in Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd. [Indiabulls Housing Finance Ltd. v. Deccan Chronicle Holdings Ltd., (2018) 14 SCC 783 : (2018) 4 SCC (Civ) 703] , it has been held that even prior arbitration proceedings are not a bar to proceedings under the NPA Act. The NPA Act sets out an expeditious, procedural methodology enabling the financial institutions to take

possession and sell secured properties for non-payment of the dues. Such powers, it is obvious, cannot be exercised through the arbitral proceedings.

116. ***Vidya Drolia*** (supra) further placing reliance on ***Transcore*** (supra) observed that insofar claims of banks and financial institutions as regards debt due is concerned that fall under the RDBFI Act, the same would non-arbitrable, as there is a prohibition against waiver of jurisdiction of the DRT. The relevant observations read as under: -

"57. In Transcore [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] , on the powers of the Debt Recovery Tribunal ("DRT") under the DRT Act, it was observed : (SCC p. 141, para 18)

"18. On analysing the above provisions of the DRT Act, we find that the said Act is a complete code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other. The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the debt due is concerned. It covers secured as well as unsecured debts. However, it does not rule out the applicability of the provisions of the TP Act, in particular, Sections 69 and 69-A of that Act. Further, in cases where the debt is secured by a pledge of shares or immovable properties, with the passage of time and delay in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, the value of the assets in the hands of the bank/FI invariably depletes which, in turn, leads to asset-liability mismatch. These contingencies are not

taken care of by the DRT Act and, therefore, Parliament had to enact the NPA Act, 2002."

58. Consistent with the above, observations in Transcore [Transcore v. Union of India, (2008) 1 SCC 125 : (2008) 1 SCC (Civ) 116] on the power of the DRT conferred by the DRT Act and the principle enunciated in the present judgment, we must overrule the judgment of the Full Bench of the Delhi High Court in HDFC Bank Ltd. v. Satpal Singh Bakshi [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] , which holds that matters covered under the DRT Act are arbitrable. It is necessary to overrule this decision and clarify the legal position as the decision in HDFC Bank Ltd. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] has been referred to in M.D. Frozen Foods Exports (P) Ltd. [M.D. Frozen Foods Exports (P) Ltd. v. Hero Fincorp Ltd., (2017) 16 SCC 741 : (2018) 2 SCC (Civ) 805] , but not examined in light of the legal principles relating to non-arbitrability. The decision in HDFC Bank Ltd. [HDFC Bank Ltd. v. Satpal Singh Bakshi, 2012 SCC OnLine Del 4815 : (2013) 134 DRJ 566] holds that only actions in rem are non-arbitrable, which as elucidated above is the correct legal position. However, non-arbitrability may arise in case of the implicit prohibition in the statute, conferring and creating special rights to be adjudicated by the courts/public fora, which right including enforcement of order/provisions cannot be enforced and applied in case of arbitration. To hold that the claims of banks and financial institutions covered under the DRT Act are arbitrable would deprive and deny these institutions of the specific rights including the modes of recovery specified in the DRT Act. Therefore, the claims covered by the DRT Act are non-arbitrable as there is a prohibition against waiver of jurisdiction of the DRT by necessary implication. The legislation has overwritten the contractual right to arbitration."

(Emphasis supplied)

117. The above exposition of law make it clear that election applies in the case where the statute provides a specific remedy that overrides general remedies.

The *ratio* of ***Vidya Drolia*** (supra) insofar as it hold that a choice to elect arbitration as a dispute resolution mechanism would exists only if the law accepts existence of arbitration as an alternative remedy with the freedom to choose it, as naturally corollary implies that, where the law accepts existence of arbitration as the only mechanism of resolution, there arbitration will not be construed as an alternative remedy but as the only remedy available.

118. The aforesaid is particularly relevant in the interpretation of Section 11 of the SARFAESI Act as the said provision by outlining a special provision for banks, financial institutions, ARCs etc., to invoke the remedy in case of dispute related to securitization, reconstruction or non-payment of any dues indicates the intention of the legislature to create a special mechanism for resolving such disputes. We are of the considered view that the usage of "shall" in the provision mandates the parties to adhere to the mentioned mechanism and restricts them from approaching any other forums. The parties cannot bypass or subvert it by seeking recourse elsewhere. If arbitration or conciliation is the prescribed route, then that prescribed route shall be followed.

119. At this juncture, we may address ourselves on another submission vehemently canvassed on behalf of the respondent bank, as regards the applicability of the AMRCD Memorandum. Ms. Ekta Choudhary, the learned counsel for the respondent bank submitted that since the dispute in the present matter is

between two public sector banks, it ought to be resolved under the framework of the AMRCD Memorandum, which provides a structured mechanism for resolution of disputes *inter-se* CPSEs. Although, this contention was not once raised by the respondent bank either before the DRT or the High Court, yet we deem it necessary to answer the same.

120. We are of the considered opinion that the contention put forth by the learned counsel on behalf of the respondent bank is completely misconceived, meritless and deserves to be rejected for two good reasons.

121. *First,* a bare perusal of the aforesaid guidelines, more particularly, clause 3.3 would show that the said guidelines only apply in respect of dispute or difference relating to the interpretation and application of provisions of commercial contracts between two CPSEs etc. (emphasis). The said clause reads as under: -

> *"3.3 Any dispute or difference relating to the interpretation and application of the provisions of commercial contract(s) between Central Public Sector Enterprises (CPSEs)/ Port Trusts inter se and also between CPSEs and Government Departments/Organizations (excluding disputes relating to Railways, Income Tax, Customs & Excise Departments), shall be taken up by either party for its resolution through AMRCD only."*
>
> (Emphasis suppled)

122. While there is no doubt that the present case involves two banks, and that both banks may be said to be CPSEs, however the nature of the dispute between

them by no stretch of imagination could be said to one pertaining to a commercial contract entered into between them. Rather, the dispute between them arises out of two separate agreements, that were executed by them with the borrower company herein, independent of each other. We are at a loss to understand, how the respondent bank could have ignored the aforesaid clause 3.3 of the AMRCD Memorandum and asserted that the dispute between it and the appellant bank ought to be resolved under the framework of the said memorandum.

123. *Secondly,* the dispute resolution mechanism envisaged under Section 11 of the SARFAESI Act has been statutorily provided and mandated. The dispute also pertains one between two banks in connection with the right of one of the banks for enforcement of a common security interest given to them by the borrower. Where such enforcement of security interest, by either bank is sought to be undertaken in terms of the SARFAESI Act, the statutory arbitration provided under Section 11 of the SARFAESI Act would immediately be attracted, as soon as there is a dispute in respect to the same with another bank, financial institution, ARC etc, as enumerated in the said provision. Section 11 of the SARFAESI Act, statutorily empowers such parties mentioned therein, to seek resolution of their dispute by way of arbitration, and their right cannot be curtailed or confined to any executive guideline or memorandum, particularly when such memorandum makes no mention of the SARFAESI Act or disputes generally covered thereunder. In

such circumstances, the aforesaid AMRCD Memorandum, can by no extent supplant the statutorily prescribed provision of Section 11 of the SARFAESI Act, which empowers the parties enumerated thereunder to opt for *ad hoc* arbitration for resolution of disputes specified therein.

G. FINAL CONCLUSION

124. We summarize our final conclusion as under: -

(I) Section 11 of the SARFAESI Act deals with resolution of disputes relating to securitisation, reconstruction or non-payment of any amount due between the bank or financial institution or asset reconstruction company or qualified buyer.

(II) In order to attract the provision of Section 11 of the SARFAESI Act, twin conditions have to be fulfilled being; ***first,*** the dispute must be between any bank or financial institution or asset reconstruction company or qualified buyer and ***secondly,*** the dispute must relate to securitisation or reconstruction or non-payment of any amount due including interest. Where the aforesaid two conditions are found to be *prima-facie* satisfied, there the DRT will have no jurisdiction and the proper recourse would only be through Section 11 of the SARFAESI Act read with the Act, 1996.

(III) The expression "*non-payment of any amount due, including interest*" used in Section 11 of the SARFAESI Act is of wide import and would

include a various range of scenarios of 'disputes' connected to unpaid amounts including those arising due to third-party defaults, such as indirect defaults of the borrowers.

(IV) Any dispute between two banks, financial institutions, asset reconstruction companies or qualified buyers etc., where the jural relation between the two is of a lender and borrower, then Section 11 of the SARFAESI Act will have no application whatsoever. The use of the phrase "any person" in the definition of 'borrower' in Section 2(f) of the SARFAESI Act, makes it abundantly clear that even a bank, financial institution or asset reconstruction company or qualified buyer can be considered a borrower, if they receive financial assistance from a bank or financial institution etc by providing or creating a security interest. Thus, a lender-turned-borrower would also fall within the scope of a "borrower" under the SARFAESI Act and shall be governed by the same statutory framework as any ordinary borrower.

(V) Section 11 of the SARFAESI Act, provides for a statutory arbitration for any dispute mentioned therein between any of the parties enumerated thereunder. There is no need for an explicit written agreement to arbitrate between such parties in order to attract Section 11 of the SARFAESI Act. The said provision creates a legal fiction as regards the existence of an arbitration agreement notwithstanding whether such agreement exists or not in actuality.

(VI) Section 11 of the SARFAESI Act is mandatory in nature. The use of the word "shall" therein, the mandate of the said provision cannot be bypassed or subverted by the parties by seeking recourse elsewhere.

125. Thus, for all the foregoing reasons, we have reached the conclusion that there is no infirmity in the impugned order passed by the High Court, directing the appellant and the respondent banks to resolve their dispute by way of arbitration in terms of Section 11 of the SARFAESI Act.

126. In the result, the present appeal fails and is hereby dismissed.

127. The parties shall bear their own costs.

128. Pending application(s), if any, shall also stand disposed of.

129. The Registry is directed to circulate one copy each of this judgment to all the High Courts and all the benches of the DRTs and DRATs respectively.

..... J.
(J.B. Pardiwala)

..... J.
(Pankaj Mithal)

23rd May, 2025.
New Delhi.