IN THE DEBTS RECOVERY TRIBUNAL – I AT CHENNAI

(TAMIL NADU & UT OF PONDICHERRY)

Dated this 8th Day of November, 2013

Read on 31/1/14.

Present: Thiru. P.K. RAMASWAMY IYER, Presiding Officer

IA SR No. 3376 of 2013
IN
OA No. 314 of 2010

M/s. Tetrahedron Limited,
No.17-A, SIDCO Industrial Estate,
Ambattur,
Chennai – 600 098. ... Petitioner / Defendant

Versus

The Authorized Officer,
Indian Bank,
Mylapore Branch,
No.21, North Mada Street,
Chennai – 600 004. ... Respondent / Applicant

INTERIM ORDERS:

1. The present petition is filed by the Defendant Mr. Ashok Surana, party in person appearing who is also the Managing Director of the 1st Defendant Company and husband of 3rd Defendant and one of the partners for 4th Defendant.

2. The main contentions raised by the Defendant is as under:- Filing of OA is both pre-mature and under a different Act which is clearly barred as per SARFAESI Act under which powers have been invoked earlier. The Plaintiff having admitted initiated action under SARFAESI Act are bound to file any application before this Tribunal for recovery of any sum due and payable by the Defendants after the Secured Assets are sold by the Authorised Officer of the Applicant Bank by moving an application under Section 13(10) of SARFAESI Act. Since the

present OA is filed under RDDB & FI Act is illegal and void. The Petitioner also contended that as per Order VII Rule XI (a) & (d) this OA has to be rejected. It is also further contended that the cause of action as shown in the present OA and also the action initiated under the SARFAESI Act is one and the same and hence no separate cause of action has been stated for filing the present OA and needs to be dismissed on that ground alone. Among various other grounds, it is claimed by the Petitioner that the Applicant Bank having decided to seek the benefit of SARFAESI Act, it has to adopt all its contents, confirm to all its provisions and renounce of rights that are inconsistent with it. Since the SARFAESI Act under Section 13(1) specifically bars filing of OA under RDDB & FI Act or on any other Act in any court or Tribunal when action under SARFAESI is pending. It is also further contended that the mandatory power under Section 13(10) of SARFAESI Act which disables the plaintiff from filing the suit on or before a particular date or the course of a particular event namely only after concluding action under SARFAESI Act.

3. The present filing of application before this Tribunal is violation of the public policy laid down in Section 13(1), 13(10), Rule 11 and Appendix VI of Rules under SARFAESI Act. The petitioner also contended that the present application filed is violative of Order – II, Rule 2 of CPC and the provisions contained therein as para to the maintainability of both the actions and proceedings in the two cases simultaneously. It is also further claimed by the Petitioner that after initiating the measures under SARFAESI Act on a particular cause of action the action of the Applicant Bank in initiating yet again action under RDDB & FI Act for the same cause of action will attract resjudicata.

4. It is also contended that the reply filed to the memo of the Applicant Bank be taken as part and parcel of the objections raised by the present petitioner to dismiss the OA on the file of this Tribunal. Various other grounds raised are nothing, but the provisions of law and certain case laws and as such the repetitions are not taken for the purpose of adjudicating the present application.

5. In the reply filed by the Respondent / Applicant Bank on 05.09.2013 it is contended that the various allegations / points raised in the said SR Application and also so many writ petitions filed by the Petitioner / Respondent and orders were passed in those Writ Petitions by the Hon'ble High Court without notice to the bank. Some of the points also raised before this Tribunal and it took considerable time for the Respondent / Applicant Bank to get the affidavits

filed in support of their plea and the delay in filing the counter is only due to the said reason. Since after hearing the Petitioner / Applicant the matter was reserved for orders, the present application is filed to re-open the same and the same was considered.

6. A Regular counter filed by the Respondent / Applicant Bank on 05.09.2013, at the outset it is contended that the application is not maintainable and is liable to be dismissed in liminie as it is an abuse in process of law with a view to drag the proceedings in OA 314 of 2000. It is further submitted that the OA is not pre-mature and is maintainable and Order 7, Rule 11 (a) & (d) will not apply to the present case. The contentions of the petitioner / applicant that the OA is not maintainable after filing SA has to be rejected because of the ratio laid down in Transcore Judgement. It is the contention of the Respondent / Applicant Bank, that since the remedy available for the bank is only one and as such election does not arise. The NPA Act is an additional remedy to the DRT and together they constitute remedy and therefore Doctrine of Election does not apply. It is further referred to Snell's equity [31st Edition Page-119], according to which the Doctrine of Election of remedies is applicable only that there are two or more co-existent remedies available to the litigants at the time of Election, which are repugnant and inconsistent with each other. In any event there is no repugnancy or inconsistency between the NPA Act and RDDB & FI Act, therefore the Doctrine of Election has no application. It is also further referred that Writ Petition 6534 of 2013 filed by the Petitioner / Applicant before the Hon'ble High Court of Madras vide its order dated 19.03.2013 in Paragraph – 50 it held that "Withdrawal of the OA pending before the DRT under the DRT Act is not a pre condition for taking recourse to NPA Act. It is for the Bank / Financial Institution to exercise its discretion as to cases in which it may apply for leave and in cases where they may not apply for leave to withdraw. We do not wish to spell out those circumstances because the said first proviso to Section 19(1) is an enabling provision, which provision may deal with myriad circumstances which we do not want to spell out herein." In view of these observations, the Respondent / Applicant Bank contend that the bank is at liberty to take appropriate steps. Accordingly, it is the contention of the Bank that NPA Act or SARFAESI Act is an additional remedy to DRT Act together they constitute one remedy. It is also contended that the Hon'ble Apex Court has held that the Judgements of some of the Hon'ble High Court's which took a similar view that the Doctrine of Election which is applicable is erroneous and liable to be set aside. It is also further contended that the allegations at Paragraph 6 to 8 in the Petition is denied as there is no multiple proceedings in view of the judgement in Transcore and that Order II Rule 2 of CPC

does not apply as there is no waiver of benefits of a SARFAESI Act as contended by the Petitioner. The bank has also not waived or relinquished or abandoned its right nor has not lost its rights. It is also further contended that in view of the Hon'ble Apex Court Judgement in Transcore case resjudicata and constructive resjudicata will not apply, as there is no irregularity or illegality in law in the Bank first resorting to provisions under SARFAESI Act and resorting to provisions of Section 19 of RDDB & FI Act. There is no defect in documentation and no illegality has been committed and there is no intention on the part of the Respondent / Applicant Bank waived its rights for the OA to be dismissed for default. Almost all the allegations raised by the Petitioner / Applicant are denied categorically by the Respondent Bank. It is also submitted that cause of action in both accounts initiated under RDDB & FI and SARFAESI Act and is not the one and the same and finally concluded that reason given for maintainability of the present application in these paragraphs are factually and legally in correct as there is no illegality on the part of the bank and that it is not necessary to take prior permission before resorting to provisions under RDDB & FI Act and it is equally not necessary to allow the SA reached its conclusion as the Bank filed OA there after the applicant bank filed the OA.

7. Observation by the Tribunal:-

During the course of argument Mr.Surana party appearing in person representing Defendant No.1, 3 & 4 submitted that as per Debt Recovery (Procedure) Rules, Rule 11 deals with endorsing copy of application to the Defendant, claiming that a copy of the application and Paper Book shall be served on each of the Defendants as soon as they are filed before the Registry by Registered Post. Since it is the duty of the Registry to serve a copy of the application and the Paper Book, the same was not served and as such the Applicant Bank has abandoned their claim and OA has to be rejected on the same contention only. Mr. Surana also referred to Rule 9, Order V of CPC, Sub-Rule 3 and further claimed that since the summons are not served on him as required under Rules and as such there is no claim against the Defendant by the Applicant. Admittedly the 1st Day of proceedings on 25.01.2011 in the Note Sheet it is recorded that Mr.Ashok Surana D2 present in person and representing other Defendants namely D1, D3 & D4 also. D1 is the Company, in which D2 is the Managing Director, D3 is his wife and for D4 Mr. Surana is one of the partners. It was also recorded that D2 present and reported that index to documents along with OA not served to D2 and as such proper Reply Statement in the OA could not be filed by him. In view of the objections raised by Mr. Surana a direction was given

to the Applicant Bank to serve the copy of index consisting of Pages 28 to 399 by RPAD to D2 and to file Affidavit of Service. Thereafter the matters were reposted as the then Presiding Officer of the Tribunal having demitted the office there were no regular sittings, while the Registrar-in-Charge on subsequent proceedings had noted that OA copy was not served to D1 to D4 which was not the case. Subsequently, a memo was filed by the Applicant Bank claiming that Junior attached the Office of the Advocate went and tried to serve the OA paper book on the 2nd Defendant, he refused to receive the same since only one copy is being served and he requires four copies even though he is in the representative capacity of the other three Defendants as already noted it proceedings dated 25.01.2011. Counsel for the Applicant Bank further submitted that even if there is any delay on the part of the applicant in serving the paper book copy it is not incurable defect and as such the same can be cured by passing appropriate direction by this Tribunal. Having considered the submissions made by the Applicant Bank and also persisted rigidity of the Defendant for insisting four copies of the OA paper book it appears that the Defendant is only trying to precipitate the issue while he had already received one copy of the OA application without its enclosures and this Tribunal now directs the applicant bank to serve one set of OA paper book along with its enclosures and index to the Defendant No.2, and also sent one of the copy through RPAD as directed by this Tribunal vide its order dated 25.01.2011. Since there was an inordinate delay on the part of the Applicant Bank, the Applicant Bank is also directed to pay a cost of Rs.1,500/- to the Defendants for the delay against not serving copy of index and other documents annexed to the paper book.

8. Apart from the above, Mr. Surana also raised during the course of his arguments, that the present application filed by the Applicant Bank on 19.12.2010, that the Applicant Bank has earlier initiated action under SARFAESI Act and the act of filing the OA after initiating action under Section13(1) of SARFAESI Act is violative of Section 13(1) of the Act. As per Section 13(1) of SARFAESI Act which is reproduced below:-

> *"Notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of this Act."*

It is the contention of the Defendant that once the secured creditor has initiated the provisions of SARFAESI Act to realize the secured assets without the intervention of court or tribunal then the secured creditor has no right to file a case unless he exhausts the remedy available in the

said section and if any short fall of recovery the secured creditor shall move an application as per Section 13(10) of SARFAESI Act to the appropriate court or tribunal as the case may be and not otherwise. A reference to the judgement of Hon'ble Apex Court in Transcore Case was also referred to by Mr. Surana during the course of his arguments and submitted that the decision of Transcore will not apply to this case and it will clearly point out that while pronouncing their Judgement, their Lordship in the Transcore case, the observation therein that two acts of RDDB & FI Act and SARFAESI Act are consistent to each other; two acts are not repugnant to each other; as they are consistent and no Repugnant; Doctrine of Election does not apply. There is nothing in the SARFAESI act which prevents the bank from invoking when the OA is pending and the two acts are complementary to each other have been made per incurium, wherein binding decisions of earlier benches were ignored or not brought to the notices of the Lordshipes and the relevant statutory provisions applicable were also ignored. Mr. Surana further submitted that when Transcore case was decided by the Hon'ble Apex Court when the OA is pending before any Tribunal, even without obtaining permission / leave of such Tribunal, the secured lender can initiate proceedings under SARFAESI Act was discussed and decided. It is also further contended by Mr.Surana that the late amendment to the SARFAESI Act in the year 2004 under Section 19(1) of RDDB & FI Act, a provisions was inserted whereby it had been made applicable in case where the applicant Bank filed OA and pending before any Tribunal the banks or financial institutions may with permission of the DRT on an application made by (a) withdraw the application whether made before or after the enforcement of security interest and recovery of debt laws (amendment) Act 2004 for the purpose of taking action under the SARFAESI Act, if no such decision taken earlier under the Act. Since these amendments was carried out in the year 2004 the observations of Hon'ble Apex Court in the Transcore case with amendment of secured lender has to be initiated again in SARFAESI Act, when the OA is pending before any Tribunal shall make an application to the Tribunal for withdrawal of the same with the leave of the Tribunal and thus proceed to initiate any action under SARFAESI Act. Mr. Surana submitted that where a secured lender has already initiated measures under SARFAESI Act unless and otherwise the proceedings so has initiated, no proceedings for recovery of debt due to secured lender under Section 19 of the RDDB & FI Act can be filed, but however such an application can be moved only as per Section 13(10) of SARFAESI Act and not otherwise. It is in this regard the contention of the Defendant that the Hon'ble Apex court while passing the judgement in the Transcore case not having taken into consideration the various earlier judgements passed by the Hon'ble Apex Court larger benches or they were not brought to the notice of the Hon'ble Apex

Court for fruitful consideration of the issues involved and the order were passed. The following judgemtns were referred by Mr.Surana which in his view had it been considered by Hon'ble Apex Court at the time of passing orders in the Transcore case would have given more meaningful judgement in cases where a secured lender has initiated measures under the SARFAESI Act and subsequently also makes an application under Section 19 of the RDDB & FI Act when complying with the measures under the SARFAESI Act or during the pendency of the proceedings that have become incomplete.

1. State of Orissa Vs. M.A.Tulloch & Co. reported in AIR 1964 SC 1284.
2. National Engineering Industries Limited Vs. Sri Kishan Bagaria and Others reported in AIR 1988 SC 329.
3. P.Raghav Kurup and Another Vs. Ananthakumari and Others reported in [2007]2SCR 1058
4. Union of India & Anr. Vs. K.S. Subramanian reported in AIR 1976 SC 2433
5. Maru Ram & Ors. Vs. Union of India & Ors. reported in AIR 1980 SC 2147
6. Ramachandran Mawalal and Ors. Vs. State of U.P. & Ors. Reported in 1984 SC R(2) 348
7. Dabour Indian Limited and Another Vs. State of U.P. and Others reported in 1990 AIR SC 1814.
8. Ratan Lal Anokja and Another Vs. Union of India reported in 1989 AGG 1080.
9. Mathura Prasad Vs Union of India and Others. AIR 2002 SC 381.
10. Ishwar Datt Vs. Land Acquisation Collector and Ano. Reported in AIR 2005 SC 3165
11. Bhanu Kumar Jain Vs. Archana Kumar & Ano. Reported in AIR 2005 SC 626.
12. National Institute of Mental Health and Neuro Sciences Vs. C.Parameshwara reported in AIR 2005 SC 242.
13. Mahavir Singh & Ors. Vs. Naresh Chandra & Anr. reported in 2000 (7) SC ALE 356
14. K.S. Bhoopathy & Ors. Vs. Kokila & Ors. reported in 2000 (4) SC ALE 640.
15. Sajjadanashin Sayed Md. B.E.Edr. (D) By Lrs. Vs. Musa Dadabhai Ummer & Ors. reported in AIR 2000 SC 1238

16. Chruch of South India Trust Association Vs. Telugu Chruch Council reported in AIR 1996 SC 987
17. Premier Tyres Limited Vs. Kerala State Road Transport Corporation reported in AIR 1993 SC 1202
18. State of U.P. Vs. Nawab Hussain reported in AIR 1977 SC 1680
19. Kuju Collieries Ltd. Vs. Jharkhand Mines Ltd. & Ors. reported in AIR 1974 SC 1892
20. Municipal Corporation of Greater Bombay Vs. Lala Pancham of Bombay & Ors. reported in AIR 1965 SC 1008
21. Rangubai Kom Shankar Jagtap Vs. Sunderabai Bhratar Sakharam Jedhe & Ors. reported in AIR 1965 SC 1794
22. Raj Lakshmi Dasi & Ors. Vs. Banamali Sen & Ors. reported in AIR 1953 SC 33.
23. Dr. Zubida Begum & Ors Vs. Indian Bank reported in 2012(5) CTC 369
24. Purnea Cold Storage Vs. State Bank of India, reported in AIR 2013 Patna 1
25. Ramesh Chandra Sankla Etc. Vs. Vikram Cement Etc. reported in AIR 2009 SC 713
26. Indian Bank, Adayar Branch Vs. Nippon Enterprises South reported in AIR 2001 Mad 238.
27. Oil & Natural Gas Corporation Ltd. Vs. SAW Pipes Ltd. reported in AIR 2003 SC 2629
28. Grindlays Bank Ltd. Vs. Central Government Industrial Tribunal & Ors. reported in AIR 1981SC 606.
29. G.Sekar Vs. Geetha & Ors. reported in AIR 2009 SC 2649
30. Rayala Corporation (P) Ltd. and M.R. Pratap Vs. Director of Enforcement, New Delhi reported in (1970)1SCR639
31. State of U.P. & Ors. Vs. Hindustan Aluminium Corporation & Ors. reported in AIR 1979 SC 1459.
32. Nahar Enterprises Vs. Hyderabad Allwyn Ltd. & Ano. Reported in (2007)2SCR413
33. Noor Mohammed Vs. Jethanand & Ano. Reported in MANU/SC/0073/2013
34. Municipal Corporation of Delhi Vs. Shiv Shanker reported in (1971)1SCC442

35. Municipal Corporation of the City of Ahemadabad, etc. Vs. New Shorock SPG & WVG. Co. Ltd, etc. reported in 1970 AIR 1292.
36. Modern Tailoring Hall Vs. Sh.H.S. Venkusa & Ors.
37. The J.K. Cotton Spinning & Weaving Mills Co. Ltd. Vs. The State of Uttar Pradesh & Ors. reported in AIR 1961 SC 1170
38. Allahabad Bank, Calcutta Vs. Radha Krishna Maity & Ors.

9. The judgement in Transcore where the Hon'ble Apex Court has laid down the law as regards filing of an application before the Debt Recovery Tribunal by Banks and Financial Institutions under Section 19 of RDDB & FI Act and then for a complete recovery of the dues by realizing through securistisation. If it was decided by the Banks or Financial Institutions to invoke the provisions of SARFAESI Act, Section 19 of RDDB & FI was amended, wherein under Sub-Section (1) three provisos were added by an amendment in 2004. The Hon'ble Apex Court while dealing with the Transcore case observed that the said proviso is enabling provisions, Banks and Financial Institutions have independent right to recover its dues and the parties behind enactment of SARFAESI Act was to obliterate of factors on their right to recovery the debt which was earlier existed only in the form of Section 69 and 69-A of Transfer of Property Act 1882. SARFAESI Act was enacted with a view to facilitate the Banks and Financial Institutions to securitise its assets without coming to Court to enforce their security interest in their secured asset. In such an event when an application is filed under Section 19 of RDDB & FI Act as permission from the Tribunal is not required for the Banks and Financial Institutions to take recourse to the SARFAESI Act otherwise the very purpose of the separate enactment is not necessary. The Hon'ble Apex Court also considered various aspects as regards consistency and in consistency between the two Acts, Doctrine of Election whether it is available or there is no such Doctrine of Election when enforcement of SARFAESI Act is initiated pending an application before the Tribunal under the RDDB & FI Act and finally the Hon'ble Apex court has come to a conclusion with the subsequent amendment made in the year 2004 as regards permission to be obtained by the Banks and Financial Institutions from concerned DRT in order to proceed under the SARFAESI Act is not the intention of the legislature and as such it was considered that if such a permission is required and measures under SARFAESI Act to be invoked by the Banks and Financial Institutions even through an earlier OA is pending before the same Tribunal. It was also further held by the Hon'ble Apex Court that the provisions of the SARFAESI Act is only

complementary to that of RDDB & FI Act, as such provisos added to Section 19 for obtaining permission of the Tribunal to initiate measures under the SARFAESI Act is not a condition precedent and even without obtaining the permission the Banks and Financial Institutions are entitled to proceed under the SARFAESI Act.

10. While this is so incidences of Financial Institutions and Banks having taken measures under the SARFEASI Act initially and immediately thereof choose to file an application for recovery of debts before the Tribunals under the RDDB & FI Act even when the measures are not exhausted under the SARFAESI Act or is not concluded. Some High Courts have taken a view that pursuant to the Hon'ble Apex Court Judgement in the Transcore case, the same can still be pursued and held accordingly that the Banks and Financial Institutions even after taking measures under the SARFAESI Act can proceed to file OA before the DRT under Section 19 of the Act. Most of these judgements were purely taken into consideration that both SARFAESI and RDDB & FI Act are consistent to each other, there is no repugnancy, and because of which the Doctrine of Election does not apply further, there is nothing in the SARFAESI Act which prevents the Banks and Financial Institutions from invoking its right under the SARFEASI Act when Banks and Financial Institutions have already initiated proceedings under the RDDB & FI Act and also when both SARFAESI Act and RDDB & FI Acts are complementary to each other.

11. Prior to the enactment of RDDB & FI Act Banks and Financial Institutions expressing considerable difficulties in recovering the loan and enforcement of securities charged with them. The Committee Appointed by the Government on the Financial System headed by Shri. T. Tiwari for examining the legal and other difficulties faced by the Banks and Financial Institutions and suggested remedial measures including changes in law. The said committee had also suggested setting up of special Tribunals for recovery of dues by following summary procedure. Subsequently in a committee headed by Mr.M.Narasimham in its report dated 30.09.1990 submitted wherein from 15 lakhs cases filed by Public Sector Banks and about 304 cases filed by Financial Institutions were pending in various courts and amount involved in these matters are almost to the tune of Rs.6,111 Crores, and keeping in view of the recommendations of the committee the RDDB & FI Act came into force. Inspite of constitution of the Tribunals for speedy recovery and in order to make the banking industry in India progressively complying with international prudential norms and accounting practices and as there was no legal provision for facilitating securitization of financial assets of banks and financial institutions, the Government had set up a committee called Andhyarujina Committee for examining certain

reforms that were required for changes in the legal system in respect of these areas for covering securitization, etc. The said committee inter-alia has suggested enactment of a new legislation for securitization and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the courts and based on such recommendation SARFAESI Act has come into force. The very purpose of passing of these two Acts are with a view to recovery of debts due to Banks and Financial Institutions by following summary procedure. Even after constitution of various DRT's due to hardy progress in recovery, in spite of these Tribunals were following the summary procedures, in order to help the banks and financial institutions to securitise their NPA and recovery measure, SARFAESI Act has come into picture and a subsequent amendment made in 2004, which made it easier for the banks and financial institutions to proceed under the SARFAESI Act for recovery of its debts due even though the applications are pending before the Tribunals constituted under the RDDB & FI act. In the Transcore judgement, the Hon'ble Apex Court has laid down a new law that a prior permission from the Tribunal is not necessary in the event the banks and financial institutions determine to take measures under the SARFAESI Act in all pending matters before Tribunals with a view to augment the recovery of NPAs to support the economy.

12. At the time of passing the SARFAESI Act the legislature intent to protect the interest of the Banks, clearly laid down in Section 13 of the said Act that "Not withstanding anything contained in Section 69 or section 69A of the Transfer of Property Act, 1882, powers were given to the secured creditor to enforce its security interest in any secured asset without the intervention of the Court or Tribunal and laid down the procedure based on which the secured creditor through its Authorised Officer could enforce the security interest for recovery of the secured debt. The said Act was amended in the year 2004 consequently, the RDDB & FI Act was also amended only to ensure that in any pending application before any Debt Recovery Tribunal under RDDB & FI Act and where the secured lender taken a decision for initiating the measures under SARFAESI Act may with the permission of such Tribunal on an application made by such lender with draw the application and may take recourse to the SARFAESI Act. The intention of the legislature was very clear that when following the SARFAESI measures is to be taken by a secured lender in matters related to an application pending before the Tribunals such lenders have to approach the Tribunal for permission to withdraw the existing application to proceed under the SARFAESI Act. Pursuant to the decision of the Hon'ble Apex Court in Transcore case now it is not necessary for the permission to be obtained by secured lender.

13. The matter before this Tribunal is where SARFAESI measures have been initiated by secured lender and during the pendency of such measures, an application is also filed by the secured lender for recovery of the debts due from its borrower / guarantor. The Defendant raised objections claiming that when the secured creditor has initiated the measures under the SARFAESI Act, simultaneously any measures under the RDDB & FI Act can be filed and as per Section 13(1) of the SARFAESI Act, the intention of the legislature has made it very clear for any short fall in recovery of its dues from the sale proceedings of the secured assets the secured creditor may file an application in the form and manner as may be prescribed by the DRT having jurisdiction or a competent court as the case may be for recovery of the balance amount from the borrower as per Section 13(10). The said Section 13(4) is also complimentary protecting the right of the secured creditor to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of Sub-Section 4 of Section 13 in relation to the secured assets. On comparing the sub-section 10 and 11 of Section 13 the legislature intent is very clear that a secured creditor is entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures available to the secured creditor as per Section 13(4), but however in the event the secured creditor opted to proceed under Section 13(4) without proceeding against the guarantors or sell the pledged assets then for recovery of the balance amount, where the dues of the secured creditor is not fully satisfied with that of the sale proceeds of the secured assets, the secured creditor has to move an application before the Tribunal or court having jurisdiction, for such balance amount only as per Section 13(10) of SARFAESI Act and not otherwise. During the course of arguments the Ld. Counsel for the Respondent / Applicant Bank submitted that there is no law or that there is no provision under the SARFAESI Act contemplating the secured creditor not to prefer an action under the RDDB & FI act until and otherwise the measures initiated under the SARFAESI Act is complete and where the secured creditor is not fully satisfied, then only move for balance amount before the Tribunal or any court having jurisdiction. This argument of the Ld. Counsel when the provisions are available as such as referred to herein about does not hold good.

14. It is in this context Mr. Surana, present petitioner / Defendant No.2 during the course of his arguments had referred to the judgement of the Hon'ble Apex Court in State of Orissa Vs. M.A. Tulloch and Co. citation No.1 referred above, wherein the Constitution Bench of the Hon'ble Apex Court held at Para – 26 "

"But even if the matter was res integra, the argument cannot be accepted. Repugnancy arises when two enactments both within the competence of the two Legislatures collide and when the Constitution expressly or by necessary implication provides that the enactment of one Legislature has superiority over the other then to extent of the repugnancy the one supersedes the other. But two enactments may be repugnant to each other even though obedience of each of them is possible without disobeying the other. The test of two legislations containing contradictory provisions is not, however, the only criterion of repugnancy, for if a competent legislature with a superior efficacy expressly or impliedly evinces by its legislation an intention to cover the whole filed, the enactments of the other legislature whether passed before or after would be overborne the on the ground of repugnance. Where such is the position, the inconsistency is demonstrated not by a detailed compression of provisions of the two statutes but by the mere existence of the two pieces of legislation. In the present case, having regard to the terms of s.18(1) it appears clear to us that the intention of Parliament was to cover the entire field and thus to leave no scope for the argument that until rules were framed, there was to inconsistency and no supersession of the State Act."

15. The SARFAESI Act was first endorsed as an ordinance, subsequently made an Act in the year 2002 and thereafter it is amended from time to time. Immediately after the decision of the Hon'ble Apex Court in the Mardia Chemicals case, it was felt by the legislature that some of the provisions of the SARFAESI Act was that the observation made by the Hon'ble Apex court is carried out. Subsequently, during the course of law as pronounced by the Hon'ble Apex court in Transcore Case the amendments carried out under Section 19 of RDDB & FI Act, wherein three provisos were endorsed, were extensively discussed and keeping in view of the recommendations of various committees appointed by the finance sector and to augment recovery of NPA effectively it was of the opinion of the Hon'ble Apex Court that when Section 13 of SARFAESI Act was legislated, the legislative intent was very clear and the very fact that Section 69 or 69-A of Transfer of Property Act was referred to in Section 13(1) only to pave way for the banks and financial institutions to enforce its security interest in any financial asset when approaching a court as is required under Section 69 and 69-A of the Transfer of Property Act. If i.e. the intention of the legislature the very purpose of seeking permission of the Tribunal to withdraw the existing OA filed prior to enactment of the SARFAESI Act in order to initiate SARFAESI action will become repugnant in so far as the amendments are aimed to recover the dues more effectively and faster without approaching the court, and as such the Hon'ble Apex court has clearly held the view that where the permission is required to withdraw the pending OA. Contrary to the intention of the legislature is to give SARFAESI powers to the Banks and Financial Institutions for a speedy recovery of a mounting NPA in the economy. While delivering the Judgement in Transcore case, the Hon'ble Apex Court had also recorded the view expressed

by Mr.K.N.Bhatt, Ld. Senior Counsel appearing for Indian Overseas Bank at Para – 25. Accordingly to the Ld. Senior Counsel, under the scheme of Section 13(4), all these powers to be exercised without the intervention of the court or Tribunal. He also further urged that if the provision was Section 19(1) of RDDB & FI Act as read as mandatory, then the consequence would be that a secured creditor can have recourse to Section 13 only with prior permission of DRT which would defeat the very object of NPA Act, which is the remedy of factors having equal right of enforcement by the secured creditor. It was also further argued that the DRT does not have enhanced powers and that Section 19(25) of RDDB & FI Act which empowers the Tribunal to issue appropriate directions for enforcement of its order is not similar to that of Section 151 of CPC and therefore the provision similar to Section 151 was of the more necessary to be inserted. This being the case nowhere in the judgement pronounced by their Lord Ship in the case of Transcore Vs. Union of India the converse position were a secured creditor has initiated SARFAESI measures and thereafter without complying the same / concluding resorted to file the OA under Section 19 of RDDB & FI Act, whether amounts to violation of any law even otherwise assuming that the SARFAESI Act has a provision of overriding under Section 35 and whether such over riding effect of special enactment in respect of any laws which has been enacted by the legislature for the substantive purpose and with a view to protect the interest of certain purpose especially Section 52 & 53 of Transfer of Property Act. Section 52 of Transfer of Property Act reads as under:-

> *"Transfer of property pending suit relating thereto: During the (pendency) in any Court having authority ((within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government (XXX) of (any) suit or proceeding which is not collusive and in which any right to immoveable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.*
>
> *(Explanation: For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order, and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."*

16. As between the SARFAESI Act and the Transfer of Property Act the SARFAESI Act is enacted in the year 2002, whereas the Transfer of Property Act in the year 1882. While the

SARFAESI Act is enacted for a special purpose and the Transfer of Property Act has in its place for over a century and still in force and has become substantial law in respect of matters relating to the Transfer of Property among parties. Lis – pendence is a principle in which pending litigation SARFAESI actions or by application of law or injuncted. Section 52 of Transfer of Property Act is also similar to lis pendence. When the law of SARFAESI Act was enacted the legislature has carefully taken into consideration the rigourse of obtaining a speedy judgement for Banks and financial institutions if the cases pending before several Civil Courts and the amount bother on the economy, where the secured lenders are obsessed in recovery of their legitimate dues for want of speedy disposal it was intended by the legislature, Section 69 and 69-A of Transfer of Property Act deal with mortgages i.e. security interest of a secured lender on a secured asset is required to be excluded to approach as court of law and obtain a decree to enforce such security interest on the secured asset. While it is so, legislature has not intended also to cover Section 52 of Transfer of Property Act and even had Section 35 of SARFAESI Act has over riding effect in special enactments by mere passing, while not take away the rights of a p[arty on a substantial law unless otherwise the legislature has intended to include such substantial law also to be over ridden.

Their Lordships of the Hon'ble Apex Court in Shah & Co. Vs. State of Maharashtra and Another reported in 1967 SC 1877, while dealing with tenancy Act and Section 6 of Bombay Land Acquisition Act read with Article 19 of Constitution of India had observed at Para – 26 has observed as under:-

> *"We have been referred to certain passages in certain text books, as well as in certain decisions, to show, under what circumstances, statutes can be considered to be in pari material, and the nature of the construction to be placed on such statutes. Sutherland, in 'Statutory constriction', 3rd Edition, Vol.2, at p. 535, states:*
>
> *"Statutes are considered to be in pari material - to pertain to the same subject matter – when they relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object."*
>
> *The learned author, further states, at p. 537:*
>
> *To be in pari material, statutes need not have been enacted simultaneously or refer to one another."*
>
> *Again, at p. 544, it is stated:*
>
> *"When the legislature enacts a provision, it has before it all the other provisions relating to the same subject matter which it enacts at the time, whether in the same statute or in a separate act. It is evident that it has in mind the provisions of a prior act to which it refers, whether it phrases the later act, act as an amendment or an independent act. Experience*

indicates that a legislature does not deliberately enact inconsistent provisions when it is cognizant of them both, without expressly recognizing the inconsistency."

The canon of construction, under these circumstances, is stated by the author, at p. 531:

"Prior statutes relating to the same subject matter are to be compared with the new provision; and if possible by reasonable construction, both are to be so construed that effect is given to every provision of each. Statutes in pari material although in apparent conflict, are so far as reasonably possible construed to be in harmony with each other."

In Craies, on 'Statute Law', 6th Edition, at p.133, it is stated:

"Where Acts of Parliament are in pari material, that is to say, are so far related a to from a system or code, of legislation, the rule as laid down by the twelve judges in Plamer's Case (1785) 1 Leach C. C. 4th ed.. 355, is that such Acts ' are to be taken together as forming one system, and as interpreting and enforcing each others. In the American case of United Society

V. Eagle Bank (1829) 7 Conn. 475, Hosmer J. said: 'Statutes are in pari material which relate to the same person or thing or to the same class of persons or things...."

Their Lordship while discussing various other laws at Paragraph 34, observed as under:-

"We may straight away say that the principals enunciated in the above decisions and in the text books, are well settled. By the question now is as to whether the Rent Act and the Requisition Act can be considered to be in pari material. Can it be stated that these to statutes are in pari maeria, in the sense that they relate to the same person or thing or to the same class of persons or things? For this purpose, it is necessary to examine the scope and ambit of the two enactments, concerned."

17. While following this judgment, it is not only clear that Section 52 of Transfer of Property Act has certain reliefs in respect of acts of parties, while personal properties, when a case is pending before the court of law, while the SARFAESI Act allow bank to otherwise proceed with enforcement of security interest notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882 in so far as recovery of the dues in respect of the security interest created with secured assets.

The special law gives a right to the secured creditor without approaching a court or Tribunal enforces its interest in the secured asset. If that were so, whether after filing of the OA before the Tribunal, in a pending action initiated by the secured lender under the SARFAESI Act, whether the order can ignore the provisions of Section 52 of Transfer of Property Act in so far as the lis is pending for adjudication.

In this regard let us examine Section 13(10) & Section 13(11) and of SARFAESI Act.

13(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

13(11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

18. As per Section 31 Clause (b), the provisions of SARFAESI Act shall not apply to pledge all movables within the meaning of Section 172 of Indian Contract Act 1872. It is evident from these provisions that the legislative intent is very clear in so far as initiation of recovery measures other then by way of proceedings under SARFAESI Act. Section 13(11) has given right on the secured creditor to proceed against the personal liability of guarantors and also so far the sale of pledged assets should the lender prepare to initiate action under the SARFAESI Act. The law in respect of pledged goods very clear and unambiguous pledgee has right to enforce his rights to recover his dues as is similar to a baile. As such while initiating SARFAESI measures, the Section 31 has clearly spelt out that action under of SARFAESI Act in respect of pledge of movables is not available. Some of the lenders were apprehensive of expirty of limitation in respect of passed liabilities of guarantors and that, where the borrowers, after initiating SARFAESI measures, is being challenged before the Tribunal and during the pendency of such challenge the personal liability limitation which is as per limitation act is only three years may ran away. Thus, with this intention the legislature has given / conferred right to the secured lender without prejudice to the rights already conferred under the SARFESI Act for reference to legal remedy other than by way of measures under Section 13(4).

19. Hon'ble Patna High Court in the matter of M/s.Purnea Cold Storage Vs. State Bank of India, reported in AIR 2013 Pat1, Coram, Hon'ble Judge Mr.Jayanandan Singh, in its judgement has observed that any action initiated by the secured lender after initiation of SARFAESI Act measures, by filing a regular application before the Tribunal under Section 19 of RDDB & FI Act was without jurisdiction and beyond any authority of law and further observed that has resulted the prayer of the petitioner was allowed restraining the banks from taking steps and

proceedings before the DRT, Patna. Subsequently the Division Bench of Patna High Court in its Judgement in LPA 1743 of 2012 in CWJC 8746 of 2012 with IA 7296 of 2012 and 4969 of 2013 set aside the Judgement of Single Judge of Patna High Court. In the Judgement Dated 31.07.2013, the Division Bench comprising their Lordship the Chief Justice and Justice Aswin Kumar Singh the Appeal preferred by State Bank of India, the Respondent before the Single Judge was allowed.

> *"We are of the opinion that the learned single Judge has rightly held that both the Acts are complementary to each other and that there is no inherent or implied inconsistency between the remedies under the two Acts. However, having held that both remedies are complementary to each other and there was no inherent or implied inconsistency in either of the enactments, the learned single Judge has erred in holding that the provisions contained in the Act of 2002 has an overriding effect over the Act of 1993. Once the Act of 2002 is invoked, the remedy under the Act of 1993 cannot be availed of except for the remainder of the dues which cannot be satisfied by sale of the secured assets.*
>
> *Section 35 of the Act of 2002 does give the Act of 2002 an overriding effect over any other law notwithstanding anything inconsistent contained in such other law. In other words, the Act of 2002 would have overriding effect over the provisions contained in the Act of 1993, had the provisions contained in the Act of 1993 been inconsistent with the provisions contained in the Act of 2002. It is by now well settled and accepted universally that the Act of 2002 is complementary to the Act of 1993 and has been enacted with a view to providing a speedier remedy to the secured creditors. Having held that there was no inherent or implied inconsistency between the two enactments, the learned single Judge has erred in invoking Section 35 of the Act of 2002 to stay the proceeding before the Tribunal. We also agree with the Delhi High Court that there is no embargo in either of the Acts restraining the secured creditor from pursuing both the remedies simultaneously or one after the other. The reading of such an embargo would frustrate the very soul and very purpose of both the enactments.*
>
> *There is nothing wrong about the Bank in approaching the Tribunal within the period of limitation. No ulterior movie can be imputed against the Bank for approaching the Tribunal within the period of limitation as suggested by Mr. Arbind Kumar Jha. On the contrary, we believe that it is the endeavour of the petitioner to thwart every action of the Bank in realizing its outstanding dues. The petitioner has challenged every stage of action before this Court or before the Tribunal. The intention to delay the proceeding is writ large in the conduct of the petitioner."*

20. With replies to the Hon'ble Judges on the Terms that were argued before their Lordship the fact that lis pendence was never considered while addressing the judgement or the same was placed before their Lordship to have considered the same. The limitation referred to by their Lordship whether it is in respect of personal liabilities of the borrowers and guarantors. If it is as regards limitation for fore closure of mortgage the very fact that the secured lender has initiated measures under SARFAESI Act will save limitation, till such time the measures are

completely comes to a conclusion. On the other hand the limitation is viewed before Lordship is in accordance to the personal liability of borrower and guarantor, appears to have been conferred on the secured creditor by virtue of Section 13(11) and in such an event while transferring the OA before this Tribunal under Section 19 of RDDB & FI Act it is required that secured lender with the leave of the Tribunal may file the OA in respect of the personal liability to save limitation by reserving its rights as regards rights in fore closure of mortgage in the event the SARFAESI measures already initiated, the secured creditor could not succeed for recovery of dues by securitization of the secured interest in the secured assets. Their Lordships have also not discussed about Section 52 of Transfer of Property Act even though Section 35 of SARFAESI Act has over riding effect as already discussed above, a special enactment in so far as and not as regards substantial law cannot have a overriding effect even though the said substantial law is which prior to enactment to enacted for specific purpose which is not otherwise dealt in a special enactment even though the later is subsequent to the substantial law. In all fairness and with due respect to the Lordships observations in the said judgement their Lordships have not considered the very purpose of Appendix VI to these SARFAESI interest and enforcement rules 2002, as regards filing of an application before the Tribunal after exhausting the SARFAESI measures for the balance of amount to satisfy the dues still recoverable by the secured creditor. If the legislature has not intended that the secured creditor shall not proceed to file a regular application before the Tribunal under Section 19(1) of the RDDB & FI Act for realizing the debt from the borrower to guarantor, Section 13(10) and Section 13(11) under the SARFAESI Act does not arise at all. Equity and Law are two different aspects, dura lex sed lex, law shall always prevail over equity, also means law is hard, but it is law, equity can only supplement law but cannot supplant or override it, when conflict between law and equity it is law which has to prevail. In this regard the Judgement of Hon'ble Apex Court in Raghunath Rai Bareja and Ano. Vs. Punjab National Bank & Ors reported in 2007 (2)ALT114(SC), wherein their Lordship Hon'ble Justice S.B. Sinha and Hon'ble Justice Markandey Katju, dealing with RDDB & FI Act arisen to discuss various other case laws and emphasized that equity and law are twin brothers and law should be applied and interpreted equitably, but equity cannot override written or settled law. It also further emphasizes that it is now well settled that when there is a conflict between law and equity the former shall prevail. Further in a case where the statutory provision is plain and unambiguous, the court shall not interpret the same in a different manner, only because of harsh consequences arising there from. Equitable considerations have no place where the statute contained express provisions. These

observations have been made by their Lordship as regards period of limitations before them and concluded that period of limitation statutorily prescribed has to be strictly adhered to and cannot be relaxed or departed from by equitable considerations. Similarly in the matter of Hiralal Ratanlal Vs. STO reported in (1973) 2 SCR 502 the Hon'ble Apex Court has observed that in construing a statutory provisions the first and foremost rule of construction is the literary construction. All that the Court has to see at the very outset is what does the provision say. If the provision is unambiguous and if from the provision the legislative intent is clear, the Court need not call into aid the other rules of construction of statutes. The other rules of construction are called into aid only when the legislative intent is not clear.

21. In Gurudevdatta VKSSS Maryadit Vs. State of Maharashtra reported in (2001)2SCR654, Hon'ble Apex Court observed that it IAs cardinal principle of interpretation of statute that the words of a statute must be understood in their natural, ordinary or popular sense and construed according to their grammatical meaning, unless such construction leads to some absurdity or unless there is something in the context or in the object of the statute to suggest to the contrary. The Golden Rule is that the words of a statute must prima facie be given their ordinary meaning. It is yet another rule of construction that when the words of the statute are clear, plain and unambiguous, then the courts are bound to give effect to that meaning, irrespective of the consequences. It is said that the words themselves best declare the intention of the law-giver. The courts are adhered to the principle that efforts should be made to give meaning to each and every word used by the legislature and it is not a sound principle of construction to brush aside words in a statute as being inapposite surpluses, if they can have a proper application in circumstances conceivable within the contemplation of the statute. Similar view has also been taken by the Hon'ble Apex Court in the matter of S.Mehta Vs. State of Maharashtra reported in 2001 CriLJ4259 and Patangrao Kaddam Vs. Prithviraj Sajira Yadav Deshmukh reported in (2001)2SCR118, wherein the Hon'ble Apex Court has clearly maintained that the literal rule of interpretation really means that they should be no interpretation, in other words, we should read the statute as it is, without distorting or twisting its language used by the legislature.

22. The present petition before this Tribunal moved by the 2nd Defendant to reject the plea filed by the Applicant Bank on various grounds including the converse position of what has happened when the Hon'ble Apex Court has delivered its Judgement in Transcore's case. I have gone through the judgement passed by the Hon'ble Single Judge of Hon'ble High Court of

Patna and also the Division Bench Judgement setting aside the same by the Hon'ble High Court of Patna and taken into consideration the view of both the benches and having referred the case laws above in respect of interpretation of law, since Section 13(10), Section 13(11) of SARFAESI act read with Section 19(1) and its provisos of RDDB & FI Act and also Appendix VI in Security Interest (Enforcement) Rules 2002, this Tribunal has come to an opinion that there is no ambiguity in law as laid down by the legislature, wherein the rights of the secured lender in respect of personal liability of the borrowers and guarantors and pledged assets were clearly protected as per Section 13(11) of SARFAESI Act similarly required under Section 19(1) of 2nd Provisio of RDDB & FI Act by virtue of the judgement in Transcore Case again the rights of the secured lender has been protected and where the secured creditor has resorted to initiate SARFAESI measures by issuing a demand notice as contemplated under Section 13(2) and there after proceedings to initiate measures under Section 13(4) of the SARFAESI Act the legislature has taken into consideration the various aspects and there after inserted Section 13(10) to protect the interest of the secured lender in so far as any deficiency to be recoverable by the secured lender after the sale proceeds of the secured assets not sufficient to discharge the liabilities in to to. This Tribunal having read Section 52 of Transfer of Property Act, wherein during the pendency of any matter in any Court having authority which is not collusive and in which any right to immovable properties directly and specifically in question, the embargo not to transfer or otherwise deal with such property by any of the parties to the suit or proceedings in so far as not ambiguous , where the applicant bank having resorted to file the OA before this Tribunal and not the relevant column also sought for a direction to sell the Schedule A , B, D & E of the OA properties to come with Schedule C property belonging to the 5th Defendant. In such an event the Respondent / Applicant Bank ought to have stopped any further proceedings already initiated SARFAESI measures. Since the contention of such measures after filing the present application will attract the provisions of Section 52 of Transfer of Property Act. In the said OA at Page – 17 the Applicant Bank has maintained that they have initiated action under SARFAESI Act by issuing the demand notice dated 26.07.2010 and further the symbolic possession of the properties were taken on 08.10.2010 by issuing the Possession notice, while the present application is filed on 09.12.2010. The fact of taking symbolic Possession is not mentioned in the present application more over the Schedule D and Schedule E properties are movable assets, while the Schedule C Property of 5th Defendant has the first charge holder and as such no SARFAESI measures were initiated against these properties by the Applicant Bank. The 2nd Defendant in the OA Mr. Ashok Surana has already moved a SARFAESI Application

bearing SA No.179 of 2011 challenging the sale notice issued by the applicant bank and the properties mentioned at Schedule B having been sold by the Applicant Bank some time during 2011. Till date the Applicant Bank, no application / memo has been filed before this Tribunal informing such sale and realization of part of the amount claimed in the OA. Mr. Ashok Surana, the 2nd Defendant appearing in person has submitted before this Tribunal that the action of the Applicant Bank tantamount to suppression of facts since the B Schedule property has been sold by the Applicant Bank and nowhere in the Application nor there after the Applicant Bank has brought the fact to the notice of this Tribunal.

23. This Tribunal has come across with number of occasions where some of the secured lender after initiating SARFAESI measures, are filing the OA in RDDB & FI Act and in some cases were the amount realized after SARFAESI have substantially after reducing the OA claim even below Rs.10 Lakhs the OA is still maintained which they should have / ought to have filed before a Civil Court as per Section 13(10) of SARFAESI Act. This being the legislature intent and having noticed that their Lordships in its Division Bench Judgement of Hon'ble Patna High Court in the Judgement dated 31.07.2012 not discussed these aspects, I may have to pass orders on the facts available before this Tribunal to dispose of the application of the Petitioner / Defendant contrary to the judgement of the Division Bench of Hon'ble Patna High Court.

24. During the course of the submissions made by the Ld. Counsel for the Respondent / Applicant Bank to have informed that the RDDB & FI Act by itself is a code and the Tribunal has to follow the principles of natural justice for disposal of the matters before it and that application of CPC is also not applicable for matters before this Tribunal. Reliance placed by the Petitioner / Defendant and some of the orders of the Civil Procedure Code especially in Order 2, Order 7 are not applicable. Further the objection to reject the plaint based on Order 7, Rule 11 Sub Rule (a) and Sub-Rule (d) is not applicable in so far as the claim of the Applicant Bank before this Tribunal is concerned. The cause of action is properly arraigned in the application so also the limitation is also calculated, thereby rejection of plaint does not arise. On going through the application, this Tribunal also found that there is a mention about the cause of action and also a separate paragraph for limitation. However, at this Juncture unless the pleadings are complete it would be appropriate to any information as regards the limitation aspect in the present application. Mr. Balachandar, Ld. Counsel for the Respondent / Applicant Bank has relied upon the judgement of Division Bench of Hon'ble Patna High Court which has

been already dealt by me in the previous paragraphs. Further reliance is made by the Respondent / Applicant Bank of Hon'ble Apex Court in Sathyadhayal Koshal and Others Vs. S.M. Deorajen Debi & Another reported in (1960) AIR SC 941. It is in respect of resjudicata, the Respondent / Applicant bank has also placed reliance in the decision of Hon'ble High Court of Madras 1995 (11) CTC 198 that also deals with applicability of resjudicata. The Petitioner / Def in its petition also raised contentious issues in respect of applicability of resjudicata since the proceedings initiated by the Applicant Bank pursuant to the issuance of the SARFAESI notice will attract the provision of Section 11 of CPC. Nowhere in the SARFAESI Act the legislature ever intended that the measures initiated by the Authorised Officer of the Secured Creditor as proceedings before the Civil Court. As regards Section 13 of SARFAESI Act the exclusion of 69 & 69-A of Transfer of Property Act must mention so that while informing the secured interest as regard secured assets, the secured creditor need not go to court of law for disposal of the mortgaged assets by way of foreclosure which is otherwise required as per the Section 69 & 69-A of Transfer of Property Act. Since the Authorised Officer has no right to summon any person or attract attendance of any witness, while proceedings under the SARFAESI Act does not constitute the Civil Court as such. The Petitioner / Defendant has referred to various judgements as regards resjudicata, this Tribunal do not consider the proceedings initiated by the secured creditor under the SARFAESI Act, the Authorised Officer as a Civil Court, and as such a mere issuance of Section 13(2) notice or other measures under Section 13(4), it has not become previous proceedings in any Civil Court and as such issuance in which the measures were initiated by the Authorised Officer cannot be considered as a matter directly and substantially the issuance before this Tribunal in an application filed subsequent o the initiation of SARFAESI Act. Accordingly the issue of resjudicate does not come in the present proceedings before this Tribunal, in which the OA is filed by the Respondent / Applicant Bank offer sec 13 as where. During the course of arguments, Mr. Balanchandar Ld. Counsel for the Applicant Bank has handed over a copy of order passed by the Hon'ble High Court of Madras in W.P. No.6534 of 2012 preferred by the petitioner / defendant as the Managing Director of 1st Defendant in the OA which was dismissed with cost of Rs.5,000/- and to praying to the notice of this Tribunal, however the same is not barring any of the issues as being discussed above which losses the attitude of the petitioner / defendant which is deprived of his property under SARFAESI measures initiated by the Respondent / Applicant Bank.

25. To sum up, this Tribunal having considered the submissions made by both sides and looking into various aspects and judgements passed by Apex Court's order ACS, which have been referred herein above including the judgement of Hon'ble Apex Court in the Transcore Case, the present Application filed by the Respondent / Applicant Bank in the present form is not maintainable since they have already initiated recovery of the dues by issuing Section 13(2) notice, thereafter the Section 13(4) notice and when the same is pending without following the requirements under Section 13(10) or Section 13(11) as may be required, preferred to file the present application u/sec 19(11) RDDBS. During the course of the proceedings the Respondent / Applicant Bank has sold one of the properties of the Petitioner / Defendant and after realizing a substantial amount, however, till date no memo has been filed by the Respondent / Applicant Bank before this Tribunal in the present application to reduce their claim for reasons known to them. In the circumstances the present OA is not maintainable in the present form, the Applicant Bank is directed to withdraw the same and filed as per Section 13(1) of SARFAESI Act in the format of Appendix VI of Security Interest (Enforcement) Rules, 2002 within 15 days from the date of receiving the order. On the other hand if the Applicant Bank would like to safe guard their interest in respect personal liability of the guarantors and the borrowers as the case may be under proper legal advice resort to file an application under Section 13(11), however the time spent before this Tribunal during the pendency of the present OA in the present form may be included in case the limitation issue does not arise. Accordingly the IA filed by the Petitioner / Defendant is allowed as discussed above, to the extent the IA SR is disposed of.

(Dictated to the PS, transcribed by him and after necessary corrections, signed and pronounced by me in the Open Court on this 8th Day of November, 2013).

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[P.K. RAMASWAMY IYER]
PRESIDING OFFICER
DRT-I, CHENNAI

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सत्यमेव जयते
DEBTS RECOVERY TRIBUNAL, CHENNAI