



**IN THE SUPREME COURT OF INDIA**  
**CIVIL APPELLATE JURISDICTION**  
**CIVIL APPEAL NO. 6492 OF 2024**

**NORTH EASTERN DEVELOPMENT  
FINANCE CORPORATION LTD. (NEDFI)**

**... APPELLANT**

**VS.**

**M/S L. DOULO BUILDERS AND SUPPLIERS  
CO. PVT. LTD.**

**... RESPONDENT**

**J U D G M E N T**

**DIPANKAR DATTA, J.**

***FACTS***

1. On or about 13<sup>th</sup> December, 2000, the respondent-Company<sup>1</sup> approached the appellant-Corporation<sup>2</sup> for financial assistance to set up a cold storage unit in the District of Dimapur, Nagaland.
2. The Corporation agreed to offer financial assistance. To secure the said loan, particularly in view of the provisions of law prevalent in the State of Nagaland, a couple of agreements were executed on 11<sup>th</sup> May,

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<sup>1</sup> Company, hereafter

<sup>2</sup> Corporation, hereafter

2001. The first one was a loan agreement<sup>3</sup> between the Corporation and the Company, the second was an agreement<sup>4</sup> between the 5<sup>th</sup> Model Village Council<sup>5</sup> and Sh. K. Doulo (Director of the Company), and the third was a deed of guarantee by which the Council stood as guarantor for the loan disbursed to the Company by the Corporation.

- 3.** The loan agreement executed by and between the Company and the Corporation contained several terms and conditions, which formed part of Articles (I) to (VI) and Schedules (I) to (IV) thereto. Relevant terms and conditions from such loan agreement read as follows:

### ARTICLE III

#### SECURITY

##### 3.1 SECURITY FOR THE LOAN

(A) The Loan together with all interest, liquidated damages, premia on prepayment or on redemption, costs, expenses and other monies whatsoever stipulated in this Agreement shall be secured by:-

(a) a first mortgage and charge in favour of the Lenders in a form satisfactory to the Lenders or all the Borrower's immovable properties, both present and future; and

(b) a first charge by way of hypothecation in favour of the Lenders of all the Borrower's movables (save and except book debts), including movable machinery, machinery spares, tools and accessories, present and future, subject to prior charges created and/or to be created:-

(i) in favour of the Borrower's Bankers on the Borrower's stocks of raw materials, semi-finished and finished goods, consumable stores and such other movables as may be agreed to by the Lenders for securing the borrowings for working capital requirements in the ordinary course of business; and

(B) The Borrower shall make out a good and marketable title to its properties to the satisfaction of the Lenders and comply with all such formalities as may be necessary or required for the said purpose.

##### 3.2 CREATION OF ADDITIONAL SECURITY

If, at any time during the subsistence of this Agreement, the Lenders is of the opinion that the security provided by the Borrower has become inadequate to cover the balance of the Loans then

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<sup>3</sup> loan agreement, hereafter

<sup>4</sup> Second agreement, hereafter

<sup>5</sup> Council, hereafter

outstanding, then, on the Lenders' advising the Borrower to that effect, the Borrower shall provide and furnish to the Lenders, to their satisfaction such additional security as may be acceptable to the Lenders to cover such deficiency.

### 3.3 ACQUISITION OF ADDITIONAL IMMOVABLE PROPERTIES

So long as any monies remain due and outstanding to the Lenders, the Borrower undertakes to notify them in writing of its acquisition of immovable properties and as soon as practicable thereafter to make out a marketable title to the satisfaction of the Lenders and charge the same in favour of Lenders by way of first charge in such form and manner as may be decided by the Lenders.

### 3.4 AGREEMENT OF GUARANTEE

The Borrower shall procure irrevocable and unconditional personal guarantee(s) from Shri Lhoupenyi Doulo and Shri Kevechutso Doulo, the main promoters, in favour of the Lenders for the due repayment of the Loan and the payment of all interest and other monies payable by the Borrower in the form prescribed by the Lenders and to be delivered to the Lenders before any part of the loan is advanced. The Borrower shall not pay any guarantee commission to the said Guarantors.

## SCHEDULE - I

### THE PROJECT

The project is to set up a cold storage unit at Model Village, 5<sup>th</sup> Mile, Dimapur, in the state of Nagaland at an estimated cost of Rs.346.00 lakh.

## SCHEDULE - IV

### SPECIAL CONDITIONS

#### (A) PRE-DISBURSEMENT CONDITIONS

Before seeking disbursement of any portion of the assistance, the Borrower shall to the satisfaction of the Lenders:

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(vii) create security for the total loan sanctioned.

4. Since, in the State of Nagaland, transfer of any property by any tribal in favour of a non-tribal including juristic person is not permitted under the extant law, the second agreement came to be executed between the Council and Sh. K. Doulo, representing the Company.

Having regard to the fact that availing loan from any financial institution or corporation without placing any property on mortgage in favour of such institution or corporation is not possible as per the existing norms, the Council had worked out modalities for Model Village citizens to avail loan facility from any financial institution or corporation. Accordingly, the agreement executed by and between Council and Sh. K. Doulo was executed, *inter alia*, with the following agreed clauses:

AGREEMENT

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4. In consideration of this agreement and in consideration of Model Village Council to stand as surety and guarantor for refund of the said loan to North Eastern Development Finance Corporation Ltd., said M/s L. Doulo Builders & Suppliers Company Pvt. Ltd. as the beneficial owner, do hereby grant, transfer, convey unto the said Model Village Council all the assets fully described in the schedule below to hold the same absolutely and for ever and/or further to seize and dispose off all the mortgaged assts for realisation of the said loan with interests, to appoint auditors for examination of all accounts, balance sheet and profit and loss accounts of the business of the said M/s L. Doulo Builders & Suppliers Company Pvt. Ltd.

5. The term and conditions of this agreement shall not be affected by any change in the constitution of the Model Village council nor on the death of said K. Doulo representing M/s. L. Doulo Builders & Suppliers Company Pvt. Ltd.

IN WITNESS WHEREOF the parties hereto have set and subscribed their respective hands and seals the day, month and year first above written.

Schedule of the property			
Sl. No.	Name of the assets	Measurement	Value/Amount (in Rs.)
1	Residential 2 storyed Building Model Village	Area 20,000 sq. ft.	45,00,000
2	Project site, Developed Model Village	Area 1,07,700 sq. ft.	30,00,000

3	Residential Plot, Developed Model Village	Area 15,000 sq. ft.	10,00,000
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Total 85,00,000  
(Rupees Eighty five lakhs only)

5. Insofar as the deed of guarantee is concerned, the recitals of such deed reflect what we have noted above. *Inter alia*, it was agreed by and between the Council and the Corporation as follows:

#### DEED OF GUARANTEE

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Now this deed witnesses as follow:-

1. In consideration of North Eastern Development Finance Corporation Ltd. having agreed to provide term loan to the extent of Rs.200 lakh (Rupees Two hundred lakhs) only to said M/s. L. Doulo Builders & Suppliers Company Pvt. Ltd. for the purpose herein above indicated, the Model Village Council do hereby guarantee that in case the aforesaid Company fail and / or neglect to repay the said loan with interests in accordance with the terms and conditions contained in the Loan Agreement dated 11<sup>th</sup> day of May, 2001 mentioned above, the Model Village Council shall repay to the North Eastern Development Finance Corporation Ltd. such amounts as they may be called upon to pay.

2. This guarantee of the Model Village Council shall be effective immediately upon the disbursement of the said loan from the North Eastern Development Finance Corporation Ltd. to said M/s. L. Doulo Builders Suppliers Company Pvt. Ltd. and shall continue in force until and unless the entire amount of loan with interests and other charges is fully repaid by said M/s. L. Doulo Builders & Suppliers Company Pvt. Ltd.

3. The guarantee hereinbefore mentioned shall not be affected be any change in the constitution of the Model Village Council nor on the death of said Sri. K. Doulo of M/s. L. Doulo Builders & Suppliers Company Pvt. Ltd.

IN WITNESS WHERE OF the parties hereto have set and subscribe their respective hands and seals the day, month and year first above written.

Schedule of the property			
Sl. No.	Name of the assets	Measurement	Value/Amount (in Rs.)
1	Residential 2 storyed Building Model Village	Area 20,000 sq. ft.	45,00,000
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3	Residential Plot, Developed Model Village	Area 15,000 sq. ft.	10,00,000
		Total	85,00,000
(Rupees Eighty five lakhs) only			

- 6.** Such being the position with regard to the agreements by and between the parties, the loan was disbursed to the Company by the Corporation. According to the Company, instead of the term loan of Rs.2,00,00,000/-, the Corporation had actually disbursed Rs. 1,49,63,580/-. This is denied by the Corporation. According to it, upon an application for working capital made by the Company for Rs.1,65,00,000/-, over and above Rs.2,00,00,000/-, a further sum of Rs.1,00,00,000/- was sanctioned. Unfortunately, the Company ran into rough weather and defaulted in honouring its obligation under the loan agreement, resulting in initiation of action by the Corporation under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002<sup>6</sup>.
- 7.** On 31<sup>st</sup> August, 2010, the Corporation issued a loan recall notice informing the Company that a sum of Rs. 3,44,58,174/- was due and payable. The Company was called upon to make payment within 15 days, failing which appropriate steps were threatened for enforcing the securities and realising the dues. The Company failed to respond to the notice dated 31<sup>st</sup> August, 2010, whereupon a demand notice

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<sup>6</sup> SARFAESI Act

dated 30<sup>th</sup> June, 2011 was issued under Section 13(2) of the SARFAESI Act, claiming Rs.3,85,28,571/- with interest.

- 8.** What happened immediately thereafter is not too clear from the records. It could be so that the Company sought for time to repay the debt which did not find favour with the Corporation. Be that as it may, more than 7 years after the notice dated 30<sup>th</sup> June, 2011 was issued, the Corporation preferred to file an original application<sup>7</sup> before the Debts Recovery Tribunal, Guwahati<sup>8</sup> under the Recovery of Debts and Bankruptcy Act, 1993 seeking recovery of Rs.7,64,35,358/-.
- 9.** While such application had proceeded to final hearing upon the Company being set *ex parte* by the DRT, Guwahati (the said order was later recalled), the Corporation was successful in obtaining an order under Section 14 of the SARFAESI Act from the Deputy Commissioner, Dimapur<sup>9</sup>. The order dated 16<sup>th</sup> March, 2019 of the Commissioner empowered the Sub-Divisional Officer (C) Sadar, Dimapur, to oversee the process of taking over physical possession of the assets mentioned therein.
- 10.** Armed with the order of the Commissioner, on 23<sup>rd</sup> March, 2019, the Corporation took over physical possession of the assets of the Company including the cold storage as well as the properties belonging to the Directors of the Company.

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<sup>7</sup> O.A. No.163/2018

<sup>8</sup> DRT, Guwahati, hereafter

<sup>9</sup> Commissioner, hereafter

**11.** It was at this stage that the Company invoked the writ jurisdiction of the Gauhati High Court by applying under Article 226 of the Constitution of India, 1950. In the writ petition<sup>10</sup>, the Company prayed for quashing of arbitrary and illegal action of the Corporation in taking over possession pursuant to the possession notice dated 23<sup>rd</sup> March, 2019. A mandamus was also claimed directing the Corporation to hand over possession of the properties of the Company and the personal properties of its Directors.

***OUTCOME OF THE WRIT PETITION***

**12.** The writ petition was heard by a Division Bench of the High Court. *Vide* a judgment and order dated 6<sup>th</sup> March, 2020, the High Court allowed the writ petition and held the notices dated 30<sup>th</sup> June, 2011 and 23<sup>rd</sup> March, 2019 as well as the order dated 16<sup>th</sup> March, 2019 as wholly illegal and without jurisdiction and, accordingly, set aside the same. While the properties, possession of which had been taken over by the Corporation in terms of the order of the Commissioner was directed to be restored in favour of the Company within 15 days from date, the Division Bench clarified that its determination was limited to the question of validity of the action initiated by the Corporation by invoking the SARFAESI Act in the facts and circumstances, and the same would not impinge upon the Corporation's right to recover its dues from the Company in accordance with law. Also, such order would not come in the way of the Corporation to pursue the

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<sup>10</sup> W.P(C) No.9241/2019

proceedings pending before the DRT, Guwahati for recovery of the unpaid debt from the Company or the Council.

- 13.** Perusal of the impugned order reveals that the High Court did not find that any right, title or interest had been validly created in favour of the Corporation over any of the tangible and intangible asset of the Company. It was also noted that counsel for the Corporation was unable to invite the Court's attention to any such document or instrument which created semblance of a right, title or interest of the Corporation *qua* the immovable properties or assets of the Corporation or the Council. The reason for which the High Court held in favour of the Company and allowed the writ petition, despite availability of an alternative remedy under Section 17 of the SARFAESI Act, is that the Corporation failed to establish that any security interest was created in its favour either by the Company (borrower) or the Council (guarantor) and/or that the Corporation was a "secured creditor" within the meaning of Section 2(1)(zd) thereof. The High Court reasoned that the deed of guarantee dated 11<sup>th</sup> May, 2011 executed by the Council was *"merely a guarantee agreement without creating any right, title or interest of the lender over any of the immovable properties mentioned in the impugned notice dated 30.06.2011 or the order dated 16.03.2019. If that be so, there is no 'security agreement' in this case"*. In paragraph 34, the High Court held as follows:

"34. In the case in hand, it appears that having realized the bar in transfer of ownership of land created by Article 371A, the respondent

had resorted to a *via media* for extending the term loan to the writ petitioner and had allowed the Model Village Council to accept the mortgage of the properties of one of the Directors of the writ petitioner company and also to stand as a guarantor of the loan. The power of the Village Council to provide security under Section 12(6) of the Act of 1978, is limited to providing security for repayment of loan obtained by any permanent resident of the village. However, a guarantee provided under section 12(6) would not amount to a "security agreement" under section 2(zb) unless such interest is created in favour of a secured creditor by following the procedure prescribed by the Act of 2002."

### **THE APPEAL**

14. Special leave to appeal having been granted on 14<sup>th</sup> May, 2024, the judgment and order dated 6<sup>th</sup> March, 2020 is assailed by the Corporation on multiple grounds which have been canvassed by Dr. Manish Singhvi, learned senior counsel for the Corporation.

### **THE QUESTION**

15. A couple of questions could arise for our determination. However, the first question that we are tasked to decide is whether provisions of the SARFAESI Act could at all have been invoked by the Corporation against the Company by issuing the notice dated 30<sup>th</sup> June, 2011 under Section 13(2) thereof, seeking to recover of Rs.7,64,35,358/-. Should the answer be in the negative, that would mark the end of the *lis* at least at the stage the same has reached.

### **ANALYSIS**

16. Although, it is recorded in the impugned judgment that learned counsel for the Company had not canvassed the plea that action taken under Section 13 of the SARFAESI Act by the Corporation contravenes Article 371A of the Constitution of India, we find a

specific averment in the counter affidavit filed before this Court by the Company to the effect that provisions of the SARFAESI Act were not applicable in the State of Nagaland when the Corporation had set in motion the recovery process. In the additional counter affidavit too, a plea has been raised that the observation made by the Division Bench in paragraph 37 of the impugned judgment and order to the effect that the plea of contravention of Article 371A was not canvassed in course of hearing, though raised in the pleadings, is not correct.

- 17.** We need not examine in depth whether any such plea was raised before the High Court for the simple reason that (non)applicability of the provisions of the SARFAESI Act in the State of Nagaland strikes at the root of the matter and being a pure question of law, it can be raised even at the appellate stage before this Court.
- 18.** Section 35 of the SARFAESI Act, though gives overriding effect to the provisions thereof notwithstanding anything to the contrary contained in any other enactment for the time being in force or any instrument having effect by virtue of any such law, the same cannot and does not override any provision of the Constitution, to wit, Article 371A thereof in this case which contains special provisions for the State of Nagaland.
- 19.** Article 371A of the Constitution, to the extent relevant, reads as follows:

Article 371-A. Special provision with respect to the State of Nagaland.—(1) Notwithstanding anything in this Constitution,—  
(a) no Act of Parliament in respect of—  
(i) religious or social practices of the Nagas,  
(ii) Naga customary law and procedure,  
(iii) administration of civil and criminal justice involving decisions according to Naga customary law,  
(iv) ownership and transfer of land and its resources,  
shall apply to the State of Nagaland unless the Legislative Assembly of Nagaland by a resolution so decides;

- 20.** SARFAESI Act does envisage transfer of property by auction sale or otherwise for realising the secured asset, i.e., the property on which security interest is created. Our attention has been drawn to a notification dated 10<sup>th</sup> December, 2021 issued by the Officer on Special Duty, Finance, published in the Nagaland Gazette Extraordinary of even date. The notification reads as follows:

“No.FIN/GEN/SLBC/12/2012 (PART-I):: Dated Kohima, the 10<sup>th</sup> December, 2021.

In conformity with the special provision conferred by Article 371A (1) (a) (iv) of the Constitution of India, the Governor of Nagaland is pleased to notify the implementation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002) in Nagaland with effect from the date of this notification.

In so far as the sale of secured assets taken over by the banks and financing institutions is concerned, it can be sold only to indigenous inhabitants of Nagaland in accordance with provisions of the Nagaland Land and Revenue Regulations (Amendment) Act, 2002.”

- 21.** Bare perusal of the aforesaid notification leads one to the conclusion that provisions of the SARFAESI Act could be implemented in the State of Nagaland with effect from 10<sup>th</sup> December, 2021, i.e., more than two decades after the Company availed loan granted by the Corporation.

- 22.** Notably, the SARFAESI Act itself became operational from 21<sup>st</sup> June, 2002. Having regard to the statutory ordainment contained therein, a secured creditor when faced with a challenge to an action taken by it under Section 13 read with the provisions of the Security Interest (Enforcement) Rules, 2002<sup>11</sup> against a borrower, broadly, must satisfy the adjudicator that the borrower has defaulted in payment of the secured debt owed by him/it to the secured creditor, that the borrower's account has been classified as a non-performing asset in accordance with parameters laid down by the Reserve Bank of India and other relevant provisions, that there being an actionable debt, the borrower was called upon to discharge the debt within 60 (sixty) days by issuance of a notice under sub-section (2), that the security interest created in respect of the secured asset in favour of the secured creditor has become enforceable in the eye of law with the borrower's objection to the demand notice having failed under sub-section (3A) and he/it having not cleared his/its debt within the period prescribed, that measures [of the nature specified in sub-section (4)] have been taken either invoking Section 14 or without invoking it, and that the secured asset has been dealt with in accordance with the Rules.
- 23.** Since the loan agreement in this case was executed on 11<sup>th</sup> May, 2001 and the SARFAESI Act became operational from 21<sup>st</sup> June, 2002, question of the Corporation resorting to the provisions of such

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<sup>11</sup> Rules

enactment in respect of a loan agreement executed prior in point of time has definitely to be viewed with some degree of caution and circumspection in view of a couple of precedents to which our attention was drawn. According to Dr. Singhvi, based on these decisions (which we propose to deal with a little later) the writ petition of the Company should have been dismissed by the High Court.

- 24.** We can take judicial notice of certain accepted banking practices. A security agreement may not be contained in a single document. Typically, it is a collection of agreements including loan, hypothecation, guarantee and mortgage agreements. All of these are aimed at securing the loan. When a business or project loan is granted, the borrower utilises the funds to create business property, which becomes the primary security. This can include assets like stock, plant and machinery, and raw materials. A separate agreement may be entered into, offering land or other property as collateral security. The key difference is that primary security involves creating a security interest, while collateral security involves transferring an interest in the property by the borrower to the lender.
- 25.** For invocation of the provisions of the SARFAESI Act, mortgage is a must which, however, is not so for filing an original application under the Recovery of Debts and Bankruptcy Act, 1993<sup>12</sup>. An original application under the RDB Act can be filed for recovery of both

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<sup>12</sup> RDB Act, hereafter

secured as well as unsecured loans. Under the SARFAESI Act, however, security interest can be enforced without intervention of Court while the procedure under the RDB Act is for execution of the decree passed by the jurisdictional Debts Recovery Tribunal upon reaching a satisfaction of there being outstanding dues of the lender which need to be recovered from the borrower.

- 26.** As is evident from the factual narrative adverted to by us at the beginning of this judgment, the arrangement worked out resulted in the Company mortgaging its property to the Council. There is an enactment titled Nagaland Village and Area Councils Act 1978<sup>13</sup>, which confers power on the Council to seize and dispose of the mortgaged property in case of any default in payment of loan.

Relevant provisions of the 1978 Act read as follows:

"2. Powers and Duties. – The Village Council shall have the following powers and duties:

(1) ...

...

...

(6) to provide security for due repayment of loan received by any permanent resident of the Villages from the Government, Bank or financial institution;

...

(8) to forfeit the security of the individual borrower on his default in repayment of loan, advanced to him or on his commission of a breach of any of the terms of loan agreement entered into by him with the Council and to dispose of such security by public auction or by private sale;

..."

Hence, it was open to the Council to take recourse to the provisions of the 1978 Act against the Company which it did not.

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<sup>13</sup> 1978 Act

- 27.** It is also evident from the deed of guarantee dated 11<sup>th</sup> May, 2001 that the Council did guarantee that in case the Company failed or neglected to repay the loan with interest to the Corporation in accordance with the terms of the loan agreement dated 11<sup>th</sup> May, 2001, the Council shall repay to the Corporation such amounts as they may be called upon to pay. In view of such deed of guarantee, the Corporation lacked the authority to invoke the SARFAESI Act against the Company. If at all, the sole option available to the Corporation was to proceed against the Council in a manner known to law.
- 28.** It is reasonable to presume that the SARFAESI Act not being in existence on 11<sup>th</sup> May, 2001, a secured creditor might not have thought of creation of any security interest in the secured asset including creation of mortgage by deposit of title deeds in terms of a security agreement to enforce a secured debt. Indeed, the terms 'secured creditor', 'secured interest', 'secured debt', 'security agreement', etc., all together, are to be found only in the SARFAESI Act and not in any previous enactment. The Division Bench has held in no unmistakable terms that no property was mortgaged by the Company in favour of the Corporation. This is an undisputed fact. It is, therefore, abundantly clear that the Division Bench of the High Court was clearly right in interdicting the actions of the Corporation and in allowing the writ petition filed by the Company by returning a finding that the action of the Corporation was without jurisdiction.

**29.** Reliance has been placed by Dr. Singhvi for the Corporation on several decisions of this Court to persuade us to overturn the impugned judgment and order. We wish to consider three of them, which have some relevance and requires our observation.

**30.** ***M.D. Frozen Foods Exports Private Limited v. Hero Fincorp***<sup>14</sup> is the first decision relied on by the Corporation. Two of the issues which arose for decision before this Court are -

“(ii) Whether resort can be had to Section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement/mortgage created prior to the application of the SARFAESI Act to the respondent?

(iii) A linked question to Question (ii), whether the lender can invoke the SARFAESI Act provision where its notification as financial institution under Section 2(1)(m) has been issued after the account became an NPA under Section 2(1)(o) of the said Act?”

**31.** This Court was called upon to answer these questions premised on a different factual situation. Loans had been granted by the respondent at a point of time when it was not notified as a financial institution within the meaning of Section 2(1)(m) of the SARFAESI Act. However, the account became a non-performing asset under Section 2(1)(o) thereof after the respondent was notified as a financial institution. It is in such a factual scenario that this Court had the occasion to observe, upon noticing cleavage of judicial opinion at the level of several high courts, as follows:

“35. The issue of whether resort can be had to Section 13 of the SARFAESI Act in respect of debts which have arisen out of a loan agreement/mortgage created prior to the application of the

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<sup>14</sup> (2017) 16 SCC 741

SARFAESI Act to the respondent, though urged before us, appears really not to have been canvassed before the learned Single Judge of the Delhi High Court. At least, it finds no substantive mention. We, however, are of the view that in the larger interest of settling the question of law, this issue is also required to be dealt with.

36. The SARFAESI Act was brought into force to solve the problem of recovery of large debts in NPAs. Thus, the very rationale for the said Act to be brought into force was to provide an expeditious procedure where there was a security interest. It certainly did not apply retrospectively from the date when it came into force. The question is whether the Act being applicable to the respondent at a subsequent date and thereby allowing the respondent to utilise its provisions with regard to a past debt, would make any difference to this principle. We are of the view that the answer to the same is in the negative.

37. The Act applies to all the claims which would be alive at the time when it was brought into force. Thus, qua the respondent or other NBFCs, it would be applicable similarly from the date when it was so made applicable to them.

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42. Similarly, the date on which a debt is declared as an NPA would again have no impact. We are, thus, of the view that the provisions of the SARFAESI Act would become applicable qua all debts owing and live when the Act became applicable to the respondent in terms of the parameters contended by the learned Senior Counsel for the respondent and enlisted at Serial Nos. (i) to (iv) in para 18.<sup>15</sup>

**32.** What follows from the above is that there has to be creation of a security interest. Security interest is defined in Section 2(1)(zf) as follows:

(zf). "security interest" means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes-

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<sup>15</sup> For completeness of understanding, paragraph 18 is quoted below:

18. On behalf of the respondent, Mr \*\*\*, Senior Advocate contended that the effect of notifying the respondent as an NBFC to which the SARFAESI Act applies, would imply that the provisions of the said Act can be used to take recourse to any live and actionable debt i.e. a debt in praesenti. In order to invoke the provision, it was submitted, four factors are of significance:

- (i) Existence of a present actionable debt;
- (ii) Status of the person invoking the jurisdiction is that of a secured creditor;
- (iii) Assets have been secured in satisfaction of the debt; and
- (iv) That the debtor/borrower should have been declared an NPA.

- (i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or
- (ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset;

- 33.** We reiterate, no security interest in respect of any property (secured asset) was created in favour of the Corporation within the meaning of the SARFAESI Act and, therefore, the Corporation is not a secured creditor. The law laid down in ***M.D. Frozen Foods Exports Private Limited*** (supra) has to be read in the light of the facts present in the appeal before this Court and the issues that arose for consideration.
- 34.** ***UCO Bank v. Deepak Debbarma***<sup>16</sup> is the next decision. The facts leading to the sale conducted by the appellant-bank are not discussed in detail. However, since the process of recovery had culminated in issuance of a sale certificate, which was under challenge in a writ petition before the relevant high court and the challenge had succeeded, we can presume creation of a security interest in terms of the SARFAESI Act. In the present case, no security interest was created by any security agreement in favour of the Corporation. This Court while reversing the decision under challenge was not required

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<sup>16</sup> (2017) 2 SCC 585

to deal with a question that we are *in seisin*. In our opinion, reliance placed on **UCO Bank** (supra) is misplaced.

- 35.** The last decision which we wish to touch upon is **United Bank of India v. Satyawati Tondon**<sup>17</sup>. The following observations of this Court was placed before us with great emphasis:

“It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues.”

- 36.** The aforesaid observation would have no application in a case of the present nature where there is no security agreement by which security interest has been created in favour of a secured creditor. Once we have held that the SARFAESI Act was erroneously invoked by the Corporation and that such invocation was without jurisdiction, there is no question of relegating the Company to the Debts Recovery Tribunal under Section 17 of the SARFAESI Act.

### **CONCLUSION**

- 37.** For the reasons aforesaid, we agree with the Division Bench and uphold the impugned judgment and order. The appeal stands dismissed, leaving it open to the Corporation to pursue/seek remedies against the Company or the Council in accordance with law.
- 38.** Since the Council is not a respondent before us, any observation made in this judgment may not be read as foreclosing any lawful plea

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<sup>17</sup> (2010) 8 SCC 110

that the Council might raise in proceedings that are initiated against it by the Corporation.

**39.** Parties shall bear their own costs.

.....**J.**  
**(DIPANKAR DATTA)**

.....**J.**  
**(ARAVIND KUMAR)**

**NEW DELHI;**  
**DECEMBER 16, 2025.**