M/S TRANSCORE

v.

UNION OF INDIA AND ANR.

NOVEMBER 29, 2006

[ARIJIT PASAYAT AND S.H. KAPADIA, JJ.]

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002:

Section 13(4)—Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (inserted by amending Act 30 of 2004)—Section 19(1) first proviso—Recovery of bank dues—Recourse to 2002 Act—Withdrawal of original application in terms of the first proviso to section 19(1)—Held: Is not a condition precedent—Bank having elected to seek their remedy in terms of DRT Act can still invoke 2002 Act for realizing secured assets without withdrawing application filed before DRT—It's the discretion of the Bank—Doctrine of election is not applicable—Code of Civil Procedure, 1908—Order XXIII, Rule 1(3).

Sections 13(4), 13(8) and 17(3)—Recovery of dues by secured creditor—Possession of secured assets of borrower under section 13(4)—Power of, secured creditor—Scope of—Held: 2002 Act provides for recovery of possession by non-adjudicatory process—If dues of secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, asset shall not be sold or transferred—Till the time of issuance of sale certificate, Authorised Officer is like a court receiver who can take symbolic possession—Where court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree—Authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of banks/FIs—Thus, the dichotomy between symbolic and actual possession does not find place in the Act read with the Rules—Security Interest (Enforcement) Rules, 2002—Rules 8 and 9—Code of Civil Procedure, 1908—Order XL Rule 1.

Sections 13(4), 17(1) and 40—Securitisation and Reconstruction of

A *Financial Assets and Enforcement of Security Interest (Removal of Difficulties) Order, 2004—Action by Banks or financial institutions under section 13(4) against borrowers—Challenged by borrowers—Application to DRT under section 17(1) as amended by Act 30 of 2004 w.e.f 11.11.04—***Ad valorem** *court fee prescribed under Rule 7 of 1993 Rules—Levy of—Borrower's case that section 17(1) provides for prescribing fees for application under section*
B *17(1) and since no Rule framed thereunder, after 11.11.2004, fees not leviable under Order 2004 dated 6.4.2004, being redundant—Held: Since fees not prescribed by Rules after 11.11.2004, it cannot be said that fees cannot be levied on the basis of Order 2004 which was there prior to 11.11.2004—Order 2004 dated 6.4.2004 does not alter the scheme of amended Act—It*
C *merely fills in the deficiency—Debts Recovery Tribunal (Procedure) Rules, 1993.*

Bank filed original application before Debt Recovery Tribunal for recovery of dues from the appellant company. Claim was disputed. Bank filed an interlocutory application in the O.A. to bring the properties to sale. In
D **2003, a notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (NPA Act) was issued. On 11.11.2004, proviso to section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was inserted by amending Act 30 of 2004 that the bank or financial institution may, with the permission**
E **of Debts Recovery Tribunal, on an application made by it, withdraw the application, for taking action under the NPA Act, if no such action had been taken earlier under that Act. Thereafter, bank issued possession notice under section 13(4) of the NPA Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 that since the appellant had failed to repay the amount the bank had taken possession of the immovable properties.**

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The question which arose for consideration in these appeal were:

(i) Whether withdrawal of O.A. in terms of the first proviso to section 19(1) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (inserted by the Amending Act No.30 of 2004) is a condition precedent
G **to recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.**

(ii) Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

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(iii) Whether *ad valorem* court fee prescribed under Rule 7 of the DRT (Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the said Act. A

Allowing the Banks/FI's appeal/I.A and dismissing the borrower's appeal/I.A., the Court B

HELD: 1.1. The withdrawal of the O.A. pending before DRT under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is not a pre-condition for taking recourse to Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (NPA Act). It is for the bank/FI 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. C [825-D-E]

1.2. The NPA Act is enacted for quick enforcement of the security. The Act deals with enforcement of the rights vested in the bank/ FI. The NPA Act proceeds on the basis that security interest vests in the bank/FI. Sections 5 and 9 of NPA Act is also important for preservation of the value of the assets D of the banks/ FIs. Quick recovery of debt is important. It is the object of DRT Act as well as NPA Act. But under NPA Act, authority is given to the banks/ FIs, which is not there in the DRT Act, to assign the secured interest to securitisation company/asset reconstruction company. In cases where the borrower has bought an asset with the finance of the bank/ FI, the latter is E treated as a lender and on assignment the securitisation company/asset reconstruction company steps into the shoes of the lender bank/ FI and it can recover the lent amounts from the borrower. [822-F-H; 823-A]

Snell's Equity Thirty-first edition p 777, referred to. F

1.3. When section 13(4) talks about taking possession of the secured assets or management of the business of the borrower, it is because a right is created by the borrower in favour of the bank/ FI when he takes a loan secured by pledge, hypothecation, mortgage or charge. Equity, exists in the bank/FI and not in the borrower. Therefore, apart from obligation to repay, the borrower undertakes to keep the margin and the value of the securities G hypothecated so that there is no mis-match between the asset-liability in the books of the bank/FI. This obligation is different and distinct from the obligation to repay. It is the former obligation of the borrower which attracts the provisions of NPA Act which seeks to enforce it by measures mentioned in Section 13(4) of NPA Act, which measures are not contemplated by DRT H

A Act and, therefore, it is wrong to say that the two Acts provide parallel remedies. The remedy under DRT Act falls short as compared to NPA Act which refers to acquisition and assignment of the receivables to the asset reconstruction company and which authorizes banks/ FIs. to take possession or to take over management which is not there in the DRT Act. It is for this reason that NPA Act is treated as an additional remedy (Section 37), which is B not inconsistent with the DRT Act. [823-E-F; 824-A-D]

1.4. The NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of C Section 13 of NPA Act is recovery by non-adjudicatory process. A secured asset under NPA Act is an asset in which interest is created by the borrower in favour of the bank/ FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also D failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of NPA Act. It is for this reason that Sections 13(1) and 13(2) of the NPA Act proceeds on the basis that security interest in the bank/ FI needs to be enforced expeditiously without the intervention of the court/ tribunal; that liability of the borrower has accrued and on account of default E in repayment, the account of the borrower in the books of the bank has become non-performing. NPA Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor. [824-G-H; 825-A-D]

F 1.5. The DRT is a tribunal, it is the creature of the statute, it has no inherent power which exists in the civil courts. Order XXIII Rule 1 (3) CPC states *inter alia* that where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim then the civil court may, on such terms as it thinks fit, grant the plaintiff permission to withdraw the entire suit or such part of G the claim with liberty to institute a fresh suit in respect thereof. Under Order XXIII Rule 1(1)(4)(b), in cases where a suit is withdrawn without the permission of the court, the plaintiff shall be precluded for instituting any fresh suit in respect of such subject-matter. Order XXIII Rule 2 states that any fresh suit instituted on permission granted shall not exclude limitation H and the plaintiff should be bound by law of limitation as if the first suit had

not been instituted. Order XXIII Rule 3 deals with compromise of suits. It states that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith. [825-D-G]

1.6. The object behind introducing the first proviso and the third proviso to Section 19(1) of the DRT Act is to align the provisions of DRT Act, the NPA Act and Order XXIII CPC. Let it be assumed that an O.A. is filed in the DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account. After filing of O.A., on account of non disposal of the O.A. by the tribunal due to heavy backlog, the bank finds that one of the three accounts has become sub-standard/ loss, in such a case the bank can invoke the NPA Act with or without the permission of the DRT. One cannot lose sight of the fact that even an application for withdrawal/leave takes time for its disposal. With inflation in the economy, value of the pledged property/asset depreciate on day to day basis. If the borrower does not provide additional asset and the value of the asset pledged keeps on falling then to that extent the account becomes non-performing. Therefore, the bank/ FI is required to move under NPA Act expeditiously by taking one of the measures by Section 13(4) of the NPA Act. Moreover, Order XXIII CPC is an exception to the common law principle of non-suit, hence the proviso to Section 19(1) became a necessity. [825-H; 826-A-D]

Mardia Chemicals Ltd. and Ors. v. *Union of India and Ors.*, [2004] 4 SCC 311, referred to.

1.7. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. If in truth there is only one remedy, then the doctrine of election does not apply. In the instant case, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. The doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application. [824-D-F]

A *American Jurisprudence* 2d, Vol. 25, p 652; *Snell's Equity* Thirty-first edition p 119, referred to.

2.1. The word possession is a relative concept. It is not an absolute concept. There is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned B (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts C the intervention of the courts/tribunals. [827-F-H]

2.2. Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the D secured assets including the right to transfer by way of lease, assignment or sale for realizing the secured assets. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4-A). [828-A-B]

2.3. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) E states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the F borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the *status quo ante.* Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the G dispute adjudicated upon is defeated by the authorised officer taking possession. The NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8 deals with sale of immovable secured assets. [828-E-H; 829-A]

H 2.4. Under Section 13(8), if the dues of the secured creditor together

with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL Rule 1 CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorized officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a *bona fide* purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules. [829-B-F]

3.1. Section 17(1) of the NPA Act states *inter alia* that a borrower aggrieved by action taken under Section 13(4) may make an application along with fees, as may be prescribed to the DRT having jurisdiction in the matter. The marginal note states that Section 17(1) is a right to appeal. The marginal notes under section 17(1) cannot control the text and the content of Section 17(1) which states that the borrower aggrieved by any of the measures in Section 13(4) may make an application to the DRT. In fact, the proviso to Section 17(1) indicates that different fees may be prescribed for making an application by the borrower. The reason is obvious. Certain measures taken under Section 13(4) like taking over the management of the fee *vis-a-vis* the secured creditor taking possession of financial assets have to bear different fees. Each measure is required to be separately charged to the borrower-applicant for which different fees could be prescribed. The said proviso indicates that the tribunal under Section 17(1) exercises Original Jurisdiction and, therefore, as far as the fees are concerned, the terminology of original or appellate jurisdiction in the context of fees is irrelevant. [831-A-D]

3.2. Under the Order 2004 issued by the Central Government under Section 40 of the NPA Act, it is provided that the fee for filing an appeal to the DRT under Section 17(1) of NPA Act shall be *mutatis mutandis* as provided for filing an application to the DRT under Rule 7 of the 1993 Rules. The word *mutatis mutandis* indicates that a measure is adopted for assessing the fees required to be paid by the borrower when he applies by way of application to the DRT under Section 17(1) of NPA Act challenging the action taken under Section 13(4) of NPA Act by the secured creditor. With regard to the submission of the borrowers that since section 17(1) of NPA Act, as amended, provides for prescribing fees for an application under Section 17(1) and since no rule has been framed under the NPA Act after 11.11.2004 fees cannot be levied under the Order 2004 dated 6.4.2004 which, according to the borrower, has come to an end after 11.11.2004 with the enactment of the amending Act 30 of 2004, it cannot be said that since fees have not been prescribed by the rules after 11.11.2004, fees cannot be levied on the basis of the Order 2004 which was there prior to 11.11.2004. [831-D-G]

3.3. The 2004 Order was issued with the object of supplying a deficiency, namely, levy of fees. By such levy of fees, the nature and scope of the NPA Act is not altered. The 2004 Order has been issued after the enactment of NPA Act. After the amending Act 30 of 2004, certain amendments have been made in Section 17(1) of NPA Act. However, the 2004 Order dated 6.4.2004 does not, in any way, alter the scheme of the amended Act. It merely fills in the deficiency and, therefore, the 2004 Order will continue to operate even after the amending Act 30 of 2004 and till rules are prescribed in terms of Section 2(s) of the NPA Act. [834-C-E]

Madeva Upendra Sinai and Ors. **v.** *Union of India and Ors.*, **relied on.**

National Insurance Co. Ltd. **v.** *Mastan and Anr.*, **[2006] 2 SCC 641 and** *A.P. State Financial Corporation* **v.** *M/s Gar Re-Rolling Mills and Anr.* **[1994]2 SCC 647, distinguished.**

Mardia Chemicals Ltd. and Ors. **v.** *Union of India and Ors.*, **[2004] 4 SCC 311, referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3228 of 2006.

From the Judgment and Order dated 27.7.2005 of the High Court of Judicature at Madras in W.P. 1565/2005.

WITH

Civil Appeal Nos. 1374/06, 2841/06, 3225/06, 3226/06 and 908/06.

Soli J. Sorabjee, Ranjit Kumar, C.A. Sundram, K.V. Viswanathan, Atul Kumar Sinha, B. Raghunath, Rajeev Kumar, Devendra Singh, Gautam Awasthi, D. Mahesh Babu, Himanshu Munshi, Ms. J.S. Wad, Ashish Wad, Neeraj Kumar, Arvind Gupta (for J.S. Wad & Co.), S.S. Ray, Rakhi Ray, Dhruv Mehta, Harshvardhan Jha, Yashraj Deora and Manoj Mehta (for M/s. K.L. Mehta) for the Appellant. A

B

K.N. Bhatt, Rajiv Shakdhar, D. Dave, K.N. Balgopal, Ajit Pudussery, Avinash Kumar, K. Vijayan, Rashi Malhotra, I. Bishnu (for M/s. Suresh A. Shroff & Co.), Ramesh Singh, Nina Gupta, Ms. Shweta Chadha, Akansha, A.K. Jaiswal, Rajesh K. Sharma, Shalu Sharma, Senthil Jagdeesan and A.P. Mohanty for the Respondents.

C

Pankaj Gupta, Pramod Dayal, N.C. Sahni and Y.P. Dhingra for Intervention.

The Judgment of the Court was delivered by

KAPADIA, J. A short question of public importance arises for determination, namely, whether withdrawal of O.A. in terms of the first proviso to Section 19(1) of the DRT Act, 1993 (inserted by the Amending Act No.30 of 2004) is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("NPA Act" for short). D

Facts in Civil Appeal No. 3228 of 2006: E

Since the above question arises in a batch of matters, for the sake of convenience, we refer briefly to the facts in civil appeal No. 3228/06, in which M/s Transco is the appellant.

In March 1999, O.A. No. 354/99 was filed by Indian Overseas Bank ("the bank") before the DRT, Chennai for recovery of dues from M/s Transcore-appellant herein. The claim was disputed. An interlocutory application was filed by the bank in the said O.A. to bring the properties to sell. That I.A. is pending even today. F

On 6.1.2003, a notice under Section 13(2) of the NPA Act was issued. On 11.11.2004 the following provisos were introduced in Section 19(1) of the DRT Act *vide* amending Act 30 of 2004: G

> "Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made H

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

B

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

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

D On 8.1.2005, the said bank issued Possession Notice under Section 13(4) of the NPA Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 ("2002 Rules") stating that, *vide* notice dated 6.1.2003, the appellant herein (M/s Transcore) was called upon to repay an amount of Rs. 4.15 crore (approximately) together with interest within sixty days; that the appellant had E failed to repay the amount; that a notice was also given to the guarantor; that the bank had taken possession of the immovable properties mentioned in the schedule to the Notice; and, that the appellant and the guarantor were directed not to deal with those immovable properties. By the said Possession Notice, the public in general were also told not to deal with the properties mentioned in the Notice as they were subject to the charge of the bank for the aforesaid F amount with interest and cost. The immovable properties were put to auction. However, pending civil appeal, confirmation of auction sale had been stayed.

As far as M/s Transcore, the appellant herein, is concerned, the argument is that the respondent-bank (Indian Overseas Bank) could not have invoked the NPA Act under the above proviso to Section 19(1) of the DRT Act G without the prior permission of the Tribunal before whom O.A. 354/99 was pending. The contention of the appellant is, that prior to the insertion of the proviso on 11.11.2004, the bank had issued a show cause notice under Section 13(2) of the NPA Act; that Notice dated 6.1.2003 was merely a show cause notice and such a Notice did not constitute an action in terms of the H first proviso to the said Section 19(1) of the DRT Act. Briefly, the first proviso

states that, the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the O.A. made before or after the amending Act 30 of 2004 for the purpose of taking action under the NPA Act, 2002, *if no such action had been taken earlier under that Act.* The contention of the borrower is that the Notice given by the bank on 6.1.2003 was merely a show cause notice and such notice did not constitute "action" in terms of the said proviso. Consequently, according to the appellant, the said bank was duty bound and obliged to make an application to the DRT seeking withdrawal of O.A. No. 354/99. The appellant contends that, in the present case, the proviso has not been complied with by the bank and, consequently, the Possession Notice/Order issued by the authorised officer of the bank under Section 13(4) dated 8.1.2005 was illegal and bad in law and liable to be set aside as the said bank could not have invoked the NPA Act without prior permission/ leave of the DRT under the said proviso to Section 19(1) of the DRT Act.

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At this point, it may be noted that, according to the banks appearing before us, the contention raised is, that the said proviso is an enabling provision; that banks and financial institutions have an independent right to recover debts; that the purpose behind enactment of the NPA Act was to obliterate all fetters on their right to recover the debt which earlier existed in the form of Sections 69 and 69A of the Transfer of Property Act, 1882 ("TP Act"), and consequently, the option lay with the banks/ FIs to invoke or not to invoke the NPA Act. According to the banks/FIs, they were not mandatorily obliged to obtain the prior leave of DRT and that the said proviso is not a condition precedent to taking recourse to the NPA Act.

D

E

What is Securitisation ?

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Securitisation of credit exposures of Banks and Credit Institutions involves a transfer of outstanding balances in Loans/Advances and packaging into transferable and tradable securities.

Mr. Joel Telpner has succinctly defined securitisation as under:

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"Securitisation is a financing tool. It involves creating, combining and recombining of assets and securities."

Basel Accord II has considered securitisation in a broader perspective saying: "A Traditional Securitisation is a structure where the cash flow from an underlying pool of exposures is used to service at least two different

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A stratified risk positions or trenches reflecting different degrees of credit risk. Payments to the investors depend upon the performance of the specified underlying exposures, as opposed to being derived from an obligation of the entity originating those exposures".

In the context of securitisation of Standard Assets, Reserve Bank of B India has defined securitisation as "a process by which a single performing asset or a pool of performing assets are sold...."

Reasons for Enactment of the NPA Act, 2002:

The NPA Act, 2002 is enacted to regulate securitisation and C reconstruction of financial assets and enforcement of security interest and for matters connected therewith. The NPA Act enables the banks and FI to realise long-term assets, manage problems of liquidity, *asset liability mismatch* and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets D by adopting measures for recovery and reconstruction. The NPA Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. The said Act also empowers the said asset reconstruction companies to take over the management of the business of the borrower. The constitutional validity of the said Act has been E upheld in the case of *Mardia Chemicals Ltd. and Ors.* v. *Union of India and Ors.*, reported in [2004] 4 SCC 311. After the judgment of this Court in Mardia Chemicals, the amending Act 30 of 2004 was inserted. By the said Act 30 of 2004, Section 19(1) of the DRT Act was recasted simultaneously with section 13 of the NPA Act, 2002. These amendments were made in order to enable F the banks/FIs. to withdraw, with the permission of DRT, the O.As. made to it, and thereafter take action under the NPA Act. In the judgment in *Mardia Chemicals* (supra) this Court observed that, in cases where a secured creditor has taken *action* under Section 13(4), it would be open to the borrower to file an application under Section 17 of the NPA Act. In the said judgment, this Court further observed that if the borrower, after service of notice under G Section 13(2) of the NPA Act, raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered by the bank/FI with due application of mind and reasons for not accepting the objections briefly must be given to the borrower. In the said judgment, it is further stated that the reasons so communicated shall only be for the purposes of information/ knowledge of the creditor and such reasons H

will not give him any right to approach the Tribunal under Section 17 of the NPA Act. The appellant herein (M/s Transcore) mainly relied on the said reasons given by this Court in *Mardia Chemicals* (supra) in support of its contention that the Notice dated 6.1.2003 under Section 13(2) of NPA Act was merely a show cause notice and it did not constitute "action" under the NPA Act and, therefore, the said bank was obliged statutorily to apply for withdrawal of O.A. No. 354/99 before invoking the NPA Act.

Non-Performing Assets (NPA) is a cost to the economy. When the Act was enacted in 2002, the NPA stood at Rs. 1.10 lac crore. This was a drag on the economy. Basically, NPA is an account which becomes non-viable and non-performing in terms of the guidelines given by the RBI. As stated in the Statement of Objects and Reasons, NPA arises on account of mis-match between asset and liability. The NPA account is an asset in the hands of the bank or FI. It represents an amount receivable and realizable by the banks or FIs. In that sense, it is an asset in the hands of the secured creditor. Therefore, the NPA Act, 2002 was primarily enacted to reduce the non-performing assets by adopting measures not only for recovery but also for reconstruction. Therefore, the Act provides for setting up of asset reconstruction companies, special purpose vehicles, asset management companies etc. which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. It also provides for realization of the secured assets. It also provides for take over of the management of the borrower company.

There is one more reason for enacting NPA Act, 2002. When the civil courts failed to expeditiously decide suits filed by the banks/FIs., Parliament enacted the DRT Act, 1993. However, the DRT did not provide for assignment of debts to securitization companies. The secured assets also could not be liquidated in time. In order to empower banks or FIs. to liquidate the assets and the secured interest, the NPA Act is enacted in 2002. The enactment of NPA Act is, therefore, not in derogation of the DRT Act. The NPA Act removes the fetters which were in existence on the rights of the secured creditors. The NPA Act is inspired by the provisions of the State Financial Corporations Act, 1951 ("SFC Act"), in particular Sections 29 and 31 thereof. The NPA Act proceeds on the basis that the liability of the borrower to repay has crystallized; that the debt has become due and that on account of delay the account of the borrower has become sub-standard and non-performing. The object of the DRT Act as well as the NPA Act is recovery of debt by non-adjudicatory process. These two enactments provide for cumulative

A remedies to the secured creditors. By removing all fetters on the rights of the secured creditor, he is given a right to choose one or more of the cumulative remedies. The object behind Section 13 of the NPA Act and Section 17 r/w Section 19 of the DRT Act is the same, namely, recovery of debt. Conceptually, there is no inherent or implied inconsistency between the two remedies. Therefore, as stated above, the object behind the enactment of the NPA Act
B is to accelerate the process of recovery of debt and to remove deficiencies/ obstacles in the way of realisation of debt under the DRT Act by the enactment of the NPA Act, 2002.

Analysis of the DRT Act, 1993:

C The DRT Act, 1993 has been enacted to provide for the establishment of Tribunals for expeditious adjudication and recovery of debts due to banks/ FIs.

Section 2(g) defines a 'debt' to mean any liability which is claimed as
D dues from any person by a bank, FI or by a consortium of banks. It covers secured, unsecured and assigned debts. It also covers debts payable under a decree, arbitration award or under a mortgage.

Chapter III deals with jurisdiction, powers and authority of DRT. Section 17 refers to jurisdiction of DRT. Section 17 states that DRT shall exercise the
E jurisdiction, powers and authority to entertain and decide applications from the banks and FIs. for *recovery of debts due* to such banks/ FIs. (emphasis supplied). Section 19 of the Act *inter alia* states that where a bank or FI has to recover any debt, it may make an application to the DRT. By amending Act 30 of 2004, the three provisos were inserted in Section 19(1). Under the first proviso, the bank or FI may, with the permission of the DRT, on an application
F made by it, withdraw the O.A. for the purpose of taking action under the NPA Act, *if no such action has been taken earlier under that Act.* Under the second proviso, it is further provided that, any application made for withdrawal to the DRT under the first proviso shall be dealt with expeditiously and shall be disposed of within thirty days from the date of such application. The
G reason is obvious. Under Section 36 of the NPA Act the bank of FI is entitled to take steps under section 13(4) in respect of the financial asset provided it is made within the period of limitation prescribed under the Limitation Act, 1963. Therefore, the second proviso to Section 19(1) states that the DRT shall decide the withdrawal application as far as possible within thirty days from the date of application by the bank or FI. The third proviso to Section 19(1)
H states that in case the DRT refuses to grant permission/ leave for withdrawal,

it shall give reasons thereof. Section 19(6) provides for the defendant's claim to set-off against the bank's demand for a certain sum of money. Similarly, Section 19(8) gives right to the defendant to set a counter claim. Section 19(12) empowers the DRT to make an interim order by way of injunction, stay or attachment before judgment debarring the defendant from transferring, alienating or otherwise deal with, or disposing of, his properties and assets. This can be done only with the prior permission of the DRT. Under Section 19(13), the DRT is empowered to direct the defendant to furnish security in cases where the DRT is satisfied that the defendant is likely to dispose of the property or cause damage to the property in order to defeat the decree which may ultimately be passed in favour of the bank or FI. Under Section 19(18) the DRT is also empowered on grounds of equity to appoint a receiver of any property, before or after grant of certificate for recovery of debt. Under Section 19(19), a recovery certificate issued against a company can be enforced by the DRT which can order the property to be sold and the sale proceeds to be distributed amongst the secured creditors in accordance with the provisions of Section 529-A of the Companies Act, 1956 and pay the balance/ surplus, if any, to the debtor-company. Section 20 of the DRT Act provides for appeal to the Appellate Tribunal. Section 21 deals with the necessity of the applicant to pre-deposit seventy-five per cent of the amount of debt due from him as determined by the DRT under Section 19. Section 25 refers to modes of recovery of debts. It provides for three modes, namely, (a) attachment and sale; (b) arrest of the defendant; and (c) appointment of a receiver for the management of the properties of the defendant. There are other modes of recovery contemplated by Section 28 which states that where a certificate has been issued by the DRT to the Recovery Officer under Section 19(7), the Recovery Officer may, without prejudice to the modes of recovery specified in Section 25, recover the amount of debt by any one or more of the modes mentioned in Section 28. Section 29 of the DRT Act incorporates provisions of the Second and Third Schedules to the Income Tax Act, 1961.

On analysing the above provisions of the DRT Act, we find that the said Act is a complete Code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. It incorporates even the provisions of the Second and Third Schedules to the Income Tax Act, 1961. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other. The DRT Act provides for adjudication. It provides for adjudication of disputes as far as the debt due is concerned. It covers secured as well as unsecured debts. However, it does not rule out applicability of the provisions of the TP Act,

A in particular Sections 69 and 69A of that Act. Further in cases where the debt is secured by pledge of shares or immovable properties, with the passage of time and delay in the DRT proceedings, the value of the pledged assets or mortgaged properties invariably falls. On account of inflation, value of the assets in the hands of the bank/FI invariably depletes which, in turn, leads to asset liability mis-match. These contingencies are not taken care of by the B DRT Act and, therefore, Parliament had to enact the NPA Act, 2002.

Analysis of the NPA Act, 2002:

We have already discussed the Statement of Objects and Reasons for enacting the NPA Act, we need not repeat. The NPA Act has been enacted C to regulate securitisation and to provide for reconstruction of financial assets. It also provides for enforcement of security interest and for matters connected therewith.

Section 2(b) defines "asset reconstruction" to mean acquisition by any securitisation company or reconstruction company *of any right or interest of* D *any bank or financial institution in any financial assistance* for the purpose of realisation of such financial assistance. Section 2(f) defines the word "borrower" to mean the principal borrower who is granted financial assistance by any bank or FI and includes a guarantor, a mortgagor as well as a pledgor. It also includes a person who becomes a borrower of an asset reconstruction E company consequent upon acquisition by it of the rights or interest of any bank or FI in relation to financial assistance. The word "debt" is also defined under Section 2(ha) to mean the debt as defined under the DRT Act. Section 2(k) defines "financial assistance" to mean any loan or advance or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or FI. Therefore, F asset reconstruction means acquisition by asset reconstruction company or asset management company of any right or interest created in favour of any bank or FI in any loan or advance granted or created in any debentures or bonds subscribed or guarantee given to the bank or FI or rights created in favour of the bank or FI under letters of credit. This shows that the NPA Act G basically deals with a crystallized liability. The NPA Act proceeds on the basis that the asset is created in favour of the bank/FI which could be assigned to the asset management company or asset reconstruction company which, in turn, steps into the shoes of the secured creditor, namely the bank/ FI. Section 2(l) defines "financial asset" to mean any debt or receivables. It includes a claim to any debt or receivables which may be secured or unsecured. H

It includes a mortgage, charge, hypothecation or pledge. It includes any right or interest in the security underlying such debt or receivables. It includes any beneficial interest in the property. It also includes any financial assistance. Section 2(n) defines hypothecation to mean a charge created by a borrower in favour of a secured creditor as a security for financial assistance. Section 2(o) defines non-performing asset to mean an asset or account of a borrower which has been classified by a bank or FI as sub-standard, doubtful or loss asset. Section 2(r) defines the word "originator" to mean the owner of a financial asset which is acquired by a reconstruction company or asset management company for the purposes of the NPA Act. Similarly, an obligor is defined under Section 2(q) to mean a person who is liable to the originator. A borrower is an obligor whereas a secured creditor, namely, a bank or FI is the originator who is the owner of a financial asset. This section also indicates that banks/ FIs. are the owners of the financial assets. It is only when these assets in the hands of the bank or FI becomes sub-standard, doubtful or loss then the account or the asset becomes classifiable as a non-performing asset and it is only then the NPA Act comes into operation. Section 2(z) defines securitisation to mean acquisition of financial assets by any asset reconstruction company from any originator (bank/FI). Section 2(zc) defines secured asset to mean the property on which security interest is created. Section 2(zd) defines secured creditor to mean any bank or FI. Section 2(ze) defines a secured debt to mean a debt which is secured by any security interest. Section 2(zf) defines security interest to means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation and assignment. Section 31 of the NPA Act excludes certain items of security interest from the provisions of the NPA Act.

Section 5 of the NPA Act deals with acquisition of rights or interest in financial assets by securitisation company or reconstruction company. Section 5A was introduced by Act 30 of 2004. It says that, if any financial asset, of a borrower is acquired by a securitisation company or reconstruction company and if such financial asset comprise of secured debts of more than one bank or FI for recovery of which such banks or FIs. has filed applications before two or more DRTs. then the securitisation company or reconstruction company may file an application to the DRT having jurisdiction for transfer of all pending applications to any one of the several DRTs. as it deems fit. Section 5A gives a clue as to the cases in which leave is required to be obtained from DRT by banks/ FIs. before invoking the NPA Act. Section 5A indicates

matters which attract the first proviso to Section 19(1) of DRT Act. Section 6 of the NPA Act *inter alia* states that the bank or FI may, if it considers appropriate, give a notice of acquisition of financial assets by any securitisation company or reconstruction company to the borrower and to any other concerned person. This is also an enabling provision. The bank/FI may or may not give notice to the borrower regarding acquisition of financial assets. The reason is that assets are transferable overnight. In certain cases, the bank/FI may feel that a third party right may be created by the borrower, in which event, the bank/FI may not give notice of acquisition. In other cases, it may give such notice if it is satisfied that the financial asset is not likely to be disposed of or alienated by the borrower. The point to be noted is that the scheme of NPA Act, whose constitutional validity is already upheld, provides for various enabling provisions. It gives discretion to the bank/FI to take steps in order to protect its assets from being alienated, transferred or disposed of in any other manner. Section 9 deals with various measures which a reconstruction company is required to take for assets reconstruction. Section 10 deals with the functions of securitisation company or reconstruction company. Section 11 deals with resolution of disputes relating to securitisation, reconstruction or non-payment of any amount due between the bank or FI or securitisation company or reconstruction company. It further states that such disputes shall be resolved by conciliation or arbitration. It is important to note that the dispute contemplated under Section 11 of NPA Act is not with the borrower. Section 12 empowers RBI to give directions from time to time. Classification of an account as non-performing asset has to be done by the bank of FI in terms of the guidelines issued by RBI.

Section 13 falls in Chapter III which deals with enforcement of security interest. It begins with a *non obstante* clause. It states *inter alia* that notwithstanding anything contained in Section 69 or Section 69A of the TP Act, any security interest created in favour of any secured creditor may be enforced, without the court's intervention, by such creditor in accordance with the provisions of this Act. When we refer to the word 'court', it includes DRT. We quote hereinbelow sub-section (2) of Section 13 of NPA Act:

"13. Enforcement of Security interest.-

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset,

then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4)." A

On reading Section 13(2), which is the heart of the controversy in the present case, one finds that if a borrower, *who is under a liability* to a secured creditor, *makes any default in repayment* of *secured debt* and his account in respect of such debt is classified as non-performing asset then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4). Reading Section 13(2) it is clear that the said sub-section proceeds on the basis that the borrower is already under a liability and further that, his account in the books of the bank or FI is classified as sub-standard, doubtful or loss. The NPA Act comes into force only when both these conditions are satisfied. Section 13(2) proceeds on the basis that the debt has become due. It proceeds on the basis that the account of the borrower in the books of bank/FI, which is an asset of the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual of liability, determination of liability and liquidation of liability. Section 13(2) deals with liquidation of liability. Section 13 deals with enforcement of security interest, therefore, the remedies of enforcement of security interest under the NPA Act and the DRT Act are complementary to each other. There is no inherent or implied inconsistency between these two remedies under the two different Acts. Therefore, the doctrine of election has no application in this case. Section 13(3) *inter alia* states that the notice under Section 13(2) shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank/ FI. In the event of non-payment of secured debts by the borrower, notice under Section 13(2) is given as a notice of demand. It is very similar to notice of demand under Section 156 of the Income Tax Act, 1961. After classification of an account as NPA, a last opportunity is given to the borrower of sixty days to repay the debt. Section 13(3-A) inserted by amending Act 30 of 2004 after the judgment of this Court in *Mardia Chemicals* (supra), whereby the borrower is permitted to make representation/ objection to the secured creditor against classification of his account as NPA. He can also object to the amount due if so advised. Under Section 13(3-A), if the bank/FI comes to the conclusion that such objection is not acceptable, it shall communicate within B C D E F G H

A one week the reasons for non-acceptance of the representation/ objection. A proviso is added to Section 13(3-A) which states that the reasons so communicated shall not confer any right upon the borrower to file an application to the DRT under Section 17. The scheme of sub-sections (2), (3) and (3-A) of Section 13 of NPA Act shows that the notice under Section 13(2) is not merely a show cause notice, it is a notice of demand. That notice of demand B is based on the footing that the debtor is under a liability and that his account in respect of such liability has become sub-standard, doubtful or loss. The identification of debt and the classification of the account as NPA is done in accordance with the guidelines issued by RBI. Such notice of demand, therefore, constitutes an action taken under the provisions of NPA Act and C such notice of demand cannot be compared to a show cause notice. In fact, because it is a notice of demand which constitutes an action, Section 13(3-A) provides for an opportunity to the borrower to make representation to the secured creditor. Section 13(2) is a condition precedent to the invocation of Section 13(4) of NPA Act by the bank/FI. Once the two conditions under Section 13(2) are fulfilled, the next step which the bank or FI is entitled to take D is either to take possession of the secured assets of the borrower or to take over management of the business of the borrower or to appoint any manager to manage the secured assets or require any person, who has acquired any of the secured assets from the borrower, to pay the secured creditor towards liquidation of the secured debt.

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Reading the scheme of Section 13(2) with Section 13(4), it is clear that the notice under Section 13(2) is not a mere show cause notice and it constitutes an action taken by the bank/ FI for the purposes of the NPA Act. Section 13(6) *inter alia* provides that any transfer of secured asset after taking possession or after taking over of management of the business, under Section F 13(4), by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured asset. Therefore, Section 13(6) *inter alia* provides that once the bank/FI takes possession of the secured asset, then the rights, title and interest in that asset can be dealt with by the bank/FI as if it is the owner of such an asset. In other words, the asset will vest in the bank/FI free of all encumbrances and the G secured creditor would be entitled to give a clear title to the transferee in respect thereof. Section 13(7) refers to recovery of all costs, charges and expenses incurred by the bank/FI for taking action under Section 13(4). Section *13*(7) provides for priority in the matter of recovery of dues from the borrower. It *inter alia* provides for payment of surplus to the person entitled H thereto. Section 13(8) *inter alia* states that if the dues of the secured creditor

together with all costs, charges and expenses incurred are tendered to the secured creditor before the debt fixed for sale/transfer, the secured asset shall not be sold or transferred by the bank/FI to the asset reconstruction company and no further steps shall be taken in that regard. Section 13(9) *inter alia* states that where a financial asset is funded by more than one bank/FI or in case of joint financing by a consortium, no single secured creditor from that consortium shall be entitled to exercise right under Section 13(4) unless exercise of such right is agreed upon by all the secured creditors. Section 13(9) provides for one more instance when permission of DRT may be required under the first proviso to Section 19(1) of the DRT Act. The agreement between the secured creditors in such cases is required to be placed before the DRT not as a fetter on the rights of the secured creditors but out of abundant caution. Generally, such agreements are complex in measure, particularly because rights of each of the secured creditor in the consortium may be required to be looked into. However, if before the DRT, all the secured creditors in such consortium enter into an agreement under Section 13(9) then no such further inquiry is required to be made by the DRT. In such cases, the DRT has only to see that all the secured creditors in the consortium are represented under the agreement. The point to be noted is that the scheme of the NPA Act does not deal with disputes between the secured creditors and the borrower. On the contrary, the NPA Act deals with the rights of the secured creditors *inter se*. The reason is that the NPA Act proceeds on the basis that the liability of the borrower has crystallized and that his account is classified as non-performing asset in the hands of the bank/FI. Section 13(9) also deals with *pari passu* charge of the workers under Section 529-A of the Companies Act, 1956, apart from banks and financial institutions, who are secured creditors. Section 13(10) *inter alia* states that where the dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application to DRT under Section 17 of the NPA Act for recovery of balance amount from the borrower. Section 13(10), therefore, shows that the bank/ FI is not only free to move under NPA Act with or without leave of DRT but having invoked NPA Act, liberty is given statutorily to the secured creditors (banks/ FIs.) to move the DRT under the DRT Act once again for recovery of the balance in cases where the action taken under Section 13(4) of the NPA Act does not result in full liquidation of recovery of the debts due to the secured creditors. Section 13(10) fortifies our view that the remedies for recovery of debts under the DRT Act and the NPA Act are complementary to each other. Further, Section 13(10) shows that the first proviso to Section 19(1) of DRT Act is an enabling provision and that the said provision cannot be read as a condition precedent to taking recourse

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A to NPA Act. Section 13(11) of the NPA Act *inter alia* states that, without prejudice to the rights conferred on the secured creditor under Section 13, the secured creditor shall be entitled to proceed against the guarantor/pledgor; that the secured creditor shall be entitled to sell the pledged assets without taking recourse under Section 13(4) against the principal borrower in relation to the secured assets under the NPA Act. Section 13(13) states that, no B borrower shall, after receipt of notice under Section 13(2), transfer by way of sale, lease or otherwise any of his secured assets referred to in the notice, without prior written consent of the secured creditor. Thus, Section 13(13) further fortifies our view that notice under Section 13(2) is not merely a show cause notice. In fact, Section 13(13) indicates that the notice under Section C 13(2) in effect operates as an attachment/ injunction restraining the borrower from disposing of the secured assets and, therefore, such a notice, which in the present case is dated 6.1.2003, is not a mere show cause notice but it is an action taken under the provision of the NPA Act.

Section 17 of NPA Act confers right to appeal. It *inter alia* states that D any person including borrower, aggrieved by exercise of rights by the secured creditor under Section 13(4), may make an application to the DRT as an appellate authority within forty-five days from the date on which action under Section 13(4) is taken. That application should be accompanied by payment of fees prescribed by the 2002 Rules made under the NPA Act. A proviso is E added to Section 17(1) by amending Act 30 of 2004. It states that different fees may be prescribed for making the application by the borrower and the person other than the borrower. By way of abundant caution, an Explanation is added to Section 17(1) saying that the communication of the reasons to the borrower by the secured creditor rejecting his representation shall not constitute a ground for appeal to the DRT. However, under Section 17(2), the F DRT is required to consider whether any of the measures referred to in Section 13(4) taken by the secured creditor for enforcement of security are in accordance with the provisions of the NPA Act and the Rules made thereunder. If the DRT, after examining the facts and circumstances of the case and the evidence produced by the parties, comes to the conclusion that any of the G measures taken under Section 13(4) are not in accordance with the NPA Act, it shall direct the secured creditor to restore the possession/management to the borrower [*vide* Section 17(3) of NPA Act]. On the other hand, after the DRT declares that the recourse taken by the secured creditor under Section 13(4) is in accordance with the provisions of the NPA Act then, notwithstanding anything contained in any other law for the time being in H force, the secured creditor shall be entitled to take recourse to any one or

more of the measures specified under Section 13(4) to recover his secured debt. A

In our view, Section 17(4) shows that the secured creditor is free to take recourse to any of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force, e.g., for the sake of argument, if in the given case the measures undertaken by the secured B creditor under Section 13(4) comes in conflict with, let us say the provision under the State land revenue law, then notwithstanding such conflict, the provision of Section 13(4) shall override the local law. This position also stands clarified by Section 35 of the NPA Act which states that the provisions of NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 is also important from another angle. As stated above, the C NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for enforcement of securities. Section 35 gives an overriding effect to the NPA Act with all other laws if such other laws are inconsistent with the NPA Act. As far as the present case is concerned, the remedies are complimentary to each other and, therefore, the doctrine of election has no D application to the present case.

In the present matter, there is a controversy with regard to payment of court fee in the matter of appeal to the Appellate Tribunal against the action taken under Section 13(4) of the NPA Act. In this connection, certain facts are required to be stated. On 21.06.2002 the NPA Act came into force. As E stated above, any person including borrower aggrieved by action taken under Section 13(4) of NPA Act is entitled to move the tribunal in appeal under Section 17(1) of NPA Act. The tribunal being established under Section 3(1) of the DRT Act. This aspect is important. The tribunal under the DRT Act is also the tribunal under the NPA Act. Under Section 19 of the DRT Act read F with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993 ("1993 Rules"), the applicant bank or FI has to pay fees for filing such application to DRT under the DRT Act and, similarly, a borrower, aggrieved by an action under Section 13(4) of NPA Act was entitled to prefer an application to the DRT under Section 17 of NPA. Similarly, the borrower was required to file an appeal to DRT under Section 18 of the NPA Act. For such appeals a borrower G was required to pay fees as prescribed by Section 20 of the DRT Act read with Rule 8 of the Debts Recovery Appellate Tribunal (Procedure) Rules, 1994 ("1994 Rules"). The Central Government, however, found that a borrower who was entitled to carry the matter further against the action taken under Section 13(4) was also required to pay court fees which give rise to difficulties and, H

A therefore, it enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Removal of Difficulties) Order, 2004 ("Order 2004") under Section 40 of the NPA Act to make provisions for levying fees in the matter of filing of application/appeal under Sections 17 and 18 of the NPA Act respectively. We quote hereinbelow the contents of the said Order, 2004:

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> "NOW, THEREFORE, in exercise of the powers conferred by sub-section (1) of section 40 of the said Act, the Central Government hereby makes the following Order to make the provisions of levying of the fee for filing of appeals under sections 17 and 18 of the said Act, being not inconsistent with the provisions of the Act, to remove the difficulty, namely: -
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> 1. *Short title and commencement.*-(i) This Order may be called THE SECURITISATION AND RECONSTRUCTION OF FINANCIAL ASSETS AND ENFORCEMENT OF SECURITY INTEREST (REMOVAL OF DEFFICULTIES) ORDER, 2004.
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> D
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> (ii) It shall come into force at once.
>
> 2. *Definition.* Debts Recovery Tribunal (Procedure) Rules, 1993 means the Debts Recovery Tribunal (Procedure) Rules, 1993 made under section 9 read with clause (e) of sub-section (2) of section 36 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.
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> E
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> 3. *Fee for filing of an appeal to Debts Recovery Tribunal.*- The fee for filing of an appeal to the Debts Recovery Tribunal under sub-section (1) of section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 shall be *mutatis mutandis* as provided for filing of an application to the Debts Recovery Tribunal under rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993.
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> F
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> 4. *Fee for filing of an appeal to Debts Recovery Appellate Tribunal.*- The fee for filing of an appeal to the Debts Recovery Appellate Tribunal under sub-section (1) of section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 shall be *mutatis mutandis* as provided for filing of an appeal to the Debts Recovery Appellate Tribunal under
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rule 8 of the Debts Recovery Appellate Tribunal (Procedure) Rules, 1994." A

It is interesting to note that the 2004 Order came into force with effect from 6.4.2004. This Order has continued even after amending Act 30 of 2004 which, as stated above, came into force with effect from 11.11.2004. As stated above, by the said amending Act 30 of 2004 an avenue to challenge was B provided to any person including a borrower, who is aggrieved by any of the measures taken by the secured creditor under Section 13(4), subject to his paying fees along with his application. The fee is to be levied in the manner prescribed. Under Section 2(s) of NPA Act, the word "prescribed" has been defined to mean prescribed by the Rules made under the NPA Act. Till today, C there are no rules prescribing the court fees for filing applications to the Tribunal under Section 17(1). Till today, the 2004 Order continues to operate, whose effect is considered hereinafter.

Points for determination:

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Three points arise for determination in these cases. They are as follows:

(i) Whether the banks or financial institutions having elected to seek their remedy in terms of DRT Act, 1993 can still invoke the NPA Act, 2002 for realizing the secured assets without withdrawing or abandoning the O.A. filed before the DRT under the DRT Act. E

(ii) Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

(iii) Whether *ad valorem* court fee prescribed under Rule 7 of the F DRT (Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the said Act.

Findings:

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(i) *On Point No. 1:*

Mr. K.V. Viswanathan, learned counsel for the appellant in the lead matter submitted that the banks or FIs. cannot be permitted to avail of the remedy under the NPA Act when they have already invoked the jurisdiction

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A of the DRT Act. He urged that it was mandatory for the respondent-bank (Indian Overseas Bank) to withdraw the said O.A. No. 354/99 before DRT before initiating action under the NPA Act. He urged, that Notice dated 6.1.2003 given by IOB under Section 13(2) of NPA Act, 2002 was a mere show cause notice; that it did not constitute action so as to exclude the applicability of the proviso to Section 19(1) of DRT Act, 1993; consequently, it was urged B that, on the facts of the present case, in the matter of M/s Transcore, the bank should have taken permission of the DRT for withdrawal of O.A. No. 354/99 before invoking the NPA Act. Elaborating this aspect, it was urged that NPA Act has been enacted to enforce the security interest without the intervention of the court and this implies that any intervention by way of OA already C resorted to should got out of the way before invoking NPA Act. Learned counsel submitted that the proviso to Section 19(1) of DRT Act inserted by amending Act 30 of 2004 was inserted precisely for the above purpose. In this connection, reliance was placed on the text of the proviso which states that the bank or FI may, with the permission of the DRT, withdraw the O.A. for the purpose of taking action under the NPA Act, if no such action had been D taken under the NPA Act. The point emphasized is that, the notice under Section 13(2) dated 6.1.2003 is the show cause notice, it is not an action in terms of the above proviso and, therefore, in the present case, the bank ought to have taken permission from the DRT before invoking the NPA Act. Similarly, in the said proviso the words are that the bank or FI may, with the permission E of the DRT, withdraw the OA for the purpose of taking action under the NPA Act, learned counsel urged that, this proviso read as a whole indicates applicability of the doctrine of election. Learned counsel urged that, the very object of enacting the proviso was that two parallel procedures cannot simultaneously be resorted to unless leave is granted in that regard by the DRT under the said proviso. According to the learned counsel, the second F proviso to Section 19(1) *inter alia* states that, the application made by the bank or FI seeking withdrawal of the OA shall be dealt with as expeditiously as possible. Reliance on second proviso was placed in support of the argument that, if the bank or FI is permitted to invoke both the remedies simultaneously, then the very object of expeditious disposal would stand defeated. It was G further urged that when NPA Act was enacted in 2002, Section 13(3-A) and the provisos to Section 19 of the DRT Act were not there on the statute book. The constitutional validity of the Act was upheld in *Mardia Chemicals* (supra). However, learned counsel invited our attention to Para 80 of the judgment of this Court in *Mardia Chemicals* (supra) which states that, before taking any action, a notice of sixty days was required to be given and after

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the measures under Section 13(4) of the NPA Act have been taken a mechanism had been provided under Section 17 of the NPA Act to approach the DRT. The object behind the above provisions was to give reasonable protection to the borrower. Placing reliance on Para 80 of the said judgment, learned counsel urged that in the said paragraph this Court has used the expression "action" in juxtaposition to the words "measures adopted under Section 13(4)", therefore, even this Court did not understand the word notice under Section 13(2) as "action" taken. Learned counsel urged that "action taken" under Section 13 of the NPA Act can only be the steps taken by the bank or FI under Section 13(4) and, therefore, notice of sixty days under Section 13(2) was a mere show cause notice which did not constitute action taken and, therefore, the proviso to Section 19(1) of the DRT Act was applicable in the facts and circumstances of the case in which M/s Transcore is the appellant. Learned counsel urged that, since the proviso had not been complied with, IOB was not entitled to invoke the NPA Act as it purported to do so vide notice dated 8.1.2005. Reliance was also placed on the provisions of Section 13(3-A) which enables the borrower to make any representation/ objection to the secured creditor and if the secured creditor rejects such representation then the proviso states that the reasons so communicated by the bank or FI shall not provide right upon the borrower to make an application under Section 17 to the DRT. In the proviso, the words used are that even a likely action by the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application under Section 17 to DRT. Once again, emphasis is on the word "action" in the said proviso to show that, a notice under Section 13(2) is different from the word action under the scheme of Section 13 as amended. Learned counsel points out that, Section 13(3-A) bars an appeal against the order communicating reasons or against the *likely action* of the secured creditor. Since no appeal is provided for against the order rejecting representation and since Section 17 of the NPA Act provides remedy to the borrower only against action taken under Section 13(4), the scheme of Section 13 suggests that, the notice under Section 13(2) should be read only as a show cause notice. Similarly, reliance is placed by the learned counsel on the provisions of Section 13(10) of the NPA Act which states that, where the dues of the secured creditor are not fully satisfied, the secured creditor may file an application to the DRT for the recovery of the balance. Learned counsel submitted that Section 13(1) shows that simultaneous action for enforcement of security interest was not contemplated by the NPA Act. It was further urged, that even conceptually there is a difference between the right to debt and the right to take action of

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A recovery; that these two concepts are totally different concepts; that one is a right to receive and the other is a right to enforce. Learned counsel urged, that a debt is not the same thing as a right of action for its recovery; that a debt is a right in the strict sense corresponding to the duty of the debtor to pay, whereas a right of action is a legal authority corresponding to the liability of the debtor to be sued, therefore, according to the learned counsel, B the two are distinct concepts which is clear from the fact that, the right of action can stand destroyed by prescription while the debt remains. Applying these concepts to the scope of the NPA Act, learned counsel urged that, the NPA Act only gives certain powers to the bank/ FI to enforce a recovery of debt and for that purpose it excludes Section 69 of the TP Act *vis-a-vis* certain acts specified therein. Therefore, it was urged that, when Section 13(2) notice is issued, it merely reiterates a right to debt which has accrued to the secured creditor. According to the learned counsel, the most important words find place in the proviso to Section 19(1) to the DRT Act are "if no such action had been taken". Learned counsel places reliance on these words in support of his contention that, there is no need to apply for withdrawal of the O.A. D where the recovery stands enforced. Learned counsel urged that, mere giving of a notice under Section 13(2) does not indicate conclusion of recovery. Hence, Section 13(2) notice is merely a show cause notice. According to the learned counsel, the proviso to Section 19 only says about concluded cases where the enforcement power stands exhausted. This power is not exhausted E by mere giving of Section 13(2) notice. The issuance of notice under Section 13(2) without a concluded action under Section 13(4) would not be saved by the proviso. Learned counsel urged that, Section 13(2) does not create a vested right of any action and, therefore, no remedy against the notice is provided for. Reliance was also placed in support of his above arguments on Section 13(13) of the NPA Act which states that, no borrower shall, after F receipt of notice under Section 13(2), transfer by way of sale, lease or otherwise (other than in the ordinary course of business) any of the secured assets without prior written consent of the secured creditor. Learned counsel urged that, Section 13(13) allows the secured assets to be disposed of in the usual course of business and, consequently, notice under Section 13(2) cannot G constitute action taken under the Act, as urged by the banks. Alternatively, it was urged that, even assuming for the sake of argument that Section 13(2) notice creates a right to take action, such a right is not a vested right and is at best contingent on other factors, namely, continuation of action by secured creditors even after representations. The proviso to Section 19 of the DRT Act speaks only of concluded action under Section 13(4) of the NPA Act H to prevent closed transactions from being reopened. In this connection,

learned counsel submitted that, the right vests when all the facts have occurred. Whereas a right is contingent when some but not all the vestitive facts have occurred. Learned counsel urged, that Section 13(2) refers to a right, at the highest, at an inchoate stage; that Section 13(4) only refers to Section 13(2) in the context of the period fixed; that before introduction of Section 13(3-A) no opportunity to represent was there and, consequently, Section 13(2) notice is only a show cause notice.

Learned counsel further submitted that, the proviso to Section 19 of the DRT Act is the statutory recognition of the doctrine of election; it is not a simple withdrawal procedure as set out in Order XXIII CPC because the proviso to Section 19 states that the withdrawal of the O.A. is for the purpose of taking action under the NPA Act. Learned counsel urged that, in view of Section 19(25) of the DRT Act, it cannot be said that the DRT has no inherent powers. Learned counsel submitted that the doctrine of election is a branch of the rule of estoppel. It was urged that, the said doctrine postulates that when two remedies are available for the same relief, the aggrieved party has an option to elect either of the two but not both. In this connection, reliance was placed on the judgments of this Court in the case of *National Insurance Co. Ltd.* v. *Mastan and Anr.*, reported in [2006] 2 SCC 641 and *A.P. State Financial Corporation* v. *M/s Gar Re-Rolling Mills and Anr.*, reported in [1994] 2 SCC 647. Learned counsel, therefore, urged that the proviso to Section 19(1) *mandates* that either one of the two remedies can be resorted to at a time but not both and in view of the statutory interventions, there is no option with the secured creditor but to withdraw the DRT proceedings to cases where the proviso to Section 19(1) of DRT Act is applied.

The above submissions of the learned counsel for the appellant (M/s Transcore) was adopted by Mr. Pankaj Gupta, learned counsel for M/s Nemat Ram Batra (the respondent in civil appeal No. 2841/06) and Mr. A.K. Jaiswal for M/s Kalyani Sales Co. (the respondent in civil appeal No. 908/2006).

In reply to the above submissions, Mr. K.N. Bhat, learned senior counsel appearing for Indian Overseas Bank (the bank) submitted that, Section 13(2) notice is a condition precedent for invoking Section 13(4) of the NPA Act and, therefore, the said notice is an action and not a mere show cause notice. Learned counsel submitted that Section 13(2) notice is the step-in-aid for enforcement of security interest under Chapter III of the NPA Act. He submitted that the proviso to Section 19(1) of the DRT Act cannot affect the

A rights of a bank/FI under the NPA Act which deals only with recovery and which only deals with enforcement of security interest. Learned counsel urged, that Section 13(2) notice is given on the basis that the client's account in the books of account, which is an asset of the bank as the amount receivable under that account, has become sub-standard, doubtful or a loss; that Section 13(2) proceeds on the basis of classification of that account as a NPA; that B there is no adjudication contemplated under Section 13(2) as the said section deals with enforcement of security interest alone which security interest is recognized by the Act as a financial asset of the bank/ FI. In the circumstances, learned counsel urged that, Section 13(2) notice is not a mere show cause notice. He submitted that, the purpose of NPA Act is to enable the secured C creditor to enforce any security interest without the intervention of the court or the tribunal, apart from creation of asset reconstruction company and securitisation company. In this connection, it was pointed out that sub-section (4)(a) of Section 13 of the NPA Act permits a bank/FI to take possession of the secured assets. Similarly, sub-section (4)(b) enables a bank/ FI to take over management of the business of the borrower. Similarly, sub-section D (4)(c) permits appointment of a manager to manage the secured assets, the possession of which has been taken over and, similarly, sub-section 4(d) authorizes the secured creditor to require any transferee of the secured assets to pay the secured creditor the specified amount by just a return notice. According to the learned senior counsel, under the scheme of Section 13(4), E all these powers are to be exercised without the intervention of the court/ tribunal. He urged that if the proviso to Section 19(1) of the DRT Act is read as mandatory, then the consequence would be that a secured creditor can have recourse to Section 13 only with the prior permission of the DRT which would defeat the very object of the NPA Act which is to remove all fetters, if any, on the right of enforcement by the secured creditor. It was next urged F that the DRT does not have inherent powers and that Section 19(25) of the DRT Act which empowers the tribunal to issue appropriate directions for enforcement of its orders is not akin to Section 151 CPC and, therefore, a provision akin to the provision was necessary to be inserted. In this connection, learned senior counsel submitted that, in the DRT Act there was no provision G similar to Order XXIII CPC and to get rid of that lacuna, the DRT Act had to be amended. He urged that, the proviso to Section 19 is an enabling provision. The bank/ FI may apply to the DRT for withdrawal of the O.A. in cases where the DRT has appointed a court receiver or in cases where the DRT had granted attachment or injunction. If the bank/ FI seeks to invoke the NPA Act *vis-a-vis* a financial asset over which a court receiver is appointed H or over which an attachment stands then in such cases an enabling provision

is made whereby the bank or FI can move the DRT for permission seeking withdrawal of O.A. in part or in whole in order to enable the bank/ FI to take appropriate steps for enforcement of security under the NPA Act. Learned counsel submitted that, vide the impugned judgments, the High Courts have erred in making the said proviso mandatory/ obligatory. He submitted that, the very purpose behind the proviso would be defeated if it is read as mandatory. He submitted that, withdrawal application in respect of O.A. can be made by the bank/ FI at any time. The proviso is inserted only to meet contingencies where the assets are in possession of the court receiver or under attachment/ injunction. Learned counsel submitted that there is no bar to the application of both the Acts simultaneously. He submitted that the NPA Act gives to the bank/ FI an independent right and wherever required the bank/FI may apply that option as given to the secured creditor. In this connection, he submitted that, under third proviso to Section 19(1) of the DRT Act even part withdrawal of the suit/application is permissible. He further submitted that, under Section 13(10) of the NPA Act where the dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the bank/ FI may file an application to the DRT for recovery of the balance from the borrower. The point which is emphasized is that part withdrawal of the suits or the invocation of DRT jurisdiction for recovery of the balance are aspects which required an amendment to be carried out in the DRT Act as well as in the NPA Act so that the provisions are brought at par with Order XXIII CPC. This was the main object behind the enactment to the first proviso to Section 19(1) to the DRT Act. In fact, it is pointed out by the learned counsel that the amending Act 30 of 2004 has made changes in both the DRT Act and the NPA Act simultaneously which indicates that both the Acts complement each other. He submitted that the enabling provision under the first proviso had to be made so that withdrawal is restricted to cases where the bank/FI wishes to withdraw the O.A. for the purpose of taking action under the NPA Act and not for any other purpose. It is pointed out that Order XXIII CPC provides for several situations whereas the proviso to Section 19 deals with some aspects/ situations only. In this connection, learned counsel submitted that Section 13(10) provides for a fresh cause of action. Inability to realise the entire dues does not provide any fresh cause of action for proceeding under the DRT Act. The course of action for proceeding under the DRT Act is the debt due. Not satisfying the dues fully, according to the learned counsel, is not a cause of action attributable to the borrower. He, therefore, submitted that proviso to Section 19(1) is not a condition precedent to taking recourse to NPA Act. Learned counsel further pointed

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A out that, Section 36 of NPA Act talks of limitation. Section 36 of NPA Act makes it clear that no action under NPA Act can be taken unless the claim is within limitation and, therefore, according to the learned counsel, the time spent in adopting action under DRT Act is not excluded and it does not stop the limitation. Therefore, it is urged that this aspect also indicates that the proviso to Section 19(1) is not a condition precedent to taking recourse to
B NPA Act. On the question of doctrine of election, learned counsel submitted that, the doctrine of election is an aspect of estoppel which can have no effect on the operation of a statute inasmuch as it is well settled that there can be no estoppel against a statute. Therefore, learned counsel submitted that the interpretation placed by the High Courts on the proviso to Section 19(1) of
C the DRT Act, making it mandatory for banks/ FIs. to take prior permission of the DRT, would render the whole NPA Act meaningless.

Learned counsel further contended that there is no merit in the arguments advanced on behalf of the borrowers that the amendments under Act 30 of 2004 introduced into the DRT Act has restricted the rights of the secured
D creditors under the NPA Act. He urged that this argument has no basis as there is no amendment restricting any of the rights of secured creditors under the NPA Act. He submitted that the NPA Act deals with the secured creditors, including, banks and financial institutions and the persons mentioned in sub-section (zd) to Section 2. He further pointed out that the words "security
E interest" with which NPA Act is concerned, includes mortgage, charge, hypothecation etc. except those specified in Section 31 which excludes ten types of securities from the purview of NPA Act. He submitted that the NPA Act is the special Act whose provisions override all other laws inconsistent therewith. In this connection, he places reliance on Section 35 of the NPA Act. Learned counsel urged, that Act 30 of 2004 amended the NPA Act as
F well as the DRT Act simultaneously; that the said Act 30 of 2004 specifically amended Section 13 by insertion of sub-section (3-A), however, no provision corresponding to the proviso to Section 19 was introduced into the NPA Act, which indicates that Parliament did not intend to dilute rights of the secured creditors granted to them under the NPA Act through DRT Act. He also invited our attention to Section 37 of the NPA Act which provides that the
G NPA Act shall be in addition to and not in derogation of the DRT Act. Learned counsel urged, that the proviso to Section 19(1) was introduced in DRT Act to make it more effective; that provision is akin to Order XXIII CPC, which was not there in the original DRT Act. As stated above, learned counsel urged that DRT unlike a court has no inherent powers. Learned
H counsel urged that there may be innumerable situations in which the secured

creditor may have to withdraw the recovery application and but for a specific provision, it was not open to the tribunal to entertain an application for withdrawal and, in any case, it was not open to the tribunal to pass conditional order on such application for withdrawal without express provision in that regard, which now is the proviso to Section 19(1) of the DRT Act. Therefore, to fill this lacuna, the proviso was inserted in Section 19(1). The proviso makes it very clear that the withdrawal of the O.A. shall be limited to the purpose of taking action under the NPA Act. It clarifies that such application for withdrawal may be made if no action has been taken under the NPA Act before seeking withdrawal. Learned senior counsel urged that the said proviso does not compel the withdrawal of the OA before having recourse to NPA Act either before 11.11.2004 or thereafter. He submitted that, reading the proviso of Section 19(1) of the DRT Act as a condition precedent for taking recourse to the NPA Act would have serious adverse effects, for example, in a given case relief might have been claimed against the guarantors also, those guarantors may be specific to one of the consortium transactions. Compelling the creditor to withdraw his application before the DRT would amount to forcing that creditor to give up his claim against the guarantors also. Similarly, if the mortgage property is not subject to any attachment or court receiver, there is no need for permission to withdraw the application before resorting to Section 13(4). However, if the argument of the borrowers is accepted, the bank/ FI is forced to move the tribunal for permission even in cases where it is not necessary. Lastly, the time spent in action under NPA Act is not excluded for saving limitation for recovery of the balance. The Banks/FIs. have to revert back to DRT within the period of limitation under Section 13(10) of the NPA Act, and if the banks/FIs. are forced to withdraw, then all securitisation actions starting from the issue of demand notice and ending with sale of securities must be completed within the period of limitation and if the banks/FIs. fail to complete these actions within the period of limitation, they will not be able to go back to DRT. In a given case, if the DRT refuses permission to withdraw, the very purpose of the NPA Act will be defeated. To make the NPA Act subject to the prior permission of DRT would make the NPA Act redundant. Learned senior counsel urged that Section 24 of the DRT Act makes the Limitation Act, 1963 applicable to claims before the DRT. This means that, by the time the pending recovery application is allowed to be withdrawn, an application under Section 13(10) of NPA Act would become time barred. Thus, the banks/FIs, if compelled to withdraw the recovery applications before resorting to Section 13, will be deprived of their rights to recover the balance amount under Section 13(10). In this connection,

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A reliance was also placed on the provisions of Section 36 of the NPA Act which requires the claims to be made under NPA Act within the period prescribed under the Limitation Act, 1963. Learned counsel, therefore, submitted that there is no merit in the contention of the appellant that the banks/FIs should be compelled to first withdraw their O.As. before resorting to Section 13 of NPA Act.

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Mr. Soli J. Sorabjee, learned senior counsel appearing on behalf of Indian Bank, submitted that the doctrine of election does not apply to curative relief. He submitted, that a creditor is entitled to choose one or more cumulative remedies open to him, unless precluded by statutory provisions or by the C doctrine of election; that in the absence of any bar, it is open to the creditor to choose one or more of the cumulative remedies. Learned senior counsel submitted that under the scheme of NPA Act, a bank/ FI is under no disability to take recourse under Section 13 of NPA Act even after it has invoked Section 19 of DRT Act. He submitted, that the object of both the sections is to recover dues; that there is no inconsistency inherent or implied in the two D remedies; that the doctrine of election applies in cases of inconsistent remedies. He submitted that, in the present case, the two remedies are not inconsistent to each other. He submitted that the judgment of this Court in the case of *A.P. State Financial Corporation* (supra) has no application because in that case this Court has held that the State Financial Corporation Act has expressly E provided for the doctrine of election. Learned counsel submitted that the doctrine of election is a doctrine evolved by courts on equity. It is based on the principle that a man shall not be allowed to approbate and reprobate. If a person has chosen a particular remedy and has intentionally relinquished another remedy, he is debarred by the doctrine of election to pursue the remedy he has intentionally given up. Learned counsel submitted that a creditor F is not precluded by the doctrine of election if he makes a choice of one or more cumulative remedies available to him. The adoption of remedies under Section 19 of DRT Act and under Section 13(4) of NPA Act are not inconsistent with each other. Both the remedies recognize the existence of the same facts, on the basis of which reliefs are claimed. In the case of election of remedies a party is confined to the remedy first chosen, precluding a resort G to another, because the two remedies are inconsistent with each other, and not analogous, consistent and concurrent. Learned senior counsel submitted that a creditor is not concluded by the rule of election where he merely makes a choice of one or more consistent and cumulative remedies available to him. Thus, a creditor whose claim is secured by two written obligations H falling due simultaneously has a right to proceed thereafter upon either or

both of them to enforce payment of the amount due. In this connection, learned senior counsel placed reliance on *Corpus Juris Secundam,* Vol. XXVIII, para 13; *American Jurisprudence, 2d,* Vol. 25 and Snell's Principles *of Equity*, Twenty-Eighth Edition, page 495. Learned counsel urged that the interpretation suggested by the borrowers would not subserve the object of the NPA Act which is enacted for speedy recovery of debts. If a bank/FI is compelled or mandatorily required to withdraw its application under the proviso to Section 19 of DRT Act and, thereafter, invoke NPA Act, it would face a situation where Section 13(10) would fail. It would lead to further complications which would involve questions of limitation and delay in the speedy recovery of its dues. Learned counsel urged that the conclusion drawn by the Punjab & Haryana High Court in the case of *Kalyani Sales Co.* v. *Union of India* was erroneous because it states that once the bank/FI decides to proceed under the NPA Act, that Act imposes an obligation on the bank/ FI to withdraw the O.A. under Section 19 of DRT Act.

Mr. Ranjit Kumar, learned senior counsel appearing for Indian Bank, submitted that if notice under Section 13(2) of NPA Act was only a show cause notice then Section 13(3-A) was not required. He submitted that because Section 13(2) notice constituted an action taken under the Act, Section 13(3-A) becomes necessary because it gives an opportunity to the borrower to object to the notice. Learned counsel submitted that the NPA Act deals only with secured assets whereas the DRT Act deals with both secured and non-secured assets. He submitted that a secured asset is an asset which is owned by the bank/ FI and, therefore, it can act without intervention of the court. Learned counsel urged that in certain respects, the DRT Act did not provide for the remedies, which led to the enactment of the NPA Act. In this connection, he cited the example of take over of management of the business of the borrower which is provided for only in the NPA Act and not in the DRT Act.

Shri D. Dave, learned senior counsel appearing for Indian Bank' Association (IBA) submitted, that NPA Act has to operate *de hors* the DRT Act; that both the Acts operate within the same scheme but the DRT Act is a general Act whereas the NPA Act is the special Act. He submitted that a bank/FI is entitled to go back to the DRT under Section 13(10) which indicates that the NPA Act is a special Act *vis-a-vis* the DRT Act which is the general Act. He urged that the NPA Act is amplification of DRT Act. In this connection, it is pointed out that the concept of asset reconstruction and the concept of asset management is wider than the concept of recovery of debt

A under the DRT Act. Our attention was invited to Section 5 of the NPA Act which refers to acquisition of rights or interest in financial assets which concept is not there in DRT Act. Learned counsel, therefore, submitted that NPA Act is a special Act and, therefore, irrespective of the pendency of litigation under the DRT Act, acquisition of interest in financial assets can take place under the NPA Act. Learned senior counsel further pointed out, B that under DRT Act a debt could be secured as well as unsecured; that under Section 9(f) of the NPA Act, a reconstruction company or a securitisation company is empowered for the purposes of assets reconstruction to take possession of secured assets without prejudice to the provisions contained in any other law for the time being in force. Therefore, even a reconstruction C company can enforce security interest under Section 13 of the NPA Act without being restricted by the provisions of the DRT Act. Section 9(f) is put into service to show that at every stage, Parliament has ousted the jurisdiction of the courts and DRT to get the NPA liquidated at the earliest opportunity. Learned senior counsel submitted, that Section 19 of the DRT Act concerns the procedure which has to be followed by the tribunal; that it is a procedural D section and, therefore, Section 19 of DRT Act cannot confer or allow jurisdiction to be retained by the tribunal. He submitted that by Section 13(3-A), Parliament has made a conscience decision that there will be no interference from DRT/ court at any stage, therefore, it states that a borrower cannot approach DRT against communication of reasons by a bank/ FI which shows E that in the matter of NPA, Parliament has ruled out intervention by courts and tribunals. Learned senior counsel submitted that calling to the borrowers for hearing, the NPA Act shall remain suspended till leave is given by DRT. This interpretation, according to the learned senior counsel, defeats the very object behind enactment of the NPA Act. Lastly, he pointed out that Section 35 of NPA Act states that the Act shall override all other laws which are inconsistent F with NPA Act. Similarly, Section 37 of NPA Act states that if any law is consistent with NPA Act then the NPA Act shall be treated as an additional Act. The NPA Act is made in addition to the Companies Act, 1956, the SEBI Act, 1992, the DRT Act, 1993 as well as the Securities Contracts (Regulation) Act, 1956 and, therefore, the doctrine of election has no application in this G case. Learned counsel submitted that the very object for enacting the NPA Act is to introduce banking reforms including change in the DRT Act so as to include the provisions of the NPA Act therein and, therefore, withdrawal of the O.A. is not a condition precedent for invoking NPA Act.

Shri Rajiv Shakdhar, learned senior counsel appearing for ICICI Bank H Ltd. submitted that Rule 2(b) of the Security Interest (Enforcement) Rules

2002 ("2002 Rules") states that a demand notice is the notice in writing issued by a secured creditor to any borrower pursuant to Section 13(2) of the NPA Act. Reliance is placed on the said rule to show that the notice under Section 13(2) is not a mere show cause notice, that it is a demand notice similar to Section 156 of the Income Tax Act. In this connection, learned counsel submitted, that Section 22 of the NPA Act refers to default in repayment of debt on the part of the borrower plus classification of his account as NPA; that once an account is classified as NPA then the account continues to remain as NPA even if there is a part payment. Learned counsel submitted that under Rule 3 of the 2002 Rules, the service of demand notice under Section 13(2) indicates the procedure to be followed in serving such notice and if the amount mentioned in the demand notice is not paid within the stipulated period then Rule 4 provides that the Authorised Officer of a bank/ FI shall proceed to realise the amount by adopting any one or more of the measures specified in Section 13(4). These rules are relied upon to show that the notice under Section 13(2) constitute an action taken under the NPA Act. Further, he pointed out that after giving of the demand notice, the debtor is debarred from dealing with the assets, *vide* Section 13(13) of NPA Act. He submitted that Section 13 of NPA Act deals with secured interest whereas Section 9 of the NPA Act deals with unsecured interest. Learned counsel submitted, that there is a basic difference between suits to recover debts and suits to enforce securities; that NPA Act deals with enforcement of securities and it does not wait for debts to crystallize and, therefore, O.A. filed in the DRT will not be required to be withdrawn in the event action by way of Section 13(2) notice is taken even before 11.11.2004. The doctrine of election would not apply to the proceedings under the NPA Act and the DRT Act. It is urged, that the nature, ambit and scope of the proceedings under the two Acts are different; that the legislative purpose for conferring the power on the secured creditors to enforce its security interest by taking recourse to Section 13(4) of NPA Act without intervention of the court is to free the secured creditors of the impediments contained in Section 69 of the TP Act. A secured creditor is now empowered by virtue of Section 13 of the NPA Act to take any of the measures including sale of the secured assets without intervention of the court and notwithstanding the limitations of Section 69 of the TP Act. The power of sale of property in a suit even prior to the passing of decree has been upheld by this Court by placing reliance on Order XL Rule 1(1)(d) CPC. In the circumstance, withdrawal of O.A. cannot be made a condition precedent for taking recourse to N.PA Act.

Mr. Dhruv Mehta, learned counsel appearing on behalf of the Punjab

A National Bank, submitted that the doctrine of election is for banks/ FIs. and not for borrowers. The reason is that a creditor has to see his debtor, it is the right of the bank to liquidate the asset which right is unfettered once a security or interest is created in favour of the bank/FI. [See *Abdul Azeez* v. *Punjab National Bank,* (2005)127CompCas514(Ker)]. Learned counsel submitted that the purpose of enacting proviso to Section 19(1) is to bring in B Order XXIII CPC. Learned counsel submitted that the doctrine of election applies only in case of inconsistent remedies and not in case of additional remedies. He urged that withdrawal of an application could be a condition precedent for alternate remedy, however, it cannot be a condition precedent for taking recourse to an additional remedy. Learned counsel urged that C unlike SICA, in the NPA Act, 2002 there is no proviso saving limitation, and, therefore, if the argument of the borrowers is accepted, it could lead to a situation where the banks' action under NPA Act would be time barred. In any event, NPA Act, according to the learned counsel, is a later enactment and, therefore, it shall prevail over the DRT Act.

D Ms. J.S. Wad, learned counsel for Central Bank of India, has adopted the above arguments advanced on behalf of the various banks.

The heart of the matter is that NPA Act proceeds on the basis that an interest in the asset pledged or mortgaged with the bank or FI is created in favour of the bank/ FI; that the borrower has become a Debtor, his liability E has crystallized and that his account with the bank/ FI (which is an asset with the bank/FI) has become sub-standard.

Value of an asset in an inflationary economy is discounted by "time" factor. A right created in favour of the bank/ FI involves corresponding F obligation on the part of the borrower to see that the value of the security does not depreciate with the passage of time which occurs due to his failure to repay the loan in time.

Keeping in mind the above circumstances, the NPA Act is enacted for quick enforcement of the security. The said Act deals with enforcement of G the rights vested in the bank/FI. The NPA Act proceeds on the basis that security interest vests in the bank/FI. Sections 5 and 9 of NPA Act is also important for preservation of the value of the assets of the banks/FIs. Quick recovery of debt is important. It is the object of DRT Act as well as NPA Act. But under NPA Act, authority is given to the banks/FIs, which is not there in the DRT Act, to assign the secured interest to securitisation company/ H asset reconstruction company. In cases where the borrower has bought an

asset with the finance of the bank/ FI, the latter is treated as a lender and on assignment the securitisation company/ asset reconstruction company steps into the shoes of the lender bank/ FI and it can recover the lent amounts from the borrower. A

According to Snell's Equity (Thirty-first edition) at page 777, a dual obligation could arise on the same transaction, namely, A's obligation to repay a sum of money to B or some other obligation. In such a case, B can sue A for money or for breach of the obligation. However, B will often have some security which covers the obligation of A, say, in the form of an asset over which B can exercise his rights. B may be entitled to this security either by law or by operation of common law principles or under the transaction (contract). In addition, B may acquire a personal right of action against the third party. Security over the asset (property) may be obtained by mortgage, charge, pledge, lien etc. Security in the form of right of action against a third party is known as guarantee. Broadly, there are three types of security over the asset. One is where the creditor obtains interest in the asset concerned (mortgage). Second is securities in which the rights of the creditor depends on possession of the asset (pledge/ lien). The third is charge where the creditor neither obtains ownership nor possession of the asset but the asset is appropriated to the satisfaction of the debt or obligation in question (charge). The dichotomy, which is of importance, is that more than one obligation could arise on the same transaction, namely, to repay the debt or to discharge some other obligation. B C D E

Therefore, when Section 13(4) talks about taking possession of the secured assets or management of the business of the borrower, it is because a right is created by the borrower in favour of the bank/ FI when he takes a loan secured by pledge, hypothecation, mortgage or charge. For example, when a company takes a loan and pledges its financial asset, it is the duty of that company to see that the margin between what the company borrows and the extent to which the loan is covered by the value of the financial asset hypothecated is retained. If the borrower company does not repay, becomes a defaulter and does not keep up the value of the financial asset which depletes then the borrower fails in its obligation which results in a mis-match between the asset and the liability in the books of the bank/FI. Therefore, Sections 5 and 9 talks of acquisition of the secured interest so that the balance sheet of the bank/FI remains clean. Same applies to immovable property charged or mortgaged to the bank/FI. These are some of the factors which the Authorised Officer of the bank/FI has to keep in mind when he gives notice F G H

A under Section 13(2) of the NPA Act. Hence, equity, exists in the bank/FI and not in the borrower. Therefore, apart from obligation to repay, the borrower undertakes to keep the margin and the value of the securities hypothecated so that there is no mis-match between the asset-liability in the books of the bank/FI. This obligation is different and distinct from the obligation to repay. It is the former obligation of the borrower which attracts the provisions of
B NPA Act which seeks to enforce it by measures mentioned in Section 13(4) of NPA Act, which measures are not contemplated by DRT Act and, therefore, it is wrong to say that the two Acts provide parallel remedies as held by the judgment of the High Court in *M/s Kalyani Sales Co.*. As stated, the remedy under DRT Act falls short as compared to NPA Act which refers to acquisition
C and assignment of the receivables to the asset reconstruction company and which authorizes banks/ FIs. to take possession or to take over management which is not there in the DRT Act. It is for this reason that NPA Act is treated as an additional remedy (Section 37), which is not inconsistent with the DRT Act.

D In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to *American Jurisprudence,* 2d, Vol. 25, page 652, if in
E truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Equity (Thirty-first Edition, page 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at
F the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application.

In our view, the judgments of the High Courts which have taken the view that the doctrine of election is applicable are erroneous and liable to be
G set aside.

We have already analysed the scheme of both the Acts. Basically, the NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/ FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section
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13 of NPA Act is recovery by non-adjudicatory process. A secured asset under NPA Act is an asset in which interest is created by the borrower in favour of the bank/ FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceeds on the basis that security interest in the bank/ FI; needs to be enforced expeditiously without the intervention of the court/ tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, NPA Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor.

The question still remains as to the object behind insertion of the three provisos to Section 19(1) of DRT Act vide amending Act 30 of 2004. The DRT is a tribunal, it is the creature of the statute, it has no inherent power which exists in the civil courts. Order XXIII Rule 1 (3) CPC states *inter alia* that where the court is satisfied that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim then the civil court may, on such terms as it thinks fit, grant the plaintiff permission to withdraw the entire suit or such part of the claim with liberty to institute a fresh suit in respect thereof. Under Order XXIII Rule 1(1)(4)(b), in cases where a suit is withdrawn without the permission of the court, the plaintiff shall be precluded for instituting any fresh suit in respect of such subject-matter. Order XXIII Rule 2 states that any fresh suit instituted on permission granted shall not exclude limitation and the plaintiff should be bound by law of limitation as if the first suit had not been instituted. Order XXIII Rule 3 deals with compromise of suits. It states that where it is proved to the satisfaction of the court that a suit has been adjusted wholly or in part by any lawful agreement or compromise or where the defendant satisfies the plaintiff in respect of whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith.

The object behind introducing the first proviso and the third proviso to

A Section 19(1) of the DRT Act is to align the provisions of DRT Act, the NPA Act and Order XXIII CPC. Let us assume for the sake of argument, that an O.A. is filed in the DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account. After filing of O.A., on account of non disposal of the O.A. by the tribunal due to heavy backlog, the bank finds that one of the three accounts has become sub-standard/ loss, in such a case the B bank can invoke the NPA Act with or without the permission of the DRT. One cannot lose sight of the fact that even an application for withdrawal/ leave takes time for its disposal. As stated above, with inflation in the economy, value of the pledged property/ asset depreciate on day to day basis. If the borrower does not provide additional asset and the value of the asset pledged C keeps on falling then to that extent the account becomes non-performing. Therefore, the bank/ FI is required to move under NPA Act expeditiously by taking one of the measures by Section 13(4) of the NPA Act. Moreover, Order XXIII CPC is an exception to the common law principle of non-suit, hence the proviso to Section 19(1) became a necessity.

D For the above reasons, we hold that withdrawal of the O.A. pending before the DRT under the DRT Act is not a pre-condition for taking recourse to NPA Act. It is for the bank/FI 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 E first proviso to Section 19(1) is an enabling provision, which provision may deal with myriad circumstances which we do not wish to spell out herein.

(ii) *On Point No. 2 on question of possession:*

The short question under this head is whether recourse to take possession F of the secured assets of the borrower under Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

Mr. N.C. Sahni and Mr. Pankaj Gupta, learned advocates appearing on behalf of the respective borrowers submitted that Section 13(4) of the NPA Act empowers the secured creditor to take possession of the secured immovable G assets of the borrower on expiry of sixty days and notice served under Section 13(2) of that Act. It is pointed out that in many cases, the banks/FIs. have taken actual physical possession whereas in other cases they have taken only a symbolic possession. Learned advocates submitted that in *Kalyani Sales Co.,* the High Court has rightly held that if physical possession is taken on expiry of sixty days, the remedy of application under Section 17 of the NPA H Act by the borrower would become illusory and meaningless as the borrower

or the person in possession would be dispossessed even before adjudication of the objections by the tribunal. Learned advocates further submitted that under Section 13(8), the bank/FI is prevented from selling the secured assets, if the dues of the secured creditor with all costs, charges and expenses are tendered to the secured creditor at any time before the date fixed for sale. Learned advocates pointed out that under Rule 8(1) of the 2002 Rules, a secured creditor is empowered to take possession as per notice appended in terms of Appendix IV. That notice cautions the borrower not to deal with the property. Learned advocates submitted that notice in terms of Rule 8(1) of the 2002 Rules operates as attachment. It contemplates a symbolic possession. Learned advocates submitted that actual physical possession of immovable assets can be taken under Rule 8(3), in cases where there is a vacant plot or a property which is lying unattended, but where the immovable property is in actual physical possession of any person, the person in possession cannot be dispossessed by virtue of a notice under Rule 8(1); that actual physical possession is to be delivered only after confirmation of sale under Rule 9(6) read with Appendix V under which the authorised officer is empowered to deliver the property to the purchaser free from all encumbrances in terms of Rule 9(9) of the 2002 Rules. Learned advocates, therefore, submitted that the High Court was right in holding that the borrower or any other person in possession of the immovable property cannot be physically dispossessed at the time of issuing notice under Section 13(4) of the NPA Act so as to defeat the adjudication of his claim by the DRT under Section 17 of NPA Act, and that, physical possession can be taken only after the sale is confirmed in terms of Rule 9(9) of the 2002 Rules.

We do not find any merits on the above contentions for the following reasons.

The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/ FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/ tribunals.

A Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realizing the B secured assets. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4-A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is C required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It *inter alia* states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. D Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances *known to the secured creditor* or *not known to* E *the secured creditor.* (emphasis supplied). Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the F DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and G can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the *status quo ante.* Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated H by the authorised officer taking possession. As stated above, the NPA Act

provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL Rule 1 CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/ FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorized officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a *bona fide* purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules.

A B C D E F

(iii) On Point No. 3, on question of court fee:

Whether *ad valorem* court fee prescribed under Rule 7 of the DRT (Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the NPA Act.

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Mr. N.C. Sahni supplemented by Mr. Pankaj Gupta, learned advocates appearing on behalf of the borrower submitted that by virtue of the amending Act 30 of 2004 with effect from 11.11.2004, the persons aggrieved against

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A the action of the bank or FI initiated under Section 13(4) of the NPA Act have a right to adjudication by way of an application to the DRT under Section 17(1) of the NPA Act. It is submitted that in exercise of powers conferred under Section 40(1) of the NPA Act, the Central Government has issued an Order called the "Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Removal of Difficulties) Order, B 2004 ("Order 2004") making the provision for levying of fees for filing of appeals. This Order 2004 was issued on 6.4.2004. It is further pointed out that on 8.4.2004, this Court delivered its judgment in the case of *Mardia Chemicals* (supra). Clause (3) of the Order 2004 provides that the fee for filing of an appeal to DRT under Section 17(1) of the NPA Act shall be C *mutatis mutandis* as provided for filing of an application to DRT under Section 19 of the DRT Act read with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993 ("1993 Rules"). Learned advocates urged that after the amending Act 30 of 2004 which came into force with effect from 11.11.2004 by which amendment was made to Section 17(1) of NPA Act, the Order 2004 dated 6.4.2004 issued by the Central Government has become D redundant because the amending provision stipulates filing of an application by the borrower under Section 17(1) of NPA Act to the DRT challenging the action under Section 13(4) by filing an application along with payment of fees as may be prescribed. Learned advocates submitted that under Section 17(1) of NPA Act, as amended, a proviso is added which states that different E fees may be prescribed for making an application by the borrower. It is further submitted that the word "prescribed" has been defined under Section 2(s) to mean prescribed by rules made under the NPA Act. It is urged that in the judgment of *Mardia Chemicals* (supra), this Court held that the remedy under Section 17 of NPA Act is not an appellate remedy. Clause (3) of the Order 2004 providing for fees for filing an appeal under the unamended F provisions cannot, therefore, be made applicable to any application filed after 11.11.2004. Learned advocates submitted that NPA Act *vide* Section 17(1) of NPA Act read with Rule 7 of the 1993 Rules under DRT Act cannot form the basis to claim *ad valorem* court fee in terms of Rule 7 of the 1993 Rules, particularly after 11.11.2004 because, as stated above, this Court has held in G *Mardia Chemicals* (supra) that the remedy under Section 17(1) of NPA Act is the original remedy and not an appellate remedy. It is further submitted that after 11.11.2004, fees could be levied only *vide* Rules and not by an Order removing Difficulties.

We do not find any merits in the above contentions, for the following H reasons.

It is true that Section 17(1) of the NPA Act states *inter alia* that a borrower aggrieved by action taken under Section 13(4) may make an application along with fees, as may be prescribed to the DRT having jurisdiction in the matter. It is true that, the marginal note states that Section 17(1) is a right to appeal. In our view, the marginal note to Section 17(1) cannot control the text and the content of Section 17(1) which, as stated above, states that the borrower aggrieved by any of the measures in Section 13(4) may make an application to the DRT. The judgment of this Court in *Mardia Chemicals* (supra) states that the DRT acts in an Original Jurisdiction under Section 17 of the NPA Act. In our opinion, as far as the levy of fee is concerned, the terminology makes no difference. In fact, the proviso to Section 17(1) indicates that different fees may be prescribed for making an application by the borrower. The reason is obvious. Certain measures taken under Section 13(4) like taking over the management of the fee *vis-a-vis* the secured creditor taking possession of financial assets have to bear different fees. Each measure is required to be separately charged to the borrower (applicant) for which different fees could be prescribed. The said proviso indicates that the tribunal under Section 17(1) exercises Original Jurisdiction and, therefore, as far as the fees are concerned, the terminology of original or appellate jurisdiction in the context of fees is irrelevant. Secondly, under the Order 2004 issued by the Central Government under Section 40 of the NPA Act, it is provided that the fee for filing an appeal to the DRT under Section 17(1) of NPA Act shall be *mutatis mutandis* as provided for filing an application to the DRT under Rule 7 of the 1993 Rules. The word *mutatis mutandis* indicates that a measure is adopted for assessing the fees required to be paid by the borrower when he applies by way of application to the DRT under Section 17(1) of NPA Act challenging the action taken under Section 13(4) of NPA Act by the secured creditor. Lastly, we do not find any merit in the argument advanced on behalf of the borrowers that since fees have not been prescribed by the rules after 11.11.2004, fees cannot be levied on the basis of the Order 2004 which was there prior to 11.11.2004. The contention of the borrowers is that since Section 17(1) of NPA Act, as amended, provides for prescribing fees for an application under Section 17(1) and since no rule has been framed under the NPA Act after 11.11.2004 fees cannot be levied under the Order 2004 dated 6.4.2004 which, according to the borrower, has come to an end after 11.11.2004 with the enactment of the amending Act 30 of 2004.

We do not find any merit in this last argument also. In the case of *Madeva Upendra Sinai and Ors.* v. *Union of India and Ors.*, reported in

A [1975] 3 SCC 765, one of the questions which arose for determination was whether the Central Government in the exercise of its power to remove difficulties under the Income Tax Act similar to Section 40 of the NPA Act was competent to supply a deficiency in the Act. Answering the above question, this Court held as follows:

B "36. This raises two questions: (1) Is this a 'difficulty' within the contemplation of clause (7) of the Regulation? (2) Is the Central Government in the exercise of its power under that clause competent to supply a deficiency or casus omissus of this nature ?

C 38. For a proper appreciation of the points involved, it is necessary to have a general idea of the nature and purpose of a "removal of difficulty clause" and the power conferred by it on the Government.

D 39. To keep pace with the rapidly increasing responsibilities of a welfare democratic State, the Legislature has to turn out a plethora of hurried legislation, the volume of which is often matched with its complexity. Under conditions of extreme pressure, with heavy demands on the time of the Legislature and the endurance and skill of the draftsman, it is well nigh impossible to foresee all the circumstances to deal with which a statute is enacted or to anticipate all the difficulties that might arise in its working due to peculiar local conditions or E even a local law. This is particularly true when Parliament undertakes legislation which gives a new dimension to socio-economic activities of the State or extends the existing Indian laws to new territories or areas freshly merged in the Union of India. In order to obviate the necessity of approaching the Legislature for removal of every difficulty, howsoever trivial, encountered in the enforcement of a F statute, by going through the time-consuming amendatory process, the legislature sometimes thinks it expedient to invest the Executive with a very limited power to make minor adaptations and peripheral adjustments in the statute, for making its implementation effective, without touching its substance. That is why the "removal of difficulty G clause", once frowned upon and nick-named as "Henry VIII Clause" in scornful commemoration of the absolutist ways in which that English King got the "difficulties" in enforcing his autocratic will be removed through the instrumentality of a servile Parliament, now finds acceptance as a practical necessity, in several Indian statutes of post independence era.

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40. Now let us turn to Clause (7) of the Regulation. It will be seen that the power given by it is not uncontrolled or unfettered. It is strictly circumscribed, and its use is conditioned and restricted. The existence or arising of a "difficulty" is the *sine qua non* for the exercise of the power. If this condition precedent is not satisfied as an objective fact, the power under this Clause cannot be invoked at all. Again, the '"difficulty" contemplated by the clause must be a difficulty arising *in giving effect to* the provisions of the Act and not a difficulty arising aliunde, or an extraneous difficulty. Further, the Central Government can exercise the power under the clause only to the extent it is necessary for applying or giving effect to the Act, etc., and no further. It may slightly tinker with the Act to round off angularities, and smoothen the joints or remove minor obscurities to make it workable, but it cannot change, disfigure or do violence to the basic structure and primary features of the Act. In no case, can it, under the guise of removing a difficulty, change the scheme and essential provisions of the Act.

41. The above principles, particularly the distinction between a 'difficulty' which falls within the purview of the Removal of Difficulty Clause and one which falls outside it, finds ample illustration in the 1949 Order and the impugned provision of the 1962 Order which came up for consideration in *Straw Products'* case [1968] 2 SCR 1. Excepting the reference to the corresponding provision of the 1922 Act, the language of the 1949 Order was the same as that of the unimpugned part of clause (3) of Order 2 of 1970 in the present case. The 1949 Order related to the removal of a difficulty which had arisen in giving effect to the provisions of Section 10(2)(vi) Proviso (c) and Section 10(5)(b) of the 1922 Act, corresponding to Section 34(2)(i) and Section 43(6)(b) of the Act of 1961. This difficulty had arises because the income-tax laws of the merged States were not repealed by the Indian Income-tax Act but by the Taxation Laws (Extension to Merged States and Amendment) Act 67 of 1949. Owing to this, the depreciation *actually allowed* under the laws of the merged States could not be taken into account in computing the aggregate depreciation allowance referred to in sub-section (2)(vi), proviso (c) or the written down value under clause (b) of sub-section (5) of Section 10 of the 1922 Act. If this difficulty had not been removed, anomalous results would have followed. The written down value of the assets acquired before the previous year would have been taken

A as the original cost of the assets without deduction of the depreciation actually allowed in the past under the State laws. This would have given to the assessees in the merged States, a benefit, inconsistently with the scheme of Section 10 of the 1922 Act, *exceeding in the aggregate even the original cost of the assets.*

B 42. The 1949 Order removed this difficulty. In terms, it did no more than directing that if under the income-tax laws of a merged State any depreciation was *actually allowed,* it was to be taken into account in ascertaining the written down value of the assets. Far from supplanting or changing the essence of the essential provisions of the Act relating to depreciation and written-down value, it gave effect, life and meaning C to them."

In view of the above judgment of this Court in *Madeva Upendra Sinai,* we are of the view that the 2004 Order, in the present case, was issued with the object of supplying a deficiency, namely, levy of fees. By such levy D of fees, the nature and scope of the NPA Act is not altered. It is not in dispute that the 2004 Order has been issued after the enactment of NPA Act. After the amending Act 30 of 2004, certain amendments have been made in Section 17(1) of NPA Act. However, the 2004 Order dated 6.4.2004 does not, in any way, alter the scheme of the amended Act. It merely fills in the deficiency and, therefore, the 2004 Order will continue to operate even after the amending E Act 30 of 2004 and till rules are prescribed in terms of Section 2(s) of the NPA Act.

Before concluding, it is necessary to analyse the following two judgments of this Court in the light of what is stated above.

F In the case of *A.P. State Financial Corporation* v. *M/s Gar Re-Rolling Mills and Anr.* (supra) it has been held that Section 29 of the State Financial Corporation Act, 1951 ("SFC Act") provides for the rights and remedies as also the procedure for enforcement of the rights. It is a complete Code. It is open to the Corporation to act under Section 29 to realise its dues from the G defaulter concerned by following the procedure prescribed thereunder. The Corporation does not require the assistance of the court to enforce its rights while invoking the provisions of Section 29. In the said judgment, it has been further held that Section 31 has been enacted to take care of a situation where any industrial concern, in breach of any agreement, makes default in repayment of the loan or advance or the Corporation requires immediate repayment H which the defaulter fails to make. This Court, therefore, held that Section 31

provides for substantive relief in the nature of an application for attachment of property in execution of a decree before the judgment and that on conjoint reading of Sections 29 and 31, in case of default in repayment/breach of an agreement, the Corporation has two remedies under the SFC Act against the defaulter, one under Section 29 and another under Section 31. This Court further held that the doctrine of election would not be attracted under the SFC Act in view of the expression "without prejudice to the provisions of Section 29" being used in Section 31. However, this Court observed that the Corporation has a right to choose initially whether to proceed under Section 29 or Section 31, but its rights under Section 29 are not extinguished, if it decides to take recourse to Section 31. The Corporation can abandon the proceedings under Section 31 at any stage. This Court further held that a decree under Section 31 is not a money decree and, therefore, recourse to Section 31 cannot debar the Corporation from taking recourse to Section 29 by not pursuing Section 31. It is also observed that debtor cannot claim equity.

In our view, the judgment in *A.P. State Financial Corporation* (supra) has no application to the present case. Under the SFC Act, Section 31 uses the expression "without prejudice to the provisions of Section 29", therefore, it is held, in the above judgment, that Section 29 is wider in scope than Section 31 which concerns attachment before judgment. Sections 29 and 31 find place in the same Act. Section 31 operates in an area carved out of its preceding Section 29 of the SFC Act. On the other hand, in the present case, we have two separate enactments, namely, the DRT Act, 1993 and the NPA Act, 2002. Further, the DRT Act does not deal with assignment of an asset by the bank/FI to the asset reconstruction company/ securitisation company. This can be done only under the NPA Act. Under the NPA Act, the asset reconstruction company/ securitisation company can manage and reconstruct the asset. The said company can even step into the shoes of the lender bank/ FI, therefore, the remedy under NPA Act is an additional remedy, as stated in Section 37 of NPA Act. The NPA Act is in addition to the DRT Act, therefore, the scheme of the SFC Act is different from the integrated scheme of the DRT Act and the NPA Act. In the circumstances, the judgment of this Court in *A.P. State Financial Corporation* (supra) has no application.

In the case of *National Insurance Co. Ltd.* v. *Mastan and Anr.* (supra) this Court has held that on the language of Section 167 of the Motor Vehicles Act, 1988 ("MV Act"), and going by the principles of election of remedies, a claimant (worker) opting to proceed under the Workmen's Compensation

A Act, 1923 ("1923 Act") cannot take recourse to the provisions to the MV Act except to the extent stated in Section 167 of the MV Act. This judgment has no application to the facts of the present case. As held in the above judgment of *National Insurance Co.* v. *Mastan* (supra), Section 167 of the MV Act statutorily provides for an option to the claimant stating that where death or bodily injury gives rise to a claim for compensation under the MV Act as B also under the 1923 Act, the person entitled to compensation may, without prejudice to the provisions of Chapter X, can claim such compensation under either of the two Acts *but not under both.* Such a section is not there in the case before us and, therefore, the judgment in the case of *National Insurance Co. Ltd.* v. *Mastan* (supra) has no application.

C

Mr. Viswanathan, learned counsel appearing for M/s Transcore seeks time for filing an application under Section 17 of the NPA Act. He prays for continuation of the interim order dated 16.9.2005 granted by this Court by which confirmation of sale has been stayed. Since the matter was pending before this Court in appeal, we extend the interim order for four weeks from D the date of the judgment in Civil Appeal No. 3228 of 2006.

Accordingly, we answer the above three questions in the affirmative that is in favour of the banks/FIs. (secured creditors) and, accordingly, the borrower's appeal/I.A. in this Court stands dismissed whereas the appeal/I.A. filed by the banks/FIs. stands allowed with no order as to costs.

N.J. Banks/Fi's appeal/I.A. allowed
Borrower's appeal/IA dismissed.