This writ petition coming on for hearing this day, ***Justice Sujoy Paul,*** *passed the following :*

O R D E R

This petition filed under Article 227 of the Constitution of India assails the legality, validity and propriety of order dated 01.08.2022 (Annexure P/5) passed by the Debts Recovery Tribunal (Tribunal), whereby while ordering restoration of the S.A. No.176/2022, which was dismissed for want of prosecution on 02.05.2022, the learned Tribunal directed that the SA will be restored subject to fulfilling certain conditions.

Submissions of petitioners :-

2. The petitioners have assailed this order dated 01.08.2022 mainly on the grounds :

(i) That the Tribunal had jurisdiction to restore the securitization application (SA) subject to payment of reasonable cost but the Tribunal did not have any jurisdiction to impose the unreasonable conditions, which have no nexus with imposition of cost.

(ii) The Tribunal did not have jurisdiction to put such onerous conditions and therefore, such without jurisdiction order can be impugned without availing statutory alternate remedy under Section 18 of the **Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act of 2002** (Act of 2002).

3. To elaborate, Shri Udit Maindiretta, learned counsel for the petitioners submits that the petitioners have filed aforesaid SA before the Tribunal. The Tribunal by order dated 11.04.2022 granted interim

protection to the petitioners by directing that till next date of hearing, no sale certificate be issued. It is worthnoting that the Tribunal did not impose any condition while granting interim relief. No doubt, the petitioners' counsel did not appear on certain dates and the Tribunal recorded that last chance is given the applicants. The Tribunal also made it clear that if on the next date of hearing the applicants seek adjournment, the Tribunal may vacate/withdraw the interim protection relating to non-issuance of sale certificate.

4. Counsel for the petitioners admittedly remained absent before the Tribunal on the next date i.e. 02.05.2022. The Tribunal by order dated 02.05.2022 dismissed the SA for want of prosecution.

5. Aggrieved, the petitioners filed application seeking restoration of the said securitization application. The said application was heard on 01.08.2022 and decided by the impugned order. Shri Udit Maindiretta, learned counsel for the petitioners by referring to paragraph-12 of the impugned order urged that the petitioners relied on various judgments of the Supreme Court and the judgments of this Court to show that such conditions while restoring the matter cannot be imposed. The Tribunal although reproduced the said judgments to some extent, did not deal with the principles laid down in the said judgments. The Tribunal imposed the condition of depositing Rs.02 crores in 4 installments within 2 months out of the outstanding amount. The installments required to be paid are also mentioned in the said condition. It is mentioned that after depositing the final installment, SA No.176/2022 will be restored for hearing. After depositing first installment, ad-interim protection granted on 11.04.2022 will automatically revive. By imposing such conditions, the Tribunal restored SA No.176/2022.

6. The reference is made to **2014 (1) M.P.L.J. 520 (Alok Saboo Vs. State Bank of India)** and **2014 (2) M.P.L.J. 379 (R.R. Flour Mills Pvt. Ltd. Vs. State Bank of India)** to bolster the submissions that the Tribunal is although competent to impose the costs, was not justified in putting aforesaid conditions. This Court deprecated the orders impugned in the said cases whereof stringent conditions were imposed by the Tribunal.

7. It is submitted that the petitioners in paragraph-5.5 of this petition have categorically pleaded that conditions so imposed are onerous and impermissible. The same will negate the very purpose of adjudication of the case on merits.

8. In view of principles laid down by the Supreme Court in **(1998) 8 SCC 1, Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai** and **others and (2003) 2 SCC 107, Harbanslal Sahnia and another Vs. Indian Oil Corpn. Ltd. And Others**, when the order impugned is without jurisdiction, this Court may not relegate the petitioners to avail the remedy of preferring an appeal under Section 18 of the Securitization Act is another limb of submission.

9. Furthermore, it is argued that the counsel appearing for the petitioners before the Tribunal remained absent without informing the present petitioners. For mistake of the counsel, petitioners cannot be made to suffer. Petitioners are not expected to act as watch dog and see that their counsel is present in every date of hearing. Judgments in **Rafiq and another v. Munshilal and another (1981) 2 SCC 788** and **Ram Kumar Gupta and another v. Har Prasad and another (2010) 1 SCC 391** are relied upon for this purpose. For the purpose of drawing analogy, it is argued that in the original Act of 2002 there was a condition of

deposit of 75% of the outstanding amount before filing of Securitization Application. The said condition was interfered with by the Supreme Court in the case of **Mardia Chemicals Ltd. and another v. Union of India and another (2004) 4 SCC 311.** By impugned order, the Tribunal has almost directed to deposit 20% of the outstanding amount which is bad in law.

Submission of Bank :-

10. *Per contra,* Shri Jagbandan Patel, learned counsel for the Bank supported the impugned order. He submits that this petition is not maintainable in view efficacious statutory alternative remedy available to the petitioner under Section 18 of the Act of 2002. Under Section 18 of the Act while filing appeal, the appellant is required to deposit 50% of the outstanding amount. In order to avoid said deposit, the petitioner has filed this petition directly before this Court which may not be entertained. He also placed reliance upon Section 19(25) of the **Recovery of Debts and Bankruptcy Act, 1993** (Act of 1993). It is argued that the Tribunal is competent to make such orders and give such directions as may be necessary or expedient to give effect to its orders or to prevent abuse of its process or to secure the ends of justice. Hence, no fault can be found in the impugned order.

11. The parties confined their arguments to the extent indicated above.

12. We have heard the learned counsel for the parties at length and perused the record.

Statutory Backing :-

13. Section 22(2)(g) of **Act of 1993** reads as under :-

> **"22. Procedure and Powers of Tribunal and the Appellate Tribunal.-**
>
> (2) The Tribunal and the Appellate Tribunal shall have, for the purposes of discharging their functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely :-
> (a) …...
> (b) ...…
> (c) .....
> (d) ...…
> (e) ...…
> (f) ...…
> (g) Setting aside any order of dismissal of any application for default or any order passed by it ex-parte;"
>
> **(Emphasis Supplied)**

14. The pivotal question before us is whether while exercising the aforesaid power and restoring the Securitization Application, the Tribunal was empowered and justified in putting the impugned conditions in the order dated 02.05.2022.

15. Before dealing with the aforesaid question, it is apposite to consider the judgments delivered in **Alok Saboo and others v. State Bank of India and others 2013 SCC OnLine MP 10788.** The Court has held as under :-

> **13.** Hon'ble the Supreme Court further in the case of *G.L. Vijain* v. *K. Shankar*, (2006) 13 SCC 136, has held as under in regard to power of the Court under Order IX, Rule 7 and Order IX, Rule 13 of Civil Procedure Code:—
>
> "7. **The Court's power to impose condition for entertaining an application must be provided for under the statute itself.** We may immediately notice the distinction between the power of the Court exercised under Order 9, Rule 7 of the Code of the

> Civil Procedure vis-a-vis Order 9, Rule 13 thereof. Whereas while exercising its jurisdiction under Order 9, Rule 7 of the Code of Civil Procedure, the Court can impose conditions in regard to payment of costs, but while exercising its power under Order 9, Rule 13 thereof, the Court can exercise a larger jurisdiction in the sense that it can impose other conditions."
>
> **14.** From the aforesaid judgments of Hon'ble the Supreme Court, the principle of law is that while exercising powers under Order IX, Rule 7 of Civil Procedure Code the Court can impose condition in regard to payment of costs but it cannot impose such hard and stringent condition which would negate the purpose of adjudication. As observed by the Court, purpose of the provision is to ensure orderly conduct of the proceedings of the Court by penalizing improper dilatoriness calculated merely to prolong the litigation.
>
> **15.** Section 22(2) of the Act of 1993 provides that while setting aside an order of *ex parte* the tribunal has the same powers as are vested in a Civil Court under the Code of Civil Procedure, in our opinion, **the tribunal cannot impose a condition in setting the *ex parte* proceeding which is so stringent amounting to finalization of dispute that it would become impossible for the party to comply the condition. However, the tribunal can impose the cost.**
>
> **(Emphasis supplied)**

16. Exactly similar view was taken by the Court in **R.R. Flour Mills Pvt. Ltd. v. State Bank of India, 2013 SCC OnLine MP 7420**. The *ratio decidendi* of judgment of **Alok Saboo (supra)** is that power to impose certain condition must flow from enabling statutory provision. In

absence of any enabling statutory source of power, imposition of such condition is impermissible.

17. In our considered opinion, under Section 22(1)(g) of the Act of 1993 the Tribunal was competent to restore the Securitization Application by imposition of reasonable cost. This power of restoration of SA as per Section 22(2)(g) of Act of 2003 cannot be confused with the power flowing from Section 19(25) of the same Act. It is noteworthy that Section 19 of the Act deals with '**application' to the Tribunal**. Section 2(b) of the Act of 1993 defines "application" which reads as under :-

> "application" means an application made to a Tribunal under Section 19.

Thus, when an 'application' is pending in order to secure the ends of justice in that proceeding relating to adjudication of said 'application', appropriate orders may be passed in the interest of justice by taking assistance of Section 19(25) of the Act of 1993. For example, if in a pending SA, ad-interim relief is prayed for, the Tribunal can very well impose justifiable conditions while granting such interim relief. Such an order will be in-consonance with the scheme and object of Section 19(25) of the Act as well as the judgment of Supreme Court in **Mardia Chemicals (supra)**.

18. However, in the instant case, the restoration application filed under Section 22(2)(g) cannot be treated to be an 'application' filed under Section 19 of the said Act. Section 22(2)(g) does not provide any power to impose impugned conditions.

19. The impugned order shows that the Tribunal has not directed restoration on payment of cost. Indeed, the Tribunal has put certain conditions. Such conditions, in our considered opinion, could not have

been imposed in exercise of power under Section 22(2)(g) of the said Act of 2003. At the time of ordering restoration, the Tribunal was not required to act as a recovery agent of the Bank. At the cost of repetition, the power founded upon Section 19(25) of Act of 2003 which is applicable to 'application' can not be read, telescoped and exercised while considering an application for restoration.

Exercise of discretionary power :-

20. The discretion whether vested with the administrative authority or a judicial forum must be exercised in a judicious manner and within the four corners of enabling statutory provision.

21. It is noteworthy that 'Law has reached its finest moments', stated ***Douglas, J.*** *in* ***United State v. Wunderlich,*** 'when it has freed man from the unlimited discretion of some ruler…. Where discretion is absolute, man has always suffered.' It is in this sense that rule of law may be said to be the sworn enemy of caprice. Discretion, as **Lord Mansfield** stated it in classic terms in **Wilkes**, (ER p. 334): **Burr** at p. 2539 'means sound discretion guided by law. It must be governed by rule, not by humour: it must not be arbitrary, vague, and fanciful.'' The Apex Court quoted with profit the aforesaid principle in **(2012) 10 SCC 1 (Natural Resources Allocation, in Re, Special Reference No.1 of 2012)**.

22. Exercise of unfettered discretion which runs contrary to or beyond the statutory enabling provision becomes vulnerable when tested on the anvil of settled principles. The Constitution Bench of Supreme Court in **DTC Vs. DTC Mazdoor Congress 1991 supp (1) SCC 600** emphasized the need of minimizing the scope of arbitrary and uncanalize power in *all walks of life*. P.B. Sawant, J. in the said judgment expressed his opinion as under :-

> "There is need to minimise the scope of the arbitrary use of power in all walks of life. It is inadvisable to depend on the good sense of the individuals, however high-placed they may be. It is all the more improper and undesirable to expose the precious rights like the rights of life, liberty and property to the vagaries of the individual whims and fancies. It is trite to say that individuals are not and do not become wise because they occupy high seats of power, and good sense, circumspection and fairness does not go with the posts, however high they may be. There is only a complacent presumption that those who occupy high posts have a high sense of responsibility. The presumption is neither legal nor rational. History does not support it and reality does not warrant it. It particular, in society pledged to uphold the rule of law, **it would be both unwise and impolitic to leave any aspect of its life to be governed by discretion when it can conveniently and easily be covered by the rule of law.**"
>
> **(Emphasis Supplied)**

23. The need to adopt judicial approach while exercising power was again emphasized by Apex Court in (**2014) 9 SCC 263 ONGC Ltd. Vs. Western Geco International Ltd.** It was poignantly held as under :-

> "The duty to adopt a judicial approach arises from the very nature of the power exercised by the Court or the authority and does not have to be separately or additionally enjoined upon the fora concerned. The importance of a judicial approach in a judicial approach in judicial and quasi-judicial determination lies in the fact that so long as the Court, tribunal or the authority exercising powers that affect the rights or obligations of the parties before them shows fidelity to judicial approach, they cannot act in an arbitrary, capricious or whimsical manner. Judicial approach ensures that the authority acts bona fide and deals with the subject in a fair, reasonable and objective manner

> and that its decision is not actuated by any extraneous consideration. Judicial approach in that sense acts as a check against flaws and faults that can render the decision of a Court, tribunal or authority vulnerable to challenge.''
>
> (**Emphasis supplied**)

24. If the conditions of impugned order are tested as per the *litmus test* laid down in aforesaid judicial pronouncements, it will be clear like cloudless sky that the learned Tribunal has failed to exercise its discretion judiciously and imposed conditions which are alien to the enabling statutory provision. Thus, impugned order to the extent such conditions were imposed, deserves to the jettisoned.

Alternative remedy :-

25. We are unable to persuade ourselves with the line of argument of learned counsel for the Bank that the Tribunal has such unfettered power to impose such conditions while ordering restoration of a Securitization Application. Thus, in our judgment, the impugned order to the extent such conditions are imposed is without jurisdiction. Once we hold that the said order is passed without jurisdiction, despite availability of alternative remedy, the petition can be entertained. **[See :- Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others (1998) 8 SCC 1].**

26. Before parting with the matter we deem it proper to further observe that paragraphs No. 12 and 13 of the impugned order shows that both the parties cited few judgments of the courts before the learned Tribunal. In paragraph No. 14 of the impugned order, learned Tribunal merely recorded that the principles laid down in the said judgments were respectfully considered by it. However, thereafter, the tribunal has not taken pains to assign a single reason as to why the judgments cited by the

parties are not applicable. No reasons are assigned by the Tribunal as to why the said judgments cannot be pressed into service. It was the minimum expectation from a judicial forum that it will apply its judicious mind, on the judgments relied upon by the parties and will assign adequate reasons for following or not following the said judgments. The 'reasons' were held to be heartbeat of 'conclusion'. In the absence of reasons, conclusion cannot sustain judicial scrutiny.

27. The Supreme Court in the case of **M/s. Kranti Associates Pvt. Ltd. & Anr. Vs. Masood Ahmed Khan & Ors. (2010) 9 SCC 496** emphasised the need of assigning reasons in administrative, quasi judicial and judicial function. The relevant portion reads as under :-

> **"47**. Summarizing the above discussion, this Court holds :-
>
> **a.** In India the judicial trend has always been to record reasons, even in **administrative decisions**, if such decisions affect anyone prejudicially.
>
> **b.** A quasi-judicial authority must record reasons in support of its conclusions.
>
> **c.** Insistence on recording of reasons is meant to serve the wider principle of justice that **justice must not only be done it must also appear to be done as well.**
>
> **d.** Recording of reasons also operates as **a valid restraint on any possible arbitrary** exercise of **judicial and quasi-judicial or even administrative power.**
>
> **e.** Reasons reassure that discretion has been exercised by the decision maker on relevant grounds and by disregarding extraneous considerations.
>
> **f. Reasons have virtually become as indispensable a component of a decision making process as observing principles of natural justice** by judicial, quasi-judicial and even by administrative bodies.
>
> **g.** Reasons facilitate the process of judicial review by superior Courts.

h. The ongoing judicial trend in all countries committed to rule of law and constitutional governance is **in favour of reasoned decisions based on relevant facts. This is virtually the life blood of judicial decision making** justifying the principle that reason is the soul of justice.

i. Judicial or even quasi-judicial opinions these days can be as different as the judges and authorities who deliver them. All these decisions serve one common purpose **which is to demonstrate by reason** that the relevant factors have been objectively considered. This is important for sustaining the litigants' faith in the justice delivery system.

j. Insistence on reason is a requirement for both judicial accountability and transparency.

k. If a Judge or a quasi-judicial authority is not candid enough about his/her decision making process then it is impossible to know whether the person deciding is faithful to the doctrine of precedent or to principles of incrementalism.

l. Reasons in support of decisions must be cogent, clear and succinct. A pretence of reasons or `rubber-stamp reasons' is not to be equated with a valid decision making process.

m. It cannot be doubted that **transparency is the sine qua non of restraint on abuse of judicial powers**. Transparency in decision making not only makes the judges and decision makers less prone to errors but also makes them subject to broader scrutiny. (See David Shapiro in Defence of Judicial Candor.

n. Since the requirement to record reasons emanates from the broad doctrine of fairness in decision making, the said requirement is now virtually a component of human rights and was considered part of Strasbourg Jurisprudence. See Ruiz Torjia Vs. Spain EHRR 553, at 562 para 29 and Anya vs. University of Oxford, wherein the Court referred to Article 6 of European Convention of Human Rights which requires, "adequate and intelligent reasons must be given for judicial decisions".

> **o.** In all common law jurisdictions judgments play a vital role in setting up precedents for the future. Therefore, for development of law **requirement of giving reasons for the decision is of the essence and is virtually a part of "Due Process."**
>
> **(Emphasis Supplied)**

28. In view of the *litmus test,* laid down by the Supreme Court in the case of **Kranti** (supra), impugned order cannot sustain judicial scrutiny. Apart from above, it is apt to remember the view of Supreme Court in **State of U.P. v. Jageshwar (1983) 2 SCC 305 :**

> "Care and brevity are not strange bed-fellows and both can combine in a judgment, with some beauty for a change."
>
> **(Emphasis Supplied)**

29. Resultantly, the order dated 01.08.2022 to the extent above conditions were imposed is set-aside. The matter is remitted back to the Tribunal to decide the question of imposition of reasonable cost on the restored Securitization Application.

30. With the aforesaid and without expressing any opinion on the merits of the case, petition is **allowed.**

(SUJOY PAUL)
JUDGE

(PRAKASH CHANDRA GUPTA)
JUDGE

PK