IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE SUSHRUT ARVIND DHARMADHIKARI

&

HON'BLE SHRI JUSTICE GAJENDRA SINGH

ON THE 22nd MAY , 2024

WRIT PETITION No. 3745 of 2024

BETWEEN:-

1. **VIRENDRA RATHORE S/O MANOHARLAL RATHORE OCCUPATION: AGRICULTURE R/O H.NO. 154 GRAM PANOUN DISTT. MANDSAUR (MADHYA PRADESH)**
2. **JEEVANLAL S/O MANOHARLAL RATHORE OCCUPATION: AGRICULTURIST 154, GRAM PANOUN TEHSIL AND DIST. MANDSAUR (MADHYA PRADESH)**
3. **BHAVNA W/O VIRENDRA RATHORE OCCUPATION: AGRICULTURIST 154, GRAM PANOUN TEHSIL AND DIST. MANDSAUR (MADHYA PRADESH)**
4. **BABLI W/O JEEVANLAL RATHORE OCCUPATION: AGRICULTURIST 154, GRAM PANOUN TEHSIL AND DIST. MANDSAUR (MADHYA PRADESH)**

.....PETITIONERS

(SHRI KUSHAGRA JAIN, LEARNED COUNSEL FOR THE PETITIONERS)

AND

1. **TEHSILDAR DISTT. MANDSAUR (MADHYA PRADESH)**
2. **SRG HOUSING FINANCE LIMITED THROUGH AN AUTHORISED PERSON, OFFICE AT 321, S.M. LODHA COMPLEX, SHASTRI CIRCLE UDIAPUR, RAJASTHAN (RAJASTHAN)**
3. **KAMLESH RATHORE S/O PRABHULAL R/O HOUSE NO. 20 WARD NO. 01, GRAM RINDA, TEHSIL AND DIST. MANDSAUR (MADHYA PRADESH)**
4. **NAND KISHORE RATHORE S/O BHUVAN RATHORE R/O HOUSE NO. 121, WARD NO. 04, GRAM LADUNA, TEHSIL SITAMAU DIST. MANDSAUR (MADHYA PRADESH)**

5. KAMLESH RATHORE S/O PARBHULAL (GUARANTOR) AGED : NA, OCC: NA R/O H.NO. 20 WARD NO. 01, GRAM RINDA, TEHSIL AND DISTT. MANDSAUR (MADHYA PRADESH)

6. NANDKISHROE S/O BHUVAN RATHORE (GUARANTOR 02)AGE : NA. OCCU: AGRICULTURIST R/O H.NO. 121, WARD NO. 04 GRAM LADUNA TEHSIL AND DIST. MANDSAUR (MADHYA PRADESH)

.....RESPONDENTS

(SHRI ROHIT SABOO, LEARNED COUNSEL FOR THE RESPONDENT NO.6)

Reserved on : 18.04.2024

Pronounced on : 22.05.2024

This petition having been heard and reserved for order coming on for pronouncement this day, Hon'ble Shri Justice S.A. DHARMADHIKARI pronounced the following

ORDER

The present petition under Article 226/227 of the Constitution of India takes exception to the impugned order dated 07.08.2023 passed by the Chief Judicial Magistrate (CJM), District Mandsaur under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for short* 'SARFAESI Act'). The action is sought to be taken under Section 14 for recovery of a loan amount due on the part of the petitioner owed to Respondent no. 2 (SRG Housing Finance Limited) (*for short* 'Respondent HFC').

2. Shorn of unnecessary details, the petitioner borrowed a secured loan of Rs. 8,00,000 (8 Lakhs) from Respondent HFC, mortgaging his

property as a collateral in lieu of the said loan. On his default in repayment, the amount became outstanding and proceedings under Section 13 of the SARFAESI Act of 2002 were initiated. Followed by declaration of NPA and Section 13 proceedings, the CJM also directed for coercive measures against the petitioner under Section 14 of the SARFAESI Act, taking over of possession, *vide* order dated04.08.2023 passed in Case No. MJCR/2606/2023.

This has triggered the filing of the present writ petition.

3. Issue for resolution at the heart of this matter is ***whether Respondent HFC is justified in resorting to provisions of SARFAESI Act for recovery of their outstanding dues from the petitioner, when it is lower than the monetary threshold of Rs. 20 Lakhs; a bar fixed by the Central Government (Ministry of Finance) for Non Banking Financing Company ('for short NBFC's)*.**

A. CONTENTIONS ON BEHALF OF THE PETITIONER:

4. The petitioner questioned the jurisdiction and authority of the Respondent HFC to institute SARFAESI proceedings as a *'secured creditor'* of the loan amount lent by a *'financial institution'* under the Act 2002 (for short 'FI'). It has been contended that proceedings under SARFAESI could not be invoked by the Respondent HFC, since they are admittedly an NBFC and the debt owed was less than Rs. 20

Lakhs.

5. Relying upon the Notification issued under Section 2 1(m)(iv) of the SARFAESI Act, specifically the latest notification dated 12.02.2021, it is contended that NBFC's are allowed to resort to machinery of SARFAESI Act towards loan recovery only when the minimum debt is Rs. 20 Lakhs or more.

6. Referring to the Gazette Notification of 12.02.2021, the petitioner vehemently argued that HFC's are one of the sub-species of larger category of NBFC, and therefore, having once been categorised as such bound by the Gazette Notifications.

7. Relying on various Circulars issued by the RBI, it is contended that all Housing Finance Companies (for short HFCs) are covered under the larger umbrella of Non- Banking Financial Companies (NBFCs), and therefore notifications applicable with respect to pecuniary jurisdiction to institute SARFAESI proceedings shall apply on all the fours to HFCs/HFI's as well. Reference is also being made to Clause 2 (a) of the Master Circular/ Directions of RBI dated 17.02.2021, relying on which it is argued that HFCs are treated as covered within the upper and middle layer of NBFCs.

8. Earlier, the Competent Authority issued a list of NBFCs, but later on superseding all the earlier notifications on 12.02.2021, it was

held and directed that if any NBFC intends to kickstart SARFAESI proceedings, then the same will be applicable to loan net worth amounts of Rs. 20,00,000/- (Rupees Twenty Lakhs) and more. Thus, in the present case when the loan amount is just Rs. 8,00,000/- (Rupees Eight Lakhs), SARFAESI Act, 2002 cannot be fell back upon for its recovery by the respondents.

B. CONTENTIONS ON BEHALF OF THE RESPONDENTS

9. The present Writ Petition is not maintainable and that the petitioner has to avail statutorily available remedy under Section 17 of the SARFAESI Act, 2002 by approaching the Debt Recovery Tribunal, which is equally competent to decide on the issue of applicability of provisions of SARFAESI Act, 2002 to the loan arrangement in question.

10. Respondent HFC is a Financial Institution (*for short* 'FI'*)* under Section 2 (1)(m)(iv) of the SARFAESI Act,2002 and registered as HFC under 29-A (5) of the National Housing Bank Act, 1987 (*for short* 'NHB Act'); therefore, provisions of SARFAESI can rightly be invoked by them being a company specifically mentioned under Notification dated 17.06.2021, bearing no. S.O. 2405 (E).

11. NHB Act, 1987 is a special enactment designed and applicable for HFCs, and therefore, dispensation with respect to NBFC shall not

be applicable to HFCs, which are special class of companies having net worth of more than Rs. 100 Crores., within the larger generic class of NBFCs.

12. Respondent HFC is entitled to invoke and resort to SARFAESI Act, 2002 by being FI under the Act of 2002 , resultantly being a *'secured creditor'* and jurisdictional monetary threshold of Rs. 20,00,000/- (Rupees Twenty Lakhs) as applicable in the case of NBFC shall not be applicable to them.

13. Separate set of Notifications are issued by the Central Govt. (Ministry of Finance) under the provisions of NHB Act, 1987, applicable to HFCs, read with section 2(1)(m)(iv) of the SARFAESI Act, 2002 for which no minimum pecuniary threshold of Rs. 20,00,000/- (Rupees Twenty Lakhs) has been prescribed.

C. MAINTAINABILITY OF THE WRIT PETITION

14. Ordinarily the Writ Court is loath to entertain writ petitions directly, when challenge is laid to proceedings initiated under SARFAESI ACT, and parties are always advised to resort to alternative remedy available under the enactment itself of Section 17 before the DRT. (Refer ***Phoenix Arc Pvt. Ltd. v Vishwa Bharati Vidya Mandir*** **(2022) 5 SCC 345;** ***Federal Bank Ltd. v Sagar Thomas,*** **(2003) 10 SCC 733;** ***State Bank of India v Arvindra***

Electronics (P) Ltd. **2022 SCC Online SC 1522;** ***United Bank of India v Satyawati Tondon,*** **(2010) 8 SCC 110).**

15. However, in the present case, the said routine course may not be followed as the petitioner questions the very jurisdiction and applicability of the SARFAESI proceedings and raises a ***pure question of law*** pertaining to invocation of Section 13 proceedings by the Respondent HFC, when admittedly the debt stands to be below the prescribed pecuniary threshold of Rs. 20,00,000/- .

16. It is trite, when the questions of jurisdiction are raised to the maintainability of any proceedings or pure questions of law arise with respect to existence, exercise of power by any statutory authority/ Tribunal created under a statute, then alternate remedy is no bar and is rendered a mere technicality. The writ Court can extend the large arms of its jurisdiction and powers to address and undo the wrong or illegal usurpation of powers by any statutory authority. As been held recently in the matter of ***Godrej Sara Lee Ltd. v Excise and Taxation Officer - cum - assessing Authority and Ors.*** **2023 SCC Online SC 95,** alternative remedy will not stand in the way of a writ Court, when ***questions pertaining to jurisdiction or pure questions of law going to existence and exercise of powers of the concerned statutory authority arise***. The writ Court can determine whether the concerned

authority created under a statute (Respondent HFC in the present case) is rightfully resorting to the draconian powers of taking over of physical and symbolic possession of the mortgaged property; and that whether it is entitled to do so. Various questions of law arise in the current proceedings pertaining to applicability of Notifications issued apparently relatable to the same provision of law, *viz* Section 2(1)(m)(iv) of the SARFAESI Act, which need to be resolved as it is upon the said determination only, the larger question hinges - avail of SARFAESI Act by the Respondent HFC. Such questions of law about existence and exercise of powers by the lending company/FI can very well be adjudicated upon by the writ Court in exercise of the multitude of powers available under Article 226 of the Constitution of India. ***Vide* Paras 7 - 9,** the Supreme Court has in the matter of ***Godrej Sara Lee Ltd. v Excise and Taxation Officer - cum - assessing Authority and Ors.* (Supra)** after adumbrating various judgments on the point held as follows :

> *"7. Not too long ago, this Court in its decision reported in 2021 SCC OnLine SC 884 (Assistant Commissioner of State Tax v. Commercial Steel Limited) has reiterated the same principles in paragraph 11.*
>
> *8. That apart, we may also usefully refer to the*

decisions of this Court reported in (1977) 2 SCC 724 (State of Uttar Pradesh v. Indian Hume Pipe Co. Ltd.) and (2000) 10 SCC 482 (Union of India v. State of Haryana). What appears on a plain reading of the former decision is that whether a certain item falls within an entry in a sales tax statute, raises a pure question of law and if investigation into facts is unnecessary, the high court could entertain a writ petition in its discretion even though the alternative remedy was not availed of; and, unless exercise of discretion is shown to be unreasonable or perverse, this Court would not interfere. In the latter decision, this Court found the issue raised by the appellant to be pristinely legal requiring determination by the high court without putting the appellant through the mill of statutory appeals in the hierarchy. What follows from the said decisions is that where the controversy is a purely legal one and it does not involve disputed questions of fact but only questions of law, then it should be decided by the high court instead of dismissing the writ petition on the

ground of an alternative remedy being available.

9. Now, reverting to the facts of this appeal, we find that the appellant had claimed before the High Court that the suo motu revisional power could not have been exercised by the Revisional Authority in view of the existing facts and circumstances leading to the only conclusion that the assessment orders were legally correct and that the final orders impugned in the writ petition were passed upon assuming a jurisdiction which the Revisional Authority did not possess. In fine, the orders impugned were passed wholly without jurisdiction. Since a jurisdictional issue was raised by the appellant in the writ petition questioning the very competence of the Revisional Authority to exercise suo motu power, being a pure question of law, we are of the considered view that the plea raised in the writ petition did deserve a consideration on merits and the appellant's writ petition ought not to have been thrown out at the threshold."

(emphasis supplied)

17. Therefore, the preliminary objections to the maintainability of the writ petition in the present case are rejected, holding that writ petition to decide upon such pure questions of law; touching upon the jurisdiction, existence and exercise of powers by the respondent HFC is maintainable.

D. APPROACH TO INTERPRETATION & APPLICABILITY OF THE SARFAESI ACT

18. The SARFAESI Act, 2002 was brought in by the Parliament to tackle the problem of sluggish pace of recovery of defaulting loans and mounting levels of non-performing assets of Banks and FI's to give proper impetus to industrial development. Designed toward ensuring commercial stability of Banks and other FIs, swifter mechanisms of recovery were ushered in through the SARFAESI Act. It was brought into force to solve the problem of recovering large debts in NPA's. The background and salient features of the SARFAESI Act have been extensively discussed, analysed, and elaborated by the Hon'ble Supreme Court in the matter of ***Mardia Chemicals Ltd. v. UOI*** ***(*****2004) 4 SCC 311** and ***United Bank of India v. Satyavati Tandon (*****2010) 8 SCC 110** : **(2010) 3 SCC (Civ) 260.**

19. Thus, the very rationale was to provide an expeditious procedure, wherever there was a security interest. It is to provide a

quicker remedy to the lender against the borrower, who defaults in repayment of the loan. The objective therefore, is clearly laudable *viz.* to fix the bad debts and non performing loans, that become a burden upon the economic fabric of the society and the country both. The SARFAESI Act therefore must receive an interpretation that furthers its object and not a self defeating one. In the context of interpretation of its provisions, therefore a broad, purposive approach must be adopted, that ensures the fulfilment of the objective and reasons behind enactment. ***The approach of the Court therefore should generally be towards holding that SARFAESI Act applies to any recovery proceedings, then leaning against on the grounds of technicalities.***

E. STATUTES & STATUTORY PROVISIONS INVOLVED IN THE PRESENT MATTER

SARFAESI ACT, 2002

20. Various provisions of SARFAESI Act, 2002 involved in the present matter can be appropriately referred to.

Section 2(1)(m) defines **Financial Institution** as follows :-

> *[(m)* ***"Financial Institutions"*** *means- a public financial institution within the meaning of Section 4-A of the Companies Act, 1956 (1 of 1956);*
>
> ii) any institution specified by the Central Government under sub-clause (ii) of clause (h)

of Section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);

iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958);

(iiia) a debenture trustee registered with the Board and appointed for secured debt securities;

(iiib) asset reconstruction company, whether acting as such or managing a trust created for the purpose of securitization or asset reconstruction, as the case may be;]

(iii) any other institution or non-banking financial company as defined in clause (f) of Section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act;

[(ma) "financial lease" means a lease under any lease agreement of tangible asset, other than negotiable instrument or negotiable document, for transfer of lessor's right therein to the lessee for a certain time in consideration of payment of agreed amount periodically and where the lessee becomes the owner of the such assets at the expiry of the term of lease or on payment of the agreed residual amount, as the case may be;]

Section 2 (zd) defines Secured Creditor thus: -

[(zd) "secured creditor" means-

(i) any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible asset or intangible asset as specified in clause (1)

ii) debenture trustee appointed by any bank or financial institution; or

iii) an asset reconstruction company whether acting as such or managing a trust set up by such asset reconstruction company for the securitisation or reconstruction, as the case may be, or

iv) debenture trustee registered with 5 [the Board and appointed for secured debt securities; or

v) any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created by any borrower for due repayment of any financial assistance.]

F. ABOUT THE NATIONAL HOUSING BANK ACT, 1987

21. The National Housing Bank Act is an Act establishing National Housing Bank to operate as a principal agency to promote ***Housing Finance Institutions (for short*** **'HFI'*)*** both at the local and regional levels for providing financial and other support to such institutions and matters connected therewith. The Act provides for an

organised institutional framework for providing Housing Finance structure through the establishment of appropriate institutions at various levels that catalyse and mobilise the housing activity. It also plays a role in the formulation of policies designed to promote housing in the country and laying down guidelines for working of all the agencies connected with housing. Some of the definitions occurring under the definition clause, *viz*. **Section 2** pertinent for the present matter read thus :

> ***"Section 2 Definitions -*** *In this Act, unless the context otherwise requires—*
>
> (d) **Housing Finance Institution** - includes every institution, whether incorporated or not, which primarily transacts or has a [one of its principal objects], the transacting of the business of providing finance for housing, whether directly or indirectly";
>
> *
> *
> *

22. **Section 29-A** titled as -***'Requirement Of Registration And Net Owned Fund'*** stipulates about the HFI, which intends to commence and operate the business of housing finance in the country. It provides host of preconditions for any company, intending to

venture into the business of housing finance, whilst also laying down the net worth and the minimum capital, it must possess in its balance and audit sheets, prior to engaging in such business. It reads as thus:

> ***"Section 29-A - Requirement Of Registration And Net Owned Fund -***
>
> *(1) Notwithstanding anything contained in this Chapter or in any other law for the time being in force, no housing finance institution which is a company shall commence housing finance as its principal business or carry on the business of housing finance as its principal business without -*
>
> *(a) obtaining a certificate of registration issued under this Chapter; and*
>
> *(b) having the net owned fund of ten crore rupees or such other higher amount, as the Reserve Bank may, by notification, specify.*
>
> *(2) Every housing finance institution which is a company shall make an application for registration to the Reserve Bank in such form as may be specified by the Reserve Bank:*
>
> *Provided that an application made by a housing finance institution which is a company to the National Housing Bank and pending for consideration with the*

National Housing Bank as on the date of commencement of the provisions of Part VII of Chapter VI of the Finance (No. 2) Act, 2019, shall stand transferred to the Reserve Bank and thereupon the application shall be deemed to have been made under the provisions of this sub-section and shall be dealt with accordingly:

Provided further that the provisions of this sub-section shall not apply to the housing finance institution which is a company and having a valid registration certificate granted under sub-section (5) on the date of commencement of the provisions of Part VII of Chapter VI of the Finance (No. 2) Act, 2019, and such housing finance institution shall be deemed to have been granted a certificate of registration under the provision of this Act.]

(4) The [Reserve Bank], for the purpose of considering the application for registration, may require to be satisfied by an inspection of the books of such housing finance institution or otherwise that the following conditions are fulfilled:-

(a) that housing finance institution is or shall be in a position to pay its present or future depositors in full as and when

their claims accrue;

(b) that the affairs of the housing finance institution are not being or are not likely to be conducted in a manner detrimental to the interest of its present or future depositors;

(c) that the general character of the management or the proposed management of the housing financial institution shall not be prejudicial to the public interest or the interests of its depositors;

(d) that the housing finance institution has adequate capital structure and earning prospects;

(e) that the public interest shall be served by the grant of certificate of registration to the housing finance institution to commence or to carry on the business in India;

(f) that the grant of certificate of registration shall not be prejudicial to the operation and growth of the housing finance sector of the country;and

(g) any other condition, fulfillment of which in the opinion of the [Reserve Bank], shall be necessary to ensure that the commencement of or carrying on the business in India by a housing finance institution shall not be prejudicial to the public interest or in the interests of the

depositors:

[Provided that the Reserve Bank may wherever it considers necessary so to do, require the National Housing Bank to inspect the books of such housing finance institutions and submit a report to the Reserve Bank for the purpose of considering the application.]

(5) The [Reserve Bank] may, after being satisfied that the conditions specified in sub-section (4) are fulfilled, grant a certificate of registration subject to such conditions which it may consider fit to impose.

(6) The [Reserve Bank] may cancel a certificate of registration granted to a housing finance institution under this section if such institution -

(i) ceases to carry on the business of a housing finance institution in India;

Or

(ii) has failed to comply with any condition subject to which the certificate of registration had been issued to it;

Or

(iii) at any time fails to fulfill any of the conditions referred to in clauses (a) to (g) of sub-section (4);

Or

(iv) fails

(a) to comply with any direction issued by the [Reserve Bank or the National Housing Bank] under the provisions of this Chapter;

Or

(b) to maintain accounts in accordance with the requirement of any law or any direction or order issued by the [Reserve Bank or the National Housing Bank] under the provisions of this Chapter;

Or

(c) to submit or offer for inspection its books of account and other relevant documents when so demanded by an inspecting authority of the [Reserve Bank or the National Housing Bank];

Or

(v) has been prohibited from accepting deposit by an order made by the National Housing Bank under the provisions of this Chapter and such order has been in force for a period of not less

than three months:

Provided that before cancelling a certificate of registration on the ground that the [housing finance institution which is a company] has failed to comply with the provisions of clause

(ii) or has failed to fulfill any of the conditions referred to in clauses (a) to (g) of sub-section 4, the [Reserve Bank], unless it is of the opinion that the delay in cancelling the certificate of registration shall be prejudicial to public interest or the interest of the depositors or the [housing finance institution which is a company], shall give an opportunity to such institution on such terms as the [Reserve Bank] may specify for taking necessary steps to comply with such provision or fulfillment of such condition:

Provided further that before making any order of cancellation of certificate of registration, such institution shall be given a reasonable opportunity of being heard.

(7) A housing finance institution aggrieved by the order or rejection of

application for registration may prefer an appeal, within a period of thirty days from the date on which such order of rejection or cancellation is communicated to it, to the Central Government and the decision of the Central Government where an appeal has been preferred to it, or of the [Reserve Bank] where no appeal has been preferred, shall be final:

Provided that before making any order of rejection of appeal, such institution shall be given a reasonable opportunity of being heard."

23. From the above provisions, it is clear that HFIs or HFCs are a specific category of entities, created specially under the provisions of the NHB Act, providing for establishment, regulation and running of business by HFC's. They are established as being governed under provisions of Section 29A under Special enactment of NHB Act, 1987.

G. ABOUT THE RBI ACT, 1934

24. The RBI Act governs running of banking activities in the country.

Chapter III-B titled as **"*Provisions Relating To Non - Banking Institutions Receiving Deposits And Financial Institutions*"** contains various provisions regulating entities and institutions indulging into

receiving of deposits. Section 45 (I) is the definition clause, specially enacted for Chapter III-B, where under vide Section 45 (I) (c) **'*Financial Institution'*** is defined; vide Section 45 (I) (e) **'*Non Banking Institution'*** is defined, and vide Section 45 (I) (f), **'*NBFC'*** is defined. They read as follows:

> ***"Section 2 Definitions -****In this Chapter, unless the context otherwise requires,–*
>
> [(c) **''financial institution''** means any non-banking institution which carries on as its business or part of its business any of the following activities, namely:–
>
> *(i) the financing, whether by way of making loans or advances or otherwise, of any activity other than its own:*
>
> *(ii) the acquisition of shares, stock, bonds, debentures or securities issued by a Government or local authority or other marketable securities of a like nature:*
>
> *(iii) letting or delivering of any goods to a hirer under a hire-purchase agreement as defined in clause (c) of section 2 of the Hire-Purchase Act, 1972:*
>
> *(iv) the carrying on of any class of insurance business;*
>
> *(v) managing, conducting or supervising, as foreman, agent or in any other capacity, of chits or kuries as defined in any law which*

is for the time being in force in any State, or any business, which is similar thereto;

(vi) collecting, for any purpose or under any scheme or arrangement by whatever name called, monies in lumpsum or otherwise, by way of subscriptions or by sale of units, or other instruments or in any other manner and awarding prizes or gifts, whether in cash or kind, or disbursing monies in any other way, to persons from whom monies are collected or to any other person, 3 [but does not include any institution, which carries on as its principal business,–

(a) agricultural operations; or

(aa) industrial activity; or]

(b) the purchase or sale of any goods (other than securities) or the providing of any services; or

(c) the purchase, construction or sale of immovable property, so however, that no portion of the income of the institution is derived from the financing of purchases, constructions or sales of immovable property by other persons;]

[Explanation.– For the purposes of this clause, ''industrial activity'' means any activity specified in sub-clauses (i) to

(xviii) of clause (c) of section 2 of the Industrial Development Bank of India Act, 1964;]

(d) ''firm'' means a firm as defined in the Indian Partnership Act, 1932 2 [* *]; (e) ''non-banking* institution'' means a company, corporation 3 [or cooperative society]

(e) ''non-banking institution'' means a company, corporation 3 [or cooperative society]

(f) ''non-banking financial company'' means– (i) a financial institution which is a company;

(ii) a non-banking institution which is a company and which has as its principal business the receiving of deposits, under any scheme or arrangement or in any other manner, or lending in any manner;

(iii) such other non-banking institution or class of such institutions, as the Bank may, with the previous approval of the Central Government and by notification in the Official Gazette, specify;]''

H. ANALYSIS OF INTER-RELATION BETWEEN THE TRINITY OF ENACTMENTS IN QUESTION - SARFAESI, NHB & THE RBI

25. Erudition of various provisions of the three enactments referred to above (SARFAESI, RBI and NHB Acts) involved in the present matter would demonstrate the following :

a) Under Section 2(1)(m)(iv) of SARFAESI

Act, a *'financial institution'* shall include *'any other institution'* or *'NBFC'* as defined under Section 45(I) (f) of the RBI Act. Thus Section45(I)(f) of RBI Act applies to NBFC defined under it. However other than NBFC, there can be multiple other institutions also, which may be so notified by the Central Government. Therefore notification by the Central Government in the Official Gazette is a precondition for any NBFC or other institutions to be treated as FI under the SARFAESI Act. The HFI as defined under NHB Act can thus be treated to be covered under generic expression *'any other institution'* referred to under Section 2(1)(m)(iv) of SARFAESI Act, having the principle object and business of providing finances for housing. Ergo, HFI must meet the preconditions for registration with the RBI, under Section 29-A of the NHB Act. Section 29-A stipulates some of the pre-conditions for coming into existence and registration of HFI/ HFC, one of them being possessing the minimum prescribed annual turnover and net owned fund.

b) A perusal of **Section 29-A (*Requirement Of Registration And Net Owned Fund*)** of the NHB Act would clarify beyond any pale of doubt that HFI's

under the Act may be an NBFC or may not be an NBFC. The requirement of obtaining a certificate of registration under Section 29-A (1) is from the RBI, which is made, processed and issued under Sections 29-A (2) to (5) of the NHB Act. The said registration certificate so granted to HFI may also be cancelled on contingencies coming into occurrence post its issuance under Section 29-A (6) by the RBI.

c) Section 45 (I) & other provisions of Chapter III-B ***(Provisions Relating To Non - Banking Institutions Receiving Deposits And Financial Institutions)*** may not *stricto senso* therefore apply in case of HFI/ HFC, which are a special class and category of institutions created under a special enactment, *viz* NHB Act whilst determining applicability of SARFAESI to either of the set of companies.

d) The Court has closely examined Section 45 (I)(f)(ii) and (iii), which are inclusive of all the companies, having principal business of receiving deposits, under any scheme or arrangement or any other manner or lending in any manner. However, the said provision shall not apply in case of HFI's /HFC's being

registered with the RBI under Section 29-A of the NHB Act, even if such HFI's/HFC's may be undertaking the principal business of receiving of deposits, under any scheme or arrangement or any other manner or lending in any manner. For the purposes of regulation by the RBI, the HFI's/ HFC's shall stand governed by the provisions of Section 29-A of the NHB Act, which is a ***complete code in itself*** governing the HFI's/ HFC's created under special enactment of NHB Act.

e) Therefore the genesis and registration of HFI's/ HFC's would always be traceable to notifications issued under NHB Act, which are independent of issuance of any notification under the provisions of **Chapter III-B** ***(Provisions Relating To Non - Banking Institutions Receiving Deposits And Financial Institutions)*** r/w Section 45(I)(f) of the RBI Act. When it comes to issuance of notification pertaining to registration or bringing into existence of any HFI/HFC, the same would always be sourced from provisions of NHB Act, especially Section 29A, and not to that of RBI Act. This is however with a clear rider that RBI may prescribe guidelines/ directions laying down preconditions for any HFCs/ HFIs to get

registered. But that doesn't dilute the character and identity of any housing company as an HFIs/HFCs under the NHB Act.For this reason therefore, the HFI/ HFC shall fall under the phrase ***'any other institution'*** occurring under Section 2 (1)(m)(iv) of the SARFAESI Act and not as a sub-species of NBFC under Section 45 (I) of the RBI Act.

f) Therefore it would depend upon the tone and tenor of the Notification issued under Section 2 (1)(m) (iv) by the Central Government, as to whether it is pertaining to NBFC or HFI's/HFC's under the NHB Act. The **latter part of Section 2 (1)(m)(iv),** *viz. 'any other institution or non-banking financial company as defined in clause (f) of Section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act'* qualifies and applies to both the distinct categories of FI's under Section 2(1)(m)(iv), *viz* any other institution as also NBFC both. Meaning thereby that the Central Government may either through the notification specify the NBFC as FI or *'any other institution'* as the FI, which is thereafter entitled to adorn the attire of a

'secured creditor' under Section 2 (z)(d) of the SARFAESI Act. The import of Section 2(z)(d)(i) defines *'secured creditor'* as any bank or FI or group of banks or FI refers to FI as enumerated under Section 2(1)(m)(iv), notified by the Central Government for the said purpose.

g) In view of the above, clearly though in a generic/ general sense, the provisions of Chapter III-B of the RBI Act, specifically Section 45 (I)(f) may include all companies engaged into the principal business of housing finance and lending, however in the face of existence of a special enactment of the NHB Act, especially Section 29-A, the specific category or the sub-species of the HFI/ FI shall stand out separately, not covered by the general provisions of the RBI Act, but covered by the specific provisions of the NHB Act.

In light of the above, it is condign now to refer to various notifications issued by the Central Government for NBFCs as also for the HFCs/ HFIs.

I. NOTIFICATIONS ISSUED FOR HFCs/ HFIs UNDER SECTION 29-A of the NHB ACT

26. In exercise of powers conferred under Section 29-A, r/w Section 2(1)(m) (iv), the Central Government (Ministry of Finance)

has issued notifications from time to time accompanied with detailed tables specifying the HFC's/HFI's to be treated as FIs under Section 2(1)(m)(iv) of the SARFAESI Act. Though the notification last and latest in time treats HFC's/HFI's with the net owned worth of more than Rs. 100 Crores as FIs, however there is no specified list of companies to be so treated as HFC/ HFIs enumerated in the said notification, as was the practice before. Under the latest notification, any & all HFC/HFI with a minimum net worth of Rs. 100 Crores, are to be treated as FIs. **The summary of those notifications issued from time to time with respect to HFCs/ HFIs is catalogued in tabular form below :**

Date	**Details**	**Remark**
18.12.2015	Notification bearing no. S.O. 3466 (E) issued with a list of HFCs registered under Section 29A(5) of the NHB Act, 1987 as Financial Institutions under Section 2(1)(m)(iv) of the SARFAESI Act, 2002. **Name of the Respondent finds mention at Sr. No. 34 in the table appended to this notification as notified FI's.**	This was however subsequently superseded by notification dated 22.01.2018
22.01.2018	Another Notification bearing no. S.O. 404 (E) issued with an additional list of HFCs registered as 'FI's' under Section 2(1)(m)(iv) of the SARFAESI Act, 2002..	
13.08.2019	Press release by RBI, where in RBI has made it clear that HFCs will be treated as one of the categories of NBFCs	

17.06.2021	Notification bearing no. S.O. 2405 (E) issued superseding all previously issued . All the HFCS HFIs registered under section 29-A of the NHB Act,1987 having assets worth more than 100 crore rupees to be treated as HFIs under section 2(1)(m)(iv) of the SARFAESI Act,2002.	

J.) NOTIFICATIONS ISSUED UNDER SECTION 45(I)(F) RBI ACT FOR NBFCs :

27. The Central Government (Ministry of Finance) has been likewise issuing a different set of notifications for various NBFCs and Companies specified under Section 45(I)(f) of the RBI Act from time to time, categorizing as FI for the purposes of Section 2(1)(m)(iv) of the SARFAESI Act. Correspondingly from time to time they have also been fixing the minimum pecuniary threshold for invocation of SARFAESI proceedings by the NBFC, below which the concerned NBFC is not entitled to resort to the same. Both the parties have brought on record various notifications issued from time to time under Chapter III-B r/w Section 45(I)(f) of the RBI as aforementioned.

The summary of those notifications issued from time to time with respect to NBFCs are catalogued in tabular form below :

Date	Details	Remark
05.08.2016	Notification bearing no. S.O. 2641 (E) containing a detailed list of NBFCs declared as *'FI's'* under Section 2(1)(m)(iv) of the SARFAESI Act, 2002.	Superseded by subsequently by Notification on dated 12.

27.08.2018	Notification bearing no. S.O. 4176 (E) containing an additional list of NBFCs declared as *'FI's'* under Section 2(1)(m)(iv) of the SARFAESI Act, 2002.	
24.10.2018	Notification bearing no. S.O. 5391 (E) containing an additional list of NBFCs declared as *'FI's'* under Section 2(1)(m)(iv) of the SARFAESI Act, 2002.	
24.02.2020	Notification bearing no. S.O. 856 (E) issued fixing the minimum threshold amount for applicability of section 2(1)(m)(iv) of SARFAESI Act, 2002**to Rs.50 Lakhs and above to loans/ borrowings extended by NBFCs. However the net owned worth of the NBFCs was laid down to be a minimum of Rs. 100 Crores & above.**	
12.02.2021	This notification bearing no. S.O. 652 (E) amended the previously issued notification dated 24.02.2020 on the same subject fixing the minimum threshold limit for SARFAESI Act applicability to a debt of more than or equal to 20 Lakh rupees instead of previously fixed limit of Rs. 50 Lakhs for the purposes of Section 2(1)(m)(iv) of the SARFAESI Act.	

K. FALL OUT OF DIFFERENT SET OF NOTIFICATIONS HAVING ISSUED FOR HFCs / HFIs VIS. VIS. A VIS. THE NBFCs

28. What does issuance of two different set of notifications separately for HFCs/HFIs and NBFCs entail? How the Court must interpret their correlations with each other. On a specific query being put to counsel for both the parties, it was informed that ***amongst the large number of NBFCs mentioned in the table constituting the notification, issued from time to time, the name of Respondent HFC doesn't find mention anywhere*** in the notifications pertaining to NBFCs. No such notification was brought on record either on behalf of the petitioner, that would evince the respondent having been

classified especially as NBFC as under Chapter III-B r/w Section 45(I) (f) of the RBI Act. Thus it is luminescent that amongst the list of NBFCs to be treated as FI's, the petitioner has never been notified in such a category specifically. By necessary implication, therefore the pecuniary threshold prescribed in the notification will not apply to HFCs/ HFIs. However, to the contrary, the name of the Respondent SRG Finance finds mention in the ***notification pertaining to HFCs dated 18.15.2015 , vide Serial No. 34.***

29. That it was further contention of the petitioner that the notifications of 2021 & 2022 have applied the pecuniary threshold to all the NBFCs as a generic class, across the board and therefore specific mention of any company or for that matter of respondent HFC (SRG Finance) was never needed. Since the minimum pecuniary threshold was being determined and prescribed for all NBFCs across the plane, therefore it would automatically cover Respondent HFC as well. This contention of the petitioner is taken forward only to be rejected. As already stated *supra,* the HFIs / HFCs being a ***special genre*** of FIs / companies, created and regulated by special enactment of NHB Act, the same cannot be compartmentalised in the bogie of NBFCs, moreso when NHB Act does not u/s 29-A postulate the applicability of Chapter III-B r/w Section 45(I)(f) of the RBI Act. Therefore HFIs/ HFCs like the respondent cannot impliedly be

deemed to have been included under the umbrella of NBFC's, till and until such an intention is express and explicit under the NHB Act or the notifications issued under it. For this reason, therefore the minimum pecuniary threshold of 20 Lakhs shall not apply to HFIs/ HFCs as contended by the petitioner as prescribed in case of the NBFCs.

30. For yet another reason the contention of the petitioner is liable to be rejected. That being issuance of separate series of notifications by the very same department, very same arm of the Central Government (Ministry of Finance), as would be explicated *infra* for the HFCs / HFIs. HFCs/ HFIs are governed holistically by Section 29-A of the NHB Act, the notifications that have been issued *qua* them specifically shall regulate applicability of SARFAESI to them and not other notifications issued generically for NBFCs. Bare glance at various notifications issued for HFCs/ HFIs from time to time by the Central Government also shows that earlier HFCs were being mentioned specifically to be treated as FIs under Section 2(1)(m)(iv) of SARFAESI. Otherwise there was never any occasion or necessity for the Central Government to have come up with a distinct bee line of notifications for HFCs / HFIs. The fact that notifications are issued separately with a separate list of enumerated HFCs / HFIs by the Central Government is indicative of the regime that HFCs / HFIs

stand in an altogether different steel silo then the NBFCs. Ergo therefore the contentions of the respondent deserves acceptance that HFCs/ HFIs are an entirely different special class, which are covered under the phrase *'any other institution'* adumbrated under Section 2(1)(m)(iv) of SARFAESI Act and can't be classed with other NBFCs.

L) APPLICABILITY OF *'GENERALIA SPECIALIBUS NON DEROGANT'*

31. Both the sides made extensive arguments on the Respondent HFC being a NBFC, being into the principal business of money lending and transacting. The petitioner, where on one hand contended that by virtue of the principal business of money lending, the Respondent being a NBFC would be treated so, apart from being treated as HFC/HFI under Chapter III-B read with Section 45(I)(f). Therefore having being once treated as so, irrespective of notifications being issued for HFC's/HFI's, they would also be amenable to notifications issued for NBFC's by the Central Government from time to time. The counsel for the Respondent on the other hand contended that notifications pertaining to NBFC shall not apply as HFI's/HFC's are though FI's, but they are governed by the self contained arrangement provided under special enactment of NHB Act.

32. The interpretation and reconciliation of so called conflicting

and overlapping provisions contained in two enactments has often been resolved by applying the long settled principle of statutory interpretation - ***'generalia specialibus non derogant***'. It means *'general provisions never derogate from the special ones and that general provisions must always give way to the special provisions'*. This principle is applied in the context of either two different conflicting/overlapping enactments or two provisions overlapping / conflicting with each other under the same enactment.

33. The Supreme Court recently had an occasion to discuss the applicability of this principle in the matter of ***Managing Director, Chhattisgarh State Co - operative Bank Maryadit v. Zila Sahkari Kendriya Bank Maryadit & Ors.*** **(2020) 6 SCC 411** as a much revered tool of statutory interpretation. The special enactment must be held to be operative with the general enactment presumed to be applicable & taking effect only with the remaining parts not dealt with / or covered by the special enactment. By this logic, thus both the different enactments become applicable without any head-on conflict with each other. ***Vide*** **Paras 33, 34, 36, and 37**, the Supreme Court whilst propounding on the said principle held thus:

> *"**33.** It is a settled principle of law that where two provisions of an enactment appear to conflict, courts must adopt an interpretation which harmonises, to the*

best extent possible, both provisions. Justice G.P. Singh in his seminal work Principles of Statutory Interpretation states:

> *"To harmonise is not to destroy. A familiar approach in all such cases is to find out which of the two apparently conflicting provisions is more general and which is more specific and to construe the more general one as to exclude the more specific… The principle is expressed in the maxims generalia specialibus non derogant and generalibus specialia."*

Similarly, Craies in Statute Law states:

"The rule is, that whenever there is a particular enactment and a general enactment in the same statute, and the latter, taken in its most comprehensive sense, would overrule the former, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may properly apply."

Where two provisions conflict, courts may enquire which of the two provisions is specific in nature and whether it was intended that the specific provision is carved out from the application of the general provision. The general provision operates, save and except in situations covered by the specific provision. The rationale behind this principle of statutory construction is that were there appears a conflict between two provisions, it must be presumed that the legislature did not intend a conflict and a subject-specific provision governs those situations in

exclusion to the operation of the general provision.

34. *In an early decision of this Court in J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. State of U.P. [J.K. Cotton Spg. & Wvg. Mills Co. Ltd. v. State of U.P., AIR 1961 SC 1170] , a three-Judge Bench of this Court considered whether the principle applied to conflicts within the same enactment. Clause 5(a) of the Government Order dated 10-5-1948 conferred upon, inter alia, any employee or a registered trade union of employers the right to move the Board constituted under the order to initiate an enquiry into an industrial dispute. Clause 23 stipulated that where an enquiry is pending before the Regional Conciliation Officer, notwithstanding the pendency of a case before the Board or Industrial Court, no employer shall discharge or dismiss any workman. Under Clause 24, an order of the Board, unless modified in appeal, was final and conclusive. The appellant, representing the employer's union, contended that once an order is made under Clause 5(a), Clause 23 has no application and the employer may proceed to dismiss the workmen. The Court rejected the contention noting that any employer could defeat the provisions of Clause 23 merely by an application under Clause 5(a). The Court held that Clause 23 was made with a definite purpose. Consequently, where an enquiry was pending under Clause 23, an application under Clause 5(a) was barred. The Court held : (AIR pp. 1174-75, paras 9-10)*

> *"9. ... We reach the same result by applying another well-known rule of construction that general provisions yield to special*

provisions. The learned Attorney General seemed to suggest that while this rule of construction is applicable to resolve the conflict between the general provision in one Act and the special provision in another Act, the rule cannot apply in resolving a conflict between general and special provisions in the same legislative instrument. This suggestion does not find support in either principle or authority. The rule that general provisions should yield to specific provisions is not an arbitrary principle made by lawyers and Judges but springs from the common understanding of men and women that when the same person gives two directions one covering a large number of matters in general and another to only some of them his intention is that these latter directions should prevail as regards these while as regards all the rest the earlier direction should have effect.

...

10. Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that Clause 5(a) has no application in a case where the special provisions of Clause 23

are applicable."

(emphasis supplied)

This Court affirmed that the principle that the general excludes the specific is a tool of statutory interpretation even in cases of conflict within the same enactment. Where one of the conflicting provisions is general in nature and the other is specific, "common understanding" dictates that the specific provision is given effect, while the general provision continues to apply to all other situations.

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36. *The Court held that where two provisions are in question — one of general application and the other specific in nature, a harmonious interpretation would mean that the general law, to the extent it is dealt with by the special law, is impliedly repealed. This Court, relying on the principle generalia specialibus non derogant held that Item 1-E is a "subject specific provision". The Court noted that the amendment removed "new cement industries" from the non-eligible Annexure 'B' and placed it into Annexure 'C' amongst the eligible industries. Consequently, the Court rejected the contention of the Respondent assessee and held that as Item 1-E concerned the more specific unit, it was excluded in its application from other general entries. The principle that the general provision excludes the more specific has been consistently applied by this Court in South India Corpn. (P) Ltd. v. Board of Revenue [South India Corpn. (P) Ltd. v. Board of Revenue, AIR 1964 SC 207] , Paradip*

Port Trust v. Workmen [Paradip Port Trust v. Workmen, (1977) 2 SCC 339 : 1977 SCC (L&S) 253 : AIR 1977 SC 36] , Maharashtra State Board of Secondary & Higher Secondary Education v. Paritosh Bhupeshkumar Sheth [Maharashtra State Board of Secondary & Higher Secondary Education v. Paritosh Bhupeshkumar Sheth, (1984) 4 SCC 27] , CCE v. Jayant Oil Mills (P) Ltd. [CCE v. Jayant Oil Mills (P) Ltd., (1989) 3 SCC 343 : 1989 SCC (Tax) 423] , P.S. Sathappan v. Andhra Bank Ltd. [P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672] , Sarabjit Rick Singh v. Union of India [Sarabjit Rick Singh v. Union of India, (2008) 2 SCC 417 : (2008) 1 SCC (Cri) 449] and Pankajakshi v. Chandrika [Pankajakshi v. Chandrika, (2016) 6 SCC 157 : (2016) 3 SCC (Civ) 105] .

37. While sub-section (3) of Section 54 deals with a class of societies, clauses (a) and (b), as inserted by the 2016 Amendment Act are specific in their application to only cooperative banks. Furthermore, while Section 54(3) deals with the appointment of deputed cadre officers on cadre posts, clauses (a) and (b) deal only with the appointment of CEOs of cooperative banks. Clause (a) contemplates that the eligibility guidelines prescribed by RBI will apply to officers holding the post of CEO of a cooperative bank. Significantly, clause (b) of Section 54(3) beings with the words "if the concerning cooperative bank fails to appoint" which denotes an intention to vest with cooperative banks the power to appoint their CEO. The provision also stipulates that where the cooperative bank fails to

> *appoint CEO within a specified period, the Registrar may appoint an eligible officer of the bank. The stipulation that in the case of default, CEO shall be an officer of the bank and not an officer from the cadre as notified under Section 54(3) demonstrates the intention of the legislature to vest with cooperative banks the power to appoint their CEO."*

34. Thus, where two interpretations arise out of interplay of two different enactments, Courts must always adopt that interpretation that furthers the intention of the legislature to be applied for, which is also reflected from the legal maxim ***'verba ita sunt intelligenda ut res magis valeat quant pereat'*** *(if two constructions of a provision are possible on its face and one would clearly advance the legislative purpose, whilst the other might end* up achieving little or nothing, the former should always be preferred).

35. In view of our above exposition of the principal of '*generalia specialibus non derogant',* clearly the provisions contained under Chapter III-B of the RBI Act, specifically Section 45 (1)(f) cannot be treated to be applicable in the context of HFI's/HFC's established under Section 29A of the NHB, for the purposes of interpretation of notifications issued under 2 (1)(m)(iv) of the SARFAESI Act. HFIs/HFCs will be categorised as FI's not by virtue of their being NBFC's, but because of their falling under the phrase *'any other*

institution' as mentioned under Section 2 (1)(m)(iv). The notifications resultantly issued pertaining to NBFC would therefore on the strength of above reasoning will also not apply to HFC's/HFI's.

36. In view of the above reasoning, we reach an irresistible conclusion that all the contentions of the petitioners are liable to be rejected, holding in turn as follows:

(a) The present writ petition is maintainable and petitioner may not be relegated to the alternative remedy available under SARFAESI Act for the reasons stated *supra*.

(b) Respondent HFC is entitled under law to resort to SARFAESI Act towards recovery of their loans and borrowings, irrespective of the loan borrowings in favour of the petitioner falling below the threshold of Rs. 20 Lakhs.

(c) The notifications relied upon by the petitioner as issued by the Central Government (Ministry of Finance) on applicability of SARFAESI Act on NBFCs shall not be applicable in the context of HFCs / HFIs, but only in the context of NBFCs so defined under Chapter III-B of the RBI Act, 1934, specially Section 45(I)(f).

(d) The petitioner, if aggrieved by any of the measures

taken under sections 13 or 14 of the SARFAESI Act against them, shall be entitled to resort to Section 17 application before the DRT on other grounds available to them factually or legally, except the one decided in the present petition. **Reserving the said liberty in favour of the petitioner, the present writ petition is accordingly dismissed with no costs.**

(S.A. Dharmadhikari)
Judge

(Gajendra Singh)
Judge

sh/-