IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMMERCIAL ARBITRATION APPLICATION NO. 95 OF 2026

Aditya Birla Housing Finance Limited ***...Applicant***

V/s.

Axis Bank Limited & Ors. ***...Respondents***

Ms. Megha Gupta *with Ms. Pranjali Khemnar and Ms. Lavanita Chityala i/b. Hedgehog & Fox LLP, for the Applicant.*

Mr. Cyrus Ardeshir, Senior Advocate *with Mr. Rushil Mathur, Ms. Alessandra Shroff and Ms. Amrita Natarajan i.b. Mr. Mayur Shetty c/o. Kochhar & Co., for Respondent No.1.*

Mr. Mayank Tripathi, *for Respondent Nos.2 to 5.*

CORAM: SANDEEP V. MARNE, J.

RESERVED ON: 23 APRIL 2026

PRONOUNCED ON: 06 MAY 2026

JUDGMENT:

1) This is a Petition filed under Section 11 of the Arbitration and Conciliation Act, 1996 **(Arbitration Act)** raising an issue of seminal importance about permissibility to conduct arbitration under Section 11 of the Securitisation and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 **(SARFAESI Act)** between a secured creditor (**Axis Bank**) and an entity (**Applicant**), who is prevented from becoming a secured creditor in respect of the property of the same borrowers. The case involves takeover of loan by the Applicant-Aditya Birla Housing Finance Ltd. (**Aditya Birla**) from Axis Bank. Towards the transaction of loan transfer, Aditya Birla credited the intimated outstanding amount in the loan account with Axis Bank. However due to some delay in such credit, an insignificant amount remained outstanding in the loan account with Axis Bank, resulting in non-closure of the loan account and on that ground, Axis Bank has refused to terminate its security interest over mortgaged properties by handing over title documents to the Applicant. Because of refusal to handover the title documents by Axis Bank, Applicant is yet to become a secured creditor whereas Axis Bank is already a secured creditor in respect of the same property of the same borrowers. Whether in such circumstances arbitration under Section 11 of the SARFAESI Act can be conducted between the Applicant and Respondent No.1-Bank is an issue that arises for consideration in the present Application. The Applicant seeks contractual arbitration against the borrowers in pursuance of arbitration clause in the loan agreement and statutory arbitration against Axis Bank under Section 11 of the SARFAESI Act.

FACTS

2) Applicant-Aditya Birla is an incorporated entity engaged in the business *inter alia* of housing finance. Respondent No.1-Axis Bank is a banking company doing business under Banking Regulation Act, 1949. Respondent No.2 is a company incorporated under the Companies Act,

1956 and Respondent Nos.3 to 5 are its directors. Respondent Nos.2 to 5 are collectively referred to as the 'borrowers'.

3) The borrowers had availed cash credit and overdraft facilities from Axis Bank for business purposes. The borrowers approached the Applicant on 17 July 2023 seeking credit facilities of Rs.4,70,05,000/- *inter alia* for the purpose of taking over the cash credit and overdraft facilities sanctioned by Axis Bank. The borrowers submitted copies of foreclosure letter and statement of accounts issued by Axis Bank in respect of the cash credit account and overdraft facilities. Applicant sanctioned loan of Rs.4,70,05,000/- to the borrowers. According to the Applicant, the loan is sanctioned against mortgage of property bearing Plot No. 25, Survey No.20, Dwarka Service Centre, Marble Market, South West Delhi, Delhi owned by Surendra Kumar Agarwal (Respondent No.3). It appears that security interest in respect of the subject property was already created in favour of Axis Bank to secure the credit facilities disbursed by it. On 4 September 2023, the Applicant and the borrower entered into loan agreement which contains clause No.10 for arbitration. The borrowers also executed irrevocable Power of Attorney in favour of the Applicant on 12 September 2023 which empowered the Applicant to step into the shoes of Respondent No.2 and the borrowers *inter alia* for collecting the title documents of the subject property from Axis Bank and to deal with Axis Bank for the performance of various acts necessary for loan takeover.

4) By letter dated 4 September 2023, the borrowers requested the Applicant to disburse Rs.1,13,30,147/- in the loan account with Axis

Bank for closure of cash credit and overdraft facilities. Accordingly, the Applicant disbursed amounts of Rs.17,05,144/- in cash credit **(CC)** loan account and Rs.96,25,003/- in Overdraft **(OD)** loan account of Axis Bank. Respondent No.5 submitted request to the Axis Bank for debit freeze on overdraft facility on 13 September 2023 and such debit freeze was implemented by Axis Bank. According to the Applicant, Axis Bank refused to handover title deeds in respect of the subject property to the Applicant though the amount due under the CC and OD facility was paid by the Applicant to the Axis Bank. On 10 January 2024, the Applicant issued letter to Axis Bank for handing over title deeds/documents of subject property. Applicant visited the office of Axis Bank for securing the title documents of the subject property. On 8 February 2024, the borrowers' accounts with Applicant were classified as Non-Performing Assets **(NPA)** as per the RBI Guidelines. Without Applicant's knowledge, the borrowers addressed request letter to Axis Bank on 26 February 2024 seeking to lift the debit freeze on the OD Account. Axis Bank lifted the debit freeze marked in the account of the borrowers on 7 March 2024 and the borrowers started drawing amounts from OD Account. On 19 June 2024, the Applicant addressed legal notice to Axis Bank requesting to handover the title documents. Axis Bank addressed reply dated 15 July 2024 refusing to handover title documents and communicated that an amount of Rs.88,90,126/- remained overdue in the OD Account. Applicant issued letter dated 27 August 2024 to the Axis Bank once again requesting for handing over the title documents.

5) In the above background, the Applicant filed Petition under Section 9 of the Arbitration Act bearing Commercial Arbitration Petition

No. 104 of 2025 seeking interim measures in which an interim order was passed directing deposit of the title-deeds by Respondent No.1-Bank in the Registry of this Court. By notice dated 4 December 2025, the Applicant invoked arbitration clause under Section 21 of the Arbitration Act. By reply dated 4 December 2025, Respondent No.3 denied existence, validity or enforceability of the loan agreement.

6) By judgment and order dated 19 January 2026, this Court decided Commercial Arbitration Petition No.104 of 2025 and directed that the title deeds pertaining to the subject property shall remain deposited with this Court during pendency of the arbitral proceedings. The issue of arbitrability of disputes between the Applicant and Respondent No.1-Bank was however left open to be decided in appropriate proceedings.

7) Respondent No.1 thereafter replied to the notice issued under Section 21 of the Arbitration Act on 19 January 2026 denying any contractual relationship and existence of any arbitration agreement. The Applicant has accordingly filed the present Application under Section 11 of the Arbitration Act.

SUBMISSIONS

8) Ms. Gupta, the learned counsel appearing for the Applicant submits that the credit facility has been granted by the Applicant to the borrowers under express representation that a charge of the Applicant would be created in respect of the subject property after release of

charge of Axis Bank after utilising credit facilities granted by the Applicant for repayment of outstanding dues of Axis Bank. That the outstanding dues were directly transferred to Axis Bank. That Axis Bank was always aware of nature of transaction and the fact that the case involves loan handover. That the debit freeze was illegally and erroneously lifted by Axis Bank by acting in collusion with the borrowers. That the borrowers have taken undue advantage of time gap between issuance of foreclosure statement and actual disbursal resulting in shortage of amount of Rs.239,936.29/-. That revival of Overdraft account Axis bank on 7 March 2024 is deliberate and intentional. That Axis Bank has acted with *mala fide* intentions by permitting the borrowers to draw the amounts from OD facility despite being fully aware that the case involved loan transfer to the Applicant.

9) Ms. Gupta further submits that the case thus involves dispute over securitisation between a financial institution and a bank, thereby clearly attracting the provisions of SARFAESI Act. That the scheme of SARFAESI Act does not restrict itself to a secured creditor but covers all parties viz. the banks, financial institutions and asset reconstruction companies **(ARCs)** or qualified buyer. That there is mandate to settle the disputes between a bank and a financial institution by arbitration or conciliation as provided in the Arbitration Act on account of use of the word "*shall*" in Section 11 of the SARFAESI Act. She takes me through definition of the term '*security interest*' under Section 2(1)(zf)(i) of SARFAESI Act in support of her contention that even a charge can be treated as security interest. She relies on definition of the term '*charge*' in Section 100 of the Transfer of Property Act, 1882 and

submits that the Applicant has charge over the subject property by virtue of sanction letter, loan agreement and irrevocable Power of Attorney executed by the borrowers.

10) Ms. Gupta Further submits that the present case concerns internal creditor dispute between the banks/financial institutions which have created a charge over the subject property by virtue of pledge/hypothecation. That by virtue of Section 31 of the SARFAESI Act, even though the provisions of the Act may not apply for enforcement of such security, the disputes of the nature can be referred to arbitration under Section 11 of the SARFAESI Act which provides for statutory arbitration. She relies on judgment of Calcutta High Court in ***Reliance Commercial Finance Limited vs. Axis Bank Limited***[1].

11) Ms. Gupta further submits that the judgment of the Apex Court in ***Bank of India vs. Sri Nangli Rice Mills Private Limited***[2] holds that once one of the two conditions of (i) dispute between the bank and financial institution and (ii) dispute relating to securitisation or non-payment of an amount due inclusive of interest, are satisfied, the Debt Recovery Tribunal would have no jurisdiction and proper recourse would be only through Section 11 of the SARFAESI Act read with Arbitration Act. She further submits that the judgment in ***Bank of India vs. Shri Nangli Rice Mills*** (supra) is delivered in the context of controversy involving entertaining of claims of rights over stock of goods over hypothecation of pledge and the Hon'ble Apex Court has held that

[1] 2021 SCC OnLine Cal 4372
[2] (2025) 9 SCC 225

disputes fall within the scope of Section 11 of the SARFAESI Act. That the Apex Court has rejected the contention that charge created by a pledge falls outside the ambit of SARFAESI Act. That the judgement cannot be cited in support of a proposition that a bank or financial institution must be a secured creditor for invoking the provisions of Section 11 of the SARFAESI Act.

12) Ms. Gupta concludes by submitting that the case involves internal credit disputes between a financial institution and a bank falling within the ambit of Section 11 of the SARFAESI Act. That Axis Bank is illegally withholding the title deeds which were already brought in the registry of this Court in Section 9 proceedings. That the arbitral tribunal would decide whether the Applicant is entitled to retain the title deeds to secure its outstanding amounts. She would therefore pray for appointment of an arbitrator even for settlement of the disputes between the Applicant and Axis Bank. In so far as borrowers (Respondent Nos.2 to 5) are concerned, she submits that the Loan Agreement undoubtedly provides for settlement of disputes through arbitration. She therefore submits that an arbitrator be appointed to settle the disputes between the Applicant and all the Respondents.

13) Mr. Ardeshir, the learned Senior Advocate appearing for Axis Bank opposes the Application submitting that the Applicant has adopted inconsistent and contradictory stands in the present Application as compared to Section 9 Petition. That the Applicant treated Axis Bank as a third party to arbitration in Section 9 Petition and expressly stated that it intended to invoke arbitration only against the borrowers and was

merely securing interim relief against Axis Bank. That entire Section 9 petition was premised on an admission that there was no arbitration agreement, contractually or statutory, *qua* Axis Bank and that the Applicant was desirous of invoking arbitration only against the borrowers. That therefore, seeking of a reference under Section 11 of the SARFAESI Act against Axis Bank is clearly an afterthought.

14) Mr. Ardeshir further submits that Section 11 of the SARFAESI Act has no application to the present case as Applicant is admittedly not a secured creditor. He further submits that an unsecured creditor can never invoke any of the provisions of the SARFAESI Act, including Section 11. That the provisions of SARFAESI Act can only be invoked by a secured creditor. He takes me through the Statement of Objects and Reasons of SARFAESI Act in support of his contention that the Act is promulgated to regularise securitisation and reconstruction of financial assets and enforcement of security interest by a secured creditor. That the Act is enacted to enable the secured creditors to secure possession of and sell the secured assets without the intervention of the Court / Tribunal. That the entire mechanism of SARFAESI Act is dependent on the fact that the bank or financial institution is a secure creditor. That a condition precedent to invoke any provision of SARFAESI Act is that the party invoking any provision of the Act is a secured creditor. That if the initial condition is not met, the bank or financial institution can never invoke provisions of the Act.

15) Mr. Ardeshir relies on judgment of the Hon'ble Supreme Court in ***North Eastern Development Finance Corporation Ltd. (NEDFI)***

vs. L. Doulo Builders and Suppliers Co.P. Ltd.[3] in support of his contention that the provisions of SARFAESI Act can be invoked only where a security interest has been created in favour of a secured creditor. That unsecured creditor cannot invoke provisions of SARFAESI Act.

16) Mr. Ardeshir further submits that Section 11 of the SARFAESI Act is limited to disputes *inter se* between secured creditors and relies upon judgment of the Apex Court in ***Bank of India vs. Shri Nangli Rice Mills*****.** He submits that the statutory arbitration contemplated under Section 11 of the SARFAESI Act is confined only to disputes between the secured creditors and more particularly in relation to priority of claims and enforcement of security interest. That therefore, even if provisions of SARFAESI Act were to apply to the Applicant, Section 11 thereof becomes applicable only when both the parties to the dispute are secured creditors and the dispute pertains to propriety and enforcement of security interests.

17) Mr. Ardeshir further submits that the Applicant has no enforceable claim against Respondent No.1, which is capable of being referred to arbitration. The grievance of the Applicant arises solely from independent contractual arrangement with the borrowers through arbitral proceedings. The Applicant cannot seek to elevate itself to the status of secured creditor. Since arbitrator can only decide disputes relating to propriety and entitlement between the secured creditors *inter se*, no purpose would be served by referring the alleged disputes between

[3] 2025 SCC OnLine SC 2819

the Applicant and Respondent No.1 to arbitration. Mr. Ardeshir would pray for dismissal of the Application.

18) Mr. Tripathi, the learned counsel appearing for Respondent Nos. 2 to 5 (borrowers) has also opposed the Application. He has sought to raise various issues touching upon merits of the case. Additionally, he has also questioned the right of the Applicant to have mortgage in respect of the subject property. That no mortgage is created in favour of Applicant. He prays for dismissal of the Application

REASONS AND ANALYSIS

19) The case involves a peculiar circumstance where in a transaction of loan takeover, a miniscule amount of Rs. 2,36,936.29/- remained outstanding in the loan account of the borrowers with Axis Bank despite repayment of outstanding amounts of Rs.17,05,144/- and Rs.96,25,003/- by the Applicant directly into the loan accounts of the borrowers with Axis Bank. The outstanding loan amount with Axis Bank was only about Rs.1,13,30,147/- whereas the borrowers wanted more loan and had approached the Applicant. The Applicant accordingly sanctioned credit facilities to the tune of Rs. 4,70,00,000/- to the borrowers subject to creation of mortgage on the subject property. However since the borrowers had already mortgaged the subject property with the Axis Bank, it was decided to directly repay the outstanding loan amount to Axis Bank for release of its charge over the subject property, so that the Applicant's security interests could be created thereon. With this intention, the borrowers submitted foreclosure statement issued by

Axis Bank and accordingly total amount of Rs.1,13,30,147/- was transferred by the Applicant in the loan accounts of the Axis Bank. However, there was some time gap between the date of issuance of account statement by Axis Bank (28 August 2023) and actual disbursal in the Loan account occurring on 13 September 2023 resulting in debit of interest and reflecting of outstanding amount of Rs.2,36,936.29/- in the OD Account of the borrowers with Axis Bank. Simultaneously with disbursal of loan amount directly in the account of borrowers with Axis Bank, Applicant requested Axis Bank to put debit freeze in the OD Account and such debit freeze was implemented. Axis Bank was fully aware of the nature of transaction of loan transfer and ideally it ought to have requested the Applicant to transfer the amount of Rs.2,36,936.29 remaining outstanding since Applicant wanted to have its mortgage created on the same property.

20) However, the borrowers apparently took disadvantage of the situation and requested for lifting of debit freeze and started drawing amounts from the OD Account. According to the Applicant, there is collusion between the borrowers and Axis Bank officials, which enabled the borrowers to secure further credit facilities from Axis Bank even though they had agreed to transfer Axis Bank Loan Account to the Applicant. It is not necessary to delve further into the merits of the case as the same have been *prima facie* dealt with while deciding Section 9 Petition.

21) The short controversy raised in the present Application is whether there can be arbitration between the Applicant and Respondent

No.1-Bank. So far as the disputes between the Applicant and Respondent Nos.2 to 5 are concerned, there is no dispute about existence of arbitration clause in the Loan Agreement. Clause-10 of the Loan Agreement provides thus:

> *10. GOVERNING LAW AND DISPUTE RESOLUTION*
>
> *10.1 Laws of India shall govern this Agreement, the security and other documentation pursuant hereto. The Courts in the City of Mumbai (unless specified otherwise in this agreement) will have exclusive jurisdiction over all aspects governing the interpretation and enforcement of this Agreement.*
>
> *10.2 The Parties also agree and acknowledge that in case of any dispute or difference arising out of or in connection with this Agreement whether during its subsistence or thereafter between the parties including any dispute or difference relating to the interpretation of the Agreement or any clause thereof shall be settled by arbitration in accordance with the provisions of The Arbitration and Conciliation Act, 1996, or any statutory modifications thereof and shall be referred to a sole arbitrator, to be appointed by ABHFL alone.*
>
> *10.3 The venue for conducting arbitration proceedings shall be conducted at the place mentioned Schedule - 1 and the language of arbitration shall be in English.*
> ...
>
> *SCHEDULE-I*
>
22	*Place of Arbitration*	*Mumbai*

22) Thus, there is not much dispute about the conduct of arbitration between the Applicant and Respondent Nos. 2 to 5. The main opposition to the arbitration is by Axis Bank. It is submitted that there is no privity of contract between the Applicant and Axis Bank and that therefore, there is no question of arbitration. It is also Axis Bank's contention that Section 11 of the SARFAESI Act cannot be applied to the present case since the Applicant is not a secured creditor.

23) Section 11 of the SARFAESI Act provides for compulsory arbitration between banks, financial institutions, asset reconstruction companies and qualified buyers, where a dispute arises relating to securitisation or reconstruction or non-payment of any amount due including interest amongst them. Such a dispute is required to be settled by conciliation or arbitration as provided in the Arbitration Act irrespective of whether the parties have consented in writing for adjudication of such disputes through arbitration. Section 11 of the SARFAESI Act provides thus:

> **11. Resolution of disputes.—**
> Where any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest arises amongst any of the parties, namely, the bank or financial institution or asset reconstruction company or qualified buyer, such dispute shall be settled by conciliation or arbitration as provided in the Arbitration and Conciliation Act, 1996 (26 of 1996), as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly.

24) There is no dispute to the position that the Applicant is covered by the expression 'financial institution'. However, mere status of parties as bank/financial institution/ARC/qualified buyer is not sufficient and it must further be demonstrated that the dispute pertains to securitisation or reconstruction or non-payment of any amount due between such entities.

25) Mr. Ardeshir has contended that the provisions of SARFAESI Act are intended to apply only to secured creditors and that an unsecured creditor is not entitled to invoke any of the provisions of the SARFAESI Act including the provisions of Section 11 thereof. He takes

me through the Statement of Objects and Reasons in support of his contention that the Act has been enacted only with the objective of regulating securitisation and reconstruction of financial assets and enforcement of security interests by a secured creditor. It is contended that the Act is brought in to enable secured creditor to take possession of and sell secured assets without the intervention of the Court/Tribunal. The Statement of Object and Reasons of SARFAESI Act are as under:

> **Statement of Objects and Reasons.-**
>
> The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, *inter alia*, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on 21-6-2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.

26) No doubt, the objective behind enacting SARFAESI Act is to provide a swifter remedy for banks or financial institutions to take possession of secured assets without the intervention of courts. However the Act also seeks to create a separate dispute resolution mechanism for banks, financial institutions, etc when disputes arise between them relating to securitisation, reconstruction or non-payment of any amount. Whether that dispute resolution mechanism envisaged under Section 11 of the SARFAESI Act is restricted only for banks or financial institutions who are secured creditors? Whether every dispute relating to securitisation, reconstruction or non-payment of any amount between banks and financial institutions can be resolved under Section 11 of the Act or the banks or financial institutions must also possess the status and capacity as secured creditors for availing the said dispute resolution mechanism? Section 11 of the SARFAESI Act by itself does not use the expression 'secured creditor'. Therefore plain language of Section 11 does not require that the bank or financial institution must also possess the status that of a secured creditor.

27) The Applicant has relied on the provisions of Section 11 of the SARFAESI Act for seeking arbitration reference in respect of disputes between it and Axis Bank. The provisions of Section 11 of the SARFAESI Act make it clear that the two conditions need to be satisfied for application of the said provision viz. (i) the dispute must arise between the bank, financial institution, asset reconstruction company or a qualified buyer and (ii) the disputes must relate to securitisation of financial assets, reconstruction of assets or non-payment of any amount

due with interests. In ***Bank of India vs. Sri Nangli Rice Mills***, the Apex Court has explained this in paras-68, 68.1 and 68.2 as under:

> 68. From the plain language of Section 11 of the SARFAESI Act, it is manifest that the scope and ambit of the said provision have been limited or confined by the twin conditions laid therein, that have to be satisfied in order to attract the said provision being as under:
>
> 68.1 Where the dispute arises between:
>
> (a) any bank;
>
> (b) any financial institution;
>
> (c) any asset reconstruction company;
>
> (d) any qualified buyer; and
>
> 68.2 Where the dispute relates to:
>
> (a) securitisation of financial assets;
>
> (b) reconstruction of assets;
>
> (c) non-payment of any amount due and/or interest

28) There is no dispute to the position that the Applicant fulfils the first condition of the dispute arising between a bank and financial institution. The contest is really with regard to the second condition about the dispute relating to securitisation / reconstruction / non-payment. According to Axis Bank, the provisions of the SARFAESI Act apply only to secured creditors and that both, the bank and financial institution must be secured creditors for application of provisions of Section 11 of the Act. It is contended on behalf of Respondent No.1 that since security interest is not created in respect of the subject property in favour of the Applicant, it does not fit into the term '*secured creditor*' and that therefore, it is not entitled to invoke any of the provisions of the SARFAESI Act and that therefore, the question of application of provisions of Section 11 of SARFAESI Act simply does not arise. Reliance

is placed by Respondent-Axis Bank on judgment of the Apex Court in ***North Eastern Development Finance Corporation Ltd. (NEDFI)*** (supra) in which the Apex Court has considered the question as to whether the provisions of SARFAESI Act could be invoked by the Appellant-Corporation against the respondent-company by issuance of notice under Section 13(2). In case before the Apex Court, the Appellant-Corporation agreed to offer financial assistance, and to secure the loan, couple of agreements were executed by executing a deed of guarantee. It appears that there was prohibition in the State of Nagaland for transfer for property by a tribal in favour of non-tribal including a juristic person. Therefore, a village council had made an arrangement for enabling the villagers to secure loan facilities from financial institutions and an agreement was executed between the village council and director of respondent-company under which the village council permitted the corporation to dispose of the mortgaged assets for realisation of loan with interest. The village council also executed guarantee for repayment of loan by the respondent-company. When the respondent-company failed to repay the loan amount, the appellant-corporation invoked the provisions of the SARFAESI Act and secured an order under Section 14 from the Deputy Commissioner, Dimapur empowering the Sub-Divisional Officer to oversee the process of taking over physical possession of assets. It is in the light of this factual background, the issue that arose for consideration is captured in para-15 of the judgment as under:

> **15.** A couple of questions could arise for our determination. However, the first question that we are tasked to decide is whether provisions of the

> Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, could at all have been invoked by the Corporation against the company by issuing the notice dated June 30, 2011 under section 13(2) thereof, seeking to recover of Rs. 7,64,35,358. Should the answer be in the negative, that would mark the end of the lis at least at the stage the same has reached.

29) In ***North Eastern Development Finance Corporation Ltd. (NEDFI)*** the Apex Court has answered the question holding that for invocation of provisions of the SARFAESI Act, creation of mortgage is must and that no security interest in respect of the property was created in favour of the Corporation within the meaning of the Act and the Corporation therefore was not a secured creditor. The Apex Court has held that the Loan Agreement was executed before coming into effect of the SARFAESI Act. The Apex Court accordingly held in paras-27, 28, 32 and 33 of the judgment as under:

> **27.** It is also evident from the deed of guarantee dated May 11, 2001 that the council did guarantee that in case the company failed or neglected to repay the loan with interest to the Corporation in accordance with the terms of the loan agreement dated May 11, 2001, the council shall repay to the Corporation such amounts as they may be called upon to pay. In view of such deed of guarantee, the Corporation lacked the authority to invoke the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, against the company. If at all, the sole option available to the Corporation was to proceed against the council in a manner known to law.
>
> **28.** It is reasonable to presume that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, not being in existence on May 11, 2001, a secured creditor might not have thought of creation of any security interest in the secured asset including creation of mortgage by deposit of title deeds in terms of a security agreement to enforce a secured debt. Indeed, the terms “secured creditor”, “secured interest”, “secured debt”, “security agreement”, etc., all together, are to be found only in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, and not in any previous enactment. The Division Bench has held in no unmistakable terms that no property was mortgaged by the company in favour of the Corporation. This is an undisputed fact. It is, therefore, abundantly clear

that the Division Bench of the High Court was clearly right in interdicting the actions of the Corporation and in allowing the writ petition filed by the company by returning a finding that the action of the Corporation was without jurisdiction.

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

> "(zf) 's ecurity interest' means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any secured creditor and includes—
>
> (i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or
>
> (ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible asset or licence of intangible asset; "

33. We reiterate, no security interest in respect of any property (secured asset) was created in favour of the Corporation within the meaning of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, and, therefore, the Corporation is not a secured creditor. The law laid down in *M.D. Frozen Foods Exports P. Ltd.* v. *Hero Fincorp Ltd.* [2017 SCC OnLine SC 1211.] has to be read in the light of the facts present in the appeal before this court and the issues that arose for consideration.

30) In my view, the judgment in ***North Eastern Development Finance Corporation Ltd. (NEDFI)*** provides limited assistance for deciding the issue at hand. The judgment is an authority on the issue as to whether the provisions of SARFAESI Act can be invoked for realisation of outstanding loan amount in absence of a valid mortgage. In the present case, Applicant is not seeking to take measures under Section 13 or 14 of the SARFAESI Act against the borrowers. The issue here is entirely different. The judgment therefore provides no assistance on the

issue of permissibility to make a reference to arbitration for adjudication of disputes between a financial institution which is yet to achieve status of a secured creditor and a bank, which is already a secured creditor.

31) The judgment of the Apex Court in ***Bank of India vs. Sri Nangli Rice Mills*** (supra) is close to the controversy at hand. It deals *inter alia* with the issue of scope of provisions of Section 11 of the SARFAESI Act. The case before the Apex Court involved borrower availing credit facilities from appellant-bank by hypothecating stocks of paddy and other assets. The borrower availed one more credit facility from respondent-bank during currency of loan disbursed by the appellant-bank. The borrower executed pledge agreement with the respondent-bank by which warehouse receipts of certain goods including stocks of paddy and rice were pledged in favour of the respondent-bank. Since the borrower defaulted in payment of loan amount, the appellant-bank issued demand notice under Section 13(2) of the SARFAESI Act and proceeded to take symbolic possession of the factory premises, plant and machinery alongwith stocks of rice and paddy which were hypothecated to pay tax security. The appellant-bank thereafter filed Application under Section 14 of the SARFAESI Act seeking assistance of District Magistrate for taking physical possession of secured assets of the borrower with the aid of the police. Respondent-bank objected to the Application. The District Magistrate permitted appellant-bank to take physical possession of the secured assets except the stocks of paddy and rice pledged with respondent-bank and restrained appellant-bank from interfering with or taking possession of the stocks of paddy and rice. The appellant-bank got aggrieved the order passed by the District Magistrate and filed Writ

Petition before the High Court which directed appellant-bank to approach DRT. The DRT set aside the order of District Magistrate and allowed the appellant-bank to sell the stock of rice and paddy which order was challenged by the respondent-bank before Debt Recovery Appellate Tribunal **(DRAT)**. The DRAT remanded the matter to DRT. In the remanded round, the DRT held that it has no jurisdiction to adjudicate the dispute since the controversy pertained to competing claims between two banks over the same secured assets by referring the provisions of Section 11 of the SARFAESI Act. The High Court dismissed the Writ Petition filed by the appellant-bank and confirmed the orders passed by the DRT and DRAT. The order passed by the High Court was under challenge before the Supreme Court. In the light of the above factual position, the issues which arose for consideration before the Apex Court were as under:

> **E. *Issues for determination***
>
> 46. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:
>
> 46.1. (I) What is the scope of Section 11 of the SARFAESI Act? In other words, what is the meaning of the expression "*any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest*" occurring in Section 11 of the SARFAESI Act?
>
> 46.2. (II) What is the significance of the expression "*arises amongst any of the parties, namely, the bank or financial institution or asset reconstruction company or qualified buyer*" used in Section 11 read with Section 2 of the SARFAESI Act? What is the underlying object behind prescribing arbitration for the adjudication of disputes between a bank, financial institution, asset reconstruction company or qualified buyer, in Section 11 of the SARFAESI Act?
>
> 46.3. (III) Whether the existence of a written arbitration agreement between the parties is required for the purpose of resolution of disputes under Section 11 of the SARFAESI Act, 2002? In other words, is there any conflict between the

> decisions of *Oriental Bank of Commerce* [*Oriental Bank of Commerce* v. *Canara Bank*, 2011 SCC OnLine DRAT 8 : (2011) 4 BC 14] and *Federal Bank* [*Federal Bank Ltd.* v. *LIC Housing Finance Ltd.*, 2010 SCC OnLine DRAT 138] ?
>
> 46.4. (IV) Whether Section 11 of the SARFAESI Act, 2002 should be construed as mandatory or directory in its nature?

32) Thus, one of the issues for consideration before the Apex Court in ***Bank of India vs. Sri Nangli Rice Mills*** (supra) was about scope of Section 11 of the SARFAESI Act and the exact meaning of the expression "*any dispute relating to securitisation or reconstruction or non-payment of any amount due including interest*". The Apex Court examined the entire case law on the subject, including judgments of various High Courts, and held in paragraphs 69 to 71 of the judgment as under:

> 69. The object underlying Section 11 of the SARFAESI Act insofar as it mandates arbitration or conciliation as the only mechanism for resolution of disputes between a bank, financial institution, ARC, etc. and ousts the jurisdiction of DRTs under Section 17 for adjudicating such disputes is to ensure that ancillary or collateral disputes that may arise between competing secured creditors do not hinder the larger purpose of the SARFAESI Act of facilitating recoveries of dues from the borrowers expeditiously by enforcement of secured assets or other means provided thereunder. **It is to ensure that discord among secured creditors should not impede, derail, or stall the recovery proceedings under the SARFAESI Act, which are designed with the idea of time-bound adjudication with minimal interference.**
>
> 70. In the absence of any such mandate as enshrined in Section 11 of the SARFAESI Act, every conflict between secured creditors over a security interest would ultimately just prolong the recovery proceedings against the borrower and thwart any possibility of a meaningful recovery of bad debts. **By requiring such disputes to be referred to arbitration, the legislature has effectively sought to avoid a situation where squabbles between secured creditors obstruct or delay the realisation of the value of the secured assets.** Both the RDBFI Act and the SARFAESI Act envision DRTs and DRAT as specialised forum for or facilitating and effectuating recovery against defaulting borrowers, and not for resolving disputes inter se secured creditors. Their jurisdiction is primarily directed towards the adjudication of recovery certificates, enforcement of security interest, and addressing borrower objections under Section 17. The nature of proceedings before DRT is largely

summary, intended to enthuse efficiency in recovery of dues and save such proceedings from the perils of pendency. This is the very reason why the legislature consciously omitted the term "borrower" in Section 11 of the SARFAESI Act.

71. The category of disputes contemplated under Section 11 of the SARFAESI Act are those which pertain to the rights and entitlements of secured creditors inter se, in relation to the enforcement of security interest independent of the borrower's liability. The entire scheme of the SARFAESI Act is premised on the liability of the borrower being crystallised by virtue of its classification as a non-performing asset by the secured creditor. The kind of disputes that may arise from the scheme of the SARFAESI Act, broadly fall into two categories being: (i) disputes in relation to the recovery proceedings or measures taken under the said Act; and (ii) disputes pertaining to any rights or claims in respect of the secured asset. The former disputes concern only the secured creditor and the borrower, although such disputes have a bearing on the security interest or secured asset, yet such proceedings are more concerned with the manner of recovery and the measures thereto and thus, encompass disputes between the borrower and secured creditor(s) alone. However, the latter disputes are specifically in respect of the secured asset or security interest, the nature of dispute is not in relation to the manner of recovery but rather the manner of apportionment of the recovery proceeds either directly or indirectly, and thus, such disputes arise and concern the secured creditors that are covered under the SARFAESI Act, namely, banks, financial institutions, asset reconstruction companies and qualified buyers. The legislature keeping the aforesaid distinction in mind, incorporated the provisions of Section(s) 11 and 17 of the SARFAESI Act, for resolution of disputes pertaining to any rights or claims in respect of the secured asset and disputes in relation to the recovery proceedings or measures taken thereunder, respectively.

(emphasis added)

33) Mr. Ardeshir has strenuously relied on findings recorded by the Apex Court in paragraph Nos.69 to 71 of the judgment in support of his contention that only a discord or dispute or squabble between two secured creditors can be resolved under Section 11 of the SARFAESI Act.

34) The Apex Court in ***Bank of India vs. Sri Nangli Rice Mills*** went ahead with the issue of interpretation of the expression "relating to securitisation or reconstruction or non-payment of any amount due

including interest" appearing in Section 11 of the SARFAESI Act. It took into consideration definition of the term 'securitisation' appearing in Section 2(z) of SARFAESI Act and has held in paragraph 79 that dispute between the Appellant and Respondent therein did not pertain to either securitisation or reconstruction. The Apex Court thereafter went into the issue of meaning of the expression "*non-payment of any amount due including interest*" and has concluded that for the purpose of Section 11 of the SARFAESI Act, the issue of priority of charge would inherently and intrinsically constitute dispute relating to "*non-payment of any amount due*". In paragraph 82 of the judgment, the Apex Court has dealt with the instance of borrower defaulting on repayment after availing credit facilities extended by two banks and has held that non-payment of loan amount would lead to "a dispute" and that such dispute is likely to concern priority of charges over the borrower's assets. The Apex Court has thus concluded that where dispute between banks fundamentally relates to "*non-payment of any amount due including interest*", Section 11 of the SARFAESI Act would apply. The Apex Court has held in paragraphs 76 to 80 and 82 to 89 as under:

> **76**. The word "dispute" used in Section 11 of the SARFAESI Act does not take into account "any dispute" that arises out of "any reason whatsoever". The scope and meaning of the said term has been qualified and limited by the provision itself, more particularly, the expression "*relating to securitisation or reconstruction or non-payment of any amount due including interest*". Hence, Section 11 would be attracted only where the dispute arises in relation to (*i*) securitisation, or (*ii*) reconstruction, or (*iii*) non-payment of any amount due (including interest).
>
> **77.** Section 2(*z*) of the SARFAESI Act defines "securitisation" as
>
> > "**2. (*z*)** "**securitisation**" means acquisition of financial assets by any asset reconstruction company from any originator, whether by raising

of funds by such asset reconstruction company from qualified buyers by issue of security receipts representing undivided interest in such financial assets or otherwise;"

78. Section 2(*b*) of the Act defines "asset reconstruction" as

> "**2.(*b*)** "**asset reconstruction**" means acquisition by any asset reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realisation of such financial assistance;"

79. It is manifest from the foregoing discussion that the present case at hand, more particularly dispute between the appellant and the respondent Banks does not pertain to either securitisation or reconstruction. It does not involve any acquisition of financial assets or rights by an asset reconstruction company (ARC). Rather, the crux of the issue is whether the controversy involving the competing claims of rights over the stocks of goods by hypothecation or pledge and the dispute therein falls within the scope of Section 11 of the SARFAESI Act, more particularly the third category of disputes delineated thereunder pertaining to "*non-payment of any amount due including interest*".

(*c*) *Meaning of the expression "non-payment of any amount due including interest"*

80. The scope and meaning of the phrase "*non-payment of any amount due including interest*", used in Section 11 of the SARFAESI Act warrants careful examination. It is pertinent to note that the statute employs the term "any" amount, thereby refraining from limiting its application to a specific category of amounts that may be owed to a party mentioned in the provision. The expression "*any amount due, including interest*", must be construed in light of the purpose of the Act and the provisions contained therein. The plain meaning of the term "*any amount due*" encompasses amounts that remain unpaid beyond the due date. However, the aforesaid is only one element of the meaning of the said expression.

82. A situation of "non-payment of any amount" or an overdue arises when one party fails to fulfil their obligation to pay the party they are indebted to. For the purposes of the present case at hand, we will be focussing on the scope of Section 11 of the SARFAESI Act specifically in the context of disputes between two banks, excluding financial institutions, asset reconstruction companies (ARCs), or qualified buyers, as otherwise contemplated under the provision. In cases, involving two banks acting as creditors, a dispute may not arise directly between the banks due to the "*non-payment of any amount*" they owe to each other. Instead, disputes typically emerge because of the borrower's failure to discharge their debt obligations. For instance, if a borrower defaults on repayment after availing of credit facilities extended by two banks, issues of

non-payment of loan amounts (including interest) owed by the borrower, the same may lead to a dispute. **Such a dispute is likely to concern the priority of charges over the borrower's assets, especially in situations where the borrower has secured loans from both banks by mortgaging the same property.** In the present case, the question of priority arises due to the simultaneous loans extended by the appellant and the respondent Banks and the creation of charges over the same security.

83. In cases such as the present one, the authority to determine which bank holds the prior charge over the borrower's assets becomes a significant issue for consideration. There have been instances where such disputes have been referred to DRT or civil courts for adjudication. The question of determining the priority of charge typically arises after the borrower defaults on their obligations and their assets are classified as NPAs. In such scenarios, two or more banks may assert competing claims over the same secured asset.

84. The dispute stems from the borrower's failure to discharge their debt obligations, including the amounts they were bound to pay to the banks. This non-payment gives rise to a conflict between the creditors regarding the hierarchy of their respective charges over the borrower's assets. Consequently, the issue of priority of charge is inherently and intrinsically linked to the borrower's "*non-payment of any amount due*" as contemplated under Section 11 of the SARFAESI Act. This provision, therefore, would undoubtedly bring such disputes within its ambit, and thereby mandate resolution of such disputes through conciliation or arbitration as prescribed under the 1996 Act.

85. It is imperative to carefully examine the bare text of Section 11 of the SARFAESI Act. The said provision does not stipulate that the "*amount due*" must be owed directly between the two banks, financial institutions, ARCs, etc. **The language of the provision is clear and discernible: "*Where any dispute relating to [...] non-payment of any amount due, including interest, arises amongst any [...]*". The broad phrasing of the aforesaid expression signifies a wide import of its meaning which would include a various range of scenarios where disputes are connected to unpaid amounts, including those arising due to third-party defaults, such as indirect defaults of the borrowers.**

86. For illustration, a borrower may owe a certain amount to Bank *A* and another amount to Bank *B*, after both of these banks have hypothecated the borrower's property. If the borrower defaults and fails to repay these loans, a dispute may arise between Bank *A* and Bank *B* regarding their respective claims over the borrower's mortgaged assets. This dispute is inherently and intrinsically linked to the borrower's "*non-payment of any amount due including interest*", which the borrower was obligated to pay under the terms of their respective loan agreements with the banks.

> **87.** Thus, it follows that where the dispute between the banks is fundamentally related to the "*non-payment of any amount due including interest*", which may be triggered by the actions of a borrower, Section 11 of the SARFAESI Act would apply. Consequently such disputes being those which fall squarely within the ambit of the said provision, would mandate the resolution of such disputes through the mechanisms of conciliation or arbitration as provided under the 1996 Act. This interpretation aligns with both the language, the legislative intent behind Section 11 and the avowed object and spirit of the SARFAESI Act.
>
> **88.** In the present case, a dispute has arisen between the appellant and the respondent Banks regarding their respective claims over the stocks of the borrower Company. The controversy primarily on the surface entails the method of creation of charge on the stocks. The appellant Bank asserts its claim based on a hypothecation agreement, whereby the stocks of the borrower Company were hypothecated in its favour. On the other hand, the respondent Bank claims a superior right by virtue of a pledge created over the same security, in terms of Section 172 of the Contract Act. It is pertinent to note that, Section 31(*b*) of the SARFAESI Act, stipulates that the provisions of the SARFAESI Act will not apply to movables that have pledged.
>
> **89.** However, a closer look would reveal that the dispute in substance is not merely concerned with whether the rights of either the appellant or the respondent Banks are enforceable by virtue of the manner in which they have been created. Rather, the dispute pertains to the priority of charge between two banks than the mode of its creation. **The contention that the charge, being created by way of pledge, falls outside the ambit of the Act under Section 31(*b*) is misplaced. This is because the exclusion under Section 31(*b*) applies to disputes between the borrower and the lender concerning the pledge of movables, where such dispute is purely in regard to enforcement of such right qua the borrower. <u>However, the present dispute between the appellant and the respondent Banks is regarding their respective rights over the stocks. The manner in which the charge was created, be it by pledge or hypothecation, is irrelevant to the determination of priority between the two Banks.</u> The said issue will only assume importance, once the rights of each of the Banks are crystallised, and thereafter enforcement of security on the strength of such rights is sought. <u>Hence, the present case falls under the ambit of Section 11 of the SARFAESI Act.</u>**
>
> *(emphasis and underlining added)*

35) Thus, in ***Bank of India vs. Sri Nangli Rice Mills*** (supra), the Apex Court has held that when a borrower defaults in payment of rent availed from two banks, the dispute between the two banks would not be a dispute pertaining to either securitisation or reconstruction, but the

same would be a dispute relating to "*non-payment of any amount due including interest*".

36) Though Mr. Ardeshir has sought to contend that the judgment of the Apex Court in ***Bank of India vs. Sri Nangli Rice Mills*** (supra) conclusively answers the issue involved in the present Application on account of clear findings that only disputes between two secured creditors can be adjudicated under Section 11 of the SARFAESI Act, the judgment needs to be read in the context of the issue involved before the Apex Court. No doubt, the Apex Court has made certain observations in paragraphs 69 to 71 of the judgment that disputes between two secured creditors can be adjudicated under Section 11 of the SARFAESI Act. However, those observations are made in the light of issue raised in the case where jurisdiction of DRT to decide disputes between appellant-bank and respondent-bank (both secured creditors) was under consideration. The Apex Court was deciding whether provisions of Section 11 of the SARFAESI Act would bar the remedy of either of the banks to the dispute to approach the DRT. The Apex Court has ruled that the arbitration under Section 11 of the SARFAESI Act is the only remedy available to the disputant banks to resolve their disputes amongst each other relating to the security interest and that the jurisdiction of DRT would not be available for resolution of those disputes.

37) I am unable to read the judgment of the Apex Court in ***Bank of India vs. Sri Nangli Rice Mills*** (supra) the way Mr. Ardeshir wants me to read. The judgment is an authority on the issue that when disputes

arise between two banks over non-payment of any amount due which get triggered by the action of the borrower, Section 11 of SARFAESI Act is the only remedy to resolve that dispute between the banks. It is well settled principle that judgment is an authority on what it decides and not what can be logically deduced therefrom. [SEE: ***Commissioner of Customs (Port), Chennai vs. Toyota Kirloskar Motor (P) Ltd.***[4], ***Secunderabad Club vs. CIT***[5]]. The Apex Court has only dealt with one of the nature of disputes which may arise between two banks or a bank and a financial institution relating to non-payment of loan by the same borrower. However, as rightly pointed out by Ms. Gupta, the Apex Court has not curtailed or restricted the categories of dispute which may arise between two banks or between a bank and a financial institution which would fit within the ambit of Section 11 of the SARFAESI Act. This is clear from use of the words "*likely*" in paragraph 82 of the judgment in ***Bank of India vs. Sri Nangli Rice Mills*** (supra). In paragraph 82 of the judgment the Apex Court has held that when a borrower defaults on repayment after availing credit facilities from two banks, the dispute between two banks "*is likely to concern the priority of charges over borrowers' assets*", especially in situations where the borrower has secured loans from both banks by mortgaging same property. Thus, priority of charges can be one type of dispute which may arise between two competing banks, is what the Hon'ble Apex Court has held in paragraph 82 of the judgment. This would mean that there can be several other types of disputes which may arise between two banks or between a bank and financial institution when same borrower has availed credit facilities from them. In my view

[4] (2007) 5 SCC 371
[5] 2023 SCC OnLine SC 1004

therefore, the judgment in ***Bank of India vs. Sri Nangli Rice Mills*** (supra) cannot be read to mean that only disputes relating to priority of charge or apportionment of sale proceeds between two competing banks having security interest over same property would be covered by provisions of Section 11 of the SARFAESI Act.

38) In fact, in paragraph 85 of the judgment in ***Bank of India vs. Sri Nangli Rice Mills*** (supra), the Apex Court has held that the expression "*non-payment of any amount due including interest*" is broadly phrased, signifying the wide import of its meaning, which would include "*various range of scenarios*" where disputes are connected to unpaid amounts, including those arising due to third party defaults such as indirect default of the borrowers. In paragraph 87 of the judgment, the Apex Court has concluded that where dispute between banks fundamentally relate to non-payment of any amount, which may be triggered by the actions of the borrower, Section 11 of SARFAESI Act would apply.

39) Reading of observations in paragraph 89 of the judgment in ***Bank of India vs. Sri Nangli Rice Mills*** (supra) would further make it clear that Section 11 of SARFAESI Act would not restrict itself only to the secured creditors and that the rigors of Section 11 of SARFAESI Act would get attracted to disputes for which exclusion provisions under Section 31 of SARFAESI Act apply. It was sought to be contended before the Apex Court that since charge was created by pledge, the same fell outside the purview of SARFAESI Act under Section 31(b). Under Section 31(b), provisions of SARFAESI Act do not apply to a pledge of movables

within the meaning of Section 172 of the Indian Contract Act, 1872. Section 31 of the SARFAESI Act provides thus:

> **31. Provisions of this Act not to apply in certain cases.—**
> The provisions of this Act shall not apply to—
> (a) a lien on any goods, money or security given by or under the Indian Contract Act, 1872 (9 of 1872) or the Sale of Goods Act, 1930 (3 of 1930) or any other law for the time being in force;
> (b) a pledge of movables within the meaning of section 172 of the Indian Contract Act, 1872 (9 of 1872);
> (c) creation of any security in any aircraft as defined in clause (1) of section 2 of the Aircraft Act, 1934 (24 of 1934);
> (d) creation of security interest in any vessel as defined in clause (55) of section 3 of the Merchant Shipping Act, 1958 (44 of 1958);
> * * * * *
> (f) any rights of unpaid seller under section 47 of the Sale of Goods Act, 1930 (3 of 1930);
> (g) 2 [any properties not liable to attachment (excluding the properties specifically charged with the debt recoverable under this Act)]or sale under the first proviso to sub-section (1) of section 60 of the Code of Civil Procedure, 1908 (5 of 1908);
> (h) any security interest for securing repayment of any financial asset not exceeding one lakh rupees;
> (i) any security interest created in agricultural land;
> (j) any case in which the amount due is less than twenty per cent. of the principal amount and interest thereon.

40) By relying on provisions of Section 31(b) of the SARFAESI Act, it was urged before the Hon'ble Apex Court in ***Bank of India vs. Sri Nangli Rice Mills*** (supra) that since disputes involved priority of charge between two banks in respect of a pledge, the same fell outside the ambit of the SARFAESI Act. The Apex Court has however rejected the contention by holding that exclusion under Section 31(b) of the SARFAESI Act applies to disputes between the borrower and lender concerning the pledge of movables where such dispute is purely in regard to enforcement of such right *qua* the borrower. The Apex Court further held that the dispute before it was between appellant-bank and

respondent-bank regarding their respective rights over the stock and the manner in which the charge was created, be it by pledge or hypothecation, was irrelevant for determining priority between the two banks. Thus, in paragraph 89 of the judgment, the Apex Court has held that provisions of Section 11 of the SARFAESI Act would apply even when the charge over which dispute arises between two banks is outside the ambit of the Act under Section 31(b). Thus even disputes between two banks which travel outside the scope of SARFAESI Act can be arbitrated under Section 11. Considering the observations of the Apex Court in paragraph 89 of the judgment, it is difficult to conclude that only disputes between two secured creditors would be covered by provisions of Section 11 of the SARFAESI Act.

41) Thus, the judgment of the Apex Court in ***Bank of India vs. Sri Nangli Rice Mills*** (supra), far from assisting the case of Axis Bank, it actually militates against it. Various observations of the Apex Court in the judgment clearly indicate that wide range of disputes connected to unpaid amounts between two banks / financial institutions can be subjected to arbitration under Section 11 of the SARFAESI Act. The judgment, in fact, goes a step further ahead and upholds applicability of Section 11 of the SARFAESI Act even to disputes where the charge is specifically excluded from the ambit of the Act under Section 31(b).

42) Ms. Gupta has relied upon judgment of learned Single Judge of Calcutta High Court in ***Reliance Commercial Finance Limited vs. Axis Bank Limited*** (supra) in which similar facts were involved. In case before the Calcutta High Court, the borrower approached the petitioner therein

(financial institution) for transferring the loan already disbursed by Axis Bank. The petitioner therein took over the loan from Axis Bank by paying the outstanding loan amount to the borrower. The petitioner therein claimed entitlement over title deeds deposited with Axis Bank after taking over of the loans. This is how exactly identical circumstances were involved in ***Reliance Commercial Finance Limited vs. Axis Bank Limited*** (supra). The learned Single Judge of the Calcutta High Court held that there existed jural relationship between the Petitioner therein and Axis Bank. It is further held that even in absence of written arbitration agreement between the parties, Section 11 of the SARFAESI Act fulfills the requirement of Section 7 of the Arbitration Act provided that the other parameters laid down in Section 11 of the SARFAESI Act are fulfilled. The Apex Court left the issue of fulfilment of the parameters to be determined by the Arbitral Tribunal. It is held in paragraphs 8 to 12 of the judgment as under:

> **8.** *Vidya Drolia* (supra) was rendered in a case relating to an arbitration agreement between the parties. In the present case, the fiction of existence of arbitration agreement is provided by the Act of 2002 namely Section 11 thereof. Therefore, it would be futile to embark upon the exercise to find out as to whether there exists a written arbitration agreement between the parties in terms of Section 7 of the Act of 1996. Section 11 of the Act of 2002 fulfils the requirement of Section 7 of the Act of 1996 provided the other parameters laid down in Section 11 in the Act of 2002 are fulfilled.
>
> **9.** In the facts of the present case, the petitioner paid a sum of Rs. 49,39,810/- to the respondent by a letter dated December 20, 2017. The letter is of the petitioner. The letter was received by the respondent. Therefore, prima facie, there exists a jural relationship between the petitioner and the respondent. As to the exact parameters of the jural relationship need not be decided in an application under Section of the Act of 1996. These are the disputed arena which the arbitrator need to decide upon.
>
> **10.** As noted above, the petitioner comes within the definition of financial institution as defined under the Act of 2002. However this finding is prima facie

for the purpose of adjudicating an application under Section 11 of the Act of 1996. The parties are at liberty to adduce evidence before the arbitral tribunal to disprove such issue.

11. Prima facie, the parameters under Section 11 of the Act of 2002 being fulfilled, it would be appropriate to refer the disputes between the parties to arbitration.

12. I am not in a position to accept the contention of the respondent that an arbitration agreement has to be in writing in view of the plain language of Section 11 of the Act of 2002. Section 11 of the Act of 2002 raises a deemed statutory fiction of the existence of an arbitration agreement, provided the other parameters are fulfilled, and does not require an agreement in writing to be entered into between the parties in terms of Section 7 of the Act of 1996. The deeming provision for existence of an arbitration agreement will appear from the user of the words "as if the parties to the dispute have consented in writing for determination of such dispute by conciliation or arbitration and the provisions of that Act shall apply accordingly" in Section 11 of the Act of 1996.

(emphasis added)

43) The judgment of Calcutta High Court in ***Reliance Commercial Finance Limited vs. Axis Bank Limited*** (supra) is taken note of by the Apex Court in paragraph 66 of the judgment in ***Bank of India vs. Sri Nangli Rice Mills*** (supra). Paragraph 66 of the judgment reads thus:

66. In *Reliance Commercial Finance Ltd.* v. *Axis Bank Ltd.* [*Reliance Commercial Finance Ltd.* v. *Axis Bank Ltd.*, 2021 SCC OnLine Cal 4372] the petitioner, a financial institution under the SARFAESI Act, 2002, sought arbitration under Section 11 of the 1996 Act, relying on the statutory arbitration provision enshrined in Section 11 of the SARFAESI Act. The dispute arose from the petitioner's takeover of a loan from the respondent Bank, and subsequent claims regarding mortgage documents and related transactions. The respondent argued that there was no privity of contract or written arbitration agreement thus, there could be no reference to arbitration as the statutory conditions of existence of an arbitration agreement under Section 7 of the 1996 Act were not fulfilled. However, the Calcutta High Court held [*Reliance Commercial Finance Ltd.* v. *Axis Bank Ltd.*, 2021 SCC OnLine Cal 4372] that Section 11 of the SARFAESI Act creates a statutory fiction of an arbitration agreement, negating the need for a written agreement under Section 7. It further observed that since

prima facie, the jural relationship between the parties based on the payment and correspondence was one as contemplated under Section 11 of the SARFAESI Act, the High Court proceeded to refer the dispute to arbitration and appoint an arbitrator.

44) Though the judgment of the Calcutta High Court in ***Reliance Commercial Finance Limited vs. Axis Bank Limited*** (supra) does not provide real assistance for determination of the issue at hand, on account of leaving the disputed issue to be determined by the Arbitrator, the fact remains that the Hon'ble Supreme Court while taking note of the judgment in paragraph 66 of ***Bank of India vs. Sri Nangli Rice Mills*** (supra), has not disturbed the ratio of the judgment. In the present case, instead of leaving the issue of arbitrability to be decided by the Arbitrator, I have considered it appropriate to decide the issue myself. In fact, Mr. Ardeshir was fair enough in urging this Court to decide the issue rather than leaving it for the arbitrator. Even otherwise, the ratio of the judgment in ***Bank of India vs. Sri Nangli Rice Mills*** (supra) clearly creates an impression that wide range of the disputes between two banks or between a bank and financial institution over "non-payment of any amount due including interest" would fit into the ambit of Section 11 of the SARFAESI Act.

45) Reverting to the facts of the present case, the dispute between the Applicant-Financial Institution and Respondent No.1-Bank is triggered by the acts of the borrowers in not repaying the amounts due to both Applicant and to Axis Bank. The Axis Bank is refusing to part with the title deeds because it also wants to recover monies from the same borrowers. The dispute would thus get covered by the expression 'non-payment of any amount due, including interest, arises amongst any

... bank or financial institution' used in Section 11 of the SARFAESI Act. Both Applicant as well as Axis Bank have disbursed loans to the borrowers by taking into consideration security in respect of same subject property. So far as Respondent No.1-Axis Bank is concerned, there is mortgage created over the subject property in its favour. For Applicant, though creation of such mortgage is envisaged, the acts of Respondent No.1 are preventing the Applicant from creating such mortgage in its favour. Otherwise, various documents executed by the borrowers in favour of the Applicant would leave no manner of doubt that the loan has been sanctioned to the borrowers on security of mortgage of the subject property. The Sanction Letter dated 31 August 2023 specifically provides that the loan of Rs.4,70,00,000/- is sanctioned against mortgage of the subject property. However, the actual mortgage cannot be executed on account of Axis Bank's refusal to part with the title deeds of the subject property. Thus, though Applicant is not yet a secured creditor and wanting to become one, ultimately the dispute between Applicant and Axis Bank relate to rights in respect of same subject property against security of which loans are disbursed by both of them to the same borrowers.

46) In my view, in the peculiar facts of the present case, where acts of Respondent-Axis Bank have resulted in non-creation of security interest over same subject property in favour of the Applicant, giving a very narrow interpretation to the language used in Section 11 of the SARFAESI Act would cause violence to the very objective behind enacting the said provision. Section 11 of SARFAESI Act is incorporated in the statute to ensure that two banks or a bank and Financial

Institution get their disputes resolved through arbitration when they arise on account of acts of same borrower. The objective behind Section 11 of the SARFAESI Act is that squabbles between two banks do not come in the way of one bank / financial institution seeking enforcement of security against the borrower under the SARFAESI Act. In the present case, if Axis Bank invokes provisions of Section 13(2) and/or secures measures under Section 14 of the SARFAESI Act, the Applicant cannot be permitted to challenge notice under Section 13(2) of the SARFAESI Act or directions issued by District Magistrate under Section 14 before the DRT. Applicant cannot come in the way of Axis Bank seeking to recover its dues by engaging it into litigation before the DRT. Applicant must have its disputes with Axis Bank resolved in Section 11 arbitration. This is the true purport of Section 11 of the SARFAESI Act. The disputes between the Applicant and Axis Bank will have to be necessarily resolved under Section 11 of the SARFAESI Act. The only difference in the present case is that Applicant cannot, as of now, invoke remedies under Sections 13 and/or 14 of the SARFAESI Act on account of non-creation of security interest in its favour and therefore, it is forced to invoke arbitration clause in the loan agreement against the borrowers. Since disputes between the Applicant and Axis Bank cannot be mixed with the right of the Applicant to recover monies from the borrowers, there can be two separate references in the present case. But instead of making two separate references, it would be better that the same Arbitral Tribunal decides both the disputes. Axis Bank would be free to take measures against the borrowers under Section 13 and 14 of the SARFAESI Act and mere pendency of Section 11 reference would not impede such action.

Thus, making of Section 11 reference would not prejudice the interests of Axis Bank.

47) In fact, forcing Applicant to get only disputes against borrowers arbitrated through contractual arbitration arrangement may defeat the entire remedy available to the Applicant as only Axis Bank would deal with the mortgaged assets even though mortgage in respect of those assets was meant to be created in favour of the Applicant. In that view of the matter, presence of Axis Bank is otherwise necessary in arbitral proceedings to be conducted against the borrowers. While Applicant can invoke contractual arbitration clause against the borrowers, it can rope in Axis Bank on the basis of statutory arbitration provision under Section 11 of the SARFAESI Act. I do not see any reason why common arbitration cannot be conducted on the basis of contractual arbitration clause and statutory arbitration provision.

48) The issue as to whether statutory arbitration can be conducted under Section 11 of SARFAESI Act or not cannot be decided on the basis of the stand taken by the Applicant in Section 9 petition. It is well settled that the interim measures can be made under Section 9 against third parties also. Therefore, merely because the Applicant described Axis Bank as a third party in Section 9 petition, the same would not preclude the Applicant from seeking a reference against Axis Bank when in law such reference lies.

49) Considering the overall conspectus of the case, in my view, reference to arbitration needs to be made in the present case for

adjudication of disputes and differences between Applicant, Axis Bank and borrowers. While arbitration against borrowers can be conducted on the basis of a direct arbitration clause, Section 11 of SARFAESI Act can be invoked for the purpose of inferring the consent to arbitration between Applicant and Axis Bank. The issues sought to be raised about merits of claim of the Applicant by borrowers cannot be decided in exercise of referral jurisdiction.

50) In view of the discussions above, I proceed to pass the following order:

(A) Hon'ble Smt. Justice Anuja Prabhudessai, Former Judge of this Court is appointed as sole Arbitrator to adjudicate upon the disputes and differences between the parties referred to above. The contact details of the Arbitrator are as under :

Office Address :- 106, Arcadia Building, NCPA Marg, Nariman Point, Mumbai - 400021

Email ID :- justiceanujaprabhudessai@gmail.com

Mobile No.:- 9823855445

(B) A copy of this order be communicated to the learned sole Arbitrator by the Advocates for the Petitioner within a period of one week from the date of upload of this order. The Applicant shall provide the contact and communication particulars of the parties to the Arbitral Tribunal alongwith a copy of this order.

(C) The learned sole Arbitrator is requested to forward the statutory Statement of Disclosure under Section 11(8) read with

Section 12(1) of the Act to the parties within a period of 2 weeks from receipt of a copy of this order.

(D) The parties shall appear before the learned sole Arbitrator on such date and at such place as indicated by him, to obtain appropriate direction with regard to conduct of the arbitration including fixing a schedule for pleadings, examination of witnesses, if any, schedule of hearings etc.

(E) The sole Arbitrator shall be entitled to the fees prescribed under the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018 and the arbitral costs and fees of the Arbitrator shall be borne by the parties in equal proportion and shall be subject to the final Award that may be passed by the Tribunal.

51) All rights and contentions between parties on merits are expressly kept open to be agitated before the Arbitral Tribunal so constituted.

52) With the above directions, the Commercial Arbitration Application is **allowed.** There shall be no order as to costs.

[SANDEEP V. MARNE, J.]

53) After the judgment is pronounced, the learned counsel appearing for Respondent No.1 seeks stay of the judgment for a period of 6 weeks. Since stay is sought only by Respondent No.1, the operative part of the judgment shall remain stayed for a period of 6 weeks only *qua* Respondent No.1 and the reference *qua* Respondent Nos.2 to 5 is not stayed.

[SANDEEP V. MARNE, J.]