IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION NO. 930 of 2011
With
SPECIAL CIVIL APPLICATION NO. 622 of 2012
With
SPECIAL CIVIL APPLICATION NO. 1730 of 2012
With
SPECIAL CIVIL APPLICATION NO. 3046 of 2012
With
SPECIAL CIVIL APPLICATION NO. 8082 of 2012
With
SPECIAL CIVIL APPLICATION NO. 15253 of 2012
With
SPECIAL CIVIL APPLICATION NO. 15269 of 2012
With
SPECIAL CIVIL APPLICATION NO. 11424 of 2012
With
SPECIAL CIVIL APPLICATION NO. 13999 of 2012

FOR APPROVAL AND SIGNATURE:

HONOURABLE THE CHIEF JUSTICE
MR. BHASKAR BHATTACHARYA
and
HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1	Whether Reporters of Local Papers may be allowed to see the judgment?
2	To be referred to the Reporter or not? `
3	Whether their Lordships wish to see the fair copy of the judgment?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made there under?
5	Whether it is to be circulated to the civil judge?

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ADMINISTRATOR - SHRI DHAKDI GROUP CO OPERATIVE COTTON SEED & ORS.

Versus

UNION OF INDIA & ORS.

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ADVOCATE for the Petitioners.
MR VISHWAS K SHAH, with MR. MASOOM K SHAH [SCAS NO. 930 OF 2011, 1730 OF 2012, 8082 OF 2012, 15253 OF 2012, 15269 OF 2012, AND 11424 OF 2012],
MR NAVIN M CHAUHAN [SCA NO. 622 OF 2012],
MR. MAHESH BHAVSAR [SCA NO. 3046 OF 2012],
AND MR J.T. TRIVEDI, ADVOCATES [SCA NO. 13999 OF 2012],

ADVOCATES for the Respondents
MR PS CHAMPANERI, ASST. SOLICITOR GENERAL OF INDIA with MR HRIDAY BUCH, SR. STANDING COUNSEL for respondent Union of India in all matters,
MR RUTVIJ S OZA for respondent No.2 in SCA No. 930 of 2011,
MS. ARCHANA R ACHARYA for respondents No. 2 in SCA No. 622 of 2012,
MR ANSHIN H DESAI, MR RUTVIJ S OZA and MR ISHAN MIHIR PATEL for respondents No. 1, 2 and 3 respectively in SCA No. 1730 of 2012,
MR. UMESH A TRIVEDI for respondents No. 2 and 3 in SCA No. 3046 of 2012,
MR K.K. TRIVEDI in SCA No. 8082 of 2012,
MR. BHARGAV KARIA & ASSOCIATES for respondent No.2 in SCA No. 15253 of 2012,
MR. KEYUR A VYAS for respondent No.2 in SCA No. 15269 of 2012,
MR. UMESH A TRIVEDI for respondent No. 3, Mr. PK JANI with MS VACHA DESAI, AGP for respondents No. 4 and 5 in SCA No. 11424 of 2012, and
MR U.I. VYAS with MS DHURVA V VYAS for respondent No.2 in SCA No. 13999 of 2012.

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CORAM: **HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA**
and
HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 22/04/2013

COMMON CAV JUDGEMNT

(PER : HONOURABLE THE CHIEF JUSTICE MR. BHASKAR BHATTACHARYA)

1. All these Special Civil Applications were heard together as the following questions arise for consideration in all these Special Civil Applications:-

(a) Whether the ratio laid down by a three-judge-bench of the Hon'ble Supreme Court of India in the matter of **Greater Bombay Cooperative Bank Ltd. vs. United Yarn Tex Pvt. Ltd**. reported in **(2007) 6 SCC 236** was considered, interpreted and appreciated in the appropriate perspective by the respondents?

(b) Whether the reasoning and analogy applied by the Hon'ble three-judge-bench of the Supreme Court of India in **Greater Bombay Cooperative Bank Ltd. vs. United Yarn Tex Pvt. Ltd**.(*supra*), in holding that the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, [RDBI Act and/or DRT Act, hereafter] will not apply to Cooperative Societies, should apply to the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [Securitization Act and/or SARFAESI Act, hereafter] ?

(c) Whether the notification dated 28th January 2003 issued by the Central Government purportedly under the exercise of its power

under Section 2(1) (c) (v) of the Securitization Act thereby bringing the Cooperative Banks within the purview of the Act, is sustainable and with authority in the light of the judgment in **Greater Bombay Cooperative Bank Ltd. vs. United Yarn Tex Pvt. Ltd**. (*supra*)?

(d) What is the true and correct scope of express bar under the Gujarat Cooperative Societies Act, 1961 *vis-à-vis* any other proceedings, prescribed under the same and in view of such bar, can the proceedings under the Securitization Act be said to be maintainable?

(e) Is it not that the Securitization Act, if made applicable to the Cooperative Banks, would be arbitrary and violative of Article 14 of the Constitution of India as it deprives the borrowers, such as the petitioners, of the right to challenge the action of the banks under Section 13 ?

(f) Whether in terms of Schedule VII List I Entry 43 and Schedule VII List II Entry 32 of the Constitution of India can the Parliament be said to have the Legislative competence to extend the purview of the Securitization Act in respect of the dues of the Cooperative Banks?

2. For the purpose of deciding the aforesaid questions, we propose

to consider Special Civil Application No.930 of 2011 as the lead matter.

3. The facts giving rise to filing of the above application may be summed up thus:-

3.1 On January 28, 2003 the impugned notification was issued by respondent No.1 under Section 2(1) (c) (v) of the Securitization Act, 2002 thereby bringing the Cooperative Banks within the purview of the Securitization Act.

3.2 In the year 2004, a summary Lavad Suit being No.944 of 2004 was filed by respondent No.2 against the petitioner before the Board of Nominees and on October 29, 2004 a decree was passed in the said suit. On April 9, 2009, this High Court passed an order in Special Civil Application No.14529 of 2008 and the Lavad suit was quashed and set aside and was remitted back for *de novo* consideration.

3.3 On September 28, 2010, a notice under Section 13(2) of the Securitization Act was issued by respondent No.2 to the petitioner and in response to the said notice, the petitioner made representation to the respondent No.2 on December 23, 2010. On December 28, 2010, after taking physical possession of the property mortgaged on December 23, 2010, the respondent No.2 rejected the said representation. According to the petitioner, taking of such possession

on December 23, 2010 was void, illegal and not tenable in law. On January 10, 2011, the petitioner filed a Securitization Appeal under Section 17(1) of the Securitization Act and the same is pending wherein the measures taken under Section 13(4) of the Securitization Act has been challenged. However, subsequently, on January 27, 2011, the present application has been filed by challenging *vires* of impugned notification dated January 28, 2003 on the premise that the field of Cooperative Society falls in List II of Schedule VII and hence, the Union of India has no power to legislate on the field of Cooperative Society.

3.4 It may not be out of place to mention here that the selfsame questions involved in these petitions are also subject matter of challenge before the Supreme Court in SLP (C) No.17573 of 2007 in which, the Supreme Court has granted stay of the operation of the order challenged before the Supreme Court against the order dated July 3, 2007 passed by the High Court of Judicature at Bombay at Aurangabad in Writ Petition No.2672 of 2007.

4. Mr Shah, the learned advocate appearing on behalf of the petitioner, strenuously contended before us that a the three-judge-bench of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd.** (*supra*) having held that the provisions of the RDBI Act are not applicable to the recovery of dues by the cooperatives from their members, it necessarily follows that the

provisions of the Securitization Act will not applicable to the recovery of dues by the cooperative societies from their members. Mr Shah contends that the notification dated January 28, 2003 issued by the Central Government purportedly in the exercise of its power under Section 2(1) (c) (v) of Securitization Act and thereby bringing the Cooperative Banks within the purview of the said Act is not sustainable in view of the judgment of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*). Mr Shah further submits that in terms of Schedule VII List I Entry 43 and Schedule VII List II Entry 32 of the Constitution of India, the Parliament has no legislative competence to apply the Securitization Act in respect of the affairs of the Cooperative Banks. Mr Shah fairly concedes that in spite of the decision of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*), several High Courts have taken a view that the said decision of the Supreme Court does not stand in the way of Union of India in bringing the Cooperative Banks within the purview of Securitization Act, but, according to him, those decisions are passed on total misinterpretation of the decision of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*).

4.1 It appears from record that in the following decisions, various High Courts have taken a view that the case of **Greater Bombay Cooperative Bank Ltd**. *(supra)* does not stand in the way of Union of India in bringing the case of Cooperative Banks within the purview

of Securitization Act :-

1. M/s. Khaja Industries & Ors. Vs. State of Maharashtra & Ors. reported in AIR 2008 (NOC) 44 (Bom.).
2. V. Krishnaswamy & Anr. Vs. Karnataka Rajya Kajgarika Sahakara Bank Niyamitha Bangalore & Ors. reported in AIR 2008 Kar. 20.
3. M/s. Rama Steel Industries vs. Union of India reported in AIR 2008 Bom. 38.
4. A.P. Varghese & Ors. Vs. The Kerala State Coop. Bank Ltd. reported in AIR 2008 Kerala 91,
5. Raj Kumar Khemka vs. Union of India & Ors. reported in AIR 2009 Madras 143.
6. Nahik Merchant's Coop. Bank Ltd. vs. Aditya Hotels Pvt. Ltd. reported in 2009 (4) Bom. C.R.734.
7. Nakodar Hindu Urban Coop. Bank vs. Deputy Registrar, Coop. Soci. & Ors. reported in AIR 2010 Pun & Har. 20.
8. Kheralu Nagrik Sahakari Bank Ltd. vs. State of Gujarat reported in 1998 Vol.39 (2) GLR 1517.
9. Hafiz Zakir Hussain vs. Akola Janta Commercial Coop. Bank Ltd. reported in AIR 2008 MP 193.
10. Karnataka Rajya Kaigarika Sahakara Bank Niyamita & Anr. Vs. V. Krishnaswamy reported in 2012 173 Comp. Case 1 (Karn).

5. The long and short of the submissions of Mr. Shah may be epitomized thus:

I. The impugned notification is unconstitutional as a Cooperative Society is a genus and the banking is species. Cooperative Bank under the Cooperative Societies Act falls in List II in Entry 32, as laid down in Paragraph 69 read with paragraphs 97 and 98 of the Judgment in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*).

II. Since 1919, the entry of the Cooperative Societies falls in State List.

III. Every Cooperative Bank is a Cooperative Society, but converse may not be true.

IV. Banking Business for a Cooperative is merely incidental trenching and in pith and substance, a Cooperative Society doing banking business, remains a Cooperative Society and falls in List II Entry 32. Hence, Banking Cooperative Society is covered by Entry 32 of State List.

V. Debt Recovery Tribunal [DRT, hereafter] is creation of Union List, Entry 45 (See Union of India and another v. Delhi High Court Bar Association and others reported in AIR 2002 SC 1479). It has been held in the judgment in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) that Cooperative Bank cannot institute case before the DRT created under RDBI Act.

VI. A Cooperative Bank cannot otherwise invoke jurisdiction of

the DRT, and hence, the phraseology as grafted in s. 17 of the Securitization Act, 2002, DRT having jurisdiction is superfluous qua the Cooperative Bank. Thus, in the light of the law declared by the Supreme Court of India, the DRT is not having jurisdiction regarding Cooperative Bank. Hence, under Section 17, the DRT will not have jurisdiction, qua Cooperative Banks.

VII. DRT, as interpreted and laid down in the decision in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) read with Delhi Bar association's case *(supra)*, is creation of List I Entry 45, and hence, it can have no jurisdiction to entertain a matter *qua* an entity which is creation of List II Entry 32 i.e. Cooperative Bank. (Banking being mere ancillary business).

VIII. The Object and purpose behind the Securitization Act is Speedy Recovery of Debt/NPA's.

IX. Enforcement of security interest is one of enforcement of a right and second is Security interest.

X. Generally Bank / Financial Institutions is taking Security but the Securitization Act is not enacted for creation of Security; the Act is enacted for enforcement of the security and it is concerned with the procedure for enforcement. Hence, in pith and substance, the Securitization Act deals

with the mode to enforce the security, but the Act does not deal with the creation of security. Power to enforce the security is a matter of procedure, and earlier, the procedure for enforcement by the Bank/Financial Institution was laid down in Code of Civil Procedure, 1908; on the other hand, for enforcement at the instance of the Cooperative Bank, the provisions were laid down in the Cooperative Societies Act, which specifically barred the jurisdiction of the Civil Court. Thus, the Cooperative Bank is not covered under CPC. [CPC covered under Entry 13 of List III.]

XI. Enforcement of Loan Agreement and security of Hypothecation and Pledge covered under Contract Act [Entry 7 of List III and Mortgage covered under Transfer of Property Act [TP Act, for short] under Entry 6 of List III is adjudicated by Civil Court following CPC.] Hence, the law governing mortgage which is the substantial law is covered by Entry 6 (Concurrent List) while the procedure for recovery of mortgage which is procedural law is effected *via* medium of Civil Court which is covered by entry 13 (Concurrent List). The recovery of NPAs is effected by DRT Act and Securitization Act which fall in List I Entry 45 as per Central Bank of India's case.

XII. Considering the report of Narsimham and Andyarujina Committee pertaining to Nationalized Bank & Financial

Institutions and the very fact that both the reports have no concern with the Cooperative Banks functioning in India, and it only considered how to reduce NPA of Bank & Financial Institutions. The RDBI Act is enacted for speedy recovery of Debt due to Bank & Financial Institutions thereby taking away the power of the civil court under CPC. The said Law is made only for Bank and Financial Institutions, which is covered under Entry 45 of List I.

XIII. The Security Interest is concerned with the Security of Mortgage under the TP Act while the Security of Hypothecation and Pledge has connection with the Contract Act.

XIV. TP Act is concerned with all classes (genus) of Secured Creditors and if such enforcement procedure was amended in the TP Act only for Banks and Financial Institutions, it would be considered as discrimination from other classes of Secured Creditor. Supreme Court held that the Bank is covered under Entry 45 of 1st List and also decided that the Cooperative Bank is not covered under entry 45 of 1st List. Supreme Court decided that Securitization Act is incorporated under the Entry 45 of the List I.

XV. Securitization Act is not in addition and nor is derogative of RDBI Act. Under the said Act, any provision of TP Act and Contract Act is not altered / not modified/ not amended or

not repealed and not incorporated in addition and in derogation of TP Act and Contract Act. Securitization Act is the extension of RDBI Act (Transcore's Case).

XVI. List III is the concurrent List and for the subject provided under List III, the Parliament and the State Legislature are empowered to make Law. But it does not mean that Union / Parliament is empowered to make Law pertaining to State List; similarly, the State Legislature is also empowered to make law pertaining to List III, but it does not mean that State is empowered to make Law pertaining to Union List. Entry of List III has no concern with List I & II.

XVII. In Central Bank of India's case the Supreme Court pointed out the circumstances in which the Securitization Act is incorporated.

XVIII. Delegation of Power under Securitization Act to the Central Government for issuing Notification for covering any Bank can be exercised within the scope of Entry 45 of 1st List. Generally, the meaning of Banking is very wide but when we consider its meaning in view of Entry 45 of List I, the Union List, as defined in the judgment of the Apex Court in the case of **Greater Bombay Cooperative Bank Ltd**. (*Supra*), a Cooperative Bank is not covered under Banking under entry of the List I. Hence, in view of Securitization Act enacted under Entry 45 of the List I, the Central

Government has limitation while exercising delegated power and they cannot add any Cooperative Bank which is not covered under said Entry. Thus, the Central Government has crossed its limit and without having any power, issued the Notification for including the Cooperative banks which is not covered under Entry 45 and has consequently encroached upon the field of list II. Therefore, the said Notification is without legislative competence. Thus, the section empowering or entrusting delegation of power is not *ultra vires* but the subject Notification is *ultra vires* Constitution.

XIX. The delegated authority cannot go beyond the scope of the authorization which empowered it. Here, the delegation is under the Securitization Act, which falls in Union List Entry 45; hence, the delegated authority cannot go beyond the parameters of the empowering Act. For this reason, it cannot touch a Cooperative Bank.

5.1 Mr Shah, therefore, prays for a declaration that the notification issued under the Securitization Act, indicated above, is *ultra vires* the provisions of Second Schedule of the Constitution of India.

6. Mr Champaneri, the learned Assistant Solicitor General of India, Mr Desai, the learned advocate appearing on behalf of the Central

Government and Mr Karia, the learned advocate appearing on behalf of the bank have, on the other hand, opposed the aforesaid contentions of Mr Shah and have contended that in all the decisions of various High Courts, the law has been correctly interpreted and thus, this is a fit case where we should dismiss all these writ-applications.

6.1 The learned counsel appearing on behalf of the Central Government viz. Mr. Champaneri and Mr. Desai developed their arguments in the following way:

a) The Securitization Act is enacted because the financial sector of the country 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 & Accounting Practices, there were certain areas in the banking and financial sector which did not have a level playing field as compared to other participants in the financial markets in the world. There was no legal provision for facilitating securitization of financial assets of the banks and financial institutions and unlike the International Banks, the banks and financial institutions in India did not have power to take possession of securities and sell them, due to which the commercial transactions did not keep pace with the changing commercial practices and financial sector reforms,

resulting into slow pace of recovery of defaulting loans and mounting levels of Non Performing Assets of banks and financial institutions. Narsimha Committee I & II and Adyaru Jinna Committee constituted by the Central Government for the purpose of examining the banking sector reforms have considered the need for changes in the legal system in respect of these areas and these suggestions led to the enactment of Securitization Act which has enabled the banks and financial institutions to realize the long term assets, manage the problems of liquidity, asset liability and mismatches and has improved the recovery by exercising powers to take possession of securities, sell them and reduce Non Performing Assets by adopting measures for recovery or reconstruction. The petitioners have tried to avert recovery and have tried to block the undisputed dues having failed before the judicial authorities.

b) The Supreme Court in the case of State of **Uttaranchal v/s Balvant Singh and others**, reported in **2010 (3) SCC 402**, while considering the whole history of the Public Interest Litigations in India, the definition of "Public Interest Litigation" as per the dictionary, and abuse of the Public Interest Litigation, gave certain directions and also directed sending the judgment to the Registrars Generals of all the High Courts to ensure compliance of the said order and in view of said directions, this High Court framed Rules called as "The High Court of Gujarat

(Practice & Procedure for Public Interest Litigation) Rules, 2010, while defining "Public Interest Litigation" in rule 2(1) and in rule 3 of Chapter II, laid down the proforma. Rule 5 gave the categories and only such persons can file Public Interest Litigation and for the causes mentioned in the said Rules. Nowhere in the present petitions, can it be said that the equitable extraordinary writ jurisdiction is sought for on breach of any such fundamental rights. Looking to the conduct and the way in which the petitions, as aforesaid, are filed, the present petitions should be dismissed because the relief sought for in these petitions, is against the public interest as it amounts to stalling a legitimate undisputed recovery which has not been declared to be illegal and the recovery of which is not nullified or set aside by any court of law.

c) When the petitioners are claiming knowledge about the several facts which they normally would not have, it is incumbent upon the petitioners to fairly point out before this Court that the very notification which is under challenge in the present petitions, was a subject matter of challenge in a reported decision in the case of **Apex Electrical Ltd. and others v/s ICICI Bank Ltd. and others**, decided way back on 30th July 2003, wherein this Court has upheld the validity of the impugned notification dated 28th January 2003. This Court has held that looking to the statement of the objects of the Act, and looking to the provisions of the Banking Regulations Act, by virtue of section

56 of the Act, certain provisions of the Banking Regulations Act are made applicable to the cooperative societies dealing with any banking business. Section 18 of the Banking Regulations Act which is made applicable for Cooperative Banks, provides for maintenance of cash reserves; section 20 applicable for Cooperative Bank provides for restrictions on loans and advances by the Cooperative Bank; section 24 provides for maintenance of cash balance and other securities; section 35 provides for inspection by the Reserve Bank of India; section 35A provides for binding effect of the directives of the Reserve Bank of India. Therefore, section 56 of the Banking Regulations Act provide with certain modifications, the provisions of the Banking Regulations Act is applicable to the Cooperative Banks and the Court has held that in substance, the provisions of Part II of the Banking Regulations Act relating to business of the banking companies are made applicable with modifications to all Cooperative Banks and has further held that it can hardly legitimately be disputed that the method provided for recovery of loans by realization of secured assets and thereby, to provide mode for reduction of the Non Performing Assets by the Cooperative Bank would not be a matter pertaining to banking business merely because a bank is a Cooperative Bank. This Court has further held that the law pertaining to regulating banking business would, by natural construction, include the method and manner of recovery of loans and realization of

assets and also the Non Performing Assets, and hence, it would not be sufficient to construe that Parliament has no power to legislate upon the method and manner of regularization and enforcement of security interest which also includes the recovery by the Cooperative Banks. As such, if a matter pertains to incorporation, regulations and winding up of Cooperative Banks, it would fall under Entry 32 of the State List, but the law providing remedy of realization of secured assets by the Cooperative Bank can be said to be a subject touching to banking. It is well settled that the Entry should be given the widest possible interpretation and in view of this, this Court, in the said decision, held that banking would include various activities of the bank, namely, receiving monies from the depositors, providing for loans, maintaining of the cash reserves, assets, recovery of loans, realization of secured assets, reduction of the Non Performing Assets by realization of monies etc. are various subjects which can be said as touching to banking provided under Entry 45 of the Central List.

d) In case of **A.P.Varghese and etc. Versus Kerala State Cooperative Bank Ltd. & others**, reported in **AIR 2008 Kerala 91**, the Hon'ble Kerala High Court has held that:

> *"18. Section 35 of the SARFAESI Act provides that the provisions thereof shall have effect, notwithstanding anything inconsistent therewith, contained in any other law for the time being in force, or any instrument having effect by virtue of any such law. Chapter III of that Act*

relates to Enforcement of Security Interest. Section 13 (1) in that Chapter provides that notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882, hereinafter referred to as the "TP Act", any security interest created in favour of any secured creditor may be enforced, by such creditor, in accordance with the provisions of the SARFAESI Act, without the intervention of the Court or Tribunal. The non-obstante Clause in Section 13(1) of that Act overrides the provision contained in Section 69 of the T.P. Act. Thereby, the general law on the subject as contained in Section 69 of the T.P. Act has been overridden by the special enactment, namely, the SARFAESI Act. This is a fundamental ground on which the distinctions based on types of mortgages as available in the T. P. Act were held to be of no consequence, by the Apex Court in Mardia Chemicals v. Union of India see Paragraph 42 of that decision as reported as 2004(2) KLJ 273 : AIR 2004 SC 2371. "Security interest", going by Section 2 (1)(zf) of the SARFAESI Act, means right, title and Interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31, in terms of which, the provisions of the SARFAESI Act shall not apply to the different matters enumerated in Clauses (a) to (j) therein, including in Clause (i), any security interest created in agricultural land. An examination of the provisions of the SARFAESI Act, particularly those contained in Chapter III thereof, in the backdrop of the interpretation Clause contained in Section 2 of that Act, would show that the said legislation is not a statute that merely creates an alternate mode of recovery, or provides for Courts, Tribunals or authorities with exclusive Jurisdiction and thereby changes the forum of adjudication, unlike what has been essentially done by the legislation of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, hereinafter referred to as the "RDB Act". Section 2 (2) of the SARFAESI Act provides

that the words and expressions used and not defined in that Act, but defined in the Indian Contract Act or the T. P. Act or the Companies Act or the Securities and Exchange Board of India Act shall have the same meanings respectively assigned to them in those Acts. The right of a secured creditor created by Section 13 of the Act with the support of the overriding effect of the SARFAESI Act provided by Section 35 thereof, is the creation of an Interest In property and not merely a modus for recovery. The creation of that interest, which is called "security interest", is made by providing that such interest shall have effect, over and above Sections 69 and 69-A of the T.P. Act, which provisions provide a right for the mortgagee to sell the mortgaged property, without the intervention of the Court and for appointment of receiver in terms of the law regulating exercise of such power, as are enjoined by those provisions. The creation of security interest in terms of the SARFAESI Act, can be upon "property" which term is defined in Section 2 (t) of that Act, to mean, among other things, immovable property and movable property. Recalling immediately that Section 31(i) of the SARFAESI Act provides that the provisions of that Act shall not apply to any security interest created in agricultural land, it can be noticed that transfer of property other than agricultural land is a subject that falls in Entry 6 in List III - Concurrent List and contracts, not including contracts relating to agricultural land, including the different types and forms Of contracts, fall in Entry 7 of that List. The word "contracts" in Entry 7 uses an inclusive mantle with an exclusionary provision relating to agricultural land. Therefore, all contracts including a charge, hypothecation, assignment etc. created in favour of a secured creditor to form a security interest in relation to property other than those relating to agricultural land, fall under Entry 7 in List III. The exemption provided by Section 31(i) of the SARFAESI Act takes that legislation away from the pale of any accusation that the "security interest" created thereby

affects agricultural land, thereby exceeding the legislative competence of the Union referable to the subject at Entry 6 in the Concurrent List. So much so, the matter dealt with in Section 13 (1) of the SARFAESI Act read with relevant provisions in the interpretation Clause of that statute clearly shows that those matters fall well within the subjects at Entries 6 and 7 of the Concurrent List.

19. It is not the contention of the petitioners that Entry 32 in List II takes within its sweep and ambit, right to property. If that were so, the States alone will have the exclusive competence to legislate on matters relating to immovable and movable properties belonging to and being dealt with by the cooperative societies. If such a view is possible, the TP Act cannot govern the immovable properties belonging to the cooperative societies. Nor would the Contract Act apply to the cooperative societies.

20. Entries 43 and 45 in List I to the Seventh Schedule were appreciated, qua Entry 32, in List II, in GBCB AIR 2007 SC 1584 (supra), to notice that the statutes relating to the field of cooperative societies that fell for consideration provided a mechanism under those legislations for resolution of disputes and that therefore, any exclusion of the jurisdiction of those authorities by the operation of the RDB Act is constitutionally impermissible in view of the exclusiveness given to the for a provided by those State legislations. In rendering that verdict, Their Lordships appreciated a classic and nice distinction between the provisions of the SARFAESI Act and the RDB Act. This can be noticed on a clear reading of the assimilation of those statutes in paragraphs 26 to 28 of that judgment. Dealing with the SARFAESI Act, the Apex Court noticed, among other things, as follows:

The Central Government is authorised by Section 2(c)(v) of the Act to specify any other bank for the purpose of the Act. In exercise of this power, the Central Government by Notification dated 28-1-2003, has specified " cooperative bank" as defined in Section 5(cci) of the BR Act as a "bank" by lifting the definition of cooperative bank' and 'primary cooperative bank' respectively from Section 56 Clauses 5(cci) and (ccv) of Part V. The Parliament has thus consistently made the meaning of 'banking company' clear beyond doubt to mean 'a company engaged in banking, and not a cooperative society engaged in banking' and in Act No. 23 of 1965, while amending the BR Act, it did not change the definition in Section 5(c) or even in 5(d) to include cooperative banks; on the other hand, it added a separate definition of ' cooperative bank' in Section 5(cci) and 'primary cooperative bank' in Section 5(ccv) of Section 56 of Part V of the BR Act. Parliament while enacting the Securitization Act created a residuary power in Section 2(c)(v) to specify any other bank as a bank for the purpose of that Act and in fact did specify ' cooperative banks' by Notification dated 28-1-2003."

(e) The contention that the provisions of recovery are already existing under the Gujarat Cooperative Societies Act and that the remedy under any other law is excluded were also not accepted by the Court in the above decision. By rejecting the said contention on the face of it, the Court held that the provisions of the Act are in addition to any other law for the time being in force and by the present Act, as additional mode of recovery of realization of securities has been provided, and therefore, when there is an express provision under the Act, such general principles and the decision providing for such

general principles cannot be made applicable. The Court also held that as per the provisions of section 35 of the Act, the provisions of the present Act shall have the effect notwithstanding the other law for the time being in force and/or an instrument having effect by virtue of such law. Moreover, the method providing for remedial measure is for realization of security interest in the secured assets of a Cooperative Bank and such method / procedure is in addition to the provisions of any other law for the time being in force. Therefore, it was held that it cannot be legitimately contended that the Cooperative Bank cannot resort to the provisions of the Act for realization of their secured assets as per the present Act.

(f) Section 56 of the Banking Regulations Act directs that the Act to apply to cooperative societies subject to modifications in which (c) in section 5 (cci) defines “Cooperative Bank” to mean a State Cooperative Bank, Central Cooperative Bank and Primary Cooperative Bank. Section 5 (cciia) means a Society registered or deemed to have been registered under any Central Act for the time being in force relating to Multi State Cooperative Societies or any other Central or State law relating to the cooperative societies for the time being in force. Therefore, the challenge to the notification dated 28th January 2003 is not tenable in the eye of law.

(g) The List I Union List (Article 246 of the 7th Schedule of the Constitution of India) being Entry No.45 which deals with banking should be given widest possible meaning so as to cover the Cooperative Society, as stated hereinabove, and it cannot be said that due to Entry 32 in List II being the State List in 7th Schedule of the Constitution of India, Cooperative Society cannot be included within the Entry 45 of List I.

(h) Once the Parliament legislates under Entry 45 of the List I and makes a law relating to recovery of dues by the banks including the Cooperative Banks, the provisions contained in the Cooperative Societies Act relating to that subject will cease to operate in relation to the Cooperative Banks. The Parliament has exclusive powers to make laws with respect to any of the matters enumerated in List I wherein the banking is included in Entry 45. Entry 44 of List I empowers the Parliament to legislate in relation to incorporation of the regulation and winding up of corporation whether they are trading or not. It means that under Article 44, the Parliament can legislate also in relation to cooperative societies and Entry 45 confers exclusive powers on the Parliament to legislate in relation to banking. It is a law laid down that recovery of dues is an essential aspect of banking business. The regulations and control of the banking business can be said to be covered under Entry 45 of List I and therefore, the Cooperative Bank will have to be included within the meaning of the definition of the term “banking company” even

for other purposes. A perusal of clause (a) of section 56 of the Banking Regulation Act shows that in this Act wherever the word "banking company" or the word "bank" appears, it shall be construed as reference to a Cooperative Bank. Therefore, a conjoint reading of section 5(c) together with section 56A of the Banking Regulation Act, leads to one conclusion that the term "banking company" also means "Cooperative Bank" which transacts a business of banking.

(i) When the question arises as to the interpretation to be put on an enactment, what the Court has to do is to ascertain the intent to make it, and liberal construction is always necessary to get the exact conception of aim, scope and object of the whole Act, to consider what was the law before the Act, what was the mischief or defect for which the law had not provided, what remedy the Parliament had appointed and the reason of the remedy. It has been held by several Courts that there may be little doubt that under Entry 45 of List I, it is Parliament alone which can enact the law with regard to the conduct of business by the enactment and the Parliament can provide for mechanism by which the monies due to the banks and financial institutions can be recovered and for expeditious recovery of debts, the inclusion of Cooperative Banks which is sought to be challenged by notification dated 28th January 2003, should be upheld.

(j) Merely because of any overlapping of law made by the State Legislature, it cannot be said that the enactment or inclusion in the present case by the Parliament is beyond its legislative competence. This may happen in relation to entries also in List I because it is now a settled law that the legislative heads which are given in the three Lists must receive large and liberal meaning. It has been held that a doctrine of domain paramountcy does not operate merely because the domain has legislated on the same subject matter. The doctrine of occupy if applies only where there is a domain clash between the legislation and provincial legislation within an area common to both but where both can exist peacefully, both reap their respective harvest, it cannot be said that the Parliament has no powers to legislate by including the Cooperative Banks *vide* notification dated 28th January 2003.

(k) Section 37 of the Securitization Act states that the provisions of the Act or the Rules made there under shall be in addition and not in derogation to various laws named therein as well as any other laws for the time being in force which renders the interpretation of the various provisions of the Securitization Act to have overriding effect on other Acts.

(l) Supreme Court in case of **United Bank of India V/s. Satyawati Tondon** reported in **AIR 2010 SC 3413** has in paragraph 17 of the judgment held that:

".....In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person..."

Further it has been also held by the Supreme Court in Para 18 of the Judgment that:

".....It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation....."

The Supreme Court, in the concluding paragraph of the judgment, has also observed that:

"It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse

impact on the rights of the banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

(m) Reliance placed by the petitioners in the case of the **Greater Bombay Cooperative Bank Ltd.** [*supra*] is a misplaced one as the present dispute did not fell for consideration before the Supreme Court and the question that fell for consideration before the Supreme Court was whether the Courts and authorities constituted under the Maharashtra Cooperative Societies Act, 1960 and the Multi State Cooperative Societies Act, 2002 would have jurisdiction to entertain applications / disputes submitted before them by the Cooperative Banks incorporated under the 1960 Act and the 2002 Act for an order of recovery of debts to them, after establishment of a Tribunal under the RDBI Act, and the Supreme Court held the question in the negative. The Supreme Court overruled the judgment on an interpretation of the relevant provisions of the RDBI Act. In the said decision, there is a reference to the notification dated 28th January 2003 i.e. the notification impugned in the present petition, and noting the difference in the definition of the terms "bank" in the RDBI Act as well as the Securitization Act, in fact, held that the Securitization Act includes within its ambit "Cooperative Banks" (case of Khaja Industry). The important

distinguishing feature is that the RDBI Act does not have provision similar to section 2(c) (v) of the Securitization Act.

(n) As far as the contention regarding the dispute being carried under section 17 of the Securitization Act, the Tribunal is concerned only with the validity of the acts of the secured creditors of taking possession of the securities and dealing with section 13. While considering this, it has been held that it is not necessary for the Tribunal to finally adjudicate the exact amount due to secured creditors. It has been further held that the purpose of application under section 17 is not the determination of the quantum of the claim *per se* and that it would not be necessary for the Tribunal to adjudicate the exact amount due by the borrower to the secured creditor. The extent by which the liability is greater than the value of the security would be irrelevant in such an inquiry u/s 17 where only question is the validity of the secured creditors' action in enforcing the security and not the quantum of the claim *per se* and to realize the balance dues, the secured creditors would have to proceed under section 13(10), and that in a case of a Cooperative Bank, it may well be that for the balance amount, proceedings under the provisions of the Cooperative Societies Act would have to be filed to adjudicate the exact amount due by the borrower to the secured creditors etc. Therefore, an application under section 17 and the proceedings pursuant to the proceedings of section

13(10) are entirely different which is further clarified by section 37 of the Securitization Act.

(o) When a challenge is made to the constitutional validity of an enactment, first, the approach of the Court while examining the challenge to the constitutionality of an enactment is to start with a presumption of constitutionality. The Court should try to sustain the validity of the enactment to the extent possible. It has also been held time and again that it may happen from time to time by the legislation though purporting to deal with the subjects in one List, touching with the subjects in other List, and the different provisions of the enactment will be so closely inter-linked, the blind adherence to strictly verbal interpretation would result in large number of statutes being declared invalid because, the legislature enacting them may appear to have legislated in a forbidden sphere. Hence, law which has been evolved by consistent judicial reviews is that the impugned statute should be examined to ascertain its "pith and substance" for the purpose of determining whether it is legislation with respect to the matters in this List or not.

(p) The fundamental difference between the State enactment and the Securitization Act and in particular section 13 thereof is that the latter does not create a mechanism for the secured creditors to institute the proceedings for adjudication or recovery of the dues. It is in fact quite contrary. The Securitization Act permits

and enables the secured creditors to realize their security without the intervention of the courts or tribunal or any other authorities. In the event of the amounts realized by enforcing the securities being inadequate, section 13(10) clarifies that the secured creditor is entitled to institute the proceedings before the Tribunal under the RDBI Act or the competent court for recovery of the balance amount from the borrower. It is important to note that there is a difference between the right of a creditor to file recovery proceedings and right of a borrower to file an application under the RDBI Act to challenge the action of a secured creditor to enforce / realize its security without the intervention of the court under section 13. The Parliament was, therefore, conscious of and in fact, drew a distinction between the enforcement / realization of the secured assets without the intervention of the courts, tribunals or other authorities on one hand, and recovery proceedings on the other hand. Therefore, the Scheme under the Securitization Act is in conformity with the constitutional scheme under Article 246 of the relevant Entry under List I and List II of the 7th Schedule. As held by several High Courts that the Securitization Act deals in pith and substance with the field of banks or banking and that merely because the Securitization Act permits the Cooperative Banks also to realize their security without the intervention of the courts, cannot lead to a conclusion that it trenches upon the State subjects of the cooperative societies under Entry 32 of the

List II. At the highest, it could be said that it is merely a case of incidental entrenchment which would not render the Act constitutionally invalid. There is nothing in the scheme of the Securitization Act which warrants any narrow interpretation contrary to the plain language of section. The Courts have held that there is no other enactments which permits the secured creditors an option of enforcing / realizing their securities without the intervention of the courts and the edjudem generic rule is not applicable to the provisions of section 37 of the Act and that there is no conflict between the two enactments. They operate not only in distinct fields, but also in altogether a different manner.

(q) The petitioners are trying to create a confusion between the terms “bank” and “banking company” defined in clause (c) and (d) of section 1 of the Securitization Act and clauses (d) and (e) of section 2 of the RDBI Act which will show that the law does not require that every bank has to be a banking company though every banking company may be a bank. The Parliament has while enacting the Securitization Act created a residuary power in section 2(c) (v) to specify any other bank as the banks for the purpose of that Act and in fact did specify Cooperative Banks by the impugned notification. The provisions under the Gujarat Cooperative Societies Act do not by themselves create any statutory right relating to property. Similarly, the provisions

of the RDBI Act are also those which create an alternate forum intended to proper and quicker mode of recovery by substituting the Tribunal constituted under the Act for the Civil Courts. The necessary follow up was included with the needs of changing times. The RDBI Act does not provide for any interest like security interest, as is created by the Securitization Act.

(r) The main basis of contention of the petitioners that the pendency of proceedings under the Securitization Act would debar the bank from instituting the proceedings for recovery of debt by obtaining a decree from the DRT under the RDBI Act, is itself faulty. It has been held that both the enactments are intended to ensure speedy recovery of the outstanding debts due to banks and financial institutions. There is nothing in either the provisions of the Securitization Act or the RDBI Act to suggest that invocation of one would forbid the invocation of the provisions contained in the other. In the case of **Transcore v/s Union of India**, as reported in **AIR 2007 SC 712**, the issue was whether the bank could, without withdrawing the proceedings instituted before the DRT, take resort to Securitization Act. Answering the question, the Supreme Court held that withdrawal of original applications before the DRT was not a condition precedent for invoking the Securitization Act and therefore, there is no reason why the converse also cannot be true, because, if the securitization proceedings are permissible during the pendency of the recovery proceedings under the

RDBI Act, there is no reason why the recovery proceedings would become legally bad because the bank had taken resort to Securitization Act. Underlining feature and importance is that both the proceedings can be instituted and maintained simultaneously. The Schemes of the two enactments do not in any way debar simultaneous resort to the provisions thereof. It cannot be said that the Central Government is precluded from bringing a Cooperative Bank under the definition of "bank". As stated earlier, under Entry 43 read with Entry 45 of the List I (Union List) of 7th Schedule of the Constitution of India, the Central Government has the exclusive power of making laws with regard to banking.

(s) The crucial difference in the language of the two Acts, namely, the Securitization Act as compared to the provisions of the RDBI Act is that the definition of the expression "bank" in section 2(d) extends to five categories in the RDBI Act, but when the Parliament enacted the Securitization Act in 2002, the expression "bank" was defined in section 2(c) to cover in clauses (1) to (4), the first four categories of section 2(d) of the RDBI Act, 1993. However, the fifth one, i.e. clause (v) of clause 2(c) of section 2 of the Securitization Act extends such definition to such other cases which the Central Government may by notification specify for the purposes of the Act.

(t) The challenge to the impugned notification made on the ground that there is a breach of a fundamental right, namely, Article 21 of the Constitution of India as the said Article cannot be in any way used so as to stall the recovery of huge amount being public money is not tenable. It may, in some cases, cause hardship to a debtor, but that is inevitable so long as the law represents the process of abstraction from the generality of cases and reflects the highest common factor. When such challenge is made, the Courts test the said challenge by way of judicial review by adopting the first rule which says that there is always a presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles and another rule, which is even more important, is that the laws relating to economic activities should be viewed with greater latitude as compared to laws touching civil rights. The said rules are judicially recognized and accepted that the legislature understands and correctly appreciates the needs of its own people. Its lines are directed to problems made manifest by experience and its discrimination are based on adequate ground and the presumption of such constitutionality when challenged, the Court will take into consideration the matters of common knowledge, public interest, history of times, changing trends, and changing economic conditions. The legislature after all has the affirmative responsibility and that while considering such

intent of the legislature, it has been held that the courts must always remember that legislation is directed to practical problems. The economic mechanism is highly sensitive and complex. The money problems are singular and contingent and every legislation particularly in economic matters and financial issues is essentially empiric and is based on experiments and what may call for trial and error method and therefore, it cannot provide for all the possible situation or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation, but on that account alone, it cannot be assailed nor struck down as invalid. There may even be possibilities of abuse, but that too, cannot by itself be a ground for invalidating the legislation because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. It has been held that pervert human intelligence tends to challenge such legislation and therefore, the courts must adjudge the constitutionality of such legislation by the generality and its provisions, its intend, scope, object and reasons and not by crudities or inequalities or by the possibilities of abuse of any of its provisions.

6.2 According to these learned advocates, therefore, the petitions should be dismissed.

7. Mr. Karia, the learned Advocate appearing on behalf of the Cooperative Bank has mostly adopted the contentions of the Central Government and his submissions may be summed up thus:

1. Section 2(1)(c) of the Securitization Act defines “bank” and sub clause (v) empower the Central Government to specify by notification “such other bank” for the purpose of the Securitization Act, 2002. Accordingly, the Central Government has issued the notification dated 28th January 2003.
2. Clause 2(1) (zd) of the Securitization Act defines “secured creditor” meaning any bank or financial institution for any consortium or credit or bank or financial institution.....
3. Section 2(1)(zf)of the Securitization Act defines “security interest” meaning the right, title and interest of any kind whatsoever upon property mortgaged in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31.
4. Section 5(c) of the Banking Regulations Act, 1949 [BR Act hereafter] defines “Banking Company” as any company, which transacts the business of banking in India.
5. Clause (cci) – inserted by section 56 of BR Act vide Act No.23 of 65 – “Cooperative Bank” means a State Cooperative Bank, Central Cooperative Bank and a primary Cooperative Bank.
6. The Hon’ble Supreme Court in case of **Transcore Vs. Union of India and another reported in AIR 2007 SC 712** has

analyzed the provisions of the Securitization Act vis-à-vis the RDBI Act.

- In paragraphs 8 to 11, the Supreme Court has analyzed what is “securitization”.
- From paragraphs Nos.12 to 14 and 19 to 26, the Supreme Court has analyzed the provisions of the Securitization Act.
- From paragraphs Nos.15 to 18, the Supreme Court has analyzed the provisions of DRT Act, 1993.
- While answering the question as to whether banks or financial institutions having elected to seek their remedy in terms of DRT Act, 1993 can still invoke the Securitization Act for realizing the secured assets without withdrawing or abandoning the OA filed before the DRT under the DRT Act, the Supreme Court, after considering the arguments of both the sides, in paragraphs Nos.41 to 51 has given its finding to hold that withdrawal of OA pending before the DRT under the DRT Act, 1993, is not a pre-condition for taking recourse to the Securitization Act. The aforesaid finding of the Supreme Court makes it clear that both the Acts i.e. the Securitization Act, 2002 and the DRT Act, 1993 are complimentary to each other and the doctrine of election has no application. The Supreme Court has held that the Securitization Act is an additional remedy to the DRT Act, 1993.

- The Supreme Court in case of Transcore (supra), in paragraph 13, has held that to reduce the non-performing assets by adopting measures not only for recovery, but also for reconstruction, the Securitization Act provides for setting up of asset reconstruction companies, special purpose vehicles, asset management companies etc. which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. It also provides for the realization of the secured assets and for taking over the management of the borrower company.
- The Supreme Court in the said case, in paragraph No.14 has further elaborated one more reason for enacting the Securitization Act by stating that:-

> *" ..... when the civil courts failed to expeditiously decide suits filed by the banks/ FIs, the Parliament enacted the DRT Act, 1993. However, the DRT did not provide for assignment of debts to securitization companies. The secured assets also could not be liquidated in time. In order to empower banks or FIs to liquidate the assets and the secured interest, the NPA Act is enacted in 2002. The enactment of NPA Act is, therefore, not in derogation of the DRT Act. The NPA Act removes the fetters which were in existence on the rights of the secured creditors. The NPA Act is inspired by the provisions of the State Financial Corporations Act, 1951, ["SFC Act"] in particular Sections 29 and 31 thereof. The NPA Act proceeds on*

the basis that the liability of the borrower to repay has crystallized; that the debt has become due and that on account of delay the account of the borrower has become sub-standard and non-performing."

The Supreme Court has, therefore, held that the object behind the enactment of the Securitization Act is to accelerate the process of recovery of debt and to remove deficiencies/ obstacles in the way of realization of debt under the DRT Act.

- The Securitization Act is not only related to taking over the possession and sell of assets, but it also includes the provision and mechanism to regularize securitization and to provide for reconstruction for financial assets. In paragraphs 20 to 26 of the said judgment, the Supreme Court has elaborately analyzed the provisions of the Securitization Act, wherein the entire scheme of the Securitization Act is analyzed, which clearly shows that the Parliament in its wisdom has thought it fit to incorporate provisions of section 2(1)(2)(c)(v) in the Securitization Act, 2002 to empower the Central Government to specify by notification "such other bank" as it deems fit for the purpose of the Securitization Act.
- The Legislature in its wisdom has empowered the Central Government to specify by notification "such other bank" which means any bank for the purpose of the

Securitization Act irrespective of its formation whether it is a Cooperative Bank or a private bank or a public bank or nationalized bank or foreign bank. The Central Government in its wisdom has, therefore, exercised the power conferred upon it by notifying any Cooperative Bank *vide* impugned notification dated 28th January 2003.

- Accordingly, the Central Government has, in exercise of the powers conferred by the said provision, specified "Cooperative Bank" as "Bank" for the purpose of the Securitization Act by the impugned notification dated 28th January 2003.

8. In view of the aforesaid findings of the Supreme Court, in case of **Transcore** (*supra*), the following distinguishing features are emerging to distinguish the applicability of the judgment of the Supreme Court in case of **Greater Bombay Cooperative Bank Limited** [*supra*]**.**

(a) The Supreme Court in the case of **Greater Bombay Cooperative Bank Limited** was pleased to hold that the provisions of the DRT Act, 1993 by invoking the doctrine of incorporation are not applicable to the recovery of dues by the Cooperative Bank from their members.

(b) The Supreme Court answered the reference holding that Cooperative Banks transacting the business of banking do not fall within the meaning of "banking company" as defined in

section 5(c) of BR Act. The Supreme Court was concerned with applicability of the DRT Act to the Cooperative Banks, whereas in view of the analysis of the Securitization Act more particularly, with regard to empowering the Central Government to notify "such other bank" by virtue of provisions of section 2(1) (c) (v) of the Securitization Act which is absent in the definition of bank given section 2(1)(d) of the DRT Act, 1993. The notification issued by the Central Government including the Cooperative Bank as defined in section 5(cci) of the BR Act is valid, legal and constitutional.

(c) In paragraph 30 of the judgment in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*), the Supreme Court has relied upon the provisions of the Securitization Act by emphasizing that the Parliament has empowered the Central Government to notify "such other bank" by creating a residuary power for the purpose of the Securitization Act, which is absent in DRT Act, 1993. The Supreme Court further observed that by notification dated 28th January 2003, the Central Government has specified "Cooperative Bank". Thus, the Supreme Court was conscious and aware about the fact of the notification dated 28th January 2003 while holding that the DRT Act, 1993 is not applicable to the Cooperative Bank.

(d) The Supreme Court in paragraphs 56 to 59 of the judgment in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) has held that section 5(c) of the BR Act, which defines "Banking

Company" had not been altered by Act of 23 of 1965, whereby section 56 of the BR Act was inserted, wherein "Cooperative Bank" was separately defined by newly inserted clause (cci) of section 5 of BR Act.

(e) By the impugned notification, which is under challenge, the clause (cci) of section 5 of the BR Act is referred to, to specify "Cooperative Bank" by the Central Government as "such other bank". The Supreme Court was not dealing with the clause 2(1)(c)(v) of the Securitization Act while deciding the applicability of the DRT Act to "Cooperative Bank". On the contrary, the Supreme Court relied upon the provisions of section 2(1)(c)(v) of the Securitization Act and more particularly, the impugned notification dated 28th January 2003 to hold that whenever the Parliament thought it fit to empower the Central Government to specify "such other bank", the same is provided for in the Securitization Act and when such provision is absent in DRT Act, the DRT Act cannot be made applicable by invoking the "doctrine of incorporation" vis-à-vis the definition of "banking company" in section 5(c) of the BR Act, which is not changed or altered by the Parliament while amending the BR Act, way back in 1965.

(f) The observation made by the Supreme Court in case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) in paragraph 58, where, there is a reference to the distinction between the People's Cooperative Banks and the Corporate Banks, but in the

ultimate analysis, the Supreme Court, while considering the applicability of the DRT Act to Cooperative Bank, has relied upon the provisions of section 5(c) of the BR Act defining "Banking Company", which is referred to in the definition of bank in section 2(1)(d) of the DRT Act.

(g) The Supreme Court in case of **Greater Bombay Cooperative Bank Ltd**. (*supra*), in paragraphs Nos.60 to 70, has analyzed the need for enactment of DRT Act and in essence, it has held that the DRT Act was enacted for shifting the burden of Civil Court in the matter of suits by banks and financial institutions to DRT. The Supreme Court has, therefore, held that the DRT has substituted the civil Court, whereas the Board of Nominees and Cooperative Tribunal under the various Cooperative Societies Act are not civil courts, and therefore, also, the provisions of the DRT Act are not applicable to Cooperative Bank.

(h) The various Cooperative Societies Act of different States provide speedy independent machinery to recover the dues of the Cooperative Banks and/or Cooperative Societies from their members and such Cooperative Banks or Societies are specifically barred from filing a suit in the civil Court and therefore, in the effect, the DRT and the machinery provided under the various State Cooperative Societies are providing equal and same remedy for recovery of the dues. The DRT Act

is therefore, held to be not applicable to the Cooperative Banks by the Hon'ble Supreme Court.

(i) However, under the Securitization Act, the secured creditor is empowered to protect the security interest and for that purpose, the Central Government is empowered to specify by notification "such other bank" and accordingly, in exercise of the specific power of the Central Government provided in section 2(1) (c) (v) of the Securitization Act, the Cooperative Banks are notified by the impugned notification.

(j) In case of **Greater Bombay Cooperative Bank Ltd**. (*supra*), the Supreme Court was not dealing with the provisions of the Securitization Act, which are for the purpose of speedier recovery without any adjudication by the secured creditor, which not only includes bank and as per the definition of bank given in section 2(1) (c) of the Securitization Act, it includes "such other bank" as specified by the Central Government and therefore, the impugned notification is legal, valid and constitutional. This aspect is considered by the Division Bench of the Bombay High Court in the case of M/s Khaja Industries in paragraphs Nos.24 to 29.

(k) The issue of applicability of Legislative Competence of the Central Government to notify "Cooperative Bank" for the purpose of the Securitization Act, the ratio of the judgment in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) is not applicable, inasmuch as the said judgment of the

Supreme Court was dealing with the Legislative Competence of the Parliament to enact the DRT Act with respect to Cooperative Bank and not the Securitization Act.

(l) In the present petitions, the Legislative Competence of the Parliament is not under challenge vis-à-vis the provision of section 2(1)(c)(v)of the Securitization Act, whereby the Central Government is empowered to specify by notification "such other bank" for the purpose of the Securitization Act. The Division Bench of the Bombay High Court has considered the above issue in paragraphs Nos.31 to 56, and more particularly, paragraphs Nos.43 to 47 of the judgment in case of **Khaja Industries**. The Bombay High Court has categorically held that there is no conflict between two enactments i.e. the Securitization Act and the DRT Act, which is in consonance as held by the Hon'ble Supreme Court in case of Transcore (supra) as stated herein above.

9. The question of legality, validity and constitutionality of the impugned notification dated 28th January 2003 has come under scanner of various High Courts of the country after the judgment in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*), wherein, the question was raised as to the applicability of the Securitization Act to "Cooperative Bank" and/or "Multi State Cooperative Bank" in view of the judgment of the Hon'ble Supreme Court in case of **Greater Bombay Cooperative Bank Ltd**. (*supra*).

Almost, all High Courts, except the Karnataka High Court (judgment by the learned Single Judge) have held that the Securitization Act is applicable to the “Cooperative Bank” and/or “Multi State Cooperative Bank” upholding the validity, legality and constitutionality of the impugned notification dated 28th January 2003. The said judgments are as under:

1. Hafiz Zakir Hussain Vs. Akola Janta Commercial Cooperative Bank Limited reported in AIR 2008 MP 193, (Para 6 to 11).
2. A.P. Varghese etc. Vs. Kerala State Cooperative Bank Limited and others reported in AIR 2008 Kerala 91. (Para 13 to 23, wherein the decision of the Greater Bombay is considered in para No.22 to hold that the Hon’ble Supreme Court was specifically dealing with the issue pertaining to applicability of RDBI Act to the Cooperative Bank and there was no reason or justification for covering the Cooperative Bank under the provisions of the RDBI Act.
3. Rajkumar Khemka Vs. Union of India and others reported in AIR 2009 Madras 143. (Para 12 to 21, the Hon’ble Court considered the decision of Greater Bombay in para Nos.18 and 19 of the judgment).
4. Nakodar Hindu Urban Cooperative Bank Limited, Nakodar Vs. Deputy Registrar, Cooperative Society, Jalandhar and another reported in AIR 2010 Punjab & Haryana 20 (Para Nos.5 to 7).

5. Nashik Merchant's Cooperative Bank Limited Vs. M/s Aditya Hotels Private Limited reported in AIR 2009 Bombay 138 (Para No.29 to 36).

6. M/s Rama Steel Industries and others Vs. Union of India and others reported in AIR 2008 Bombay 38. (Para Nos.11 to 20, more particularly, para No.19, wherein decision of Greater Bombay is considered). SLP (c) No.19685 of 2007 is also dismissed by the Hon'ble Supreme Court vide order dated 10.12.2008.

7. Georgekutty Abraham & Ors. vs. Secretary, Kottayam Dist. Cooperative Bank Ltd & Ors. reported in AIR 2008 KERALA 137. [para nos.7 and 8].

8. Mayur Coirs P. Ltd. v/s Development Credit Bank - Delhi High Court Judgment dated 11.04.2008 at para no.5 and 9.

9. New Hariyana Dal Mill v/s Union Of India and other. Judgment of Bombay High Court dated 9th November 2009 at paragraphs nos.10 to 26.

10. Shaikh Mehmood v/s The Authorized Officer and others. Judgment of Bombay High Court dated 13-1-2011 at para no. 4.

11. Unreported decision of the Hon'ble Division Bench of the Bombay High Court at Aurangabad in case of Khaja Industries being Writ Petition No.2672 of 2007. The relevant paragraphs are also stated herein above. Civil

Appeal No.5680 of 2009 is pending before the Hon'ble Supreme Court.

10. In view of the aforesaid fact situation and provisions of the Securitization Act read with judgments rendered by the Supreme Court as well as by the various High Courts of the country, it unequivocally emerges that the impugned notification dated 28th January 2003 is legal, valid and constitutional in light of the distinguishing features vis-à-vis the decision in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) rendered by the Supreme Court in connection with the DRT Act, 1993.

11. Therefore, the question that falls for determination in these Special Civil Applications is, whether the notification indicated above should be held to be invalid in view of the fact that the Securitization Act was enacted in exercise of power conferred under List I of Schedule VII under Item No.45, whereas Cooperative Society is included in List II of Schedule VII under Item No.32 and further whether the decision of the three-judge-bench of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) was properly interpreted by those High Courts while delivering the above decisions.

12. In the case of **Greater Bombay Cooperative Bank Ltd**. [*supra*], two questions had arisen for determination before the

Supreme Court:

[1]. Whether the RDBI Act applies to debts due to Cooperative Banks constituted under the Maharashtra Cooperative Societies Act, 1960, the Multi-State Cooperative Societies Act, 2002 and the Andhra Pradesh Cooperative Societies Act, 1964.

[2]. Whether the State Legislature is competent to enact legislation in respect of cooperative societies incidentally transacting business of banking in the light of Schedule VII List II Entry 32 of the Constitution?

12.1 In answering the first question referred to above, the Supreme Court held that the Cooperative Banks established under the Maharashtra Cooperative Societies Act or the Multi-State Cooperative Societies Act or the Andhra Pradesh Cooperative Societies Act transacting the business of banking do not fall within the meaning of "banking company" as defined in section 5(c) of the BR Act and, thus, the provisions of the RDBI Act are not applicable to the recovery of dues by the cooperative societies from their members.

12.2 In answering the second question referred to above, the Supreme Court held that the express exclusion of the cooperative societies in Schedule VII List I Entry 43 and the express inclusion of

cooperative societies in List II Entry 32 separately and apart from but along with corporations other than those specified in List I and universities, clearly indicated that the constitutional scheme was designed to treat the cooperative societies as the institutions distinct from the corporations. According to the Supreme Court, the constitutional intendment seems to be that the cooperative movement was to be left to the States to promote and legislate upon and the banking activities of cooperative societies were also not to be touched unless Parliament considered it imperative. The Supreme Court further held that Cooperatives form a species of the genus "corporation" and as such, the cooperative societies with the objects not confined to one State are read in with the Union as provided in List I Entry 44. The Maharashtra Cooperative Societies Act, according to the Supreme Court, governs such multi-State Cooperatives and hence, the Cooperative Banks performing functions for the public with a limited commercial function as opposed to corporate banks cannot be covered by List I Entry 45 dealing with "banking". The Supreme Court, therefore, concluded that the field of cooperative societies cannot be said to have been covered by the Parliament by reference to List I Entry 45 and the Cooperative banks constituted under the Cooperative Societies Acts enacted by the respective States would be covered by List II Entry 32.

13. In this connection, we may profitably refer to the following observations of the Supreme Court in paragraphs 88 and 89 of the

judgment in the case of **Greater Bombay Cooperative Bank Ltd**. [*supra*]:-

> *88. Entry 43 List of I speaks of banking, insurance and financial corporations etc. but expressly excludes cooperative societies from its ambit. The constitutional intendment seems to be that the cooperative movement was to be left to the States to promote and legislate upon and the banking activities of cooperative societies were also not to be touched unless Parliament considered it imperative. The BR Act deals with the regulation of the banking business. There is no provision whatsoever relating to proceedings for recovery by any bank of its dues. Recovery was initially governed by the Code of Civil Procedure by way of civil suits and after the RDB Act came into force, the recovery of the dues of the banks and financial institutions was by filing applications to the Tribunal. The Tribunal has been established with the sole object to provide speedy remedy for recovery of debts of the banks and financial institutions since there has been considerable difficulties experienced therefore from normal remedy of Civil Court.*
>
> *(89). In R. C. Cooper v. Union of India, this Court observed that power to legislate for setting up corporations to carry on banking and other business and to acquire, hold and dispose of property and to provide for administration of the corporations is conferred upon the Parliament by Entries 43, 44 and 45 of the Constitution. Therefore, the express exclusion of cooperative societies in Entry 43 of List I and the express inclusion of cooperative societies in Entry 32 of List II separately and apart from but along with corporations*

other than those specified in List I and universities, clearly indicated that the constitutional scheme was designed to treat cooperative societies as institutions distinct from corporations. Cooperative Societies, incorporation, regulation and winding up are State subjects in the ambit of Entry 32 of List II of Seventh Schedule to the Constitution of India. Cooperatives form a specie of genus 'corporation' and as such cooperative societies with objects not confined to one State are read in with the Union as provided in Entry 44 of List I of the Seventh Schedule of the Constitution, MSCS Act, 2002 governs such multi-state cooperatives. Hence, the cooperative banks performing functions for the public with a limited commercial function as opposed to corporate banks cannot be covered by Entry 45 of List I dealing with "banking". The subject of cooperative societies is not included in the Union List rather it is covered under Entry 32 of List II of Seventh Schedule appended to the Constitution.

(Emphasis supplied by us).

14. From the observations emphasized by us above, it appears that the Supreme Court, in above case, has laid down the following propositions of law which are binding upon all the courts in India by virtue of Article 141 of the Constitution:

[a]. The first proposition laid down is that the constitutional intendment seems to be that the cooperative movement was to be left to the States to promote and legislate upon and the banking activities of cooperative societies were also not to be

touched unless Parliament considered it imperative. Thus, the limited banking activities of a Cooperative Society can be regulated by the Parliament if it considers imperative. It is needless to mention that by the amendment of B. R. Act, the Parliament has, in the past, made necessary amendment by applying the provisions of the B. R. Act upon the Cooperative Societies which intend to do the limited banking activities among its members, although not as a regular bank or corporation.

[b]. The second proposition laid down in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) is that the B. R Act deals with the regulation of the banking business and that there is no provision therein whatsoever relating to proceedings for recovery by any bank of its dues. In other words, according to Supreme Court, the B. R. Act has nothing to do with the procedure for recovery by any bank of its dues and thus, while making the amendment of the B. R. Act, the Parliament had no occasion to consider the aspect of recovery of its dues by banks which are governed by the said Act.

[c]. The third proposition laid down in the above decision is that the express exclusion of cooperative societies in Entry 43 of List I and the express inclusion of cooperative societies in Entry 32 of List II separately and apart from but along with corporations other than those specified in List I and universities, clearly indicated that the constitutional scheme was designed to treat

cooperative societies as institutions distinct from corporations. In other words, according to the Supreme Court, notwithstanding its limited activity of banking, the Cooperative Banks do not become a regular bank or a corporation and the Parliament does not get any authority to interfere with the right of a Cooperative Society towards its members or its obligations towards them as created by the laws enacted by the State Legislatures in this behalf.

[d]. The third proposition mentioned above has been emphatically reiterated by the Supreme Court by specifically observing that the *Cooperative Banks performing functions for the public with a limited commercial function as opposed to corporate banks cannot be covered by Entry 45 of List I dealing with* "*banking*" and that *the subject of cooperative societies is not included in the Union List rather it covers under Entry 32 of List II of Seventh Schedule appended to the Constitution.*

15. Thus, law relating to the recovery of the amount due from a member of the Cooperative Society by the Society must be legislated by the State Legislature.

16. Over and above, once the Supreme Court has specifically laid down that a Tribunal constituted under the RDBI Act has no lawful jurisdiction or authority to pass any order relating to a debt if the applicant happens to be a Cooperative Society, it necessarily follows

that the right of appeal under Section 17 of the Securitization Act against an order under Section 13(4) provided therein cannot also be exercised by the Tribunal appointed under the RDBI Act either in favour of a Cooperative Society or against such society.

17. Under the Securitization Act, the right of appeal under Section 17 has been given to the Debt Recovery Tribunal *having jurisdiction in the matter*. The phrase *Debt Recovery Tribunal* under the Securitization Act has been defined as the one established under the RDBI Act. When, according to the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*), the Tribunal constituted under the RDBI Act has no jurisdiction to entertain a matter relating to the Cooperative Bank, it necessarily follows that such Tribunal has no *jurisdiction in the matter* where the Cooperative Bank is the alleged creditor and cannot also act as an appellate authority under the Securitization Act. In other words, in order to exercise power of the appellate tribunal under the Securitization Act, the Bank referred to in the Act cannot be a Cooperative Bank which is essentially nothing but a Cooperative Society.

18. Thus, so long the appellate power under Section 17 is vested with the Tribunal established under the RDBI Act, there is no scope of bringing a Co-operative Society within the definition of a bank so as to vest the power of adjudication in relation to the recovery of debt due to such society from its members in direct violation of the

mandate of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd.** (*supra*). Consequently, the argument that by way of notification in terms of the definition of a bank given in the Securitization Act, even a Cooperative Bank can be notified is not tenable because in that event, the right of appeal by a member of a Cooperative Society or by the society itself under Section 17 or further appeal under Section 18 would become ineffective and of no avail. We cannot lose sight of the fact that the appellate authority under Section 17 of the Securitization Act is also the Tribunal constituted under the RDBI Act which according to the judgment in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*), has no jurisdiction to deal with the question of recovery of debt due to a Cooperative Society unless a State Legislature authorizes it to exercise jurisdiction. Therefore, in order to issue notification for inclusion of bank in terms of the definition clause of the Securitization Act, such bank must be regular bank over which the Parliament must have power to legislate in respect of recovery of its dues, but at least, not a Cooperative Society doing limited banking business because the Parliament has no right to legislate in regard to the matters relating to recovery of the dues from its member being specifically excluded from List I and conferred upon List II.

19. In other words, the Debt Recovery Tribunal created under the RDBI Act having been held to have no jurisdiction to pass any order in the proceedings by or against a Cooperative Society for recovery

of due on the sole ground that the RDBI Act is the creature of Parliament, for the selfsame reason, the Securitization Act will also have no jurisdiction to proceed at the instance of a Cooperative Society for enforcement of its security on the ground that the concerned legislation is a creature of Parliament and cannot encroach upon the field exclusively meant for the State Legislature.

20. We now propose to consider whether the views taken by different High Courts that even in the light of the above observations of the Supreme Court, it should be held that the Securitization Act is applicable for enforcement of the debts due in favour of the Cooperative Banks from its members, are correct or not.

20.1 In the case of **RAMA STEEL INDUSTRIES & ORS. v. UNION OF INDIA & ANR.** reported in **AIR 2008 BOMBAY 38**, while deciding the above question, a Division Bench of the Nagpur Bench distinguished the decision of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. [*supra*] by stating that the question which came up for consideration before the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. [*supra*] was about the availability of remedy under the RDBI Act to Cooperative Banks covered under the State Cooperative Societies Acts and that the question before the Supreme Court in the said case was not about remedies available under the Securitization Act. The said Division Bench of the Nagpur Bench, by relying on the decision of

a Division Bench of Aurangabad Bench in Writ Petition No. 2672 of 2007, overruled the contention of the petitioner. According to the said Division Bench, the distinction in the expression used in Section 37 of the Securitization Act and sub-section (2) of Section 34 of the RDBI Act which has been underlined by the Division bench of that Court in Aurangabad bench in the above decision squarely debunked the arguments of the learned advocate for the petitioners.

20.1.1 With great respect to the said Division Bench judgment, we are unable to subscribe to the views taken by that Bench in view of the reasoning expressed by us above.

20.2 In the case of **A.P. VARGHESE & ORS. v. THE KERALA STATE COOPERATIVE BANK LTD** reported in **AIR 2008 KERALA 91**, a learned Single Judge of the Kerala High Court considered the selfsame question. The said learned Single Judge, however, was of the view that creation of security interest in terms of Securitization Act can be upon "property" which is defined in section 2(t) of that Act, to mean, among other things, immovable property and movable property. According to the learned Single Judge, noticing that section 31(i) of the Securitization Act provides that the provisions of that Act shall not apply to any security interest created in agricultural land, it can be noticed that transfer of property other than agricultural land is a subject that falls in Entry 6 of List III – Concurrent List – and contracts, not including contracts relating to agricultural land,

including the different types and forms of contracts, fall in Entry 7 uses an inclusive mantle with an exclusionary provision relating to agricultural land, and, therefore, all contracts including a charge, hypothecation, assignment, etc. created in favour of a secured creditor to form a security interest in relation to property other than those relating to agricultural land fall under Entry 7 in list III. According to the learned Single Judge of the Kerala High Court, the exemption provided by section 31(i) of the Securitization Act takes that legislation away from the pale of any accusation that the "security interest" created thereby affects agricultural land, thereby exceeding the legislative competence of the Union referable to the subject at Entry 6 in Concurrent List. So much so, according to the learned Single Judge, the matter dealt with in section 13(1) of the Securitization Act read with relevant provisions in the interpretation clause of that statute clearly shows that those matters fall well within the subjects at Entries 6 and 7 of the Concurrent List, and, according to the learned Single Judge, the legislative competence as regards Securitization Act falls easily within Entries 6 and 7 of List III and thereby with the competence of the Union, even as regards the Cooperative Banks, the impugned notification used by the Central Government, therefore, stands.

20.2.1 With reference to the above view taken by the learned Single Judge of the Kerala High Court, we are of the opinion that it is true that transfer of interest in immovable property includes a

mortgage and thus, in law, the enforcement of such mortgage can fall within the subject-matter of Concurrent List; but in the case before us, such enforcement has been implemented not through any separate enactment of the Parliament but by taking aid of delegated legislation by the Central Government by issue of a notification under the Securitization Act, by overlooking the mandate of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. [*supra*], laying down that even in the field of limited banking by a Cooperative Society, the rights and obligations of the cooperative societies towards its member is the subject matter of List II. Such being the position, by taking aid of Securitization Act by way of delegated legislation which is creature of List I, no right can be created in favour of a Cooperative Bank which is subject matter of List II to be applicable against its members. With great respect to the learned Single Judge of the Kerala High Court, we are unable to accept that portion of the findings which says that by delegated legislation of Securitization Act, which is a product of List I, the subject matters of List II can be encroached. Moreover, even if the enforcement of mortgage is a matter of a Concurrent List, in the absence of a specific enactment relating to mortgage in favour of the Co-operative Society in exercise of power conferred upon the Parliament under the concurrent list, the Securitization Act, essentially a product of List I dealing with recovery of debt of a bank, cannot affect the right of a member of a Cooperative Society which is within the exclusive jurisdiction of the State legislature by treating the

Co-operative Society as a corporation or regular bank as held impermissible in the case of ***Greater Bombay Cooperative Bank Ltd****. (supra)*.

20.3 In the case of **RAJ KUMAR KHEMKA vs. UNION OF INDIA & ORS** reported in **AIR 2009 MADRAS 143**, a Division Bench of the Madras High Court, while dealing with the case of a present nature, no doubt, took note of the decision in the case of **Greater Bombay Cooperative Bank Ltd**. [*supra*], yet, did not refer to paragraphs 98 and 99 of the said judgment, which are strongly relied upon by the petitioners in these cases. In the said decision, the Division Bench of the Madras High Court simply relied upon the observations of the Supreme Court in paragraphs 37 to 43 of the judgment and observed that according to Section 56 of the BR Act, although it may not bring the cooperative Banks within the meaning of the 'banking company', that does not preclude the Central Government from bringing a cooperative Bank under the definition of "banking" as distinct from the banking Company. Ultimately, the Division Bench held that under Entry 32 List II (State List) of Schedule VII of the Constitution of India, though the "State" has been empowered with regard to cooperative societies, under Entry 43 read with Entry 45 of List I (Union List) of 7th Schedule of the Constitution, the Central Government has the power of regulation in making laws with regard to "banking" distinct from "banking business", and, therefore, it cannot be asserted that the Central Government had no

power to introduce Section 2 (c) (v) of the Securitization Act, nor the Notification contained in S.O. No. 105(E) dated 28th January 2003 can be held to unconstitutional.

20.3.1 With great respect to the said Division Bench of the Madras High Court, we are unable to agree with the above observations because it failed to take note of the views of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) in paragraphs 98 and 99 holding that that the *Cooperative Banks performing functions for the public with a limited commercial function as opposed to corporate banks cannot be covered by Entry 45 of List I dealing with* "*banking*" and that *the subject of cooperative societies is not included in the Union List rather it covers under Entry 32 of List II of Seventh Schedule appended to the Constitution.*

20.4 In the case of **NASHIK MERCHANT'S COOPERATIVE BANK LTD. VS. ADITYA HOTELS PVT. LTD**. reported in **2009 (4) BOM CR 734**, a Division Bench of the Bombay High Court was hearing a petition under Articles 226 and 227 of the Constitution of India thereby challenging an order passed by the Presiding Officer of the Debt Recovery Tribunal, Pune, in Securitization Application together with the judgment and order passed by the Debts Recovery Appellate Tribunal, Mumbai, and seeking directions against the respondent calling upon it to deposit an amount of Rs.2 Crore in Debt Recovery Tribunal, Pune or with the petitioner Bank as indicated in

the order passed by the appellate Tribunal. In the said decision, there was no challenge to *vires* of the notifications nor was their constitutional validity involved. Thus, the said decision cannot be of any help for deciding the dispute involved in these cases.

20.5 In the cases of **NAKODAR HINDU URBAN CO-OP BANK vs. DEPUTY REGISTRAR, CO-OP SOCIETIES & ORS** reported in **AIR 2010 P&H 20**, **HAFIZ ZAKIR HUSSAIN vs. AKOLA JANTA COMMERCIAL CO-OP. BANK LTD**. reported in **AIR 2008 MP 193** and **GEORGEKUTTY ABRAHAM & ORS. vs. SECRETARY, KOTTAYAM DIST. CO-OP. BANK. LTD & ORS.** reported in **AIR 2008 KER 137**, there were no challenge to the *vires* of the notification or constitutional validity of the provisions involved, and thus, the point involved in these applications were not considered in the above decisions.

20.6 In the case of **KHERALU NAGARIK SAHAKARI BANK TD. v. STATE OF GUJARAT** reported in **1998 (2) GLR 1517**, the question involved was with regard to constitutional validity of Section 71 of the Gujarat Cooperative Societies Act. It was contended that Section 71 could not, in any manner, control the affairs of the Society engaged in banking business, and on account of the amendment brought about by Banking Laws (Applicable to Cooperative Societies) Act, Central Act No. 23 of 1965, the provisions contained in the Act became *ultra vires* the power of the State legislature. The Division

Bench held that the State Legislature has powers to legislate on all matters concerning cooperative societies, and such cooperative societies falling under Entry 32 of List II may even be engaged in the business of banking. Thus, the Division Bench held that by virtue of amendment of 1965, Section 71 did not become *ultra vires* by application of Article 245 of the Constitution. We find that the view of the Division Bench is quite in conformity with the decision in the case of **Greater Bombay Cooperative Bank Ltd**. (*supra*) and supports the petitioners in these cases.

20.7 In the case of **APEX ELECTRICALS vs. ICICI BANK LTD**. reported in **2003(2) GLR 1785**, the learned Single Judge of this Court had no occasion to consider the effect of the decision in the case of **Greater Bombay Cooperative Bank Ltd**. [*supra*] as at that point of time, the said decision was not in existence and, in our opinion, after the decision of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd.** [*supra*], the said decision is not a good law.

20.8 In the case of **SHAIKH MEHMOOD SHAILH BIBHAN vs. THE AUTHORIZED OFFICER, NARAYAN G. MENDON THE MOGAVEERA COOP. BANK LTD. AND ORS** reported in **MANU/MH/0047/2011**, a Division Bench of the Bombay High Court was dealing with the similar question and according to the said Division Bench, in view of the earlier decision of the said Court in the

case of **KHAJA INDUSTRIES vs. THE STATE OF MAHARASHTRA & ANR** reported in **AIR 2007 BOM 722**, the said point was no longer *res integra*. Apart from the aforesaid, it was held by the said Division Bench that there was a crucial difference in the language of the Securitization Act as compared to the provisions of the RDBI Act. In the RDBI Act, the definition of the expression "bank" in section 2(d) extends to five categories namely, a banking company, a corresponding new bank, the State Bank of India, a subsidiary bank, and, a Regional Rural Bank. According to the said Division Bench, when the Parliament enacted the Securitization Act, 2002, the expression 'bank' was defined in Section 2 (c) to cover in clauses (i) to (iv), the first four categories as referred to in section 2(d) of the RDBI Act. However, according to the said Division Bench, sub clause (v) of clause (c) of section 2 of Securitization Act extends the definition to such other bank which the Central Government may by notification specify for the purpose of the Act. The Central Government has issued a Notification dated 28th January 2003 expressly bringing in within the purview of the expression bank, a Cooperative Bank as defined in clause (c) of Section 5 of the Banking Regulation Act, 1949. The provisions of the Securitization Act, according to the said Division Bench, provides an additional remedy and hence, the Cooperative Banks have been specifically brought within the purview of Securitization Act by virtue of definition which was introduced in section 2(c) (v) and in terms of the Notification of the Central Government dated 28th January 2003.

20.8.1 It appears that the Division Bench, while arriving at such a conclusion, did not refer to paragraphs 98 and 99 of the judgment of the Supreme Court in the case of **Greater Bombay Cooperative Bank Ltd**. [*supra*] which we have relied upon. With great respect to the Division Bench of the Bombay High Court, we are unable to subscribe to the view taken therein as by virtue of power of delegation conferred upon the Central Government under the Securitization Act, a statute enacted in exercise of power conferred upon the Parliament under List I of seventh schedule relating to banking, the subject of a State Legislature cannot be encroached upon.

21. As regards the other question raised by the learned advocates for the respondents that these petitions should be dismissed solely on the ground of delay, we are of the opinion that after having held that by issuing the impugned notification, the delegated authority has encroached upon the field of legislation allotted to the State Legislature, the question of delay becomes insignificant. It is a well-settled law that by mere delay or acquiescence, a right even conferred by a statute based on public policy cannot be waived. In the cases before us, we are concerned with the illegal action of the Central Government which is *ultra vires* the Constitution. Thus, delay cannot stand in the way of the petitioners.

22. The other contention of the learned advocates for the respondents regarding the conduct of the petitioners is also inconsequential when the allegation is of violation of the constitutional provision itself. By virtue of our order, all that we propose to hold is that the respondents will not be entitled to invoke the provisions of the Securitization Act on the members of a Cooperative Society but we are not going into the question of genuineness of the default, and if the petitioners are really defaulters, the Cooperative Banks are free to proceed in accordance with law laid down by the State Legislature but certainly not under the provisions of the Securitization Act.

23. On consideration of the entire materials on record, we hold that the notification dated 28th January 2003 issued by the Central Government impugned in these writ-applications is *ultra vires*, unconstitutional, *non est*, and, void *ab initio* and the respondent-Cooperative Banks are restrained from taking any action against its members under section 13 (4) of the Securitization Act.

24. These petitions are allowed accordingly. We make it clear, as indicated above, that we have otherwise not gone into the question of extent of default, if at all and this order will not stand in the way of the Co-operative Banks in proceeding under the existing law for recovery of their dues from the members.

24.1 Rule is made absolute in all these petitions. In the facts of the cases, however, there shall be no order as to costs.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

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FURTHER ORDER:

After this judgment was pronounced, Mr. Champaneri, the learned Assistant Solicitor General of India appearing on behalf of the Union of India prays for stay of operation of our judgment.

In view of what has been stated above, we find no reason to stay our judgment. The prayer is refused. However, certified copy be given by 24th April 2013, if applied for.

(BHASKAR BHATTACHARYA, CJ.)

(J.B.PARDIWALA, J.)

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