BEFORE THE RECOVERY OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

MUMBAI

Recovery Certificate No. 1020 of 2016

CFM Asset Reconstruction Private Limited .... Applicant

Order as per directions of Hon'ble Securities Appellate Tribunal, Mumbai in Appeal No. 408 of 2019 in the matter of Pancard Clubs Ltd. and Others.

1. SEBI had passed an order dated February 29, 2016 under Sections 11 and 11B of the Securities and Exchange Board of India Act, 1992 (SEBI Act), *inter alia,* directing Pancard Clubs Ltd. (PCL) and its directors to refund the money collected from investors under its unregistered Collective Investment Schemes (CIS) with returns as per the terms of offer within a period of three months from the date of the order. Upon failure to refund the monies to investors as directed by SEBI, recovery proceedings were initiated against PCL and its directors, viz., Mr. Sudhir Shankar Moravekar, Mrs. Shobha Ratnakar Barde, Mrs. Usha Arun Tari, Mr. Manish Kalidas Gandhi, Mr. Chandrasen Ganpatrao Bhise and Mr. Ramachandran Ramakrishnan (Defaulters) for an amount of Rs.7035,00,01,000/- (Rupees Seven Thousand Thirty Five Crore One Thousand Only) along with further interest, costs, expenses, etc. vide Certificate No. 1020 of 2016 dated December 2, 2016 drawn up by the Recovery Officer, Mumbai.

2. In continuation of the said recovery proceedings, Recovery Officer vide order dated December 09, 2016 attached the shareholding of Defaulters in PCL's subsidiary companies including Panoramic Universal Limited (PUL). Further, it was observed that huge amounts were transferred from the accounts of PCL to PUL and its subsidiaries and the same were not returned to PCL. It was also observed that PCL was making payments for the purchase of the properties in the names of PUL

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and its subsidiaries and the said amounts were also not returned to PCL. Accordingly, a notice dated March 21, 2018 was issued to PUL under Section 28A of the SEBI Act read with Section 226(3) of the Income-tax Act, 1961 directing it to remit the entire amounts due to PCL along with interest to SEBI within a week from the date of receipt of the notice. However, no reply was received from PUL.

3. In terms of Section 226(3)(x) of the Income-tax Act, if the person to whom notice under Section 226 is sent fails to make payment, he shall be deemed to be an assessee in default and further proceedings may be taken against him for realization of the amounts, as if such person is the defaulter. Therefore, in order to protect the interests of the investors of PCL, the Recovery Officer, in exercise of powers under Section 28A of the SEBI Act read with Section 226 and Rule 16 and 48 of the Second Schedule to the Income-tax Act, 1961, *inter alia,* attached all the properties of PUL vide order dated March 28, 2018. PUL thereafter appeared before SEBI and made submissions on May 07, 2018 and May 24, 2018 and an order confirming the directions in the order dated March 28, 2018 was passed on August 21, 2018.

4. The Applicant, vide its letter dated December 17, 2018, informed SEBI that PUL had availed a term loan facility to the extent of Rs. 15 Crore from Apna Sahakari Bank Ltd. (Apna Bank) and created a mortgage of two residential flats as security against the said loan viz. Flat Nos. 2201 and 2202, Tower No. 1, Sumer Trinity Towers Co-operative Housing Society, Prabhadevi, Mumbai (Prabhadevi Property). Upon default in payment by PUL, recovery action was initiated by Apna Bank under the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). Subsequently, the loan account of PUL along with underlying financial assets and security were transferred to the Applicant by Apna Bank under the provisions of SARFAESI Act vide an assignment agreement dated April 21, 2018. Thereafter, the Court Commissioner had taken the physical possession of the Prabhadevi Property on December 3, 2018 and handed over the same to the authorized officer of the

Applicant. During the taking over of physical possession of the Prabhadevi Property, it had been noticed by the Applicant that three cupboards inside the said house were attached by SEBI. Therefore, the Applicant requested SEBI to remove the items/articles in the attached cupboards after making due inventory or shift them to other place suitable to SEBI as the Applicant was in the process of issuing a sale notice in order to sell the Prabhadevi Property under the provisions of SARFAESI Act to recover its dues.

5. In response to the aforementioned letter, SEBI vide letter dated January 04, 2019, *inter alia,* informed the Applicant that the Prabhadevi Property was attached by SEBI vide order dated March 28, 2018 and the Applicant was requested to provide copies of orders cited in its letter for examination by SEBI, pending which the Applicant was requested not to alienate or create third party rights over the Prabhadevi Property.

6. The Applicant, vide letter dated January 10, 2019 provided copies of Assignment Agreement dated April 21, 2018, Chief Metropolitan Magistrate Court's (CMMC) Order dated January 16, 2018, CMMC Order dated August 04, 2018, writ of commission issued by CMMC, Mumbai dated November 13, 2018, Court Commissioner Notice dated November 15, 2018 and possession report dated December 03, 2018. Further, the Applicant requested SEBI to arrange to remove the items/articles in the cupboards enabling it to recover dues in exercise of its rights and powers under the SARFAESI Act.

7. While the documents submitted by the Applicant were under examination by SEBI, the Applicant sent another letter dated June 19, 2019 reiterating its earlier requests. Subsequently, the Applicant filed an appeal before the Hon'ble Securities Appellate Tribunal (Hon'ble SAT) as Appeal No. 408/2019 assailing the orders dated March 28, 2018 and August 21, 2018. The Hon'ble SAT vide order dated December 04, 2020 disposed the appeal filed by the Applicant with the following directions:

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"9. …….. we dispose of the appeal directing the appellant to file a comprehensive claim/objections before the Recovery Officer objecting to the attachment of the two flats in question. If such an objection is filed within two weeks from today the Recovery Officer will decide the claim/objection by a reasoned and speaking order after giving an opportunity of hearing within six weeks thereafter."

As per the directions of the Hon'ble SAT, the Applicant submitted its objections regarding attachment of Prabhadevi Property on December 18, 2020. Accordingly, an opportunity of hearing through video conference was granted to the Applicant on December 29, 2020. Mr. Nirman Sharma, Advocate represented the Applicant in the hearing and made submissions on behalf of the Applicant. Representative of the Applicant, Mr. Pankaj Agnihotri also attended the hearing. The Applicant filed compilations of judgments, statutory provisions and additional judgments during the course of hearing vide emails.

8. On the basis of the objections filed by the Applicant on December 18, 2020, the chronology of the events leading into taking possession of Prabhadevi Property by the Applicant are as follows:

Date	Event
February 24, 2015	PUL availed a Term Loan of Rs. 15 Crore from Apna Bank.
February 26, 2015	PUL created the security interest/mortgage over the Prabhadevi Property in favour of Apna Bank through registered Mortgage Deed.
September 30, 2016	PUL defaulted in repayment of debt to Apna Bank and the loan account of PUL was declared as Non-Performing Asset.
August 03, 2017	An attachment order was passed in respect of the Prabhadevi Property in the proceedings initiated by Apna Bank against PUL for recovery of its dues before the Arbitral Tribunal under the Multistate Cooperative Societies Act, 2002.
January 16, 2018	The CMMC appointed a Court Commissioner to take possession of the Prabhadevi Property in the proceedings

	initiated by Apna Bank against PUL under the SARFAESI Act.
April 21, 2018	Vide an Assignment Agreement, the entire outstanding debt/loan along with underlying securities, which was created in favour of Apna Bank was assigned to the Applicant and all the rights, title, interest and powers of Apna Bank as secured creditor/mortgagee stood transferred to and vested in the Applicant. In view of the Assignment Agreement, the Applicant became entitled to recover its dues and enforce the securities under the provisions of the SARFAESI Act.
August 04, 2018	CMMC allowed substitution of the name of the Applicant as secured creditor in place of Apna Bank under the provisions of SARFAESI Act.
December 03, 2018	Court Commissioner took physical possession of the Prabhadevi Property and handed over the same to the authorized officer of the Applicant.

9. It was argued by the Applicant that there is no attachment of the Prabhadevi Property vide order dated March 28, 2018 as the said property is not mentioned in Annexure A to the aforesaid order. It was further submitted that the Prabhadevi Property was duly mortgaged in its favour and symbolic possession and physical possession was taken under the provisions of the SARFAESI Act much prior to the wrongful and illegal attachment of SEBI vide order dated March 28, 2018.

10. The Applicant has also argued that the mortgaged properties were exclusively charged as security on February 26, 2015 with Apna Bank towards the Term Loan and in any event the same could not have been attached by SEBI. The non-obstante clause under Section 28A(3) of SEBI Act only suggests and empowers SEBI that the recovery of amounts by a Recovery Officer under sub-section (1) of Section 28A, pursuant to non-compliance with any direction issued by the Board under Section 11B, shall have precedence over any other claim against such person. According to the Applicant, it does not create any charge over the assets of the

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person who had defaulted or not complied with the directions of SEBI Act whereas the Applicant has first charge over the mortgaged assets. In any event, a charge under Section 100 of the Transfer of Property Act, 1882 is neither a sale nor a mortgage because it creates no interest in or over a specific immovable property. Therefore, Section 28A of SEBI Act *per se* does not create any charge over the immovable properties and even if such charge is created, it is neither sale nor a mortgage because it creates no interest in or over the mortgaged properties of Applicant. A duly valid mortgage of the immovable properties in favour of a financial institution does not get vitiated either by the provisions of Section 28A of SEBI Act or under the provisions of Income-tax Act, 1961.

11. The Applicant has submitted that SARFAESI Act is a special statute enacted to regulate securitization and reconstruction of financial asset and enforcement of security interest and for matters connected therewith or incidental thereto. Its main object is to empower banks and financial institutions to take possession of securities and sell them. The significant provisions of SARFAESI Act have been noted in detail in Mardia Chemicals & Ors. vs. Union of India and Ors., (2004) 4 SCC 311. The intention of the Parliament is clearly expressed in Section 13 of the SARFAESI Act and leaves no manner of doubt for enforcement of its security interest and a secured creditor is vested with powers to do so without intervention of the court. The Hon'ble Supreme Court in the matter of Pegasus Assets Reconstruction Private Limited vs. Haryana Concast Limited, (2016) 4 SCC 47, held that SARFAESI Act is a complete code and a special law overriding liquidation provisions of the Companies Act, 1956. Further, in the matter of Madras Petrochem Limited & Anr. vs. BIFR, (2016) 4 SCC 1, it was held that SARFAESI Act overrides Sick Industries Companies (Special Provisions) Act, 1985.

12. According to the Applicant, while determining the question whether a statute is general or special, one should consider the principal subject matter coupled with a particular perspective with reference to the intendment of the Act. Keeping in mind the aforesaid golden rule, the SARFAESI Act was enacted. One of the main

SECURITIES AND EXCHANGE BOARD OF INDIA ★ RECOVERY DIVISION object of SARFAESI Act is to clothe the banks and financial institutions in India with power to take possessions of securities and sell them in the event of default by the borrower, i.e., classification of the borrower's account as non-performing asset in accordance with the directions given or under guidelines issued by Reserve Bank of India and by adopting measures for recovery or reconstruction.

13. On the overriding effects of a special law, the Applicant has referred the relevant dates of respective enactments and provisions of SEBI Act and SARFAESI Act as under:

Sr. No.	Date of Enactment	Particulars
1.	January 30, 1992	SEBI Act
2.	June 21, 2002	SARFAESI Act
3.	July 18, 2013	Section 28A of the SEBI Act
4.	August 12, 2016	Section 26E of SARFAESI Act Note: *Date of notification: January 24, 2020

In this regard, the Applicant has relied upon Hon'ble Supreme Court's judgment in the matter of LIC vs. D.J. Bahadur, (1981) 1 SCC 315, and Atma Ram Properties Pvt. Ltd. vs. Oriental Insurance Co. Ltd., (2018) 2 SCC 27 wherein it was held that the earlier enactment will prevail over latter enactment, if it were to be held that the earlier enactment is a special enactment on the particular subject being in issue. It has been further held that the golden rule of interpretation is that words should be read in the ordinary, natural and grammatical meaning and the principle of harmonious constructions applies to the rule that where there is a general provision of law and special provision of law dealing with a subject, the special provisions prevail over the general law. If it is not constructed in that way, the result would be that the special provision would be wholly defeated.

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14. Applicant has also submitted that SARFAESI Act is a special enactment with regard to the matter in issue and has a non-obstante clause. The SEBI Act is not a special enactment insofar as the borrower-secured creditor issue is concerned and it contains Section 32 which provides that other laws are not to be disregarded. Section 28A of SEBI Act merely gives a right to SEBI that in the event a person fails to comply with the directions or order passed by SEBI, SEBI shall proceed to recover the dues from such person by adopting the modes specified therein and taking measures under the provisions of Sections 220 to 227, 228A, 229, 232, the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962. The provisions of SEBI Act and more particularly Section 28A of SEBI Act do not obviate SARFAESI Act insofar as the provisions regarding rights of Banks and financial institution to take action for enforcement of security interest are concerned.

15. Without prejudice to the aforesaid submission, the Applicant argued that the provisions of Section 26E of SARFAESI Act received presidential assent on August 12, 2016. The provisions of Section 26E of SARFAESI Act gives priority to Secured Creditors over all other debts and all revenues, taxes, cesses and debts payable to Central Government or State Government. Even Section 35 of SARFAESI Act provides that its provisions 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.

16. The Applicant has relied upon the judgment in State of Kerala vs. Mar Appraem Kuri Co. Ltd., (2012) 7 SCC 106, on the issue of late notification of Section 26E that irrespective of the date of notification of a parliamentary enactment, a Bill becomes an Act and comes on the statute book immediately on receiving the assent of the President. Merely because the legislator has postponed the notification of the Act, it does not mean that the law has not been made. Thus, in the facts of the present case, on August 12, 2016, i.e., the date of enactment of Section 26E of SARFAESI Act, the debts due to Applicant gained priority over all other debts and all revenues,

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taxes, cesses and debts payable to State Government and Central Government. Thus, the wrongful claim and attachment of SEBI under its order dated March 28, 2018 over the mortgaged properties under Section 28A of SEBI Act is absolutely illegal. Without prejudice to the aforesaid, the Applicant submitted that admitting whilst denying that Section 28A of SEBI Act is a Crown's debt, even a Crown's debt is not applicable against a mortgage in respect of secured debt.

17. Based on the objections and particularly the arguments made in the hearing, the Applicant has relied on the following points:

(i). there is no attachment by SEBI on Prabhadevi Property vide order dated March 28, 2018;

(ii). first charge created in favour of the Applicant is not vitiated by Section 28A of the SEBI Act;

(iii). SARFAESI Act being a special statute, it prevails over the general law;

(iv). Section 26E of SARFAESI Act is non-obstante clause which overrides Section 28A of SEBI Act and its later notification does not affect the rights of the Applicant;

(v). even on assuming that SEBI had a crown debt, the rights of the secured creditor supersede the SEBI debt;

(vi). provisions of SARFAESI Act being a later enactment, it will prevail over SEBI Act provisions;

18. I have considered the objections made by the Applicant and the arguments of the advocate in the hearing. On the issue that there is no attachment by SEBI on Prabhadevi Property vide order dated March 28, 2018, it is necessary to see the operative part of the said order at paragraph 15(a) which reads as under:

> *"All the movable and immovable properties including properties of PUL and its subsidiaries/enterprises referred in the **Annexure A** are hereby attached;"*

On a plain reading of the aforementioned direction, it is found that all the properties of PUL, movable as well as immovable were attached by SEBI. Further, it is an inclusive order and by no means Annexure A was an exhaustive list. A reference was made to the Annexure as those properties were readily identifiable at that time of passing of the order. On the other hand, passing an order after taking stock of all assets of PUL would have defeated the purpose of attachment itself. It is for this reason, as stated in para 15(h) of the said order, a copy of the order was forwarded to the Inspectors General of Registration of all the States and Union Territories with a request not to act upon any documents purporting to be dealing with transfer, mortgage, charge, lease or creation or alteration of any interest in any of the properties of PUL and all its subsidiary companies if presented for registration. Further, the order attaching the properties of PUL was uploaded on the website of SEBI for dissemination to the public and it was duly delivered to PUL. Accordingly, the Prabhadevi Property was attached by SEBI vide Order dated March 28, 2018 and the objection of the Applicant in this regard is not maintainable.

19. The Applicant argued that being a secured creditor, it has first charge over the Prabhadevi Property whereas SEBI Act does not create a charge upon attachment. However, the mortgage as well as creation of the charge here are part of the same transaction between Apna Bank and PUL whereby Apna Bank became the secured creditor and the Applicant thereafter, by an assignment agreement. The mortgage, the rights of the secured creditor, the deed of assignment, etc. are part of the same transaction and the whole process and rights and liabilities of the parties involved are eventually governed by SARFAESI Act and therefore, deciding the key issue of overriding effect of SARFAESI Act over SEBI Act, would effectively answer rights of parties governed under the respective statutes.

20. In this regard, the Hon'ble Kerala High Court vide its judgment in the matter of State Bank of India and Ors. vs. State of Kerala and Ors., 2019 5 KHC 330: MANU/KE/3448/2019, considered the concept of first charge. In the said matter, the petitioner-Banks/Financial Institutions claimed that they had the primary right, as secured creditors to proceed against the properties in question under Section 26E of the SARFAESI Act and Section 31B of the Recovery of Debts Due to Banks and

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Financial Institutions Act, 1993 (RDB Act) whereas the respondents-Revenue authorities claimed 'First Charge' over the properties under the provisions of Section 26B of the Kerala General Sales Tax (KGST) Act and Section 38 of the Kerala Value Added Tax (KVAT) Act as the SARFAESI Act proceedings were initiated later in time. Upon hearing the parties, the Hon'ble High Court held as follows:

> *"33. A close survey of the afore judgments thus renders it beyond contest that the words 'First Charge' and 'priority in payment of debts' are virtually synonymous and means the same, except for its semantic variation on account of differing phraseology. In both events, the holder obtains the privilege of recovery before anyone else and hence, whether it is the 'First Charge' or the right to claim 'Priority' in recovery, the ultimate effect and consequence is the same.*
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> *34. Thus, even though the KGST Act/KVAT Act creates a 'First Charge' in favour of the Revenue to recover the arrears of tax, the afore provisions of the SARFAESI Act and RDB Act make the secured dues entitled to be paid in priority over such taxes and in fact, elevates the rights of the secured creditor, to recover such dues, also to a position of priority."*

In terms of the aforesaid decision of the Hon'ble Court, by deciding as to which statute has priority over the other in recovery would automatically decide the issue of first charge. Hence, it has become necessary and inevitable to decide upon the issue whether SARFAESI Act has priority over SEBI Act in recovery.

21. On the overriding effects of statutes, the Applicant has argued that SARFAESI Act being a special statute, it prevails over the general law including SEBI Act. SEBI Act also is a special law which has been enacted by the Parliament for the specific purpose of protecting the interest of investors in the securities market, for promoting the development of securities market and to regulate the securities market. Reliance is placed on Hon'ble Supreme Court decision in Sahara India Real Estate vs. SEBI, (2013)1 SCC 1: [2012] 174 Comp Cas 154 (SC). Relevant findings of the Hon'ble Apex Court in the said case are as follows:

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"57. SEBI Act is a special law, a complete code in itself containing elaborate provisions to protect interests of the investors. Section 32 of the Act says that the provisions of that Act shall be in addition to and not in derogation of the provisions of any other law.

58. SEBI Act is a special Act dealing with specific subject, which has to be read in harmony with the provisions of the Companies Act 1956. In fact, 2002 Amendment of the SEBI Act further re-emphasize the fact that some of the provisions of the Act will continue to operate without prejudice to the provisions of the Companies Act, qua few provisions say that notwithstanding the regulation and order made by SEBI, the provisions of the Companies Act dealing with the same issues will remain unaffected. I only want to highlight the fact that both the Acts will have to work in tandem, in the interest of investors, especially when public money is raised by the issue of securities from the people at large.

....

101. The Securities and Exchange Board of India (SEBI) was established in 1988 by way of a Government resolution to promote orderly and healthy growth of the securities market and for investors' protection. On account of tremendous growth of the capital market characterized particularly by increasing participation of the public, to sustain confidence in the capital market it was considered essential to ensure investors' protection. Accordingly, it was decided to vest SEBI with statutory powers, so as to enable it to deal effectively with all matters relating to the capital market.

....

107. From a collective perusal of sections 11, 11A, 11B and 11C of the SEBI Act, the conclusions drawn by the SAT, that on the subject of regulating the securities market and protecting interest of investors in securities, the SEBI Act is a stand alone enactment, and the SEBI's powers thereunder are not fettered by any other law including the Companies Act, is fully justified. In fact the aforesaid justification was rendered absolute, by the addition of section 55A in the Companies Act, whereby, administrative authority on the subjects relating to "issue and transfer of securities and non-payment of dividend" which was earlier *vested in the Central Government (Tribunal or Registrar of Companies), came to be exclusively transferred to the SEBI."*

Further, while analyzing the legislative intent of SEBI Act, Hon'ble Supreme Court in the matter of SEBI vs. Ajay Agarwal, (2010) 3 SCC 765, held as under:

"40. The said Act is pre-eminently a social welfare legislation seeking to protect the interests of common men who are small investors.

41. It is a well known canon of construction that when Court is called upon to interpret provisions of a social welfare legislation the paramount duty of the Court is to adopt such an interpretation as to further the purposes of law and if possible eschew the one which frustrates it."

In the said back drop, where both SARFAESI Act and SEBI Act are special statutes in their respective fields, the issue that resurfaces is the priority of rights of a secured creditor over that of an investor whose monies had been used to create the secured assets protected by a social welfare legislation.

22. All the issues discussed above eventually narrow down to the critical issue of the non-obstante clause, i.e. whether Section 26E of SARFAESI Act overrides Section 28A of SEBI Act. In the aforesaid context, the relevant provision of the SEBI Act empowering the Recovery Officer to attach assets of a defaulter is quoted below:

"Recovery of amounts.

28A. (1) If a person fails to pay the penalty imposed under this Act or fails to comply with any direction of the Board for refund of monies or fails to comply with a direction of disgorgement order issued under section 11B or fails to pay any fees due to the Board, the Recovery Officer may draw up under his signature a statement in the specified form specifying the amount due from the person (such statement being hereafter in this Chapter referred to as certificate) and shall proceed to recover from such person the amount specified in the certificate by one or more of the following modes, namely: –

(a) attachment and sale of the person's movable property;

(b) attachment of the person's bank accounts;

(c) attachment and sale of the person's immovable property;

(d) arrest of the person and his detention in prison;

(e) appointing a receiver for the management of the person's movable and immovable properties,

and for this purpose, the provisions of sections 220 to 227, 228A, 229, 232, the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time, in so far as may be, apply with necessary modifications as if the said provisions and the rules made thereunder were the provisions of this Act and referred to the amount due under this Act instead of to income-tax under the Income-tax Act, 1961.

Explanation 1.— For the purposes of this sub-section, the person's movable or immovable property or monies held in bank accounts shall include any property or monies held in bank accounts which has been transferred directly or indirectly on or after the date when the amount specified in certificate had become due, by the person to his spouse or minor child or son's wife or son's minor child, otherwise than for adequate consideration, and which is held by, or stands in the name of, any of the persons aforesaid; and so far as the movable or immovable property or monies held in bank accounts so transferred to his minor child or his son's minor child is concerned, it shall, even after the date of attainment of majority by such minor child or son's minor child, as the case may be, continue to be included in the person's movable or immovable property or monies held in bank accounts for recovering any amount due from the person under this Act.

Explanation 2.— Any reference under the provisions of the Second and Third Schedules to the Income-tax Act, 1961 and the Income-tax (Certificate Proceedings)Rules, 1962 to the assessee shall be construed as a reference to the person specified in the certificate.

Explanation 3.— Any reference to appeal in Chapter XVIID and the Second Schedule to the Income-tax Act, 1961, shall be construed as a reference to appeal before the Securities Appellate Tribunal under section 15T of this Act.

Explanation 4.— The interest referred to in section 220 of the Income-tax Act, 1961 shall commence from the date the amount became payable by the person

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(2) The Recovery Officer shall be empowered to seek the assistance of the local district administration while exercising the powers under sub-section (1).

(3) Notwithstanding anything contained in any other law for the time being in force, the recovery of amounts by a Recovery Officer under sub-section (1), pursuant to non-compliance with any direction issued by the Board under section 11B, shall have precedence over any other claim against such person.

(4) For the purposes of sub-sections (1), (2) and (3), the expression "Recovery Officer" means any officer of the Board who may be authorised, by general or special order in writing, to exercise the powers of a Recovery Officer."

23. As per sub-section (3) of Section 28A of SEBI Act, proceedings initiated by the Recovery Officer for non-compliance of a direction issued by SEBI under Section 11B shall take precedence over any other claim against such person under any law for the time being in force. The directions to refund the monies to investors of PCL vide SEBI's order dated February 29, 2016 were issued under Section 11B and non-compliance of the said order resulted in the extant recovery proceedings. The funds mobilised by PCL were deemed to be held in trust on behalf of the investors and upon recovery of the amount by SEBI, the said money shall be refunded to the investors. The relevant provision of the SEBI (Collective Investment Scheme) Regulations, 1999 reads as under:

"Trust Deed to be registered under the Registration Act

16. (1) A collective investment scheme shall be constituted in the form of a trust and the instrument of trust shall be in the form of a deed duly registered under the provisions of the Indian Registration Act, 1908 (16 of 1908) executed by the Collective Investment Management Company in favour of the trustees named in such an instrument."

However, the amounts mobilised by PCL was transferred to PUL and therefore, in exercise of the powers under sub-section (3) of Section 226 of Income-tax Act, 1961, the aforesaid orders dated March 28, 2018 and August 21, 2018 were passed

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attaching the assets of PUL. Hence, in public equity, the claim of investors is at a higher footing than the claim of a financial institution as the asset was originally created out of the investors' money which should have been held in a trust.

24. After analysing the non-obstante clause under SEBI Act, the non-obstante clause under SARFAESI Act providing priority rights to the Applicant is analysed in the following paragraphs. Section 26E of the SARFAESI Act reads as under:

> *"26E. Priority to secured creditors- Notwithstanding anything contained in any other law for the time being in force, after the registration of security interest, the debts due to any secured creditor shall be paid in priority over all other debts and all revenues, taxes, cesses and other rates payable to the Central Government or State Government or local authority.*
>
> *Explanation.--For the purposes of this section, it is hereby clarified that on or after the commencement of the Insolvency and Bankruptcy Code, 2016 (31 of 2016), in cases where insolvency or bankruptcy proceedings are pending in respect of secured assets of the borrower, priority to secured creditors in payment of debt shall be subject to the provisions of that Code."*

25. As unambiguously held in the Section, a secured creditor shall have priority over all other debts and all revenues, taxes, cesses and other rates as payable to the Central Government or State Government or local authority. Therefore, it is pertinent to consider whether the amount which is the subject matter of SEBI's recovery proceedings comes within the ambit of the terms 'debt' or 'revenue' or 'tax' or 'cess' or 'other rate'. In this regard, Section 28A empowers SEBI to recover dues from a person in the following four situations, where he:

(a) fails to pay the penalty imposed under SEBI Act;
(b) fails to comply with any direction of the Board for refund of monies;
(c) fails to comply with a direction of disgorgement;
(d) fails to pay any fees due to the Board.

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The extant matter is pursuant to a direction of the Board to refund monies to the investors in an unregistered CIS and it falls within clause (b) above. Therefore, the issue here is to decide whether moneys to be refunded to investors under clause (b) above is a debt or revenue or tax or cess or other rate.

26. The term debt is defined in SARFAESI Act as under:

" 2 (ha) "debt" shall have the meaning assigned to it in clause (g) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and includes –

(i) unpaid portion of the purchase price of any tangible asset given on hire or financial lease or conditional sale or under any other contract;

(ii) any right, title or interest on any intangible asset or licence or assignment of such intangible asset, which secures the obligation to pay any unpaid portion of the purchase price of such intangible asset or an obligation incurred or credit otherwise extended to enable any borrower to acquire the intangible asset or obtain licence of such asset;"

Section 2 (g) of the RDB Act has defined debt as under:

"debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application and includes any liability towards debt securities which remains unpaid in full or part after notice of ninety days served upon the borrower by the debenture trustee or any other authority in whose favour security interest is created for the benefit of holders of debt securities,"

From a reading of above quoted provisions, it is evident that the monies to be recovered under SEBI's recovery proceedings has none of the characteristics of the debt as defined under SARFAESI Act and RDB Act. The recovery is for the purpose of refund to investors in the unregistered CIS of PCL and the amount mentioned in Certificate of Recovery is neither a debt nor a liability arising out of any express or implied contract with SEBI. These amounts originally were not due to SEBI and would not be kept with SEBI after recovery.

27. Against this backdrop, the remaining question to be considered is whether the amount to be recovered comes under revenue or tax or cess or other rate. As it is specifically provided in the said section the unique criteria is that the said dues are 'payable to the Central Government or State Government or local authority'. However, the amount to be recovered in the present matter is not payable to Government or any agency rather to the investors of PCL. Further, as per Black's Law Dictionary, in case of income of the Government, revenue as a broad and general term includes all public moneys which the state collects and receives, from whatever source and in whatever manner. These terms have specialized meaning and cannot be held to include the recovery proceedings of SEBI in the present matter.

28. At this juncture, it is relevant to consider the argument of the Applicant that even on assuming that SEBI had a crown debt, the rights of the secured creditor supersede the SEBI debt. The doctrine of priority of crown debts is trite law and in the absence of preference given to the crown debt by a statute, the dues of a secured creditor shall have preference. Undisputedly, SARFAESI Act provides preference to the debts of the Applicant though as narrated above the monies to be recovered by SEBI is not crown debt as it is not income, tax, cess or other rate due to Government. As already explained ut supra, the amount to be recovered was deemed to be held in trust by PCL on behalf of the investors which it failed to do and the said failure has compelled SEBI to issue an order to PCL to refund the said amounts to the investors. Upon non-compliance of the aforesaid order to refund, these recovery proceedings were initiated to recover the amounts diverted by PCL to PUL for the purpose of refund. This unique nature of asset held in trust is also recognized under Insolvency and Bankruptcy Code, 2016 (Code) wherein it is specifically mentioned under

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Section 36(4)(a)(i) of the Code that assets held in trust for any third party should not be included in the liquidation estate and shall not be used for recovery in liquidation.

29. In view of the aforesaid discussions, it is found that the money sought to be recovered in the extant recovery proceedings is not in the nature of debt, revenue, cess or taxes or other rate and thus Section 26E of the SARFAESI Act has no application in the recovery proceedings initiated by SEBI in the present matter.

30. Since Section 26E is not applicable in the present case, it calls for reference to the provisions of Sections 35 and 37 of the SARFAESI Act which respectively provide for non-obstante clause and application of other laws. Section 35 and 37 are reproduced below:

> *"35. The provisions of this Act to override other laws- The provisions of this Act 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.*
>
> *37. Application of other laws not barred- The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."*

As per Section 35 of the SARFAESI Act, any law which is inconsistent with the provisions of SARFAESI Act shall be overridden by that Act. However, this has to be read harmoniously with the provisions of Section 37 which *inter alia* makes a specific mention of SEBI Act and states that SARFAESI Act provisions shall be in addition to the provisions of the SEBI Act and not in derogation of it. The reference to SEBI Act under Section 37 is not limited to any particular circumstances and is given blanket

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overriding effect over the provisions of SARFAESI Act. With respect to the phrase "or any other law for time being in force", it was held by the Hon'ble Supreme Court in the matter of Madras Petrochem Ltd. and Ors. vs. BIFR & Ors., 2016 4 SCC 1, that these should be such laws having relation to the securities market only. The relevant extract of the aforesaid judgment is reproduced below:

> *"36. This is what then brings us to the doctrine of harmonious construction, which is one of the paramount doctrines that is applied in interpreting all statutes. Since neither Section 35 nor Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is subject to the other, we think it is necessary to interpret the expression "or any other law for the time being in force" in Section 37. If a literal meaning is given to the said expression, Section 35 will become completely otiose as all other laws will then be in addition to and not in derogation of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Obviously this could not have been the Parliamentary intendment, after providing in Section 35 that the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 will prevail over all other laws that are inconsistent therewith. A middle ground has therefore necessarily to be taken. According to us, the two apparently conflicting Sections can best be harmonized by giving meaning to both. This can only be done by limiting the scope of the expression "or any other law for the time being in force" contained in Section 37. This expression will therefore have to be held to mean other laws having relation to the securities market only, as the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is the only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions."*

Therefore, it is clear that the action taken by the Applicant cannot be in derogation of the recovery proceedings initiated by SEBI and the proceedings of SEBI shall prevail over the proceedings of the Applicant under SARFAESI Act.

31. The Applicant has also raised the argument that SARFAESI Act provisions being a later enactment, it shall prevail over SEBI Act provisions. As already discussed above, both these statutes in question are special in nature. The relative priority of statutes in such a scenario is considered in the matter of Solidaire India Ltd. vs. Fairgrowth Financial Services Ltd. and Ors., AIR 2001 SC 958, by the Hon'ble Supreme Court as follows:

> *"Where there are two special statues which contain non-obstante clauses the later statute must prevail. This is because at the time of enactment of the later statute, the Legislature was aware of the earlier legislation and its non-obstante clause. If the Legislature still confers the later enactment with a non-obstante clause it means that the Legislature wanted that enactment to prevail. If the Legislature does not want the later enactment to prevail then it could and would provide in the later enactment that the provisions of the earlier enactment continue to apply."*

In view of the aforesaid observations of the Hon'ble Supreme Court, the later enactment shall prevail subject to the fact that the intent of the legislature was so. In this regard, the Parliament had thought it fit to provide a specific exemption to the provisions of SEBI Act from the provisions of SARFAESI Act by laying down that the provisions of SARFAESI Act shall not be in derogation of SEBI Act as mandated under Section 37. It is to be understood that whenever legislature wishes to exempt application of certain laws, it makes appropriate provisions in the later Act in this regard. This specific exemption to SEBI Act has to be read in the context that the Parliament while enacting a special statute to ensure recovery by banks and financial institutions was well aware of the significance of the provisions of SEBI Act and did not intend to override the provisions of SEBI Act. Irrespective of the above, in the present case, Section 28A is the later enactment as it was brought into force with effect from July 18, 2013 as against Section 35 of SARFAESI Act which came into effect on June 21, 2002. Thus, Section 28A of SEBI Act being later in time, it prevails over the provisions of SARFAESI Act. The Applicant had erroneously drawn reference to Section 28A of SEBI Act vs. Section 26E of SARFAESI Act, where Section 26E does not apply to extant recovery proceedings of SEBI as discussed above.

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32. In view of the aforesaid findings that recovery proceedings under SEBI Act is not barred by SARFAESI Act and provisions of SEBI Act would prevail over that of SARFAESI Act, the objections of the Applicant are not maintainable.

33. Therefore, in compliance of the order of Hon'ble SAT dated December 04, 2020 in Appeal No. 408 of 2019, the objections of the Applicant are disposed of as above.

Date: January 29, 2021 **Jai Sebastian**

Place: Mumbai **Deputy General Manager & Recovery Officer**

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