

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) Nos. 13152/2009 & 5317/2010**

% Reserved on: 07th October, 2010

Pronounced on: 1st November, 2010

1. W.P.(C) No.13152/2009

M/S. RAM MURTY PYARA LAL & ORS. Petitioners

Through: Mr. Sudhir Nandrajog, Senior
Advocate with Mr. Rohit Nagpal
& Ms. Sahila Lamba, Advocates.

VERSUS

CENTRAL BANK OF INDIA AND OTHERS

....Respondents

Through: Mr. Jaswinder Singh, Advocate
for R-1.
Mr. Jayant Bhushan, Sr.
Advocate with Mr. C.Mohan
Rao & Mr. Lokesh Kumar,
Advocates for R-2 to R-5.

2. W.P.(C) No. 5317/2010

M/S. PRAGATI BUILDERS AND PROMOTERS & ORS. Petitioners

Through: Mr. Jayant Bhushan, Sr.
Advocate with Mr. C.Mohan
Rao and Mr. Lokesh Kumar,
Advocates

VERSUS

M/S. RAM MURTY PYARA LAL & ORS.

....Respondents

Through: Mr. Sudhir Nandrajog, Sr.
Advocate with Mr. Rohit Nagpal
and Ms. Sahila Lamba,
Advocates for R-1 to R-3
Mr. Jaswinder Singh, Adv. for R-
4.

CORAM:
HON'BLE MR. JUSTICE SANJAY KISHAN KAUL
HON'BLE MR. JUSTICE VALMIKI J. MEHTA

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

JUDGMENT

VALMIKI J. MEHTA, J

W.P.(C) No.13152/2009

1. The petitioners by means of the present petition under Article 226 of the Constitution of India impugn the order dated 18.9.2009 passed by the Debt Recovery Appellate Tribunal (DRAT). By the impugned order, DRAT dismissed the appeal of the present petitioners filed against the order dated 4.3.2008 passed by the Debt Recovery Tribunal (DRT). By the impugned orders the DRT and the DRAT have rejected the prayer of the petitioners-borrowers seeking redemption of the mortgaged property on the ground that the auction purchase stood concluded and the stage for exercising the option of redemption had come to an end.

2. The facts of the case are that the petitioners as the borrowers availed of financial limits from the respondent No.1 herein Central Bank of India. On account of default of the petitioners in

payment of the dues, the respondent No.1 bank exercised its rights under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act). Auction of property took place on 11.6.2005 after the petitioners failed to comply with the notice of demand issued under Section 13(2) of the SARFAESI Act. Respondent Nos.2 to 5 were the successful auction purchasers. It was only after about two and half years in November, 2007 that the petitioners made an application for seeking redemption of the mortgaged property by seeking to pay the outstanding dues. Applications were filed before the DRT in November, 2007 and January, 2008 and which were dismissed by the DRT vide its order dated 4.3.2008 and which order was confirmed by the DRAT by the impugned order dated 18.9.2009.

3. The respondent No.1 bank and the auction purchasers have disputed the prayer of the petitioners. The respondent No.1 bank argued that the objections filed by the petitioners to the notice under Section 13(2) were after the expiry of the statutory period and the reply was antedated to 9.11.2004 and which was received by the bank on 10.11.2004 i.e. after the statutory period of sixty days of service of the notice under Section 13(2) of the SARFAESI Act on 9.9.2004. It has also been argued by the respondent No.1 bank and the auction purchasers respondent Nos.2 to 5 that the petitioners did their utmost and used all malafide tactics to stall the sale of the mortgaged property. It is argued that the petitioners falsely set up two separate

tenancies claiming statutory protection under the Delhi Rent Control Act, 1958. One tenancy was claimed in favour of Smt. Shruti Aggarwal (sister-in-law) in respect of ground floor on monthly rent of Rs.2500/- (i.e. less than the statutory limit of Rs.3500/-) under the Delhi Rent Control Act, 1958. The second tenancy was in respect of the first floor in favour of Sh. Harish Aggarwal (father-in-law) on a monthly rent of Rs.2800/-. These persons filed suit in the original side of this Hon'ble Court and this Court granted interim order against dispossession which continued till 23.12.2009. The suit also came to be dismissed by the learned Single Judge on 23.12.2009 recording that the suit is a collusive one between the borrowers and the purported tenants. In the suit, Local Commissioner was appointed to find out the actual persons in possession and the Local Commissioner reported that it is in fact the borrowers who were in physical possession of the property and that belongings in the cupboard were of Sh. Amit Aggarwal and the books lying in the premises were of Ms. Kavya daughter of Sh. Amit Aggarwal. It is argued that the malafides of the borrowers and the purported tenants became clear from the fact that lease deeds were on stamp papers dated 1.9.1998 but the licence was granted to the stamp vendor one Mr. Ramesh Chand only on 31.3.1999. After dismissal of the suit, the purported tenants filed an S.A. before the DRT under Section 17 of the SARFAESI Act and which also was dismissed by the DRT on 29.1.2010 holding the tenancies to be not bonafide.

4. The petitioners, thereafter, filed S.A. under Section 17 of the SARFAESI Act before the DRT. Various grounds of challenge have been laid by the petitioners for challenging the auction sale proceedings. One ground was that the equitable mortgage was not an equitable mortgage because the title deeds were only given to the bank to show credit worthiness. Another ground is that the reply to the objections filed under Section 13(3A) were not given within a period of one month and that further proceedings could have been taken under Section 13(4) of the SARFAESI Act. The plea of tenancy in favour of Smt. Shruti Aggarwal and Sh. Harish Aggarwal was also taken that the leases were created in the year 1998 before the alleged mortgage of the property. Pleas of violation of the provisions of SARFAESI Act and the Rules framed thereunder were also taken with respect to notices not having been issued to the petitioners and not published as required. Other defences have also been raised.

This petition was opposed by the respondent No.1 bank and the auction purchasers and the issues pleaded by the petitioners were denied. The bank inter-alia pleaded that the petition was barred by time as it was filed beyond the period of 45 days of the action having been taken under Section 13(4) of the SARFAESI Act. The auction purchasers also opposed the S.A. by disputing the case as set up by the petitioners under Section 17. This petition was ultimately dismissed by the DRT vide its order dated 24.5.2010 and appeal against the said order of the DRT is pending before the DRAT. The

DRAT, vide its order dated 23.7.2010 stayed further proceedings under the SARFAESI Act subject to the petitioners herein depositing 50% of the amount shown to be due in the notice under Section 13(2) of the Act. That order has been challenged by the respondent Nos.2 to 5 herein in W.P.(C) No.5317/2010 which has also been heard by us alongwith the present petition and is being disposed of alongwith the present writ petition.

5. The main issue which is called for decision in the present petition is the stage till which the right of redemption can be exercised over the mortgaged property. The contention of the respondents herein is that as per Section 13(8) of the SARFAESI Act, the stage for exercise of redemption is only till the date fixed for sale/transfer under Section and not 13(8) and not thereafter. Section 13(8) reads as under:

“Section 13. Enforcement of security interest.-(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.” (emphasis added)

On the other hand, on behalf of the petitioners, the right of redemption was claimed in terms of the relevant provisions of the Transfer of Property Act and also certain provisions of order 21 of the Code of Civil Procedure, 1908 (CPC). Reliance was placed on various judgments of the Supreme Court under the Transfer of Property Act & CPC in support of the plea of the right of redemption.

6. The arguments in this case were concluded on 22.9.2010. However, on reading of certain provisions of the SARFAESI Act, more particularly sub-sections (2) to (4) of Section 17, there seemed to emerge a position as to the lack of finality of the auction sale and the consequent right to redemption until the disposal of the S.A. filed by the petitioners under Section 17 of the SARFAESI Act. There also seemed to emerge a position that there is an automatic stay of proceedings under Section 13 (4) on filing of an S.A under Section 17 and consequently of Section 13 (8) not coming into play entitling a right of redemption of the mortgaged property including of auction sale since S.A. under Section 17 was still pending. The matter was therefore listed for directions on 27.9.2010 and on which date as also on 4.10.2010, we further heard the counsel for the parties. The parties were also directed to file their written submissions and the matter ultimately came to be reserved on 7.10.2010.

7. Sub-sections (2) to (4) of Section 17 read as under:

“Section 17. Right to appeal.-(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of

the secured assets to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.” (Emphasis added)

8. The first aspect is whether the provisions of the Transfer of Property Act, including Sections 60 and 69, will apply or whether the provisions of the SARFAESI Act will apply with respect to redemption.

9. To this aspect we have no doubt in our minds that the provisions of the SARFAESI Act will apply because the said Act is a special Act dealing with respective rights and obligations with respect to proceedings to be taken thereunder. It is trite that a special legislation will prevail over a general legislation. We need not burden our judgment with case laws on this point and which indeed are legion. The provisions of the SARFAESI Act will therefore prevail in case of any conflict and inconsistency of any provision therein with any provisions of the Transfer of Property Act and the CPC. That being so, various judgments which have been cited on behalf of the petitioners under the

provisions of the Transfer of Property Act and the CPC would not apply at all. We are, therefore, not referring to those judgments and distinguishing them individually.

10. We have already reproduced the provisions of Section 13(8) and Section 17 sub sections (2) to (4) above. Section 13 sub section (8) in plain language provides that no steps with regard to the transfer or sale of secured assets can take place if dues of the secured creditors together with cost charges and expenses incurred are tendered to the secured creditor at any time before the date fixed for sale/transfer. However, sub sections (2) to (4) of Section 17 provide that the DRT in the proceedings under Section 17 has the right to declare whether the action of the secured creditor taken under Section 13(4) is or is not in accordance with the provisions of the SARFAESI Act. In case, the DRT comes to the conclusion that the action taken by the secured creditor is not in accordance with the provisions of the SARFAESI Act and the rules framed thereunder, then, by virtue of sub section (3), DRT can declare the actions taken pursuant to Section 13(4) as invalid and pass necessary orders including of cancellation of the auction sale proceedings and restoring the possession of the secured asset to the borrower. Thus, a conjoint reading of the provisions of Section 13(8) on one hand and sub sections (2) to (4) of Section 17 on the other hand, bring out the position that although the right of redemption is to be ordinarily exercised before the date fixed for sale of transfer, however, even if the auction sale proceedings take place but in case the

borrower succeeds in the S.A. under Section 17, the auction sale proceedings can be cancelled and since fresh auction sale may have to be conducted the right of redemption can **again** be exercised at that stage when a fresh date will be fixed for sale/transfer.

There is a vital difference in this legal position and the legal position which emerges under the provisions of Order 21 of the CPC. Whereas under relevant rules and sub rules of Order 21 of CPC, and as interpreted by the Supreme Court, even if a decree is set aside a bonafide purchaser for value at an auction sale proceedings gets a complete title in case he purchases the property without any notice of any dispute or claims with respect to the auctioned property, however under the SARFAESI Act, the DRT has complete powers under the provisions of sub sections (2) to (4) of Section 17 to set aside the auction sale and restore back the possession of the secured asset to the borrower. Clearly, therefore, the auction sale proceedings are not final under the SARFAESI Act unless the S.A. of the borrower under Section 17 is decided. A purchaser at an auction sale cannot claim title merely because the auction sale proceedings for concluded in his favour and a necessary sale certificate issued as the same as per sub-sections (2) to (4) of Section 17 is subject to final decision on an S.A. filed under Section 17. However, auction sale and steps under Section 13(4) can continue unless the applicant in the S.A. under Section 17 takes appropriate interim orders.

11. This very issue, namely, whether auction sale proceedings can go on in spite of an S.A. filed by the borrower under Section 17 was decided by a Full Bench of the Madras High Court in the judgment reported as **Lakshmi Shankar Mills (P) Ltd. Vs. Authorised Officer, Indian Bank (FB) AIR 2008 Madras 181**. Speaking for the Full Bench, A.P.Shah, CJ held that it is the duty of the borrower to obtain stay of auction sale proceedings in a petition under Section 17 and in case of failure to obtain stay of the auction sale proceedings, the auction sale proceedings can go on and be concluded. The four questions were framed by the Full Bench in the case of **Lakshmi Shankar Mills (P) Ltd.** for being answered read as under:-

“ (i) Whether even where no stay is prayed for by the Borrower, during pendency of the proceedings under Section 17 before the Debt Recovery Tribunal, the Secured Creditor can proceed to auction the secured asset even before a declaration envisaged under Section 17(4) of the SARFAESI Act as made by the Debt Recovery Tribunal?

(ii) Whether for granting any stay of auction, the Debt Recovery Tribunal can impose any condition relating to deposit?

(iii) Whether, even before finalisation of the proceedings under Section 17 of the SARFAESI Act, the Debt Recovery Appellate Tribunal has any incidental or ancillary power to pass any interim order relating to restoration of possession or restoration of management, subject to imposition of any reasonable condition as deemed fit and proper?

(iv) What is the scope of enquiry under Section 17 of the SARFAESI Act and whether the merits of the contentions raised by the borrower can be decided while dealing with the question relating to validity of the action taken by the Bank under Section 13 of the Act?”

12. With regard to question no.(i) above, the Full Bench in the case of **Lakshmi Shankar Mills (P) Ltd. (supra)** held that there is nothing in Section 17 of the Securitization Act which would indicate that the legislature intended that there would be automatic stay of the proceedings under Section 13(4) on filing of an application under Section 17.

On question no. (ii), it was held that a Tribunal while granting stay of auction can impose a condition relating to deposit of monies by the applicant under Section 17. The relevant paragraphs with regard to these questions which have been answered by the Full Bench are paragraphs 10 to 17, and with which we agree, read as under:-

“10. The first question is whether the right of the bank to take proceedings under Section 13(4) shall remain suspended on filing an application under Section 17. The second question concerns the jurisdiction of the Debt Recovery Tribunal to impose a condition of deposit for grant of stay of auction. Section 13(4) of the Securitisation Act is pivotal to the whole controversy. It provides that a secured creditor may enforce any security interest without intervention of the court or tribunal irrespective of Section 69 or Section 69-A of the Transfer of Property Act where according to Sub-section (2) of Section 13 the borrower is a defaulter in repayment of the secured debt or any instalment of repayment and further the debt standing against him has been classified as a non-performing asset by the secured creditor. Sub-section (2) of Section 13 further provides that before taking any steps in the direction of realizing the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in Sub-section (4) of Section 13. Sub-section (4) of Section 13 provides for four measures which can be taken by the secured creditor in case of non-compliance with the notice served upon the borrower namely, (a) to take possession of the secured assets including the right to transfer the secured

assets by way of lease, assignment or sale; (b) to take over the management of the secured assets including the right to transfer; (c) to appoint a manager to manage the secured assets which have been taken possession of by the secured creditor; and (d) to require any person who had acquired any secured assets from the borrower or from whom any money is due to the borrower to pay the same as it may be sufficient to pay the secured debt. Sub-section 3-A, which has been inserted by the amendment, provides that if on receipt of the notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. The proviso to Sub-section 3-A provides that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A. In Mardia Chemical's case, the Supreme Court has clearly held that such right accrues only if measures are taken under Sub-section (4) of Section 13 of the Securitisation Act (para.48 SCC page 348). Therefore, only if one or other measure is taken by the secured creditor, a cause of action arises for any person or borrower to prefer an application under Section 17 of the Securitisation Act.

11. Under Sub-section (1) of Section 17 any person aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor can prefer an appeal (application) to the Debts Recovery Tribunal within 45 days from the date on which such measures had been taken. Under Sub-section (2) of Section 17, the Tribunal is bound to consider whether any of the measures referred to under Sub-section (4) of Section 13 taken by the secured creditors are in accordance with the provisions of the Act. Under Sub-section (3) of Section 17, after examining the facts and circumstances of the case, and evidence produced by the parties, if the Tribunal comes to the conclusion that any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act and the rules, and require restoration of the management of the business or restoration of possession of the secured assets to the borrower, it may declare such

action as invalid and restore possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be. As a necessary corollary, Sub-section (4) of Section 17 provides that if the Tribunal declares that the recourse taken by the secured creditor under Sub-section (4) of Section 13 was in accordance with the provisions of the Act and the rules made thereunder, then, notwithstanding anything contained in the Act or any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under Sub-section (4) of Section 13 to recover his secured debt.

12. On a plain reading of Section 17, it is seen that the Tribunal has wide powers to restore possession in favour of the borrower, if such action taken under Sub-section (4) of Section 13 is declared invalid. Even where the property is sold or dealt with, pending hearing of the application under Section 17, the Tribunal is not rendered powerless to restore possession in favour of the borrower, if such action taken under Sub-section (4) of Section 13 is declared invalid. In such an eventuality, Sub-section (3) of Section 17 gives ample powers to the Tribunal to direct restoration of the possession or restoration of management, as the case may be or to pass such other order, as it may consider proper and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

13. Learned Counsel for the borrowers however argued that the use of the expressions "if" and "then" would only mean that the bank can take one or more measures laid down under Section 13(4) only if the Tribunal declares that the action taken already is in accordance with the provisions of the Securitisation Act and the rules made thereunder. It was submitted that the use of the word "if" connotes a condition precedent and no further action can be taken unless the condition is fulfilled. We are unable to accept the submission of the learned Counsel for the borrowers. The provisions of Sections 13 and 17 are amended after the Marida Chemicals case. The Statement of Objects and Reasons makes it manifestly clear that the amendment has been effected in view of the judgment of the Supreme Court and to discourage the borrowers to postpone the repayment of their dues and also to enable the secured creditor to speedily recover their dues, if required by enforcement of security or other measures specified in Sub-section (4) of Section 13 of the Act. Legislature was clearly aware of the ruling in Marida

Chemicals case which interpreted Section 17 as granting to the Tribunal a discretionary power of stay. Accepting the submission of the borrowers would mean that the Legislature intended to undo this by enacting Section 17 so as to suspend the power of the banks to take appropriate measures under Section 13. It is a recognized rule of interpretation of Statutes that expressions used therein should ordinarily be understood in a sense in which they harmonized with the object of the statute and which effectuate the object of the legislature (See *New India Sugar Mills Ltd. v. Commissioner of Sales Tax* MANU/SC/0353/1962 : AIR1963SC1207). The provisions of Section 17 must therefore receive such construction at the hands of the Court as would advance the object and at any event not thwart it. In other words, the principle of purposive interpretation should be applied while construing the said provision. The Securitisation Act is enacted to provide a speedy and summary remedy for recovery of thousands of crores which were due to the banks and financial institutions and accepting the interpretation suggested by the counsel for the borrowers would defeat the very object of the Act.

14. The matter can be viewed from another angle. It is well known that when the Legislature wants to grant a statutory stay, it would expressly say so. For example, Section 36 of the Arbitration and Conciliation Act, 1996 pursuant to which an award can be enforced only after the expiry of the period for making an application under Section 34 or, if such an application is made, till it is refused by the Court. Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 is another example of statutory stay. There is nothing in Section 17 of the Securitisation Act which would indicate that the Legislature intended that there would be automatic stay of proceedings under Section 13(4) on filing an application under Section 17.

15. As regards the second question, there is no specific provision made under Section 17 of the Securitisation Act or under any other provisions of the said Act empowering the Tribunal to pass any interim order. But under Sub-section (12) of Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, the Tribunal has been empowered to pass various interim orders. If Sub-section (7) of Section 17 of the Securitisation Act is read along with Sub-section (12) of Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, it would be clear that the Tribunal also has jurisdiction to pass interim orders under

Section 17 of the Securitisation Act in appropriate cases. In Marida Chemicals case, in Clause (iv) of paragraph 80 of the judgment, the Supreme Court has categorically held that the Tribunal in exercise of its discretionary power shall have jurisdiction to pass any stay/interim order, subject to the condition as it may deem fit and proper to impose. Earlier, there was a controversy as to whether the Tribunal has power to grant ad-interim orders under Section 19(12) of the Recovery of Debts due to Banks and Financial Institutions Act, but that had been set at rest in I.C.I.C.I Ltd., v. Grapco Industries Ltd. MANU/SC/0372/1999 : [1999]3SCR759 . The Tribunal is thus empowered to grant interim stay subject to such conditions as may be deemed proper including condition of deposit. We may add that even under Section 69 of the Transfer of Property Act, the only remedy of the borrower, whose mortgagee has invoked Section 69 of the Transfer of Property Act, is to file a civil suit. In such suit, the power of the Court to grant injunction and to impose condition for the grant thereof has been recognized in Jagjivan v. Shridhar ILR 1878 Bom. 252 and Narasimchariar v. E.B.S. 3rd Branch MANU/TN/0093/1955 : AIR1955Mad135.

16. Repelling a similar argument, a Division Bench of this Court in Ramco Super Leathers Ltd. v. UCO Bank, (supra) has also held that there is no automatic stay or prohibition on the secured creditor to take recourse to one or more measures under Sub-section (4) to Section 13 of the Securitisation Act to recover its secured debts, till an interim order is passed by the Tribunal. The following observations of the Bench are pertinent:

The finding of the Supreme Court at Clause (4) of paragraph-80 aforesaid, is the answer to the question raised by the writ petitioner, wherein the Supreme Court held that the Tribunal, in exercise of its ancillary power, shall have jurisdiction to pass any stay/interim order, subject to the condition as it may deem fit and proper to impose. The corollary is that, there is no automatic stay or prohibition on the secured creditor to take recourse to one or more measures under Sub-section (4) to Section 13 of the SARFAESI Act to recover its secured debts, till an interim order is passed by the Tribunal.

From the aforesaid Section 17, it will be evident that any person, including borrower, could file an appeal (application) under Section 17 at any stage, including the stage when management of business is taken or possession of secured assets of the borrower, including right to transfer is taken over by the secured creditor. In such a case, the Tribunal has

power to restore possession in favour of the borrower, if such action taken under Sub-section (4) to Section 13 is declared invalid. Merely because a secured creditor has taken possession of secured asset, or issued notice inviting application for sale of secured asset, or issued a sale certificate in favour of one or other auction purchaser, will not render the Tribunal powerless to restore possession in favour of the borrower, if such action taken under Sub-section (4) to Section 13 is found not in accordance with the Acts and the Rules framed thereunder, and is declared invalid.

17. We accordingly hold that there will be no automatic stay on filing of an application under Section 17 of the Securitisation Act, and the Tribunal while granting stay of auction can impose a condition relating to deposit."

(Emphasis added)

13. We are in the present case not concerned with the question no.(iii) which was framed and answered by the Full Bench in **Lakshmi Shankar Mills (P) Ltd. (supra)** case for the present, however, suffice to state that in the present case auction sale has been finalised and sale certificate issued, but physical possession of the secured asset continues to be with the petitioners.

14. On question no.(iv), the Full Bench held that all grounds which render the action of the bank/financial institution illegal under Section 13(4) can be raised in proceedings under Section 17 of the SARFAESI Act before the DRT and which are accordingly decided by the DRT. The Full Bench for arriving at the conclusion relied upon an earlier Division Bench judgment of the same court in **Mison Leathers Ltd. Vs. Canara Ban, Chennai AIR 2007 Madras 268**. Paras 20 and 21 of the judgment of the Full Bench are relevant and which read as under:-

“20. In *Mison Leathers Ltd., v. Canara Bank, Chennai* (2007) 3 LW 500 the constitutional validity of the amended Section 17 was challenged on the ground that the remedy of filing application under Section 17 of the Act which is declared to be in the nature of the suit by the Supreme Court is totally taken away by the amendment and in any event, the remedy is only an empty formality and does not protect the rights of the borrowers, mortgagors and guarantors. Repelling this contention, the Division Bench observed:

10. We are afraid that the contention is totally misconceived. The provisions of Section 17(1) of the Act provides remedy for the borrower/guarantor/mortgagor to challenge the action of the Bank under Section 13(4) of the Act before the Debt Recovery Tribunal. The Debt Recovery Tribunal is required to decide whether the action of the Bank/Financial institutions, under Section 13(4) is in accordance with the provisions of the Act and the rules framed thereunder. It is open to the borrower/guarantor /mortgagor to demonstrate before the Debt Recovery Tribunal that resort to Section 13 of the Act is not permissible by law. In a given case, the claim of the Bank/Financial Institutions may be barred by limitation or there may be cases, where the adjustment of the amount paid is not reflected in the notice or the calculation of interest may not be in accordance with the contract between the parties. Needless to say that all such grounds, which render the action of the Bank/Financial Institutions illegal can be raised in the proceedings under Section 17 of the Act before the Debt Recovery Tribunal.

11. Learned Additional Solicitor General and the learned Counsel appearing for banks and financial institutions fairly stated that all the objections which can be legally raised in the reply to the notice under Section 13(2) of the Act can also be raised in the proceedings under Section 17(1) of the Act. It would be for the Debt Recovery Tribunal to decide in each case whether the action of the bank is in accordance with the provisions of the Act and is legally sustainable.

21. As can be seen from the Statement of Objects and Reasons of the Securitisation Act, the main purpose of the Securitisation Act, and in particular Section 13 thereof, is to enable and empower the secured creditors to take possession of their securities and to deal with them without the intervention of the Court. Therefore, in an application under Section 17, the Tribunal is concerned only with the validity of the acts of the secured creditor in taking possession of the securities and dealing with the same under Section 13. In our opinion, the Division Bench has

rightly held that all such grounds, which would render the action of the bank/financial institution illegal, can be raised before the Tribunal in the proceedings under Section 17. It is for the Tribunal to decide in each case whether the action of the bank was in accordance with the provisions of the Act and legally sustainable. However, we hasten to add that while considering the question of validity of the action of the bank, it is not necessary for the Tribunal to adjudicate the exact amount due to the secured creditors. In other words, the purpose of an application under Section 17 is not the determination of the quantum of claim per se as the Tribunal is concerned with the issue of the validity of the measures taken by the banks/financial institutions under Section 13(4). In our opinion, the judgment of the Division Bench in Mison Leathers Ltd., lays down the law correctly and does not require any reconsideration.”(Emphasis added)

15. While we agree with the conclusion of the Full Bench in the **Lakshmi Shankar Mills (P) Ltd.** case however, we do not agree with the underlined observations in para 21 reproduced above that it is not necessary for the DRT to adjudicate the exact amount due to the secured creditor. In our opinion, this ratio of the judgment in the case of **Lakshmi Shankar Mills (P) Ltd. (supra)** seems to be in conflict with paras 18 and 54 of the judgment in the case of **Madia Chemicals Ltd. & Ors. Vs Union of India & Ors. 2004 (4) SCC 311.** The Supreme Court has clearly held in the case of **Madia Chemicals Ltd.** that the proceedings under Section 17 is in the nature of original proceedings and that even the amount which is claimed to be due to a bank/financial institution as stated in the notice under Section 13(2) can be challenged by the borrower. Paras 18 and 54 of the judgment in the case of **Madia Chemicals Ltd.** are relevant and the same read as under:-

“18. It is submitted that the mechanism provided for recovery of the debt under Section 13 indicated above does not provide for any adjudicatory forum to resolve any dispute which may arise in relation to the liability of the borrower to be treated as a defaulter or to see as to whether there has been any violation or lapse on the part of the creditor or in regard to the correctness of the amount sought to be recovered and the interest levied thereupon. On the other hand, Section 34 bars the jurisdiction of the civil court to entertain any suit in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. It also provides that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act or under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. Section 35 gives an overriding effect to the provisions of the Act over the provisions contained under any other law. The submission, therefore, is that before any action is taken under Section 13, there is no forum or adjudicatory mechanism to resolve any dispute which may arise in respect of the alleged dues or NPA.

54. Insofar as the argument advanced on behalf of the petitioners that by virtue of the provisions contained under sub-section (4) of Section 13 the borrowers lose their right of redemption of the mortgage, in reply it is submitted that rather such a right is preserved under sub-section (8) of Section 13 of the Act. Where a borrower tenders to the creditor the amount due with costs and expenses incurred, no further steps for sale of the property are to take place. In this connection, a reference has also been made by the learned Attorney General to the decision in *Narandas Karsondas V. S.A. Kamtam* which provides that a mortgagor can exercise his right of redemption any time until the final sale of the property by execution of a conveyance. Shri Sibal, however, submits that it is the amount due according to the secured creditor which shall have to be deposited to redeem the property. Maybe so, some difference regarding the amount due may be there but it cannot be said that right of redemption of property is completely lost. In cases where no such dispute is there, the right can be exercised and in other cases the question of difference in amount may be kept open and got decided before sale of property.” (Emphasis added)

We, therefore, feel that the Full Bench may not be right when it holds that it is necessary for the Tribunal to adjudicate the exact amount due to the secured creditor in the proceedings under Section 17 of the SARFAESI Act. All grounds including the merits of the disputes, the amount due, the violation of the provision of the SARFAESI Act and all other applicable laws and rules have necessarily to be decided in a proceeding under Section 17 of the Act.

16. We have had an occasion to consider the aspect as to whether crystallization of the amount as stated by the bank in the notice under Section 13(2) of the Act is final or not in our judgment in the case of **Indira Devi Vs. Union of India** W.P.(C) 8221/2009 decided on 9.8.2010. In para 7 of the said judgment we have referred to paras 18 and 54 of the judgment of **Madia Chemicals Ltd. & Ors. Vs Union of India & Ors. 2004 (4) SCC 311.** and have held as under:-

“7. xxxxxx

A reading of the aforesaid paragraphs clearly shows that the amount which is claimed by the financial institution on passing of an order under Section 13(3A) of the Securitization Act whereby the amount is claimed against the borrower/mortgagor/guarantor etc, the said crystallisation is not final and it can always be challenged in an appeal under Section 17(1) of the Securitization Act which proceedings are in fact, though titled as ‘appeal proceedings’, original jurisdiction proceedings.”

17. In view of the above, we hold that the right of redemption claimed by the petitioners will depend upon success of the proceedings

initiated by the petitioners under Section 17 of the SARFAESI Act. In case, the petitioners finally fail, then it will not have a right of redemption, however, in case the petitioners succeed in the proceedings under Section 17 and orders are passed for setting aside the auction sale in terms of sub-section (2) to (4) of Section 17, then in such a case, it will be open to the petitioners to claim right of redemption. The conclusion which emerges is this that in case the borrower succeeds in its petition under Section 17, then, the DRT can pass orders under sub-sections 3 and 4 of Section 17 cancelling the auction sale proceedings. In case, the auction sale proceedings are cancelled because the action of the bank/financial institution is found to be violative of various provisions of the SARFAESI Act and the Rules framed there under, it is possible that a fresh auction may have to be conducted. In case a fresh auction of the mortgaged property has to be conducted then, a fresh date will be fixed for auction sale and it is at that stage that again Section 13 sub-section 8 will come into play and at which stage, the borrower can seek to exercise its right of redemption of the mortgaged property. Therefore, everything will turn upon the success or failure of the petitioners in the petition under Section 17 of the Act when the same reaches finality. Presently, the stage of the proceedings under Section 17 is that, and as already stated above, the same has been dismissed by the DRT and a statutory appeal under Section 18 is pending before the DRAT. Therefore, if the petitioners succeed in its appeal under Section 18 before the DRAT, the

petitioners can exercise a right of redemption because fresh auction sale proceedings may have to be conducted and when so required to be conducted, once again a date will have to be fixed for sale/transfer/auction and before which date, the petitioners can seek to pay all the dues of the bank in terms of Section 13(8) of the SARFAESI Act.

The present petition is therefore disposed of with the aforesaid directions by setting aside the impugned orders of the DRT and DRAT dated 4.3.2008 and 18.9.2009, respectively and holding that the right of redemption will be decided in terms of the success or failure of the petitioners in the proceedings initiated by them under Section 17. The petition is accordingly disposed of leaving the parties to bear their own costs.

WP (C) No. 5317/2010

18. In view of our judgment in WP(C) No. 13152/2009, the present petition would stand disposed of with the direction that the impugned order is sustained which directs deposit of the 50% of the amount as shown in the notice under Section 13(2) of the SARFAESI Act, and which direction is purely an interim direction and subject to the final decision of the DRAT in the appeal which is pending before it under Section 18 of the SARFEASI Act against the order of the DRT dated 24.5.2010 dismissing the S.A. under Section 17 filed by the present petitioners. We may note that the DRAT in an appeal under Section 18 is fully empowered to impose condition for the deposit for

hearing of the appeal, however, no observation in the impugned order will amount to giving the entitlement to the petitioners herein for redemption of the mortgaged property merely because they seek to deposit the entire loan amount in terms of the impugned order and the right of redemption will only be subject to their succeeding in their petition under Section 17 and as already so held by us while disposing of WP(C) No. 13152/2009.

The petition is accordingly stand disposed of, leaving the parties to bear their own costs.

VALMIKI J. MEHTA, J.

NOVEMBER 01, 2010
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SANJAY KISHAN KAUL, J.