

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION No. 11459 OF 2014**

M/s. Hari Trading Corporation ... Petitioners
Vs.
Bank of Baroda ... Respondents

WITH

WRIT PETITION No. 11460 OF 2014

M/s. Pelena Trading Pvt. Ltd. ... Petitioner
Vs.
State Bank of India ... Respondent

WITH

WRIT PETITION No. 239 OF 2015

Kamal Jajoo & Anr. ... Petitioners
Vs.
Oriental Bank of Commerce & Ors. ... Respondents

WITH

WRIT PETITION No. 992 OF 2015

Rangara Industries Pvt. Ltd. & Anr. ... Petitioner
Vs.
State Bank of India ... Respondent

WITH

WRIT PETITION No. 1045 OF 2015

M/s. Kalsaria Diamonds Pvt. Ltd. ... Petitioner
Vs.
Bank of India ... Respondent

Mr. Sanjay Jain a/w Vivek Phadke i/b Kaikini Phadke & Associates,
for the Petitioner in WP 11459/2014, 11460/2014 & 1045/2015.

Mr. Mayur Khandeparkar a/w Jayesh Patel & Devang Khira, for

Petitioner in WP 239/2015.

Mr. Sanjay Jain a/w Manish P. Gitay, for the Petitioner in WP 992/2015.

Mr. Rabindra Hazari a/w Debasish Kotaky & Khozema Mukhtiar, for Respondent in WP. 11459/2014.

Ms. Rathina Maravarman, for Respondent in WP 11460/2014.

Ms. Tasneem Zariwala i/b Vidhi Partners, for Respondent in WP 1045/2015.

Mr. P. Kumar Jain a/w Prakash Punjabi i/b Prakash Punjabi, for Respondent No. 992/2015.

**CORAM: V. M. KANADE &
A. R. JOSHI, JJ.**

DATE: 23rd February, 2015

P.C.:- (Per V.M. Kanade, J.)

1. Petitioners in all these cases are principal borrowers and Respondents – Banks are the secured Creditors. Petitioners are aggrieved by the orders passed by the Chief Metropolitan Magistrate/District Magistrate under section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (For short “SARFAESI Act”) allowing the Banks to take physical possession of the secured assets and, if necessary, with the police help. In a few cases, Petitioners have also challenged validity of certain provisions under the SARFAESI Act.

2. This is yet another attempt made by the borrowers to argue the same submissions which were argued before the Apex Court in several cases including the cases decided by the Apex Court in *Mardia Chemicals Ltd. vs. Union of India*¹, *Transcore vs. Union of India*² and *Standard Chartered Bank vs. V. Noble Kumar & Others*³ and all the submissions regarding violation of principles of natural justice, validity of the provisions of SARFAESI Act were repelled by the Apex Court. Now, again, after the proviso to Section 14 has been added by the Amendment Act of 2013, Petitioners/borrowers have once again lined up and arguing the same points and seeking an order and direction from this Court directing the Chief Metropolitan Magistrate to give personal hearing to the borrowers on account of amendment to Section 14 of the SARFAESI Act and only thereafter decide the application filed by the Bank under Section 14. (Emphasis supplied)

3. As rightly pointed out by the learned Counsel appearing on behalf of the Banks that after the legislature realized that civil justice delivery system was not adequate to decide the cases of commercial transactions, particularly for the recovery of secured debts, Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was passed and after six years it realized that secured debts could not be recovered.

1 AIR 2004 SC 2371

2 AIR 2007 SC 712

3 2013(2) D.R.T.C. 609 (S.C.)

Two Committees made in-depth analysis and submitted their reports popularly known as Narasimhan Report and Andhyarujina Report which have culminated into SARFAESI Act being passed. We are informed by the learned Counsel appearing on behalf of the Banks that even after SARFAESI Act is passed, the Banks rarely succeed in getting the possession of the secured assets and even if they are successful, the properties are not sold and the debts are not recovered. (Emphasis supplied)

4. Petitioners obtained financial assistance from the Banks on furnishing security in the form of a mortgage. Petitioners in all these Petitions contended that the principal borrower has a right to be heard by the Magistrate when he exercises power vested in him under section 14 of the SARFAESI Act. It is submitted that after the amendment of Section 14 and inclusion of the proviso to Section 14 sub-clauses (i) to (ix), the Chief Metropolitan Magistrate/District Magistrate has to satisfy himself about the correctness or otherwise of the information which is provided by the Bank and, therefore, the exercise of the said power is judicial/quasi judicial and, therefore, the Chief Metropolitan Magistrate or District Magistrate is duty bound to give hearing to the principal borrower before passing any order. Reliance also has been placed on several judgments of the Apex Court and this Court in support of the said submission.

5. On the other hand, the learned Counsel appearing on behalf of the Banks has submitted that no right has accrued in favour of the principal borrower after amendment of Section 14 in 2013 and the position which prevailed prior to the amendment has not changed and, therefore, right of hearing cannot be read into Section 14 of the SARFAESI Act. He has taken us through all the judgments of the Apex Court right from *Mardia Chemicals Ltd. vs. Union of India*¹ to the latest judgment of the Apex Court in *Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and others*² and also judgments of other High Courts as well as this Court.

6. We are of the view that there is absolutely no merit in the submissions made by the learned Counsel appearing on behalf of the Petitioners. Mr. Mathew Nedumpara, the learned Counsel also appeared in order to assist this Court as *amicus curiae* though we have not so appointed him and he had, on his own, requested us to permit him to argue on some points. We are not in agreement with the submissions made by him also, which are more or less on the same lines as that of other Counsels for the borrowers for the following reasons.

The scheme of the SARFAESI Act which is evident from

1 AIR 2004 SC 2371

2 (2014) 6 SCC 1

the preamble, objects and reasons and the provisions and Rules is that the Act has been passed for quick recovery of secured assets from borrowers and guarantors after the account of the borrower is declared as non-performing asset as laid down by the judgment in *Mardia Chemicals Ltd.* (supra) and in *Transcore vs Union of India*¹ and other judgments of the Apex Court. The said process is non-adjudicatory in nature and the process starts once the Bank declares the account of the borrower as non-performing asset. If the Bank follows measures which are laid down in section 13(2) of the SARFAESI Act then it can take possession of the secured asset under section 13(4) and for that purpose obtain an order of the Magistrate to assist it to secure the possession, if possible with police help. Proviso to section (3A) makes it clear that if explanation given by the borrower to notice issued by the Bank under section 13(2) is not accepted, borrower cannot file an appeal under section 17. The right to challenge the action of the Bank or Financial Institution of taking possession of the secured asset can be challenged under Section 17 only after the possession is taken. The Apex Court has observed that this is a sufficient remedy, firstly because DRT can restore back the possession to the borrower/guarantor and award compensation if it finds that measures under section 13(2) have not been properly taken. This being the scheme of the Act which has been

1 AIR 2007 SC 712

approved by the Apex Court in *Mardia Chemicals Ltd.* (supra) and in *Transcore* (supra), the question of giving further hearing under section 14 in view of inclusion of the proviso does not arise since the remedy under section 17 is still available to any person. The borrower did not have any locus to be heard before amendment of Section 14 and even after the inclusion of the proviso since under section 13(4) no right was vested in the borrower to be heard at this stage. That being the position, inclusion of the proviso does not change the position in any manner. For this purpose we have reproduced hereinbelow certain paragraphs from judgments in *Mardia Chemicals Ltd.* (supra) and *Transcore* (supra) to point out that these issues have been finally settled by the Supreme Court in these cases

In *Mardia Chemicals Ltd.*, validity of SARFAESI Act was challenged. The Apex Court, after taking into consideration various provisions of the Act, upheld the validity of the Act except the provision which was incorporated in Section 17 which required the principal borrower or guarantor to deposit 75% of the amount claimed before any application was filed under section 17. In the said judgment, practically all the submissions of the principal borrower were considered including the submissions viz that there was violation of the principles of natural justice in not giving hearing to the principal borrower and, secondly, that there was no

adjudication of the actual amount claimed before the Bank could take possession of the secured assets and the Apex Court, after taking into consideration the scheme of the Act and various provisions, did not accept any of the arguments advanced by the Counsel appearing on behalf of the principal borrower/guarantor. The Apex Court in *Mardia Chemicals Ltd* (supra) has observed in paragraphs 34, 36, 37, 42, 43, 44, 66 and 67 as under:-

“34. Some facts which need be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects. Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the governments in creating Debt Recovery Tribunals and appointing Presiding Officers, for a long time. Even after leaving that margin, it is to be noted that things in the concerned spheres are desired to move faster. In the present day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards Securitisation of the debts and to evolve means for faster recovery of the

NPA's was not called for or that it was superimposition of undesired law since one legislation was already operating in the field namely the Recovery of Debts due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another expert committee was constituted then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved. "

"36. In its Second Report, the Narasimham Committee observed that the NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed :

"8.1 A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries....."

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the asset without intervention of the court and for reconstruction of the assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting the attention and the matter was considered in depth by the committees specially constituted consisting of the experts in the field. In the prevalent situation where the amount of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the report of the Narasimham Committee, yet another committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps without the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of debts due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances the financial climate world over, if it was thought as a matter of policy, to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor it is a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy."

"37. Next we come to the question as to whether it is on whims and fancies of the financial institutions to classify the assets as non-performing assets, as canvassed before us. We find it not to be so. As a matter of fact a policy has been laid down by the Reserve Bank of India providing guidelines in the matter for declaring an asset to be a non-performing asset known as "RBI's prudential norms on income

recognition, asset classification and provisioning - pertaining to advances" through a Circular dated August 30, 2001. It is mentioned in the said Circular as follows :

"1.1 In line with the international practices and as per the recommendations made by the Committee on the Financial System (Chairman Shri M.Narasimham), the Reserve Bank of India has introduced, in a phased manner, prudential norms for income recognition, asset classification and provisioning for the advances portfolio of the banks so as to move towards greater consistency and transparency in the published accounts."

2.1 Non-performing Assets:

"2.1.1 An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank. A 'non-performing asset' (NPA) was defined as a credit facility in respect of which the interest and/or installment of principal has remained 'past due' for a specified period of time. The specified period was reduced in a phased manner as under:

Year ending March 31	Specified period
1993	four quarters
1994	three quarters
1995 onwards	two quarters

2.1.2 An amount due under any credit facility is treated as "past due" when it has not been paid within 30 days from the due date. Due to the improvements in the payment and settlement systems, recovery climate, upgradation of technology in the banking system, etc., it was decided to dispense with 'past due' concept,

with effect from March 31, 2001. Accordingly, as from that date, a Non- performing Asset (NPA) shall be an advance where

(i) interest and/or installment of principal remain overdue for a period of more than 180 days in respect of a Term Loan,

(ii) the account remains 'out of order' for a period of more than 180 days, in respect of an Overdraft/Cash Credit (OD/CC),

(iii) the bill remains overdue for a period of more than 180 days in the case of bills purchased and discounted,

(iv) interest and/or installment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes, and (v) any amount to be received remains overdue for a period of more than 180 days in respect of other accounts.

4.2.2 Banks should establish appropriate internal systems to eliminate the tendency to delay or postpone the identification of NPAs, especially in respect of high value accounts. The banks may fix a minimum cut off point to decide what would constitute a high value account depending upon their respective business levels. The cut off point should be valid for the entire accounting year. Responsibility and validation levels for ensuring proper asset classification may be fixed by the banks. The system should ensure that doubts in asset classification due to any reason are settled through specified internal channels within one month from the date on

which the account would have been classified as NPA as per extant guidelines."

From what is quoted above, it is quite evident that guidelines as laid down by the Reserve Bank of India which are in more details but not necessary to be reproduced here, laying down the terms and conditions and circumstances in which the debt is to be classified as non-performing asset as early as possible. Therefore, we find no substance in the submission made on behalf of the petitioners that there are no guidelines for treating the debt as a non-performing asset."

"42. Mainly it is to be considered as to whether there is absolute bar of any remedy to the borrower, before an action is taken under sub-section (4) of Section 13 of the Act in view of non-obstante clause under sub-section (1) of Section 13 and the bar of the jurisdiction of the civil court under Section 34 of the Act. Sub-section (1) of Section 13 begins with "Notwithstanding anything contained" under Section 69 of the Transfer of Property Act any secured interest can be enforced without intervention of the court or Tribunal. Section 69 of the Transfer of Property Act provides as follows :

"69. Power of sale when valid.-(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of the payment of mortgage-money, without the intervention of the Court, in the following cases and in no others, namely -

(a) where the mortgage is an English mortgage, and neither the mortgagor nor

the mortgagee is a Hindu, Mohammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgagee is the Government;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by mortgage- deed, and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until -

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in

professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) and (5)

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It is clear that mortgaged property cannot be sold without intervention of the court except in three conditions as enumerated in clauses (a), (b) and (c) of sub-section (1) of Section 69. Clause (a) relates to English mortgage in which a mortgaged property is permitted to be sold without intervention of the court but in the stricto sensu cl. (a) would not be applicable to the present case as it contains many conditions which obviously are not fulfilled in case in hand. It is however, submitted that the provision for enforcing secured debt was made on the lines of the principle governing English mortgage. It is perhaps sought to be canvassed that if that kind of step namely enforcing the secured debt without intervention of the court is permissible in a case of English mortgage such a provision may legitimately be enacted in respect of mortgages like English mortgages. We find much has been argued on the point as to whether the transactions involved in the cases before us amount to English mortgage or not though none of agreements have been placed before us. Distinction between the two have also been tried to be shown and it has been submitted that English mortgage is in fact transfer of the

property absolutely to the mortgagee with a term of retransfer. Section 58(e) pertaining to English mortgage is quoted below :

"58. 'Mortgage', 'mortgagor', 'mortgagee', 'mortgage-money' and 'mortgage-deed' defined.-

xxx xxx xxx xxx xxx xxx

(d) English mortgage - Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

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It is thus pointed out that in English mortgage, absolute transfer of the property already takes place. Hence the question of intervention of the court may not arise. It has a condition of retransfer. It is submitted that by no means it can be said that the transactions in question are like those as English mortgage. On the basis of the above provision it is further submitted that if the condition of retransfer is not invoked the mortgagee is possessed of all rights absolutely in the property. There are different kinds of mortgages as enumerated in section 58 of the Transfer of Property Act. We feel that it would not be necessary to further go into the matter as to whether the agreements in the cases before us amount to English mortgage or not since the non-obstante clause under Section

13(1) of the Act provides that notwithstanding anything contained in Section 69 a secured interest can be enforced without intervention of the court. That is to say it overrides the provision as contained under Section 69 where it is said that in no cases, other than those as enumerated in clauses (a), (b) and (c), a mortgage shall be enforced without intervention of the court. Once the said condition, as noted above, in section 69 of the Transfer of Property Act, the general law on the subject, has been overridden by the special enactment namely the Securitisation Act, it would not make much of a difference as to whether the transactions in question are akin to or amount to English mortgage or not, since irrespective of the kind of the mortgage the secured interest is liable to be enforced without intervention of the court as per the provision contained under Section 13 of the Act. Needless to refer Section 35 of the Act, which provides as under :

"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."

"43. It may, however, be worthwhile to mention here as to why and in what circumstances it had been thought necessary to provide a non-obstante clause in sub-section (1) of Section 13 of the Act. In a nutshell, the position as prevailed in 1882 when the Transfer of Property Act was enacted has undergone a sea-change.

What was conceived correct in the situation then prevailing may not be so in the present day situation. Functions of different institutions including the banking and financial institutions have changed and new functions have been introduced for financing the industries etc. New economic and fiscal environment is around more than 100 years later after the enactment of the Transfer of Property Act. In this connection it has been pointed out on behalf of the respondents that Rajamannar Committee was appointed by Government of India which submitted its report in 1977 indicating the effect of the changed situation and the relevance of the provisions of the Transfer of Property Act in context thereof. Mr. Salve has drawn our attention to the Rajamannar Committee report as quoted in the Narasimham Committee Report 1998, which reads as under :

"The Rajamannar Committee appointed by the Government of India gave its report in 1977 pointing out the development of the law of mortgages and explaining how it had become completely anachronistic in the latter part of the 20th century where mortgages had become a very important instrument to facilitate development of commercial credit. The Rajamannar Committee's recommendations, that were extracted in the Narasimham Report (1998) stated "... thus a distinction was made in the original schemes as regards mortgages to which Europeans were parties mortgages where the properties were situated in the presidency towns, and mortgages where the mortgages were of native origin and mortgages where the property was situate in the mofussil. This distinction was based on the fact that in the mofussil, it was the money lenders with their unscrupulous methods, who were, by and large, the persons lending against mortgage of immovable property evidently, the situation that prevailed at the time of the enactment of the Transfer of Property Act 1882, justify the legislative action of

the then Government of India in limiting the right of sale without the intervention of courteconomic conditions have vastly changed since the enactment of the Transfer of Property Act in 1882. The role of the unscrupulous money lenders dominating in the field of credit is no longer validwith our reliance on institutionalization of credit, the banks another financing institutions are the major moneylenders of credit today. In their dealings with their mortgagors, it is anachronistic to assume that they will adopt the unscrupulous moneylenders. (Paragraph 1.2.19).

In fact in extending credit, the necessity for suitable safeguards to banks and other financing institutions is now rightly stressed. It is understandable that the legal framework is essentially conceived to deal with unscrupulous moneylenders is no longer appropriate to deal with credit given by banks and other financing institutions...". “

“44. As a matter of fact, the Narasimham Committee also advocates for a legal framework which may clearly define the rights and liabilities of the parties to the contract and provisions for speedy resolution of disputes, which is a sine qua non for efficient trade and commerce, especially for financial intermediation. Even the guidelines of the Reserve Bank of India in relation to classifying the NPA's while stressing the need of expeditious steps in taking a decision for classifying and identification of NPA's says, a system be evolved which should ensure that the doubts in asset classification are settled through specified internal channels within the time specified in the guidelines. It is thus clear that while recommending speedier steps for recovery of the debts it is envisaged by all concerned that within the legal framework, such provisions may be contained which may curtail the delays. Nonetheless dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards

for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved.”

“66. On behalf of the petitioners one of the contentions which has been forcefully raised is that existing rights of private parties under a contract cannot be interfered with, more particularly putting one party to an advantageous position over the other. For example, in the present case, in a matter of private contract between the borrower and the financing bank or institution through impugned legislation rights of the borrowers have been curtailed and enforcement of secured assets has been provided for without intervention of the court and above all depriving them the remedy available under the law by approaching to the civil court. Such a law, it is submitted, is not envisaged in any civilized society governed by rule of law. As discussed earlier as well, it may be observed that though the transaction may have a character of a private contract yet the question of great importance behind such transactions as a whole having far reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions more particularly when financing is through banks and financial institutions utilizing the money of the people in general namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact in the socio-economic drive of the country. The two aspects are inter- twined which are difficult to be separated. There have been many instances where existing rights of the individuals have been affected by legislative measures taken in public interest. Certain decisions which have

been relied on behalf of the respondents, on the point are 1951 SCR p.292, [AIR 1951 SC 189] Ramaswamy Aiyengar Vs. Kailasa Thevar. In that case by enacting the Madras Agriculturist's Relief Act, relief was given to the debtors who were agriculturists as a class, by sealing down their debts. The validity of the Act was upheld though it affected the individual interest of creditors. In Dahya Lala Vs. Rasul Mohd.Abdul Rahim, [1963] 3SCR1 , the tenants under the Provisions of the Bombay Tenancy Act, 1939 were given protection against eviction and they were granted the status of protected tenant, who had cultivated the land personally six years prior to the prescribed date. It was found that the legislation was with the object of improving the economic condition of the peasants and for ensuring full and efficient use of land for agricultural purpose. By a statutory provision special benefit was conferred upon the tenants in Madras City where they had put up a building for residential or non-residential purposes and were saved from eviction, it did though affect the existing rights of the landlords. See also 1963 (Supp.) 1 SCR p.282, Swami Motor Transports Pvt. Ltd. Vs. Shri Sankraswamigal Mutt and Raval & Co. Vs. K.G.Ramachandran, 1974 (1) SCC 424. Similarly it is also to be found that in the case reported in 2001 (5) SCC 546, Kanshi Ram v. Lachhman the law granting relief to the debtors protecting their property was upheld. Also see 1978 (2) SCC 1, Pathumma v. State of Kerala, 1977 (2) SCC 670, Fatehchand Himmatlal v. State of Maharashtra, 1962 (1) SCR 852, Ramdhandas v. State of Punjab."

"67. It is well known that in different States Rent Control legislations were enacted providing safeguards to the sitting tenants as against the existing rights of the landlords, which before coming into force of such law were governed by contract between the private parties. Therefore, it is clear that it has always been held to be lawful, whenever it was necessary in the public interest to legislate irrespective of the fact that it may affect some individuals enjoying certain rights. In the present we find that case the unrealized dues of banking

companies and financial institutions utilizing public money for advances were mounting and it was considered imperative in view of recommendations of experts committees to have such law which may provide speedier remedy before any major fiscal set back occurs and for improvement of general financial flow of money necessary for the economy of the country that the impugned Act was enacted. Undoubtedly such a legislation would be in the public interest and the individual interest shall be subservient to it. Even if a few borrowers are affected here and there, that would not impinge upon the validity of the Act which otherwise serves the larger interest.”

7. In *Transcore vs. Union of India*¹, the Apex Court was called upon to decide the three questions which are as under:-

(i) Whether the banks or financial institutions having elected to seek their remedy in terms of DRT Act, 1993 can still invoke the NPA Act, 2002 for realizing the secured assets without withdrawing or abandoning the O.A filed before the DRT under the DRT Act.

(ii) Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

(iii) Whether ad valorem court fee prescribed under Rule 7 of the DRT (Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the said Act.

¹ AIR 2007 SC 712

The Apex Court answered all these questions in favour of the Bank and against the principal borrower. Again, in this judgment, the entire scheme of the Act and the relevant provisions have been considered. The Apex Court in *Transcore* (supra) has observed in paragraphs 52, 53, 55 and 56 as under:-

“52. The short question under this head is whether recourse to take possession of the secured assets of the borrower under Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.”

“53. Mr. N.C. Sahni and Mr. Pankaj Gupta, learned advocates appearing on behalf of the respective borrowers submitted that Section 13(4) of the NPA Act empowers the secured creditor to take possession of the secured immovable assets of the borrower on expiry of sixty days and notice served under Section 13(2) of that Act. It is pointed out that in many cases, the banks/FIs have taken actual physical possession whereas in other cases they have taken only a symbolic possession. Learned advocates submitted that in *Kalyani Sales Co.*, [AIR 2006 P & H 107] the High Court has rightly held that if physical possession is taken on expiry of sixty days, the remedy of application under Section 17 of the NPA Act by the borrower would become illusory and meaningless as the borrower or the person in possession would be dispossessed even before adjudication of the objections by the tribunal. Learned advocates further submitted that under Section 13(8), the bank/FI is prevented from selling the secured assets, if the dues of the secured creditor with all costs, charges and expenses are tendered to the secured creditor at any time before the date fixed for sale. Learned

advocates pointed out that under Rule 8(1) of the 2002 Rules, a secured creditor is empowered to take possession as per notice appended in terms of Appendix IV. That notice cautions the borrower not to deal with the property. Learned advocates submitted that notice in terms of Rule 8(1) of the 2002 Rules operates as attachment. It contemplates a symbolic possession. Learned advocates submitted that actual physical possession of immovable assets can be taken under Rule 8(3), in cases where there is a vacant plot or a property which is lying unattended, but where the immovable property is in actual physical possession of any person, the person in possession cannot be dispossessed by virtue of a notice under Rule 8(1); that actual physical possession is to be delivered only after confirmation of sale under Rule 9(6) read with Appendix V under which the authorised officer is empowered to deliver the property to the purchaser free from all encumbrances in terms of Rule 9(9) of the 2002 Rules. Learned advocates, therefore, submitted that the High Court was right in holding that the borrower or any other person in possession of the immovable property cannot be physically dispossessed at the time of issuing notice under Section 13(4) of the NPA Act so as to defeat the adjudication of his claim by the DRT under Section 17 of NPA Act, and that, physical possession can be taken only after the sale is confirmed in terms of Rule 9(9) of the 2002 Rules.”

“55. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt

(charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/ tribunals."

"56. Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realizing the secured assets. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4-A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It *inter alia* states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. (Emphasis supplied). Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured

creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the *status quo ante*. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for

preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL Rule 1 CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorized officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules."

8. The Apex Court, thereafter in its recent judgment in *Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and others*¹ has held that a lessee in whose favour there is registered agreement of lease executed prior to the mortgage has a right to be heard by the Magistrate in an application filed under Section 14 of the

¹ (2014) 6 SCC 1

SARFAESI, Act by the Bank and, to that extent, in the said case, set aside the ratio of the judgment in *Trade Well & Anr. vs. Indian Bank & Anr.*². The Apex Court, however, has held that in order to get protection from being dispossessed, the lessee has to show that there is a registered instrument of lease in his favour which was executed prior to the mortgage and only in that case his possession could be protected. The Apex Court in *Harshad Govardhan Sondagar* (supra), has observed in paragraphs 34 and 36 as under:-

“34. We have perused the aforesaid decision of this Court in *Transcore* (supra) and we find that in that case, the question whether the secured creditor, in exercise of its rights under Section 13 of the SARFAESI Act, can take over possession of the secured asset in possession of a lessee under a valid lease was not considered nor was the question whether there is anything in the SARFAESI Act inconsistent with the right of a lessee to remain in possession of the secured asset under the Transfer of Property Act considered. In our view, therefore, the High Court has not properly appreciated the judgment of this Court in *Transcore* (supra) and has lost sight of the opening words of Sub-section (1) of Section 13 of the SARFAESI Act which state that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with

2 2007 Cri. L.J. 2544

the provisions of the Act. The High Court has failed to appreciate that the provisions of Section 13 of the SARFAESI Act thus override the provisions of Section 69 or Section 69A of the Transfer of Property Act, but does not override the provisions of the Transfer of Property Act relating to the rights of a lessee under a lease created before receipt of a notice under Sub-section (2) of Section 13 of the SARFAESI Act by a borrower. Hence, the view taken by the Bombay High Court in the impugned judgment as well as in *Trade Well* (supra) so far as the rights of the lessee in possession of the secured asset under a valid lease made by the mortgagor prior to the creation of mortgage or after the creation of mortgage in accordance with Section 65A of the Transfer of Property Act is not correct and the impugned judgment of the High Court insofar it takes this view is set aside."

"36. We may now consider the contention of the Respondents that some of the Appellants have not produced any document to prove that they are bona fide lessees of the secured assets. We find that in the cases before us, the Appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant. Section 107 of the Transfer of Property Act provides that a lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made 'only by a registered instrument' and all other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the Appellants claim that they are entitled to

possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than an year from the date of the instrument or from the date of delivery of possession in his favour by the landlord.”

9. It is quite well settled that the Apex Court and various High Courts all along have taken a view that in the application which is filed under Section 14 of the SARFAESI Act by the Bank, principal borrower has no locus and it is a matter between the applicant/bank and the Court.

10. Respondents-Banks have relied upon the following judgments in support of their submissions.

*1. Mrs Sunanda Kumari vs. Standard Chartered Bank*¹

*2. Tensile Steel Ltd & Anr. vs. Punjab and Sind Bank and Ors.*²

1 2007 135 CompCas 604 Kar = ILR 2006 KAR 16

2 AIR 2007 Guj 126 = 2007 139 CompCas 359 Guj, 2007 79 SCL 570

3. *Vijaya Bank vs. Shameem Transport*¹
4. *M/s Trade Well, a Propertorship Firm Mumbai & Anr. Vs. Indian Bank & Anr.*²
5. *Indian Overseas Bank Vs. M/s Sree Aravindh Steels Ltd.*³
6. *State Bank of India Vs. M/s. Kathikkal Tea Plantations*⁴
7. *UCO Bank, Churchgate Branch Vs. Kanji Manji Kothari & Co.*⁵
8. *Authorized Officer, Indian Overseas Bank Vs. M/s Ashok Saw Mill*⁶
9. *United Bank of India vs. Satyawati Tondon and others*⁷
10. *Kanaiyalal Lalchand Sachdev Vs.State of Maharashtra*⁸
11. *General Manager, Sri Siddeshwara Co-operative Bank Limited & Anr. Vs. Ikbal & Ors.*⁹
12. *Mansa Synthetic Pvt. Ltd. & Others Vs. Union of India & Another*¹⁰

1 2007 137 CompCas 428 Kar = ILR 2006 KAR 4663, 2007 (1) KarLJ 309, 2007 76 SCL 235 Kar

2 2007 CRI.L.J. 2544

3 Judgment of Madras High Court in Crl. O.P. (MD) No.3102 of 2008 dated 09/09/2008

4 Judgment of Madras High Court in C.R.P. (P.D.) No.90 of 2009 and M.P. No.1 of 2009 dated 26/03/2009

5 2008(3) BomCR 290 = 2008(110) Bom.L.R. 744

6 Judgment of the Apex Court arising out of SLP (C) No.27399 of 2008 dated 16.7.2009

7 Judgment of the Apex Court arising out of SLP (C) No.10145 of 2010 dated 26/7/2010

8 (2011) 2 SCC 782

9 (2013) 10 SCC 83

10 2012 (2) D.R.T.C. 187

11. In the light of all this background, the submissions made by the learned Counsel appearing on behalf of the principal borrower will have to be examined.

12. Mr. Sanjay Jain and Mr. Mayur Khandeparkar the learned Counsels appearing on behalf of the Petitioners have strenuously urged that after the amendment to Section 14 of the SARFAESI Act, a statutory obligation and duty is cast on the Magistrate to be fully satisfied about the correctness of the averments made in the application. It is submitted that, therefore, the Magistrate has to pass a judicial order. Secondly, it is submitted that since adversarial consequences follow after the order is passed under Section 14 viz principal borrower/guarantor is dispossessed, he has a right to be heard. Reliance is placed on the following judgments:-

*1. Mathew Varghese vs. M. Amritha Kumar and Others*¹

*2. Vasu P. Shetty Vs. Hotel Vandan Palace and Others*²

*3. SBP & Co. vs. Patel Engineering Ltd and Another*³

*4. Rajesh Kumar and Others vs. Dy. CIT and Others*⁴

13. It is submitted by the learned Counsel appearing on

1 (2014) 5 SCC 610

2 (2014) 5 SCC 660

3 (2005) 8 SCC 618

4 (2007) 2 SCC 181

behalf of the Banks that the judgment in *Trade Well & Anr. vs. Indian Bank & Anr.*⁵ which was decided by Division Bench of this Court is *per incuriam* since it does not take into consideration the law laid down by the Apex Court in all these cases.

14. Before taking into consideration the rival submissions it will be necessary to consider the amended provisions of section 14 of the SARFAESI Act. Section 14 reads as under:-

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.-

(1) Whether the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him -

(a) take possession of such asset and documents relating thereto: and

⁵ 2007 Cri. L.J. 2544

(b) forward such assets and documents to the secured creditor:

[Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor declaring that -

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has

been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

[(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him-

(i) to take possession of such assets and documents relating thereto; and
(ii) to forward such assets and documents to the secured creditor.]

(2) For the purpose of securing compliance

with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any court or before any authority.”

15. The words in italic therefore were not there before section 14 was amended in 2013. In our view, amendment to Section 14 has not changed the character of the application which is made by the secured creditor, seeking assistance of the Magistrate in getting possession of the secured assets. The amendment only seeks to impose further obligation on the Bank (i) to file an application which is duly affirmed by the authorized Officer and (ii) to give the relevant information as provided in clauses (i) to (ix) of the proviso and all that the Magistrate is called upon to do is to check whether this information is supplied or not. In the event, the Magistrate finds that all the information is given in the application under Section 14 then he has no other option but to pass an order allowing the application under Section 14 and in the event he finds that some information is not provided then he has to return the application to the secured creditor and only after all the information is provided final

order under section 14 will be passed. Much emphasis has been laid on the words “after satisfying the contents of the affidavit” which are found in the amended provision. We are afraid that we are unable to accept the contention raised by the learned Counsels appearing on behalf of the Petitioners viz (i) that the inclusion of these words indicate that the Magistrate has now to adjudicate and decide the correctness or otherwise of the information which is given in the application and (ii) that by virtue of inclusion of these clauses, principal borrower gets right of taking part in these proceedings for the purpose of assisting the Magistrate. It is also not possible to accept the submission that since the section 14(3) contemplates a finality to the orders passed by the Magistrate, the principal borrower does not get any right to point out that the decision of the Bank of declaring the Account of the borrower as non-performing asset is not correct or the measures taken by the Bank are not in accordance with law and, therefore, under Section 14 alone the borrower would get a right to point out to the Magistrate that these measures not being taken properly, the order directing that the possession should be taken cannot be passed without giving hearing to him.

16. It will be necessary to briefly see the scheme of the SARFAESI Act. The objects and reasons of the Act clearly reveal that when the legislature found that the Recovery of Debts due to Banks and Financial Institutions Act, 1993 did

not serve the purpose of making quick recovery of secured assets from the borrowers/guarantors, the SARFAESI Act was passed. The Act therefore gives right to the Bank to take possession of the secured assets upon there being default in payment of secured debt or any installment thereof and if his Account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor can give notice in writing to the borrower to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor will have right to exercise all or any other rights under sub-section (4) of Section 13 of the SARFAESI, Act; one of which includes taking possession of the secured asset. The relevant provisions of section 13 of SARFAESI Act viz section 13(1), 13(2), 13(3), 13(3A), 13(4) read as under:-

“13. Enforcement of security interest.-

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset,

then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

[(3A) 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 fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided 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 17A.]

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely :-

(a) take possession of the secured assets

of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;]

(c) appoint any person (hereinafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing , any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt

- (5)
- (6)
- (7)
- (8)

(9).....
(10).....”

Sub-section (3A) to Section 13 was inserted by the Act 30 of 2004 with effect from 11-11-2004. The procedure, therefore, which is contemplated under Section 13 is that the secured creditor can give a notice in writing to the borrower to discharge in full his liability if (i) he makes any default in payment of secured debt or any installment thereof and (ii) his Account in respect of such debt is classified by the secured creditor as non-performing asset. Sub-section (3) of Section 13 provides that the notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. By virtue of insertion of Section (3A), right has been given to the borrower to make a representation or raise an objection and if such a representation is made, the secured creditor has to consider such representation or objection and if he finds that such representation or objection is not acceptable, he has to communicate within fifteen days of receipt of such representation the reasons for non-acceptance of the representation. Proviso to sub-section (3A) clearly provides that upon the secured creditor rejecting the representation of the borrower, no right would confer upon the borrower to

prefer an application to the Debts Recovery Tribunal under section 17. Sub-section (4) of Section 13 gives a right to the secured creditor to take possession of the secured assets of the borrower if he fails to discharge his liability within a period specified in sub-section (2). It is obvious therefore that right of the secured creditor to take possession flows from section 13(4) and not from Section 14 of the SARFAESI Act. Section 14 clearly contemplates that Chief Metropolitan Magistrate or District Magistrate can pass an order under Section 14 so as to assist the secured creditor to take possession of the secured assets and, if necessary, with the police help. Section 14 therefore is not a stage for adjudication of rights and liabilities between the parties before the Magistrate. Prior to the said amendment, it was a settled position in law that borrower did not have any locus when application under section 14 was filed by secured creditor in the Court of the Chief Metropolitan Magistrate or before the District Magistrate. Even after amendment to Section 14, no such right, therefore, can be read into the said provision merely because the words "after satisfying the contents of the affidavit" have been used in the proviso to Section 14 after amendment in 2013.

17. Reliance has been placed on the order dated 26/11/2014 passed by the Division Bench of this Court in Writ Petition No.10615 of 2014 (M/s Ritex Overseas vs. Dena Bank) and also on the order dated 15/12/2014 passed in Writ

Petition No.10692 of 2014 (Rangara Industries Pvt. Ltd. & Ors. vs. SICOM Ltd.) In our view, the said two orders have been passed without taking into consideration the settled position in law as held by the Apex Court from time to time and therefore the said observations are clearly *per incuriam*. One of us (V.M. Kanade, J.) was a member of the Division Bench which passed both these orders.

Mr. Sanjay Jain, the learned Counsel for the Petitioners submitted that since there is difference of opinion between the two Division Benches, the matter has to be referred to a larger Bench. This submission, in our view, is also without any substance since we have held that the said orders are *per incuriam*.

18. Mr. Jain the learned Counsel appearing on behalf of the Petitioners submitted that if hearing is not given to the borrower by the Chief Metropolitan Magistrate/District Magistrate, there will be a breach of principles of natural justice. He submitted that as a result of the order passed by the Chief Metropolitan Magistrate/District Magistrate, possession of the borrower is lost and, therefore, it entails adverse civil consequences. He submitted that it is quite well settled that whenever any order is passed by the judicial or quasi judicial authority and it entails adverse civil consequences then in such cases hearing has to be given to the said party who is going

to be adversely affected. Our attention was invited to the Judgment of the Apex Court in *A.K. Kraipak & Ors. vs. Union of India & Ors*¹ and in *Maneka Gandhi vs. Union of India*² and number of other judgments on the said issue including the judgment of the Apex Court in *SBP & Co. vs Patel Engineering Ltd and Anr.*³ He submitted that the judgment in the case of *M/s Tradewell* (supra) does not take into consideration the aforesaid judgments and, therefore, it is per incurriam.

We are unable to accept the said submissions, as we have pointed out hereinabove that the right to take possession flows from section 13(4) of the SARFAESI Act and not under section 14. The Apex Court has already held that the question of giving hearing to the borrower at the stage of taking possession under section 13(4) does not arise. All these contentions were also raised by the borrowers before the Apex Court in *Mardia Chemicals* (supra) and in *Transcore* (supra) and the Apex Court, after taking into consideration all these submissions, held that the question of giving hearing to the borrower at this stage does not arise since he has a remedy of filing an appeal under section 17 and the DRT has a right to restore the possession in the event it is found that the measures which are taken by the Bank are not proper and are not in accordance with law. There is no substance in the said submissions made by the learned Counsel appearing on behalf of the Petitioners.

1 AIR 1970 SC 150

2 AIR 1978 SC 597

3 (2005) 8 SCC 618

Mr. Sanjay Jain, the learned Counsel for the Petitioners also relied upon the Judgment in *Standard Chartered Bank vs. V. Noble Kumar & Others*¹. In our view, for the reasons stated above, ratio of this judgment will not be of any assistance to the Petitioners.

19. It is also urged by the learned Counsels appearing on behalf of the Petitioners that the provisions of section 13(2) and 13(4) of the SARFAESI Act are *ultra vires* to the constitution. The Apex Court, however, has already upheld the validity of the said Act in *Mardia Chemicals Ltd. vs. Union of India*². The judgment of the Apex Court is binding on this Court and, therefore, it is not open now for the Petitioners to re-urge the said issue before this Court.

20. These Petitions are, therefore, dismissed. At this stage, a request made for continuation of interim relief is declined. However, interim relief is continued till the order is uploaded.

(A.R. JOSHI, J.)

(V.M. KANADE, J.)

bdp

1 2013(2) D.R.T.C. 609 (S.C.)

2 AIR 2004 SC 2371