THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

And

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

WRIT PETITION No.35802 of 2014

ORDER: (per Hon'ble Sri Justice Ramesh Ranganathan)

The 1st petitioner herein borrowed money from the 1st respondent-Bank. Petitioners 2 and 3 stood as guarantors to the said loan. The 1st respondent-Bank initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act") by issuing notice under Section 13(2) thereof on 05.11.2009. They took possession of the subject property under Section 13(4) of the SARFAESI Act on 27.01.2010. The petitioners herein filed their objections under Section 13(3A) of the SARFAESI Act, thereafter, on 18.09.2012. The 1st respondent-Bank filed an application before the Metropolitan Magistrate under Section 14 of the SARFAESI Act who directed that physical possession of the property be taken.

While matters stood thus, the 1st respondent-Bank filed O.A.No.263 of 2011 before the Debt Recovery Tribunal, Hyderabad, (the 2nd respondent herein) for recovery of Rs.7,30,97,449/- with interest at the rate of 13.25% per annum. The petitioner alleges deletion of a few lines in one of the documents with which we are not concerned in the present writ petition. Suffice it to note that the petitioner has invoked the jurisdiction of this Court, under Article 226 of the Constitution of India, contending that, as the 1st respondent-Bank had already initiated proceedings under the SARFAESI Act, they must await completion of proceedings under the said Act before invoking the jurisdiction of the Debt Recovery Tribunal. Sri B.Chandrasen Reddy, learned counsel for the petitioners, would place reliance on Section 13(10) of the SARFAESI Act, Rule 11 of the SARFAESI Rules and Appendix 6 thereof, and the judgment of the Patna High Court, in ***M/s. Purnea Cold Storage vs. State Bank of***

India[1], in this regard.

On the other hand, Sri M.Narender Reddy, learned senior counsel appearing on behalf of the 1st respondent-Bank, would contend that the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the DRT Act") and the SARFAESI Act are complementary; the mere fact that the Bank has initiated proceedings under the DRT Act would not bar it from, simultaneously, invoking the provisions of the SARFAESI Act; likewise, the mere fact that the Bank has initiated proceedings under the SARFAESI Act against the security would not disable them from approaching the Debt Recovery Tribunal for recovery of the loan amount including proceeding against the personal guarantees given towards the said loan; while the Bank is entitled to proceed against the security under the SARFAESI Act, in case of dispute of title it is open to any person, who disputes the title, to approach the Debt Recovery Tribunal under Section 17 of the SARFAESI Act; and the mere fact that the Bank has invoked the provisions of SARFAESI Act does not bar them from, simultaneously, initiating proceedings before the Debt Recovery Tribunal under the DRT Act. Learned Senior Counsel would rely on ***Transcore vs. Union of India***[2] in this regard.

Section 13 of the SARFAESI Act deals with the enforcement of the security interest. Sub-section (10) thereof provides that, where the dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application, in the form and manner as maybe prescribed, to the Debts Recovery Tribunal having jurisdiction or a competent Court, as the case may be, for recovery of the balance amount from the borrower. Section 13(10) of the SARFAESI Act, in effect, enables the creditor, after realization of a part of the debt due from the sale of the secured asset, to make an application for recovery of the balance amount before the Debt Recovery Tribunal. Rule 11 of the SARFAESI Rules prescribes the procedure for recovery of the shortfall of secured debt, and the manner in which the application is required to be made is prescribed in Appendix 6 to the Rules.

Section 35 of the SARFAESI Act stipulates that the provisions thereof shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law. Section 37 of the SARFAESI Act stipulates that the provisions of the Act, or the Rules made thereunder, shall be in addition to, and not in derogation of various enactments including the DRT Act. It is evident from Section 37 of the Act that the provisions of the SARFAESI Act are in addition to and not in derogation of the DRT Act. In ***Transcore***[2], the Hon'ble Supreme Court held:

> *64. In the light of the above discussion, we now examine the doctrine of election. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. According to American Jurisprudence, 2d, Vol. 25, page 652, if in truth there is only one remedy, then the doctrine of election does not apply.* ***In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply****. Even according to Snell's Equity (Thirty-first Edition, page 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent.* ***In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application****.*
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> *65. In our view, the judgments of the High Courts which have taken the view that the doctrine of election is applicable are erroneous and liable to be set aside.*
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> *66. We have already analysed the scheme of both the Acts. Basically, the NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/ FI by virtue of the contract between the parties or by operation of common law principles or by law. The very object of Section 13 of NPA Act is recovery by non-adjudicatory process. A secured asset under NPA Act is an asset in which interest is created by the borrower in favour of the bank/ FI and on that basis alone the NPA Act seeks to enforce the security interest by non-adjudicatory process. Essentially, the NPA Act deals with the rights of the secured creditor. The NPA Act proceeds*

on the basis that the debtor has failed not only to repay the debt, but he has also failed to maintain the level of margin and to maintain value of the security at a level is the other obligation of the debtor. It is this other obligation which invites applicability of NPA Act. It is for this reason, that Sections 13(1) and 13(2) of the NPA Act proceeds on the basis that security interest in the bank/FI; needs to be enforced expeditiously without the intervention of the court/tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, NPA Act states that the enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor.

68. The object behind introducing the first proviso and the third proviso to Section 19(1) of the DRT Act is to align the provisions of DRT Act, the NPA Act and Order XXIII CPC. Let us assume for the sake of argument, that an O.A. is filed in the DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account. After filing of O.A., on account of non disposal of the O.A. by the tribunal due to heavy backlog, the bank finds that one of the three accounts has become sub-standard/ loss, in such a case the bank can invoke the NPA Act with or without the permission of the DRT. One cannot lose sight of the fact that even an application for withdrawal/ leave takes time for its disposal. As stated above, with inflation in the economy, value of the pledged property/ asset depreciate on day to day basis. If the borrower does not provide additional asset and the value of the asset pledged keeps on falling then to that extent the account becomes non-performing. Therefore, the bank/ FI is required to move under NPA Act expeditiously by taking one of the measures by Section 13(4) of the NPA Act. Moreover, Order XXIII CPC is an exception to the common law principle of non-suit, hence the proviso to Section 19(1) became a necessity.

69. For the above reasons, we hold that withdrawal of the O.A. pending before the DRT under the DRT Act is not a pre-condition for taking recourse to NPA Act. It is for the bank/FI to exercise its discretion as to cases in which it may apply for leave and in cases where they may not apply for leave to withdraw. We do not wish to spell out those circumstances because the said first proviso to Section 19(1) is an enabling provision, which provision may deal with myriad circumstances which we do not wish to spell out herein………" (emphasis supplied)

The law declared by the Supreme Court in ***Transcore***[2] is that the remedies under the SARFAESI Act and the DRT Act together constitute one remedy and, in any event, there is no repugnancy nor inconsistency between the remedy under the SARFAESI Act and the remedy under the DRT Act. It is true that the question, which arose for consideration, before the Supreme Court in ***Transcore***[2], was whether the secured creditor, having invoked the jurisdiction of the Debt Recovery Tribunal in the first instance, could thereafter have invoked the provisions of the SARFAESI Act. The Supreme Court held that the secured creditor could do so. The present case relates to a converse situation where the Bank has proceeded against the borrower first under the SARFAESI Act and now seeks to proceed against them under the DRT Act. If the remedies under SARFAESI Act and the DRT Act together are held to be one remedy, and there is no repugnancy or inconsistency between both these remedies, it matters little whether the secured creditor has invoked the provisions of the SARFAESI Act in the first instance and the DRT Act, later, or the DRT Act in the first instance and the SARFAESI Act later, as the remedies under both the enactments are complementary and not in the alternative.

The law declared by the Supreme Court is binding on the High Courts under Article 141 of the Constitution of India. Though the Patna High Court, in **M/s. Purnea Cold Storage**[1], referred to the judgment of the Supreme Curt in ***Transcore***[2], it was swayed by the provisions of Section 13(10) of the SARFAESI Act, and Rule 11 of the SARFAESI Rules read with Appendix 6 thereof. The remedy under Section 13(10) of the Act would be available to the secured creditor even if he chooses not to approach the Debt Recovery Tribunal and, instead, decides to await completion of proceedings under the SARFAESI Act and, after realization of the security, to approach the Debts Recovery Tribunal thereafter only to recover the balance amount still due. That does not mean that the Bank is disentitled from approaching the Debt Recovery Tribunal earlier. We must express our inability to agree with the opinion expressed, in

M/s. Purnea Cold Storage[1], by a Single Judge of the Patna High Court as, in our view, the said judgment is contrary to the law declared by the Supreme Court in ***Transcore***[2].

The writ petition as filed is misconceived and is, accordingly, dismissed. Miscellaneous petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

RAMESH RANGANATHAN, J

M.SATYANARAYANA MURTHY, J

09th February 2015.
JSU

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN
And
THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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Date: 09.02.2015

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[1] Civil Writ Jurisdiction Case No.8746 of 2012, dated 27.08.2012

[2] (2008)1 Supreme Court Cases 125