

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

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W.P.No.14252 of 2014

Between:

M/s.Deccan Chronicle Holdings Ltd, Secunderabad.

.... Petitioner

Vs.

\$ 1) IL&FS Trust Co. Ltd. rep. by its Chairman, Mumbai & Ors.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 10.12.2015.

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

1. Whether Reporters of Local newspapers may --
be allowed to see the Judgments?

2. Whether the copies of judgment may be marked -Yes-
to Law Reports/Journals

3. Whether Their Ladyship/Lordship wish to see the -Yes-
fair copy of the Judgment?

JUSTICE RAMESH RANGANATHAN

*** THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN**

AND

*** THE HON'BLE SRI JUSTICE S. RAVI KUMAR**

WRIT PETITION No.14252 of 2014

% Dated 10-12-2015

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Between:

M/s.Deccan Chronicle Holdings Ltd, Secunderabad.

.... Petitioner

Vs.

\$ 1) IL&FS Trust Co. Ltd. rep. by its Chairman, Mumbai & Ors.

-

! Counsel for the petitioner: Sri Vedula Venkata Ramana,

Learned Senior Counsel,

appearing for Sri Sharad Sanghi

^ Counsel for respondent No.1: Sri D.Prakash Reddy, Learned

Senior Counsel,

Counsel for respondents 2 to 4: Sri B.Narayana Reddy, Asst.

Solicitor General,

Sri Gandham Durga Bose

M/s.Trio Advisory Services LLP.

<GIST:

> HEAD NOTE:

? Citations:

1. (2015) 10 Comp. Cas 511
2. AIR 2015 SC 1168
3. 1971(3) SCC 550
4. AIR 1960 SC 610 = 1960(2) SCR 866
5. AIR 1992 SC 129
6. AIR 2004 SC 3757
7. (1974) 1 SCC 19 = AIR 1974 SC 1
8. (1990) 3 SCC 223
9. 320 US 591, 602 (1944)
10. AIR 1958 SC 538
11. (1994) 6 SCC 349
12. AIR 1967 SC 839
13. (2004) 4 SCC 311 = 2004 (4) ALT 4 (SC)
14. LAWS -TLMAD 2003-0-582: MANU/TN/0192/2003
15. (2013) 2 SCC 772
16. (2013) 5 SCC 470
17. (2011) 7 SCC 639
18. (1966) 5 SCC 125

19. (2013) 8 SCC 519
20. AIR 1955 SC 191
21. (2003) 9 SCC 358
22. (1990) 4 SCC 366
23. (2003) 7 SCC 83
24. AIR 1945 Calcutta 53
25. (1879) 11 Ch. D. 372
26. (1918) 2 Ch. 324

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

AND

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

WRIT PETITION No.14252 of 2014

-

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

M/s. Deccan Chronicle Holdings Limited (the petitioner herein) has invoked the jurisdiction of this Court seeking a writ of mandamus to declare the action taken by IL&FS Trust Company Limited (the first respondent) in issuing notice dated 15.07.2013, the subsequent possession notice dated 08.11.2013, and in contemplating taking physical possession under the orders in the Criminal M.Ps pending before the Chief Metropolitan Magistrates, Hyderabad and Vijayawada as illegal and arbitrary; to declare that the first respondent is not entitled to invoke the provisions of the SARFAESI Act; to declare the action taken by the first respondent under the SARFAESI Act, with respect to the assets of the petitioner-Company, as null and void; and to consequently direct the first respondent to restore symbolic possession of the properties of the petitioner taken over by it under the SARFAESI Act.

The petitioner publishes daily newspapers both in English and Telugu under the name and style of "Deccan Chronicle" English daily, and "Andhra Bhoomi" Telugu daily. The first respondent filed a petition before the Chief Metropolitan Magistrate, Hyderabad seeking assistance in taking physical possession of the

properties situated at Hyderabad. Likewise, they filed a petition before the Chief Metropolitan Magistrate, Vijayawada seeking assistance in taking physical possession of the properties of the petitioner in Krishna District.

Earlier the first respondent issued legal notice dated 09.04.2013 informing that they were acting as a debenture trustee for the debentures issued by the petitioner as referred to in the notice; they were acting as a debenture trustee for the benefit of the debenture holders/secured parties in terms of the debenture trust agreements dated 08.08.2005, 24.10.2005, 19.04.2008 and 31.12.2008; the petitioner had executed various documents, with respect to these debenture issues, including debenture trust agreements, debenture trust deeds, and other security and transaction documents for securing these debentures; the petitioner had created a charge, in favour of the first respondent, by way of mortgage and hypothecation of its moveable and immovable properties as detailed in the notice; the petitioner had also executed security documents in favour of the first respondent; the charges, so created by the petitioner in favour of the first respondent, were duly registered with the Registrar of Companies; the petitioner was in default in payment of interest, and repayment of amounts towards the Non-Convertible Debentures (NCDs) issued by them; as per Clause 19, of the Listing of Debt Securities Regulations issued by SEBI, the petitioner was required to inform the stock exchanges with regards non-payment of interest and principal for the listed issues, prior to occurrence of default, and if default was not rectified within three months from such default; the first respondent had called upon the petitioner to furnish details/information/documents, and to give confirmation in respect of payment of interest and redemption amounts due from time to time to the debenture holders, and whether the petitioner would be servicing interest payments on the next due dates with respect to the NCD issues; there was no proper response from them; the petitioner was requested to make necessary arrangement and rectify the default; the amounts due to the debenture holders viz., Life Insurance Corporation of India ("LIC" for short), Canara Bank ("CB" for short) and Oriental Bank of Commerce ("OBC" for short), towards interest and/or repayment under four debenture issues, along with the interest and penal interest as applicable, had not been paid by the petitioner, and was still outstanding; they were recalling the entire outstanding debenture payments along with interest and penal interest and liquidated damages, as may be applicable, as per the transaction documents; and the petitioner was called upon to make payment of the entire principal outstanding amounts, along with interest, further interest, penal interest and

liquidated damages thereon, under all the four debenture issues within 15 days, failing which they would initiate appropriate legal proceedings.

Thereafter the first respondent issued a notice, under Section 13(2) of the SARFAESI Act, on 15.07.2013 informing the petitioner that the amounts due to the debenture holders had not been paid, and was still outstanding; and if they failed to repay the debenture holders the outstanding amount, as stated in terms of the notice, action would be taken under Section 13(4) and other applicable provisions of the Act. The petitioner was informed that they were being put on notice, in terms of Section 13(13) of the SARFAESI Act, that they should not transfer, by way of sale, lease or otherwise, any of the secured assets, referred to in the notice, without obtaining their prior written consent. These notices were issued by the 1st respondent as the debenture trustee of the three debenture holders viz., LIC, CB and OBC.

Another notice was issued by the 1st respondent, under Section 13(4) of the Act, on 08.11.2013 regarding taking possession of the secured assets. The petitioner was informed that possession of the secured assets would be taken; they should remain present and hand over possession of the secured assets; and they should co-operate with the authorised officer of the first respondent. The petitioner was also informed that, if they did not co-operate or caused obstruction to the authorised officer of the first respondent in taking peaceful possession of the secured assets, the authorised officer reserved his right to approach the Chief Metropolitan Magistrate, or the District Magistrate, as contemplated under Section 14 of the SARFAESI Act. Separate notices were issued on behalf of the three debenture holders i.e., LIC, CB and OBC. As the petitioner did not hand over possession of the assets, the first respondent invoked the jurisdiction of the Chief Metropolitan Magistrates, Hyderabad and Vijayawada under Section 14 of the SARFAESI Act.

The petitioner would contend that the first respondent is a company registered under the Companies Act, 1956; they are not registered under Section 3 of the SARFAESI Act to be called a 'Securitisation Company'; they cannot invoke the provisions of the SARFAESI Act more so as they had issued a notice earlier on 09.04.2013 under the general civil law calling upon the petitioner to make payment within 15 days; they cannot approbate and reprobate; they are estopped from

claiming to the contrary; the first respondent is a trustee of the debenture holders viz., LIC, CB and OBC who are the main lenders; in the absence of any specific authority from the principal lender, action taken by the agent, i.e, the first respondent, is illegal and arbitrary; LIC, CB and OBC are not 'secured creditors' for the amounts lent to the petitioner; when the principals themselves are not 'secured creditors', no security interest can be said to have been created in favour of the agent i.e. the first respondent; even if such a security interest has been created, it is illegal, null and void as the first respondent is only a trustee of the amounts due to the original lenders; and action taken by the first respondent, under the provisions of Sections 13 and 14 of the SARFAESI Act, is illegal as action can be taken thereunder only by the secured creditors. Reliance is placed by the petitioner on the judgment of the Gujarat High Court in **Ionik Metallics v. Union of India**.

Despite reference in the writ affidavit, to the judgment of the Division bench of the Gujarat High Court, in **Ionik Metallics**¹, Sri Vedula Venkataramana, Learned Senior Counsel appearing on behalf of the petitioner, has rightly chosen not to place reliance thereupon as the said judgment has been overruled by the Supreme Court in **Keshavlal Khemchand and Sons Pvt. Ltd. v. Union of India**.

It is convenient to examine the rival submissions, urged by Learned Senior Counsel on either side, under different sub-heads.

I. IS THE 1ST RESPONDENT A "SECURED CREDITOR" WITHIN THE MEANING OF SECTION 2(ZD) OF THE SARFAESI ACT?

Sri Vedula Venkataramana, Learned Senior Counsel appearing on behalf of the petitioner-company, would submit that it is only a security interest, created in favour of a secured creditor, which can be enforced under the SARFAESI Act; the first respondent is neither a secured creditor within the meaning of Section 2(zd) of the SARFAESI Act nor has any security interest been created in favour of the banks and financial institutions who had subscribed to the debentures; clause (i) of Section 2(zd) is attracted only when a debenture trustee is appointed by the banks/financial institutions who had subscribed to the debentures of the petitioner; clause (iii) is attracted only when the debenture trustees hold securities (debentures) on behalf of

banks or financial institutions; the security must be held by the entity i.e., the bank/financial institution, and not its proxy ie the debenture trustee; and it is only then that such a trustee would become a “secured creditor” for the purposes of the SARFAESI Act.

On the other hand Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the 1st respondent, would submit that the expression ‘in whose favour’, in Section 2(zd)(iii) of the SARFAESI Act, refers to the debenture trustees and not to banks/financial institutions; and the 1st respondent-debenture trustee is a secured creditor under Section 2(zd)(iii) of the SARFAESI Act.

Section 2(zd) of the SARFAESI Act defines “**secured creditor**” to mean a bank or a financial institution. In the present case the debenture holders, who hold the debentures issued by the petitioner-company, are the LIC, OBC and CB. While LIC is a financial institution, both OBC and CB are banks. All these three entities are, therefore, secured creditors within the meaning of Section 2(zd) of the SARFAESI Act. Section 2(zd) of the SARFAESI Act includes, under Clause (iii) thereof, any other trustee holding securities on behalf of a bank or financial institution in whose favour security interest is created for the due repayment by any borrower of any financial assistance. The word "include" is used to enlarge the meaning of the preceding words and it is by way of extension and not with restriction. The word "include" is generally used, in interpretation clauses, in order to enlarge the meaning of words or phrases occurring in the body of the statute and, when it is so used, these words or phrases must be construed as comprehending not only such things as they signify according to their natural import but also those things which the interpretation clause declares that they shall include. (**Stroud's Judicial Dictionary, 5th ed. Vol. 3, p. 1263; C.I.T. Andhra Pradesh v. M/s Taj Mahal Hotel, Secunderabad; State of Bombay v. The Hospital Mazdoor Sabha; Regl. Director, ESIC v. High Land Coffee Works of PFX Saldanha & Sons; Tamil Nadu Kalyana Mandapam Assn. v. Union of India**).

As the word “include” is used in Section 2(zd), the meaning of the expression “secured creditor” must be held to have been given an extended meaning. It not only brings within its ambit banks and financial institutions but also a trustee holding securities on behalf of banks and financial institutions, in whose favour security interest is created for due repayment by any borrower of any financial assistance.

While the 1st respondent is neither a bank nor a financial institution, the question which necessitates examination is whether it qualifies to be called a “secured creditor” under the extended meaning given to the said expression under Section 2(zd)(iii) of the SARFAESI Act.

Clause (iii) of Section 2(zd) requires “security interest” to be created in favour of a trustee. Section 2(zf) defines “security interest” to mean right, title and interest of any kind whatsoever upon property created in favour of any secured creditor, and includes any mortgage, charge, hypothecation or assignment. A debenture trust deed was executed between the petitioner company and the 1st respondent, (IL&FS Trust Company Limited, a company incorporated by IL&FS Limited under the Companies Act, 1956). Clause 1(h) thereof defines “mortgaged properties” to mean the immovable and movable properties of the Company expressed to be granted, conveyed, transferred, assured and assigned, and all other properties made as specific security for the redemption of the principal amount of the debentures, interest and other monies owing, and intended to be secured, in terms of the provisions of Clause 8, and all its future properties agreed to be granted, conveyed, transferred, assured and assigned by the Company to the Trustees in terms of the provisions of Clause 7. Clause 1(n) defines “Security” to mean the security, by way of an English mortgage or any other form acceptable to the trustee, to be created over the mortgaged properties of the Company in favour of the trustee as security for the due repayment of the principal amount, interest, remuneration of the trustee and all fees, costs, charges, expenses and other monies payable by the Company in respect of the debentures.

Clause 4 of the debenture trust deed stipulates that the immovable properties, and the movable properties, of the company would be collectively referred to as “***the Mortgaged Properties***”; and with a view to meet its long term working capital requirements, and also for general corporate purposes, the Company proposed to issue and allot secured redeemable taxable cumulative non-convertible debentures. Clause 5 relates to “security” and stipulates that the debentures, interest thereon, trustees remuneration and all other monies relating thereto, shall be secured by way of first charge on the company’s properties as described in the first and second schedules to the debenture trust deed. Clause 6 of the debenture trust deed, which is the covenant for redemption, stipulates that the debentures, held in the dematerialised form, shall be taken as discharged on payment of the redemption

amount by the Company on maturity to the registered debenture holders whose name appears in the Register of Debenture holders on the Record Date; such payment will be a legal discharge of the liability of the Company towards the debenture holders; upon proof being given to its reasonable satisfaction that all the debentures, all interest, liquidated damages and all other monies secured have been paid or satisfied, the Trustee shall, at the request and cost of the Company, release, re-convey, re-assign, re-assure and re-transfer to the Company the mortgaged properties, or such part thereof, as may remain subject to the security hereby created.

Clause 7, which relates to Grant and Transfer, stipulates that (a) for the consideration aforesaid, and as security for the redemption and payment of the principal amount of the debentures, interest, default interest (where applicable), the Company does hereby – (i) grant, convey and assure unto the Trustees the properties being the lands more particularly described in the first schedule, together with all buildings, erections, godowns and constructions, to have and to hold unto and to the use of the Trustees absolutely upon trust, and subject also to the provision for redemption hereinafter mentioned, provided that it has not given, nor has it agreed to give, possession of the mortgaged properties to the Trustees until enforcement of the security. Clause 8 stipulates that one of the terms of the issue of debentures was that the repayment/redemption of the principal amount of the debentures, payment of interest, additional interest in case of default (where applicable), remuneration of the trustees and all costs, charges, expenses and other monies payable by the Company, in respect of the debentures, would be secured by a mortgage and charge in favour of the trustees, on the Company's mortgaged properties more particularly described in the first and second schedules to said deed.

Clause 10, which relates to events of default, stipulates that (i) If one or more of the events specified (called the event(s) of default) happen(s), the trustees may, in their discretion and by a notice in writing to the Company, declare the principal of, and all accrued interest on, the debentures to be due and payable forthwith; and the security created shall become enforceable (a) if default is committed in payment of the principal amount of the debentures on the due date(s); (b) if default is committed in payment of any interest on the Debentures on the due date(s). Clause 11 relates to trust of the mortgaged properties and, thereunder, the mortgaged properties shall

be, and remain, the security to the trustees for the due repayment of the principal amount of the debentures, premium or redemption, interest, default interest (where applicable), trustees' remuneration and all other monies payable under the debentures. The Trustees shall permit the Company, until the happening of one or more of the events, to hold and enjoy the mortgaged properties, and to carry on therein and therewith the business authorised by its Memorandum of Association. Upon the happening of any such event the Trustees may (but subject to the provisions as to notice where such provision is applicable in their discretion) enter upon or take possession of the mortgaged properties and, subject to and with the rights conferred on them by Clause 7, may, at their discretion, sell, call in, collect and convert into monies the same or any part thereof with full contract and either for a lump-sum or a sum payable by instalments or for a sum on account of a mortgage or charge for the balance.

Clause 13 stipulates that the Trustees had, at the request of the Company, agreed to act as the trustees for the benefit of the holders of the debentures provided in the debenture trust deed. Clause 14 relates to enforcement of security and stipulates that, on the occurrence of any of the events of defaults as set out in the Trust Deed, the Trustees may give notice to the Company that the debentures are, and they shall immediately become, due and payable for their principal amount together with accrued interest as provided in the Trust Deed. At any time after the Debentures or any of them have become repayable, and have not been repaid, the Trustees may at their discretion, and without further notice, institute such proceedings against the Company as they may think fit to enforce repayment thereof together with accrued interest and all other monies payable in respect thereof. The third schedule to the Trust deed are the financial covenants and conditions. Clause 3 thereunder prescribes the redemption period, and requires the long term debentures to be redeemed on equal instalments on the 8th, 9th and 10th year from the date of allotment.

It is clear, from the above referred clauses of the debenture trust deed, that the immoveable properties of the petitioner-company were mortgaged in favour of the 1st respondent which, in terms of the debenture trust deed, holds securities (mortgaged properties) on behalf of the debenture holders i.e., LIC, OBC and CB

which are financial institutions and banks. A charge (security interest) was created, over the immovable and moveable properties of the petitioner-company, in favour of the 1st respondent for the due repayment of the principal and interest due on redemption of the debentures, of the petitioner-company, subscribed earlier by LIC, OBC and CB. Section 2(f) of the SARFAESI Act defines “borrower” to mean any person who has been granted financial assistance by any bank or financial institution, or who has created any mortgage or pledge or security for the financial assistance granted by any bank or financial institution. Section 2(k) defines “financial assistance” to mean, among others, any debentures subscribed by any bank or financial institution. As the debentures of the petitioner company have been subscribed by CB, OBC and LIC, which are banks/financial institutions, these three entities must be held to have rendered financial assistance to the petitioner which would, in terms of Section 2(f), be a borrower both on account of its being granted financial assistance by these three entities, and for having created a charge, over its movable and immovable properties, in favour of the first respondent.

In the present context, the “security agreement”, as defined in Section 2(zb), is the debenture trust deed. Section 2(zc) defines “secured asset” to mean the property on which security interest is created. The moveable and immoveable properties on which the petitioner has created a charge, in favour of the 1st respondent, are the “secured assets”. Section 2(ze) defines “secured debt” to mean a debt, which is secured by any security interest, which, in the present context, refer to the amount payable on the redemption of the non-convertible debentures subscribed by the three entities. Section 2(zf) defines “security interest” to mean right, title, interest of any kind whatsoever upon property created in favour of any secured creditor and includes a mortgage, charge, hypothecation or assignment. In terms of the security agreement (debenture trust deed), security interest (charge on the movable and immovable properties of the petitioner) is created in favour of a secured creditor (debenture trustee).

The words “***in whose favour security interest is created***”, in Section 2(zd) (iii), refers to the trustee, and not to the bank/financial institution. As the petitioner has created a charge, on its movable and immovable properties, a security interest is created in favour of the 1st respondent for due repayment of the amount payable, towards the principal and interest, on redemption of the debentures subscribed by LIC, CB. and OBC. As a security interest is created in its favour for the due

repayment by the petitioner, of the financial assistance (subscription of debentures) extended by LIC, CB and OBC, and as it holds the “security” on behalf of banks or financial institutions (CB, OBC and LIC), the 1st respondent fulfils all the conditions stipulated in Section 2(zd)(iii) of the SARFAESI Act to become the “secured creditor” of the petitioner company. As the debenture trust deed itself stipulates that the security created by the petitioner in favour of the 1st respondent is to be held for the beneficial interest of LIC, CB and OBC, it matters little that the 1st respondent-debenture trustee has not, otherwise, stated that the security is held by it on behalf of banks/financial institutions.

II. IS THE CLASSIFICATION OF DEBENTURE HOLDERS, BETWEEN THOSE WHICH ARE BANKS/FINANCIAL INSTITUTIONS AND THOSE WHICH ARE NOT, IN VIOLATION OF ARTICLE 14 OF THE CONSTITUTION?

Sri Vedula Venkataramana, Learned Senior Counsel appearing on behalf of the petitioner, would submit that the SARFAESI Act should receive strict interpretation, and not a liberal construction, in view of its consequences; the securities held by the debenture trustee is for a class of debenture holders; there cannot be a further classification among debenture holders between those which are banks and financial institutions and those which are not; such a classification cannot be made the basis for invoking the provisions of the SARFAESI Act, and thereby securing preferential treatment for those debenture holders which are banks and financial institutions; debenture holders who are not banks/financial institutions, though similarly situated to debenture holders which are banks and financial institutions, may only be entitled to invoke the contractual provisions, while debenture holders which are banks/financial institutions would be able to invoke the provisions of the SARFAESI Act; that is not what Parliament intended while enacting the SARFAESI Act; no elevated right is conferred on debenture holders which are banks/financial institutions; the first respondent does not hold securities of the petitioners on behalf of the debenture holders as a whole; the first respondent does not even hold all the securities on behalf of banks/financial institutions; this is evident from the notice issued by the first respondent under Section 13(2) of the SARFAESI Act; to attract the provisions of the SARFAESI Act, the security should be held on behalf of banks or financial institutions; the trustee should specifically state that the security is held on behalf of banks/financial institutions; in the present

case, the debenture trust deed does not stipulate that the securities are held by the first respondent on behalf of banks/financial institutions; and the trust deed does not refer to the name of any of the entities on whose behalf securities are held by the first respondent.

On the other hand Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that the petitioner has not even stated, in the writ affidavit, that the debenture trustee holds debentures not only on behalf of LIC, CB and OBC, but also on behalf of others; the subject debenture trust deeds exclusively deal with these three entities alone; the object of the SARFAESI Act is to protect the interests of banks/financial institutions, and a purposive interpretation should be given thereto; none of the submissions made across the bar, on behalf of the petitioners, are referable to the grounds raised in the Writ Petition; nowhere has the petitioner stated that the debenture trustees also hold security interest on behalf of debenture holders other than the aforesaid three entities; the first respondent holds debentures only on behalf of these three banks/financial institutions; the trust deed refers to the Board resolutions of the petitioner which clearly show that these debentures have been issued exclusively to these financial institutions/banks; the debenture trust deed creates a security interest, on the debentures trustee, on behalf of the debenture holders i.e. the three banks/financial institutions; from ground (e) of the Writ Petition, it is evident that the petitioner has understood that the first respondent is acting in the interest of the debenture holders; and the object of appointing debenture trustees, under the Companies Act, is to protect the interest of debenture holders which, in the present case, are only these three entities.

The petitioner company, in its Board of Directors meeting held on 22.06.2005, noted that, pursuant to the applications made by them, L.I.C. had, by letter dated 27.05.2005, agreed to provide financial assistance by way of subscription to 8% secured redeemable non-convertible debentures of the face value of Rs.100/- each aggregating to Rs.3000/- lakhs, on the terms and conditions detailed in the sanction letter, in the proposed issue of 8% secured redeemable non-convertible debentures of the face value of Rs.100/- each aggregating to Rs.30 crores proposed to be made by the company by way of Private Placement for meeting their long term working capital requirements. The Board of Directors of the petitioner-company resolved to appoint IL&FS Trust Company Limited (the first respondent) as the debenture

trustee, and to complete the formalities of trusteeship documentation and security creation in favour of the debenture trustee as stipulated in the sanction letter; to avail financial assistance from LIC by way of subscription to 8% secured redeemable debentures aggregating to Rs.30/- crores, on the terms and conditions detailed in the letter dated 27.05.2005 received from the LIC; and the company would constitute 8% secured redeemable NCDs of the face value of Rs.100/- each aggregating to Rs.30 crores for the purpose of issue of allotment on private placement basis.

Thereafter, the petitioner informed the LIC, by its letter dated 29.06.2005, that, pursuant to their application for secured debentures, they were being allotted debentures; and the terms and conditions of the debentures would be as per the subscription agreement executed by the LIC and the petitioner. In their meeting held on 29.06.2005, the Board of Directors of the petitioner-company resolved to allot 300 8% long term fully secured non-convertible debentures of Rs.10 lakhs each, for a total sum of Rs. 30 crores, in favour of LIC. Similar resolutions were passed for the financial assistance extended by CB and OBC in the form of subscription of the debentures of the petitioner-company.

It is evident, from the resolution of the Board of Directors of the petitioner company in its meeting held on 22.06.2005, that non-convertible debentures were proposed to be issued on private placement, and not by way of a public issue. The contention, urged for the first time across the bar, is that the 1st respondent holds securities on behalf of debenture holders as a whole, and not merely on behalf of debenture holders which are banks/financial institutions; and the classification of debenture holders, between those which are banks and financial institutions and those which are not, is in violation of Article 14 of the Constitution of India.

In the absence of a specific plea in the writ affidavit, that the debenture trustee represents the interest of not only these three entities (LIC, CB & OBC), but also other debenture holders, these contentions cannot be examined in these writ proceedings. From the above referred clauses of the debenture trust deed, and the resolution of the Board of directors of petitioner company, it does appear that the 1st respondent was appointed as a debenture trustee for the debentures issued in favour of these three entities alone, and none else. The three entities, all of whom have subscribed to the debenture issued by the petitioner- company, have not even

been arrayed as respondents in this Writ Petition. It would be wholly inappropriate, therefore, for us to presume that the 1st respondent is a debenture trustee representing not only the interests of these three entities, but other debenture-holders also.

As the contention regarding the validity of classification of debenture-holders, all of whom are represented by the debenture trustee, is based on the premise that the very same debenture trustee represents the interest of these three banks and financial institutions, and other debenture holders who are not banks and financial institutions, it would not be proper for us to examine whether such a classification is in violation of Article 14, in the absence of even a plea in this regard in the writ affidavit. In order to establish that the protection of the equality clause has been denied to them, it is not enough for the petitioners to say that they have been treated differently from others, not even enough that a differential treatment has been accorded to them in comparison with others similarly circumstanced. Discrimination is the essence of classification and does violence to the constitutional guarantee of equality only if it rests on an unreasonable basis. It is for the petitioners to show that the classification is unreasonable and bears no rational nexus with its purported object. (**State of J&K v. Triloki Nath Khosa**). The person assailing the classification "carries the heavy burden of making a convincing showing that it is invalid because it is unjust and unreasonable in its consequences, (**Shri Sitaram Sugar Co. Ltd. v. Union of India; Federal Power Commission v. Hope Gas Co.**), or that there has been a clear transgression of the constitutional principles. (**Ram Krishna Dalmia v. Justice S.R. Tendulkar; Gauri Shanker v. Union of India**).

Where a party seeks to impeach the validity of a classification on the ground that they offend Article 14, the burden is on him to plead and prove the infirmity, to set out facts necessary to sustain the plea of discrimination, and to adduce

[image]

“cogent and convincing evidence” to prove those facts for “there is a presumption that every factor which is relevant or material has been taken into account in formulating the classification. Unless the classification is unjust on the face of it, the onus lies upon the party attacking the classification to show, by pleading and placing the necessary material before the Court, that the said classification is unreasonable and is violative of Article 14 of the Constitution. (**Triloki Nath Khosa**⁷; **G.D. Kelkar v. Chief Controller of Imports and Exports**). In the absence of even a plea in this regard in the writ affidavit, the petitioner cannot be said to have discharged the onus which lies heavily on them to establish that the classification is invalid.

Even otherwise, the SARFAESI Act has been enacted to evolve means for faster recovery of non-performing assets of banks, financial institutions and Securitisation and Reconstruction Companies, and not any other class of creditors. The unrealized dues of banking companies and financial institutions, utilizing public money for advances, are mounting and it was considered imperative, in view of recommendations of Expert Committees, to have such a law which may provide speedier remedy before any major fiscal setback occurs, and for improvement of the general financial flow of money necessary for the economy of the country. Such legislation, i.e., the SARFAESI Act, is in public interest, and the individual interest shall be subservient to it. (**Mardia Chemicals Ltd. v. Union of India**). Financial liquidity is essential to ensure that effective financial assistance is extended to industries by banks/financial institutions, failing which large sums of money would be blocked creating circumstances which would not only retard economic progress, but would also have consequential ill effects. The normal process, of recovery of debts through courts, is lengthy and ill-suited. It cannot be said that a step, taken to evolve means for faster recovery of NPAs, is not called for. Financial liquidity is

essential for a growth-oriented economy. (**Mardia Chemicals Ltd.**¹³). The mere fact that the general class of debenture holders are required to invoke the contractual provisions, while debenture holders, which are banks and financial institutions, can invoke the provisions of the SARFAESI Act, does not mean that such a classification is in violation of Article 14 of the Constitution of India.

Article 14 forbids class legislation, and not a reasonable classification. What is forbidden is discrimination. Persons similarly situated must be similarly treated. Where, however, the persons are not similarly situated, there is no prohibition to treat them separately, provided of course there is a reasonable nexus between the basis of the classification and the object to be achieved. (**K. Muthusamy v. Government of Tamilnadu**). A valid classification, based on a just objective, is truly a valid discrimination. The result to be achieved by the just objective presupposes the choice of some for differential consideration/treatment over others. Legally, the test for a valid classification may be summarized as a distinction based on a classification founded on an intelligible differentia, which has a rational relationship with the object sought to be achieved. (**Kallakurichi Taluk Retired Officials Assn. v. State of T.N.**). Every instance of discrimination does not necessarily fall within the ambit of Article 14 of the Constitution. Discrimination means an unjust, an unfair action in favour of one and against another. It involves an element of intentional and purposeful differentiation and further an element of unfavourable bias; an unfair classification. (**Rajasthan State Industrial Development & Investment Corporation v. Diamond & Gem Development Corporation Ltd; The State of M.P. v. Narmada Bachao Andolan; [Madhu Kishwar v. State of Bihar](#)**).

Classification must be truly founded on substantial differences which distinguish persons grouped together from those left out of the group and such differential attributes must bear a just and rational relation to the object sought to be achieved. (**State of Maharashtra v. Indian Hotel & Restaurants Assn.; Triloki Nath Khosa**⁷). To pass the test of permissible classification two conditions must be fulfilled, namely, (i) that the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (ii) that differentia must have a rational relation to the object sought to be achieved by the statute in question. The classification may be founded on different basis. What is necessary is that there must be a nexus between the basis of the classification and the object of the provision under consideration.

(Indian Hotel & Restaurants Assn.¹⁹; Budhan Choudhry v. State of Bihar).

Classification, to be valid under Article 14, need not necessarily fall within an exact or a scientific formula for exclusion or inclusion of persons or things. There is no requirement of mathematical exactness or for doctrinaire tests to be applied for determining the validity, as long as it is not *palpably* arbitrary. **(Indian Hotel & Restaurants Assn.¹⁹; Ram Krishna Dalmia¹⁰; Welfare Association, A.R.P. v. Ranjit Pl.Gohili; Shashikant Laxman Kale v. Union of India).** So long as there is a nexus, between the basis of the classification and the object sought to be achieved, the classification is valid. **(The State of Madhya Pradesh v. Gopal D. Tirthani).**

The object sought to be achieved by the SARFAESI Act is speedier recovery of NPAs of banks/financial institutions. Debenture holders, which are banks and financial institutions, constitute a class, distinct and apart from other debenture holders, and the speedier remedy, provided by the SARFAESI Act, for recovery of their mounting dues, is to reduce the fiscal burden of these banks/financial institutions created by its huge non-performing assets which is eroding its liquidity. The differentia, between debenture holders which are banks/financial institutions and those which are not, has a rational relation to the object sought to be achieved by the SARFAESI Act which is speedier recovery of the amounts due to banks and financial institutions consequent on the defaulter's account being declared as a non-performing asset. The classification satisfies the requirement of a valid classification under Article 14 of the Constitution and the challenge, to its validity, must fail.

III. SECTIONS 13(2) & (4) AND SECTION 14 OF THE SARFAESI ACT: ITS SCOPE:

Sri Vedula Venkataramana, Learned Senior Counsel appearing on behalf of the petitioner, would submit that, under Section 13(2) of the SARFAESI Act, it is the secured creditor which should classify the debt as a non-performing asset; Section 2(o) of the SARFAESI Act enables only a bank or a financial institution to classify an account as a non-performing asset; it is only in cases where the secured creditor is empowered to declare the assets as non-performing, would Section 13(2) be attracted; as the debenture holders do not have any security interest, they cannot be

permitted to invoke the provisions of the Act through another i.e, the debenture trustee; the three entities i.e, LIC, CB and OBC are not “secured creditors” as no security interest is held by them in the petitioner-company; the word ‘borrower’ in Section 2(zd)(iii) refers to a borrower as defined in Section 2(f) wherein ‘borrower’ is defined to mean any person who has been granted financial assistance by any bank or financial institution; the three entities had only subscribed to the debentures issued by the petitioner company; the petitioner cannot, therefore, be said to be a “borrower” within the definition of Section 2(f) of the SARFAESI Act; the Section 13(2) notice refers only to the debenture holders, and not to the debenture trustee; in any event, no security interest is created in favour of the debenture holders; and, as such, the first respondent cannot invoke the provisions of the SARFAESI Act.

On the other hand Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the 1st respondent, would submit that all these three institutions i.e., L.I.C, C.B and O.B.C, which are banks and financial institutions, have classified the debt of the petitioner as a non-performing asset; and the contention that the first respondent should avail the remedy of a Civil Suit for recovery of the amount due, and not invoke the provisions of the SARFAESI Act, is misplaced as Section 34 bars the remedy of a Suit.

Section 13 of the SARFAESI Act relates to enforcement of security interest. Under sub-section (1) thereof, 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 court or tribunal, by such creditor in accordance with the provisions of the Act. As the mortgaged properties of the petitioner-company constitutes “security interest” created, in favour of the 1st respondent (secured creditor), the security interest may be enforced, without the intervention of the Court or Tribunal, by such creditor (1st respondent) in accordance with the provisions of the SARFAESI Act. In view of the non-obstante clause therein, Section 13(1) of the SARFAESI Act overrides the provisions of Section 69 of the Transfer of Property Act wherein it is said that in no cases, other than those enumerated in clauses (a), (b) and (c), a mortgage shall be enforced without the intervention of the Court. Once the said condition, in Section 69 of the Transfer of Property Act, has been overridden by the special enactment,

namely, the SARFAESI Act, irrespective of the kind of mortgage, the security interest is liable to be enforced without the intervention of the Court in accordance with the provisions contained in Section 13 of the SARFAESI Act. (**Mardia Chemicals Ltd.**¹³). It is unnecessary, therefore, for the 1st respondent to file a civil suit to redeem the mortgage, and the provisions of the SARFAESI Act can be invoked for enforcement of the security interest.

By their letter dated 21.06.2013, the LIC informed the debenture trustee (the first respondent) that they were conveying their consent to initiate action under the SARFAESI Act, on their behalf, in respect of the 10% non-convertible debentures of Rs.105 crores, wherein LIC's holdings was Rs.75 crores. They also requested the debenture trustee to initiate action in respect of the three NCDs, totalling to Rs.100 crores, wherein LIC was the sole debenture holder. Similar letters were addressed by the Canara Bank to the debenture trustee on 07.03.2013, and by Oriental Bank of Commerce on 20.06.2013.

The Debenture Trustee issued notice dated 15.07.2013 informing the petitioner that they, in their capacity as a debenture trustee for the unlisted Secured Non Convertible Debentures issued by the petitioner aggregating to Rs.1050 million, were issuing notice under Section 13(2) of the SARFAESI Act; the NCDs were secured by hypothecation of all the movable properties, including plant and machinery, and rights under insurance contracts relating to such properties of the company, as described in the Schedule A, and by mortgage of immoveable property of the Company more particularly described in Schedule B; charges, by way of hypothecation and mortgage on the secured assets of the Company, had been created in favour of the debenture trustee for securing due repayment of the outstanding amounts under the NCDs to the debenture holders; the details of the secured assets were described in the first Schedule of the debenture trust deed, and were given in Schedules A and B; and the charges so created by the petitioner on the secured assets, in favour of the debenture trustee, were duly registered with the Registrar of Companies.

Section 117B of the Companies Act, 1956 relates to appointment of debenture trustees and their duties. Under sub-section (1) thereof, no company shall issue a prospectus, or a letter of offer, to the public for subscription of its debentures, unless the company has, before such issue, appointed one or more debenture trustees for

such debentures and the company has, on the face of the prospectus or the letter of offer, stated that the debenture trustee or trustees have given their consent to the company to be so appointed. Section 117B(2) stipulates that, subject to the provisions of the Act, the functions of the debenture trustees shall generally be to protect the interest of the holders of debentures (including creation of securities within the stipulated time) and to redress the grievances of the holders of debentures effectively. Section 117B(3) enables a debenture trustee to take such steps as he may deem fit to ensure that the assets of the company issuing the debentures, and each of the guarantors, are sufficient to discharge the principal amount at all times; to ensure that the company does not commit any breach of the covenants and provisions of the trust deed; and to take reasonable steps to remedy any breach of the covenants of the trust deed, or the terms of issue of the debentures. Section 117-C(3) stipulates that the company shall pay interest, and redeem the debentures, in accordance with the terms and conditions of their issue. The aforesaid provisions of the Companies Act, 1956 requires the Company, which issues debentures, to appoint one or more debenture trustees before it issues debentures. It is because of the mandate of Section 117-B of the Companies Act are debenture trustees required to be appointed to protect the interests of debenture holders, and for creation of security interest in their favour.

These securities are held by the debenture trustee for the beneficial interest of the debenture holders. Debentures are very often secured by a trust deed by which property is mortgaged to the trustees, for debenture holders, upon trust if the company makes default, to sell and pay off the debentures. Debentures are frequently constituted and secured by a trust deed conveying property of the company to trustees in favour of the debenture holders, regulating the respective rights of the company and the debenture holders and containing a covenant for the payment of a specified capital sum and for payment of interest, and gives the trustees security by way of a mortgage or charge. When debentures are issued under a trust deed, the debenture holders are the cestuis que trust of the trust created by the deed. In case a charge is created in favour of the trustees, the debenture-holders are mere beneficiaries of the charge, and not the charge holder. It is a practice well settled, and which has been recognised and followed for a long period, that debentures are issued under a trust deed by which they are constituted, and that the trust deed is a mortgage over the company's properties when they are conveyed or transferred to trustees to secure payment to the debenture holders of

the principal sum and interest due from the company. (**Commissioner of Income Tax, Bengal v. Messrs. Chowringhee Properties Ltd; N. N. Sircar and S. C. Sen** [The Indian Companies Act](#); **Palmer's Company Law, 17th Edition**; **In re Uruguay Central and Hygeuritus Railway Co. of Monte Video**). Where a company makes an issue of debentures which it secures by a debenture trust deed, and property is mortgaged to be registered in the names of the trustees of the deed, the trustees are entitled to exercise the powers of mortgagees. (**Siemens Brothers Dynamo Works Limited v. Burns**). The trustees, and not the company, are the mortgagees, and the former can enforce the mortgage. They would do so as trustees for, and for the benefit of, the debenture holders. (**Messrs. Chowringhee Properties Ltd**²⁴).

Section 13(2) stipulates that where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of a secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as a 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 the notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). As noted hereinabove banks, financial institutions and the debenture trustee are all secured creditors under Section 2(zd) of the Act. Security cannot be created in favour of the banks/financial institutions, for the financial assistance extended by them in the form of subscription of the debentures issued by the borrower company, in view of Section 117-B of the Companies Act which requires the borrower-company to appoint a debenture trustee before it issues debentures, and to create a security interest in their favour for due repayment of the amount due on redemption of the debentures. In view of this statutory requirement, while banks/financial institutions can declare the account of a borrower, who commits default in repayment of a secured debt, as a non-performing asset, they cannot issue the notice under Section 13(2) as no security interest is created in their favour to be enforced in accordance with the provisions of the SARFAESI Act. It is the debenture trustee, in whose favour a security interest is created, which can issue the notice under Section 13(2) calling upon the borrower to discharge its liabilities to the bank/financial institution.

It is no doubt true that Section 13(2) of the SARFAESI Act requires the account of a borrower, in respect of a secured debt, to be classified by the secured creditor as a non-performing asset, before the secured creditor can require the borrower, by notice in writing, to discharge in full his liabilities to the secured creditor. The petitioner-company has been granted financial assistance, in the form of subscription of its debentures, by banks and financial institutions. As such it is a “borrower” within the meaning of Section 2(f) of the Act. Section 2(j) defines “default” to mean non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as a non-performing asset in the books of accounts of the secured creditor. On their failure to repay the principal and interest due on the redemption of debentures, the petitioner has committed “default” in terms of Section 2(j) of the Act consequent upon which the petitioner’s account with LIC, CB and OBC appears to have been classified as a “non-performing asset” in their books of accounts. The security interest for redemption of the debentures, and for repayment of the principal and interest to the debenture holders, is however created only in favour of the debenture trustee.

As financial assistance to borrowers is extended only by banks/financial institutions, it is only they who can classify the account of the borrower as a non-performing asset. As no security interest is created in their favour, banks and financial institutions cannot issue the notice, under Section 13(2) of the SARFAESI Act, requiring the borrower to discharge, in full, his liability to the secured creditors (banks/financial institutions). It is only the debenture trustee, in whose favour a security interest is created by the borrower, who can issue the notice under Section 13(2) of the Act and it is for this reason that LIC, CB and OBC had requested the 1st respondent to issue the said notice.

As banks/financial institutions, and the debenture trustee, are “secured creditors” within the meaning of Section 2(zd) of the Act, reference to a “secured creditor”, in Section 13(2), is both to the banks/financial institutions and to the debenture trustee. In so far as Section 13(2) requires the account of a borrower, who makes default in repayment of a secured debt, to be classified as a non-performing asset, reference to the “secured creditor” is to the banks and financial institutions which have extended financial assistance to the borrower. On the other hand 13(2), in the context of issuing a notice in writing requiring the borrower to discharge, in full,

his liability, refers to the debenture trustee as a “secured creditor”. Reference to a “secured creditor” in Section 13(2), in the context of requiring the borrower to discharge in full his liability, is to banks/financial institutions.

To para-phrase Section 13(2), if the borrower (petitioner company), who is under a liability to a secured creditor (LIC, CB & OBC) under a security agreement (debenture trust deed), makes any default in repayment of the secured debt, and his account in respect of such debt is classified by the secured creditor (LIC, CB and OBC) as a non-performing asset, then the secured creditor (debenture trustee) may require the borrower (petitioner company), by notice in writing, to discharge in full his liabilities to the secured creditor (LIC, CB & OBC) within sixty days from the date of the notice, failing which the secured creditor (debenture trustee) shall be entitled to exercise all or any of the rights under sub-section (4). Section 13(4) stipulates that, 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 measures specified therein to recover the secured debt, including to take possession of the secured assets of the borrower, and to exercise the right to transfer by way of lease, assignment or sale for realizing the secured asset. Action taken by the 1st respondent as a debenture trustee, to take possession of the secured assets of the petitioner company, is authorised by Section 13(4) of the SARFAESI Act.

Under Section 14(1), where 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 the SARFAESI 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 (b) forward such assets and documents to the secured creditor. Section 14(1)(A) stipulates that the District Magistrate, or the Chief Metropolitan Magistrate, may authorize 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. Section 14(2) stipulates that, for the

purpose of securing compliance with the provisions of Section 14(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. If the defaulting borrower fails to hand over possession of the mortgaged properties, on a notice being issued to it under Section 13(4), it is open to the debenture transfer to invoke the provisions of Section 14(1) of the Act. In the present context, Section 14(1) enables the 1st respondent, as the debenture trustee and a secured creditor, to request the Chief Metropolitan Magistrate, Hyderabad and Vijayawada, within those jurisdiction the secured assets are situated, to take possession thereof, and forward such assets to it.

IV. ALTERNATIVE REMEDY:

Sri D. Prakash Reddy, Learned Senior Counsel appearing on behalf of the first respondent, would submit that the petitioner has an effective alternative statutory remedy under the provisions of the SARFAESI Act.

While the petitioner has an effective alternate statutory remedy under Section 17 of the SARFAESI Act, against the action taken by the 1st respondent under Section 13(4) of the Act, we see no reason to now relegate the petitioner to the statutory remedy under Section 17 of the Act, as we have dealt with all their contentions and have rejected them as devoid of merits.

V. CONCLUSION:

Viewed from any angle, the notice issued by the 1st respondent under Section 13(2), the action taken by them under Section 13(4), and the request made by them to the Chief Metropolitan Magistrate, Hyderabad and Vijayawada under Section 14 of the Act, are strictly in accordance with the provisions of the SARFAESI Act and do not suffer from any illegality. It would be wholly inappropriate, therefore, for us to interdict the action taken by them to recover, from the petitioner-company, the principal and interest due on the redemption of debentures, including by seeking the assistance of the Chief Metropolitan Magistrate, Hyderabad and Vijayawada, under Section 14(1) of the Act, to take possession of the secured assets of the petitioner company.

The Writ Petition as filed is devoid of merits and is, accordingly, dismissed.

However, in the circumstances, without costs. The miscellaneous petitions pending, if any, shall also stand dismissed.

RAMESH RANGANATHAN, J

S. RAVI KUMAR, J

Date:10.12.2015.

Note: L.R. copy to be marked

B/o

CS/MRKR