

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE N.AUTHINATHAN

W.P.Nos.38156 and 38157 of 2016
W.M.P.Nos.32692 and 38157 of 2016

M/s.Gugan Paper Mills Ltd.,
rep., by its Executive Director,
Mr.K.R.Gunaseelan

.. Petitioner in both W.Ps.,

versus

1. The Presiding Officer,
Debts Recovery Tribunal,
Coimbatore.
2. The Authorised Officer,
Central Bank of India,
No.14/15, Variety Hall Road,
Coimbatore 641 001.
3. The Authorised Officer,
IDBI Bank, 4th Floor,
No.104, Race Course Road,
Coimbatore 641 018.
4. The Authorised Officer,
Indian Bank,
T.G.N. Complex, West Car Street,
Anna Salai, Tiruchengode,
Namakkal 637 211.

.. Respondents in both W.Ps.,

Prayer made in W.P.No.38156 of 2016: Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus, to call for the records, relating to the order, dated 20.05.2016, made in I.A.No.919 of 2016 in S.A.No.106 of 2016, on the file of the first respondent herein, quash the same and to direct the first respondent (DRT), to hear and dispose of the S.A.No.106 of 2016, on merits and in accordance with law, without pre-deposit.

Prayer made in W.P.No.38157 of 2016: Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorari, to call for the records, relating to E-Auction Notice bearing No.CBI/CBE/2016-17, dated 01.10.2016, on the file of the second respondent Bank, viz., Central Bank of India, Coimbatore and quash the same.

For Petitioner

: Mr.G.Masilamani, Senior Counsel
for Mr.Mani Sundargopal

ORDER

(Order of the Court was made by **S.MANIKUMAR, J.**)

M/s.Gugan Paper Mills Ltd., has filed W.P.No.38156 of 2016, challenging the order, dated 20.05.2016, made in I.A.No.919 of 2016 in S.A.No.106 of 2016, on the file of the Presiding Officer, Debts Recovery Tribunal, Coimbatore, first respondent herein, by which, the Tribunal has granted injunction against the Central Bank of India, Coimbatore, 2nd respondent herein, imposing certain

conditions. Consequently, in this writ petition, they have also sought for a direction to the first respondent-Tribunal to dispose of S.A.No.106 of 2016, on merits and in accordance with law, without pre-deposit.

2. Prayer sought for in W.P.No.38157 of 2016, is to issue a Writ of Certiorari, to quash the E-Auction Notice, bearing No.CBI/CBE/2016-17, dated 01.10.2016, on the file of the Central Bank of India, Coimbatore, 2nd respondent herein.

3. As both the writ petitions arise out of the SARFAESI auction taken by the Central Bank of India, Coimbatore, 2nd respondent herein, facts and submissions, being common, they are taken up together and disposed of, by a common order.

4. The petitioner-Company was incorporated in the year 2008, under the Companies Act and engaged in manufacture of kraft papers and board papers. The establishment of entire plant and machinery was completed in 2011. With the support of 172 employees, the Company commenced commercial production and till 2012, the promoters infused their contribution.

Apart from the above, the petitioner company had also approached the respondents-banks under a consortium arrangement and the Central Bank of India, Coimbatore, 2nd respondent, is the lead bank. By way of equitable mortgage created over the primary securities offered by the petitioner-company along with the other collateral securities of the Directors/guarantors of the company, the loans were sanctioned by the respondents-Banks.

5. From the year 2012, there was power shortage in Tamil Nadu, which had a tremendous impact on the production capacity of the petitioner company, resulting in failure to achieve the targeted turn over and consequently, there was a default in repayment schedule. The petitioner company approached the respondents-banks, with a proposal, dated 27.11.2012, to sanction additional term loan for establishing a power plant and to restructure the existing loans. Pursuant to the Joint Lenders Meeting, held on 16.11.2011 and 23.11.2011, the petitioner company carried out a Techno-Economic Viability (TEV) study, done by ITCOT, Chennai, regarding the feasibility of the said project, along with the issue of suitable restructuring package. According to the petitioner-Company, the study report, submitted in February, 2013, by ITCOT, suggested the banks to sanction loan for the power

plant to make the industry viable, and also indicated that the existing loans should be restructured.

6. The petitioner-Company has further submitted that during the abovesaid crucial phase, Central Bank of India, Coimbatore, 2nd respondent herein, accepted the study report of ITCOT and sanctioned a new term loan of Rs.7.80 Crores, for setting up of 4MW Co-Generation plant and restructured the existing loans, vide Sanction Ticket, dated 22.02.2013. On similar lines, the Indian Bank, Tiruchengode, 4th respondent herein, approved the proposal of the petitioner, by sanctioning the new term loan for power plant to the tune of Rs.7.35 Crores, vide Sanction Ticket, dated 27.06.2013. However, sanctioning of loan by the fourth respondent-bank was belated. IDBI Bank, Coimbatore, 3rd respondent herein, had only restructured the existing loans, vide Sanction Ticket, dated 28.03.2013.

7. The petitioner-Company has further submitted that even after the approval of the bankers, on consortium, the IDBI Bank, Coimbatore, 3rd respondent-bank has failed to consider the request to sanction the term loan for the power plant, without assigning any reasons. During the process, the

petitioner-Company arranged funds and was ready with their contribution of Rs.9.35 Crores, out of total cost for power plant (Rs.33 Crores) and vide letter, dated 05.04.2013, addressed to the 3rd respondent herein, the petitioner underlined the relevance of setting up of a power plant, in connection with the repayment of existing dues/loan, and further requested to sanction the new term loan for the same.

8. When the matter stood thus, the Central Bank of India, Coimbatore, the 2nd respondent bank cancelled the sanction given previously for the new term loan for the power plant, vide revised Sanction Ticket, dated 15.10.2014, apparently, due to the rejection by one of the members of the consortium, the IDBI Bank, Coimbatore, 3rd respondent herein. There were discussions with all banks. As the Company had accumulated a loss of Rs.36.43 Crores, whereby, its net worth got eroded on 17.09.2015, the company was constrained to seek for reference to the Board of Industrial and Financial Reconstruction ('BIFR'), in accordance with Section 15(1) of the said SICA Act and Case No.130/2015, was registered on the file of BIFR on 08.10.2015, with a direction to serve the copies of the relevant documents to the concerned government, banks and financial institutions, which was also complied with.

9. The IDBI Bank, Coimbatore, the third respondent issued a recall notice, dated 28.08.2015 to the petitioner, calling upon him to repay a sum of Rs.17.79 Crores (approx.), consisting of Rs.16.40 Crores (approx.) towards the principal amount borrowed and Rs.1.38 Crores (approx.) towards the interest thereon, within 15 days, failing which, proceedings under Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFEASI Act'), would be initiated. On receipt of the same, the petitioner issued a detailed reply on 09.09.2015. In spite of the same, the third respondent-bank issued a similar demand notice, dated 12.10.2015, to each of the guarantors, calling upon them to pay a sum of Rs.19.18 Crores (approx.) towards the outstanding dues.

10. On 26.11.2015, the IDBI Bank, Coimbatore, the third respondent herein, issued a demand notice, under Section 13(2) of the SARFEASI Act, unilaterally seeking to enforce the security interest and calling upon the petitioners to pay a sum of Rs.19.41 Crores (approx.), within a period of 60 days from the date of said notice. Responding to the same, the petitioner company sent a reply, dated 23.01.2016, to the IDBI Bank, Coimbatore, the third respondent herein, in exercise of its right under Section 13(3A) of the SARFEASI

Act, 2002, stating that the company has made reference to BIFR and not in a position to discharge the debts for the time being. In the reply, it was also stated that the action of the bank in proceeding unilaterally under the SARFEASI Act, 2002, as illegal, since the secured assets are charged by the respondents-banks on 'paripassu' basis, under the consortium arrangement.

11. In the above circumstances, the petitioner company filed W.P.No.4056/2016, seeking to quash the demand notice, dated 26.11.2015, issued under Section 13(2), by the IDBI Bank, Coimbatore, the third respondent herein. The said writ petition, came to be dismissed on 03.02.2016, with a direction to the respondent bank to consider and pass orders, based on the objections raised by the petitioner in its letter, dated 23.01.2016. In the meantime, the IDBI Bank, Coimbatore, the third respondent herein, issued its reply notice, dated 03.02.2016, to the objections raised by the petitioner, vide letter, dated 23.01.2016, wherein, it was stated that the petitioner company had defaulted in payment of its dues, for a period of more than 90 days and hence, the accounts were classified as NPA on 30.06.2015, as per the extant guidelines of the RBI and hence, the Bank issued a recall notice, dated 28.08.2015. The third respondent-bank also sent a letter, dated 04.02.2016, to

the petitioner, admitting that certain agricultural properties cannot be attached under the SARFAESI Act, 2002.

12. At that stage, the Central Bank of India, Coimbatore, 2nd respondent herein, has issued a demand notice, dated 04.02.2016, to the petitioner as well as to the guarantors under, Section 13(2) of the SARFEASI Act, 2002, demanding payment of Rs.50.40 Crores (approx.) towards the outstanding dues of the respondents-banks, as on 31.12.2015, within a period of 60 days, from the date of the said notice, failing which, measures under Section 13(4) of the said Act, would be taken. On receipt of said notice, the petitioner company issued a detailed reply, dated 02.04.2016, under provisions of Section 13(3A) of the said Act.

13. In the mean time, the Indian Bank, Tiruchengode, the fourth respondent herein, issued a separate loan recall notice, dated 25.09.2015, calling upon the petitioner/guarantors to pay a sum of Rs.13.96 Crores (approx.), towards the outstanding dues to the said bank, as on 21.09.2015, for which, the petitioner sent a reply on 29.09.2015. This fact was also recorded in the reply, dated 02.04.2016, submitted to the demand notice, dated

04.02.2016, of the 2nd respondent. That apart, guarantors of the petitioner company have also sent a reply, dated 02.04.2016, to the demand notice, dated 04.02.2016, wherein a specific stand was taken that the properties described in Item Nos.6, 7, 8, 11, 12 & 13 of Section 13(2) notice, dated 04.02.2016, admeasuring about 60 acres, are outside the purview of the present proceedings, under the SARFEASI Act, 2002, since they were agricultural properties, as admitted by the IDBI bank.

14. The Central Bank of India, Coimbatore, 2nd respondent herein, has sent a reply, dated 20.04.2016, to petitioner's reply, dated 02.04.2016, stating that the bankers in Joint Lenders Meeting, held on 07.01.2016, had decided to entrust the Central Bank of India, Coimbatore, 2nd respondent herein, to initiate proceedings under the SARFEASI Act, 2002, on behalf of the other bankers in consortium. It also replied that the bank had never admitted that the properties included in the demand notice, are agricultural lands and further stated that no agricultural activities are carried out in the said lands. With regard to the issue of BIFR proceedings, it was stated that no communication was received from BIFR, till date.

15. In the above backdrop and in view of the fact that respondents-banks were not willing to restructure the existing loans or to enhance the limits further, the petitioner company was compelled to submit One-Time Settlement (OTS) proposals, dated 05.05.2016, to the respondents-bankers. However, the said OTS proposals were rejected by the banks. Consequently, the Central Bank of India, Coimbatore, 2nd respondent herein, by invoking the provisions under Section 13(4) of the SARFAESI Act, has issued a possession notice, dated 11.05.2016, on behalf of other respondents-bankers in consortium.

16. Within seven days, from the date of taking symbolic possession, the petitioner company along with the guarantors of the company, have approached the Debts Recovery Tribunal, Coimbatore, on 18.05.2016, under Section 17 of the SARFEASI Act, in S.A.No.106 of 2016, assailing the measures taken under Section 13(4) of the Act. Pending disposal of the said S.A.No.106 of 2016, I.A.No.919/2016, under Section 19(25) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as 'RDDBFI Act'), was filed to stay all further proceedings, in pursuance of action taken under Section 13(4) notice, dated 11.05.2016. After hearing the petitioner company, the Debt Recovery Tribunal, Coimbatore, vide order, dated 20.05.2016, granted

ad-interim injunction against the respondent banks, till 21.09.2016, subject to payment of Rs.3,18,75,000/- each, directly to the respondent-Bank, for four instalments, on or before 20.06.2016, 20.07.2016, 20.08.2016 and 20.09.2016 respectively and failing to pay even a single payment as ordered, the injunction granted would vacated automatically and thereafter, the respondent bank will be at liberty to proceed against the secured asset as per law. Being aggrieved by the above order, the petitioner company has preferred the W.P.No.38156 of 2016, for the reliefs, stated supra.

17. Assailing the correctness of the impugned order, dated 20.05.2016, made in I.A.No.919 of 2016 in S.A.No.106 of 2016, on the file of the first respondent herein, Mr.G.Masilamani, learned Senior Counsel for the writ petitioner submitted that under Section 17(4) of the SARFAESI Act only, in the event of the Tribunal, coming to the conclusion and declaring that the recourse taken by the secured creditor, under Section 13(4) of the Act, is in accordance with the provisions of the Act, the secured creditor would be entitled to proceed further, as per Section 13(4) of the said Act, and till such time, no action by the Bank is permissible.

18. He further submitted that the Tribunal ought to have seen that before arriving at any conclusion, regarding the validity/invalidity of the action taken by the secured creditor, as to whether, it is legal or otherwise, the direction issued by the Tribunal, directing the petitioner to deposit a sum of Rs.12.75 Crores, is beyond the scope and powers vested, on the Tribunal as per Section 17(4) of the SARFAESI Act.

19. Referring to the observations of the Hon'ble Supreme Court in **Mardia Chemicals v. Union of India** reported in **AIR 2004 SC 2371**, learned Senior Counsel for the petitioner submitted that the pre-amended Section 17 of the SARFAESI Act, does not provide for Sub-Sections (2), (3) and (4), which lays down a detailed procedure, to be followed by the Tribunal, in adjudicating the disputes and the consequential effect thereon. He also drew the attention of this Court to sub-Section (5) of the amended Section 17, which provides that an application, made under Section 17, has to be disposed of, within a maximum period of 60 days. According to him, from the above, it would emerge that the financial and other interests of the secured creditor has been adequately secured, and the inordinate delay in the process of disposing of the dispute, dealing with the properties furnished as security, in the event of borrower, committing the default, has been taken note of.

20. He further submitted that the validity of sub-Section (2) of Section 17, imposing a onerous condition of 75% of pre-deposit, was struck down, as unconstitutional and at Paragraph 80(3) of **Mardia Chemicals'** case (cited supra), in order to provide a reasonable protection to the borrower, the Hon'ble Supreme Court observed that, "That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose."

21. Learned Senior Counsel further submitted that though in **Mardia Chemicals'** case (cited supra), the Hon'ble Supreme Court observed that the Tribunal has inherent and ancillary powers and also empowered to pass an interim order for the purpose of protecting the borrower, till the disposal of the application, the Parliament thought it fit, not to make any further amendment to Section 17 of the SARFAESI Act, stipulations that an application to be filed for stay of the proceedings, has to be filed by the borrower/guarantor, as the case may be and thus, enabling the Tribunal to impose any condition, for grant of any such interim orders and therefore, it should be construed that filing of an appeal is statutory, with an in-built provision of automatic stay of all further proceedings, under Section 17 of the SARFAESI Act.

22. He reiterated that only in the event of the Tribunal, coming to the

conclusion that the action taken by the secured creditor, under Section 13(4), is valid or invalid, as the case may be, no other action taken by the secured creditor, is permissible and all the proceedings challenged under Section 17, are deemed to be stayed, when the appeal is filed. He further submitted that the power of stay has to be read into Section 17 of the Act, more so, when a specific time limit is also provided for the disposal of the appeal, under Section 17 of the Act.

23. Notwithstanding the submission that filing of an appeal amounts to automatic stay, Mr.G.Masilamani, learned Senior Counsel for the petitioner submitted that the conditions imposed in the interim order, dated 20.05.2016, made in I.A.No.919 of 2016 in S.A.No.106 of 2016, on the file of the Debt Recovery Tribunal, Coimbatore, should be in the nature of protecting the interest of the borrower/guarantor also, and that it should not cause irreparable hardship. He further contended that when the Hon'ble Supreme Court at Paragraph 80.3 of **Mardia Chemicals'** case (cited supra), observed that, "the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose." in the case on hand, the conditions imposed by the Tribunal in the

abovesaid I.A., is far from granting protection to the borrower/guarator, on the contra, the conditions imposed inflict serious adverse consequences. By imposing conditions of impossibility of performance, the Tribunal has negated the purpose, object and spirit of the amended Section 17 of the Act.

24. It is also his submission that in the event of imposing such onerous conditions, not being capable of compliance, even before, the Tribunal, deciding the validity of action taken under Section 13(4) and if the secured creditor brings the properties for auction and takes recourse to further proceedings and eventually, gives possession to an auction purchaser, then there is every possibility for the auction purchaser to sell the plant and machinery and other immovables, to others, which may create third party rights and in which event, restitution of the subject properties, along with the plant and machinery, would be an impossibility of the performance by the secured creditor or the Tribunal, as the case may be and therefore, it is his submission that the stay of the proceedings, under challenge, is automatic, whenever an appeal, under Section 17 is made and that is why, the Parliament has thought it fit not to enact any specific provision for stay. He therefore submitted that even taking it for granted that the Tribunal is conferred with the ancillary powers to grant stay or interim order, the conditions imposed should protect the interest of the borrower/guarantor also.

25. Referring to the decision in **Lakshmi Shanker Mills Ltd vs. Authorised**

Officer, Indian Bank reported in **AIR 2008 Mad 181 (FB)**, learned Senior Counsel submitted that the Hon'ble Full Bench of this Court did not consider the scheme of the SARFAESI Act, in proper perspective and more so, with reference to **Mardia Chemicals'** case (cited supra). He further submitted that the judgment in **Lakshmi Shanker Mills Ltd's** case (cited supra), requires re-consideration, on the aspect, as to whether, filing of an appeal, under Section 17 of the Act, amounts to automatic stay of the entire proceedings, under challenge.

26. Inviting the attention of this Court to ITCOT report, submitted to the bankers, learned Senior Counsel submitted that when rehabilitation measures have been taken, at the instance of the bankers and valuation was obtained, action of the Central Bank of India, Coimbatore, 2nd respondent herein, in bringing the property for re-auction, is violative of the rights, guaranteed under Article 300-A of the Constitution of India. He further submitted that though the Tribunal has ancillary powers, to grant the interim order, without assigning any valid reasons, to impose onerous condition, the Tribunal has simply stated that to prove bonafides, the borrower should deposit a sum of Rs.12.75 Crores, in instalments and except the above, no other reason is assigned. For the abovesaid reasons, he prayed to quash the order, dated 20.05.2016, made in I.A.No.919 of 2016 in S.A.No.106 of 2016.

27. Heard the learned counsel appearing for the parties and perused the materials available on record.

28. Before advertng to the contentions of the learned Senior Counsel for the petitioner, it is relevant to have a cursory look, at the provisions under Sections 13 and 17 of the SARFAESI Act.

“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 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 subsection (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 one week 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 for the debt.

(c) appoint any person (hereafter 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) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and

expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

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

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to subsection (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

PROVIDED that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in

accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956):

PROVIDED FURTHER that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

PROVIDED ALSO that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

PROVIDED ALSO that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

PROVIDED ALSO that the secured creditor shall furnish an

undertaking to the liquidator to pay the balance of the workmen's dues, if any. Explanation : For the purposes of this sub-section,--

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where 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 may be 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.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in

sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

17. Right to appeal (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application alongwith such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation : For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

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

thereunder.

_____ (3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

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

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application: PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.”

29. Directions granted by the Tribunal in I.A.No.919 of 2016 in S.A.No.106 of 2016, dated 20.05.2016, is extracted hereunder:

“..this Tribunal is of the view that without going into the merits of the matter, as an interim measure, and to prove the bonafides of the petitioner/applicant, if a limited conditional order is passed, it would meet the interest of justice and natural justice. Accordingly, Ad-Interim Injunction is granted against the Respondents Bank till 21.09.2016 subject to payment of Rs.3,18,75,000/- directly before the Respondent Bank on or before 20.06.2016, as 1st instalment, another sum of Rs.3,18,75,000/- directly before the Respondent Bank on or before 20.07.2016, as 2nd instalment, another sum of Rs.3,18,75,000/- directly before the Respondent Bank on or before 22.08.2016, as 3rd instalment and another sum of Rs.3,18,75,000/- directly before the Respondent Bank on or before 20.09.2016, as 4th instalment. However, in the event of failure to pay even a single payment as ordered above, the Ad-interim injunction granted against the Respondent Bank till 21.09.2016 shall stand vacated automatically, and thereafter, the respondent bank will be at liberty to proceed against the secured asset as per law.”

30. While granting the abovesaid interim order, the Tribunal has directed the writ petitioner to pay Rs.12.75 Crores, in four instalments and further stated in the event of failure to pay even a single payment as ordered

above, the ad-interim injunction granted against the 2nd respondent-Bank, till 21.09.2016, shall stand vacated automatically and thereafter, the bank would be at liberty to proceed against the secured asset, as per law.

31. From the material on record, it could be seen that the writ petitioner has not made any payment, as directed, instead filed I.A.No.995 of 2016 in I.A.No.919 of 2016 in S.A.No.106 of 2016, praying for an order to modify the order, dated 20.05.2016, “permitting the petitioner’s proposed buyer to deposit a sum of Rs.5 Crores, being 10% of the amount stipulated in Section 13(4) notice or such other minimum amount to be ordered by the Tribunal, in one shot, only in a no lien account, on or before 20.09.2016 and to pay the balance amount of Rs.11 Crores of the proposed OTS, if the respondents-banks agree, upon the OTS proposal of Rs.16 Crores, within 90 days, from such date”, as to protect the interest of the bankers, as well as the proposed buyer by permitting him to withdraw the money deposited by him, in the no lien account, in case if the OTS is not arrived upon and to extend the interim injunction, till 21.09.2016, next date slated for hearing to I.A.No.919 of 2016. The Bank has filed a detailed counter affidavit, opposing the modification petition and prayed for its dismissal.

32. In the meantime, as the first instalment itself has not been paid,

inspection and valuation of the plant and machinery have been carried on. Copy of the report has been sought for, by the petitioner. Record of proceedings of the Tribunal, is extracted hereunder:

“First applicant represented by second applicant in person, Ms.Swati Subramaniam, Authorised Officer & Mr.Arun Babu, Law Officer of R1 present. Mr.Pawan Kumar, AGM of R2 present. R1 officers represent on behalf of R3 also, since R1 is the lead bank for the whole transactions. Copies furnished. For filing vakalat and counter by 10.06.2016. Memo filed and recorded. Call on 10.06.2016.

10.06.2016.

First applicant represented by second applicant present. Mr.Arun Babu, Manager (Law) for R1. Mr.Pawan Kumar, AGM of R2 present. Mr.Annamalai, AGM of R3 present. Vakalat of R1 to R3 filed. R1 counter filed, R2 and R3 adopts. Memo filed and recorded. Copies furnished. The ad-interim injunction order is in force till 20.06.2016. ABC. Since the interim order is already in force, the extension sought for in the Memo is not ordered, as there is no necessity for that. Enquiry by 20.06.2016, last chance. Call on 20.06.2016.

20.06.2016

Applicant appearing in person. Ms.Swati Subramanian, Chief Manager is present for R1. Mr.Phani Pawan Kumar, AGM for R2 present. Mr.Gunaseelan, Executive Director is appearing for R3.

Enquiry by 30.06.2016. Call on 30.06.2016.

30.06.2016

Second applicant appearing in person. Mr.Gunaseelan, Executive Director of the applicant present. Memo filed seeking the copy of the valuation report relied upon by the R/B and recorded. R1 is directed to furnish the copy of the valuation report obtained by them to the applicant within a week. Applicant expressed their willingness to refer the matter before the Lok Adalat which is scheduled to be held on 15.07.16. The Registry is directed to refer the matter before the Lok Adalat. Further proceedings would be ordered depends upon the outcome of the Lok Adalat proceedings.

15.07.2016

Reposted to 22.07.2016

22.07.2016

Call on 07.09.2016

07.09.2016

For final hearing by 22.11.2016. For filling valuation report also by them. Call on 22.11.2016.”

33. Thereafter, on 01.10.2016, Central Bank of India, Coimbatore, 2nd respondent herein, has issued a notice for sale of secured assets, under the SARFAESI Act, 2002, which is extracted hereunder:

“With reference to the above, we would like to draw your

kind attention to the Demand Notice, dated 04.02.2016, issued to you, U/s.13(2) of the SARFAESI Act and also to the Possession Notice, dated 12.05.2016 issued to you U/s.13(4) of the SARFAESI Act.

Now this is to inform you that the Secured Assets mentioned in the above referred notices are being brought for sale through public auction, in conformity with the provisions of SARFAESI Act and Security Interest (Enforcement) Rules, 2002. The E Auction will be conducted on 08.11.2016.”

34. Though several grounds have been raised, assailing the correctness of the order, dated 20.05.2016, made in I.A.No.919 of 2016 in S.A.No.106 of 2016, on the file of the first respondent-Tribunal, from the contents of the impugned order, it could be deduced that on the failure to comply with the conditions, on or before 20.09.2016, interim injunction granted stands automatically vacated. Instant writ petition has been filed on 10th November, 2016, when the interim order, no longer exists.

35. Section 17 of the SARFAESI Act, 2002, before challenge, to the Hon'ble Apex Court, is extracted:

"17. Right to appeal .- (1) Any person (including borrower),

aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken.

(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-section (2) of Section 13.

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

(3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

36. In *Mardia Chemicals Ltd. etc. vs. Union of India and others* reported in AIR 2004 SC 2371(1), the Hon'ble Apex Court, considered the validity of Section 17 of the SARFAESI Act, 2002 (Act 54 of 2002) and held that some writ petitions were filed in different High Courts on promulgation of

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest (Second Ordinance), 2002. However, Act 54 of 2002 was enacted and enforced, vires of which was in question, more particularly, the provisions, contained in Sections 13, 15, 17 and 34 of the Act.

37. One of the contentions raised therein was that condition of pre-deposit of 75% of the amount claimed in the notice, to be deposited, to entertain an appeal under Section 17 of the Act, was onerous and unconstitutional, when it is the discretion of the Tribunal, to waive the condition of pre-deposit or reduce the same, for the reasons to be recorded. Condition imposed is illusory and a mere farce. Contention has also been made that after the possession of the secured assets or its management has been taken over by the secured creditor or the property is leased out or sold to any other person, it would not be possible to raise and deposit 75% of the amount claimed by the secured creditor. It is also submitted that once the secured assets are taken over there is hardly any occasion for deposit of 75% of the claim since it is already secured and the management and the possession of the secured assets moves into the hands of the creditor. The position thus is that the borrower is gagged into a helpless position where he cannot ventilate his

grievance against the drastic steps taken against him. The doors of the civil court are closed for him and no adjudicatory mechanism is provided before steps are taken under sub-section (4) of Section 13. Such a law was submitted, as arbitrary and suffers from the vice of unreasonableness.

38. Per contra, contentions have been made to sustain the provision 17(2) of the Act which imposed a condition of pre-deposit of 75% of the amount claimed in Section 13(2) notice. Adverting to the rival submissions, the Hon'ble Apex Court in **Mardia Chemicals Ltd.'s** case (cited supra), at paragraphs 59, 60, 64 held as follows:

59. We may like to observe that proceedings under Section 17 of the Act, in fact are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a Forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act in the present case. We may refer to a decision of this Court reported in (1974) 2 SCC p. 393 Smt. Ganga Bai Vs. Vijay Kumar and Ors.

where in respect of original and appellate proceedings a distinction has been drawn as follows:-

".....There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature and unless one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on basis of one sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the

Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one- sidedly in favour of the party, who, so far has alone been the party to decide the amount and the fact of default and classifying the dues as NPAs without participation/association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the concerned authority. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory.

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75% of the amount claimed by no means would be a meager amount (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such

conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.

39. Finally, at paragraphs 80 to 83, the Hon'ble Apex Court in **Mardia Chemicals Ltd.'s** case (cited *supra*), ordered as here under:

80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:-

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of

the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debt Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition at it may deem fit and proper to impose.

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.

81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and

opportunity to get the matter adjudicated upon before the Debt Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest.

82. We, therefore, subject to what is provided in paragraph 80 above, uphold the validity of the Act and its provisions except that of sub-section (2) of Section 17 of the Act, which is declared ultra vires of Article 14 of the Constitution of India.

83. Before we part with the case, we would like to observe that where a secured creditor has taken action under Section 13(4) of the Act, in such cases it would be open to borrowers to file appeals under Section 17 of the Act within the limitation as prescribed therefor, to be counted with effect from today.

40. In *M/s.Lakshmi Shankar Mills (P) Ltd. and Ors. etc. v. Authorised Officer/Chief Manager, Indian Bank and Ors. etc.* reported in AIR 2008 Madras 181, a Hon'ble Full Bench of this Court considered the following questions,

(i)Whether even where no stay is prayed for by the

Borrower, during pendency of the proceedings under Section 17 before the Debt Recovery Tribunal, the Secured Creditor can proceed to auction the secured asset even before a declaration envisaged under Section 17(4) of the SARFAESI Act as made by the Debt Recovery Tribunal?

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

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

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

41. Contentions of the petitioners before the Hon'ble Division Bench, which culminated into a reference, as summarised in paragraph 5 of **Lakshmi Shankar's** case are as follows:

5. Before the Division Bench it was submitted by the learned counsel appearing for the borrowers that till the application under Section 17(1) of the Securitisation Act is decided and as contemplated under Section 17(4) of the Act the Debts Recovery Tribunal declares that the recourse taken by the secured creditor under Section 13(4) is in accordance with the provisions of the Act, the secured creditor shall not be entitled to take further recourse to one or more measures specified under sub-section (4) of Section 13 to recover the secured debt. It was submitted that the right of the secured creditor to auction the property remains in abeyance until the Tribunal declares that the recourse taken by the secured creditor under Section 13(4) was in accordance with the provisions of the Securitisation Act. It was therefore argued that the Tribunal has no power to direct the borrower to deposit any amount as a condition of stay failing which the secured creditor can auction the property even before such proceedings are finalized on merit. On the other hand, on behalf of the banks it was submitted that mere filing of an application under Section 17 of the Securitisation Act should not be construed as an automatic stay as held by a Division Bench of this Court in M/s.Ramco Super Leathers Ltd. and 4 Others Vs. UCO Bank and Another, (2007) 5 MLJ 986. It was submitted that there is no occasion for the Tribunal to order redelivery of the possession before the final determination of

the issue. A contention was also raised by the learned counsel for the banks that the decision of the Division Bench in Mission Leather Ltd. Vs. Canara Bank, Chennai,(2007) 4 MLJ 245, wherein it is observed that it is open to the borrower to raise all questions, may not be correct in view of the decision of the Supreme Court in Transcore Vs. Union of India and Another, (2006) 5 CTC 753. The Division Bench felt that the questions raised by the counsel for the parties are of seminal importance and similar questions are being raised time and again and therefore the matter is required to be decided by a larger Bench so that the legal position can be authoritatively laid down for future guidance of the courts including the tribunals.

42. At paragraph 8, the Hon'ble Full Bench in **Lakshmi Shankar's** case, has taken note of the amendments issued after **Mardia Chemical's** case and held as hereunder:

"8. It is important to note two amendments to the Securitisation Act after the judgment of the Supreme Court in Mardia Chemicals Case. These amendments were pursuant to and in consonance with the judgment in Mardia Chemicals and the observations therein. Firstly, in Section 13 of the Act, the following was added after sub-section (3), as sub-section (3-A):-

(3-A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the

secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

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 17-A.

9. Secondly, sub-section (2) of Section 17, which was held to be unconstitutional by the Supreme Court was deleted and sub-sections (2) to (6) were inserted in Section 17 and original sub-section (3) was re-numbered as sub-section (7). The provisions of Section 17 of the Act after the amendment read as follows:-

17.Right to appeal (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under this Chapter, (may make an application along with such fee, as may be prescribed,) to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

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

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the creditors assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the

recourse taken by the secured creditor under sub-section (4) of Section 13.

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

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery

Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder."

43. While considering the questions referred, the Hon'ble Full Bench in Lakshmi Shankar's case, at paragraphs 10 to 19 held as follows:

"10. The first question is whether the right of the bank to take proceedings under Section 13(4) shall remain suspended on filing an application under Section 17. The second question concerns the jurisdiction of the Debt Recovery Tribunal to impose a condition of deposit for grant of stay of auction. Section 13(4) of the Securitisation Act is pivotal to the whole controversy. It provides that a secured creditor may enforce any security interest without intervention of the court or tribunal irrespective of Section 69 or Section 69-A of the Transfer of Property Act where according to sub-section (2) of Section 13 the borrower is a defaulter in repayment of the secured debt or any instalment of repayment and further the debt standing against him has been classified as a non-

performing asset by the secured creditor. Sub-section (2) of Section 13 further provides that before taking any steps in the direction of realizing the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in sub-section (4) of Section 13. Sub-section (4) of Section 13 provides for four measures which can be taken by the secured creditor in case of non-compliance with the notice served upon the borrower namely, (a) to take possession of the secured assets including the right to transfer the secured assets by way of lease, assignment or sale; (b) to take over the management of the secured assets including the right to transfer; (c) to appoint a manager to manage the secured assets which have been taken possession of by the secured creditor; and (d) to require any person who had acquired any secured assets from the borrower or from whom any money is due to the borrower to pay the same as it may be sufficient to pay the secured debt. Sub-section 3-A, which has been inserted by the amendment, provides that if on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of

receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. The proviso to sub-section 3-A provides that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A. In *Mardia Chemicals* case, the Supreme Court has clearly held that such right accrues only if measures are taken under sub-section (4) of Section 13 of the Securitisation Act (para.48 SCC page 348). Therefore, only if one or other measure is taken by the secured creditor, a cause of action arises for any person or borrower to prefer an application under Section 17 of the Securitisation Act.

11. Under sub-section (1) of Section 17 any person aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor can prefer an appeal (application) to the Debts Recovery Tribunal within 45 days from the date on which such measures had been taken. Under sub-section (2) of Section 17, the Tribunal is bound to consider whether any of the measures referred to under sub-section (4) of Section 13 taken by the secured creditors are in accordance with the provisions of the Act. Under sub-section (3) of Section 17, after examining the facts and circumstances of the case, and evidence produced by the parties, if the Tribunal comes to

the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act and the rules, and require restoration of the management of the business or restoration of possession of the secured assets to the borrower, it may declare such action as invalid and restore possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be. As a necessary corollary, sub-section (4) of Section 17 provides that if the Tribunal declares that the recourse taken by the secured creditor under sub-section (4) of Section 13 was in accordance with the provisions of the Act and the rules made thereunder, then, notwithstanding anything contained in the Act or any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.

12. On a plain reading of Section 17, it is seen that the Tribunal has wide powers to restore possession in favour of the borrower, if such action taken under sub-section (4) of Section 13 is declared invalid. Even where the property is sold or dealt with, pending hearing of the application under Section 17, the Tribunal is not rendered powerless to restore possession in favour of the borrower, if such action taken under sub-section (4) of Section 13 is declared invalid. In such an eventuality, sub-section (3) of Section 17 gives ample powers to the

Tribunal to direct restoration of the possession or restoration of management, as the case may be or to pass such other order, as it may consider proper and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.

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

borrowers would mean that the Legislature intended to undo this by enacting Section 17 so as to suspend the power of the banks to take appropriate measures under Section 13. It is a recognized rule of interpretation of Statutes that expressions used therein should ordinarily be understood in a sense in which they harmonized with the object of the statute and which effectuate the object of the legislature (See New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, AIR 1963 SC 1207). The provisions of Section 17 must therefore receive such construction at the hands of the Court as would advance the object and at any event not thwart it. In other words, the principle of purposive interpretation should be applied while construing the said provision. The Securitisation Act is enacted to provide a speedy and summary remedy for recovery of thousands of crores which were due to the banks and financial institutions and accepting the interpretation suggested by the counsel for the borrowers would defeat the very object of the Act.

14. The matter can be viewed from another angle. It is well known that when the Legislature wants to grant a statutory stay, it would expressly say so. For example, Section 36 of the Arbitration and Conciliation Act, 1996 pursuant to which an award can be enforced only after the expiry of the period for making an application under Section 34 or, if such an application is made, till it is refused by the Court. Section 22 of the Sick Industrial Companies (Special

Provisions) Act, 1985 is another example of statutory stay. There is nothing in Section 17 of the Securitisation Act which would indicate that the Legislature intended that there would be automatic stay of proceedings under Section 13(4) on filing an application under Section 17.

15. As regards the second question, there is no specific provision made under Section 17 of the Securitisation Act or under any other provisions of the said Act empowering the Tribunal to pass any interim order. But under sub-section (12) of Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, the Tribunal has been empowered to pass various interim orders. If sub-section (7) of Section 17 of the Securitisation Act is read along with sub-section (12) of Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, it would be clear that the Tribunal also has jurisdiction to pass interim orders under Section 17 of the Securitisation Act in appropriate cases. In Mardia Chemicals case, in clause (iv) of paragraph 80 of the judgment, the Supreme Court has categorically held that the Tribunal in exercise of its discretionary power shall have jurisdiction to pass any stay/interim order, subject to the condition as it may deem fit and proper to impose. Earlier, there was a controversy as to whether the Tribunal has power to grant ad-interim orders under Section 19(12) of the Recovery of Debts due to Banks and Financial Institutions Act, but that had been set at rest in I.C.I.C.I Ltd., v. Grapco Industries Ltd.,

AIR 1999 SC 1975. The Tribunal is thus empowered to grant interim stay subject to such conditions as may be deemed proper including condition of deposit. We may add that even under Section 69 of the Transfer of Property Act, the only remedy of the borrower, whose mortgagee has invoked Section 69 of the Transfer of Property Act, is to file a civil suit. In such suit, the power of the Court to grant injunction and to impose condition for the grant thereof has been recognized in Jagjivan v. Shridhar, 1878 ILR 2 Bom. 252 and Narasimchariar v. E.B.S. 3rd Branch, AIR 1955 Madras 135.

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

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

Section 13 of the SARFAESI Act to recover its secured debts, till an interim order is passed by the Tribunal. From the aforesaid Section 17, it will be evident that any person, including borrower, could file an appeal (application) under Section 17 at any stage, including the stage when management of business is taken or possession of secured assets of the borrower, including right to transfer is taken over by the secured creditor. In such a case, the Tribunal has power to restore possession in favour of the borrower, if such action taken under sub-section (4) to Section 13 is declared invalid. Merely because a secured creditor has taken possession of secured asset, or issued notice inviting application for sale of secured asset, or issued a sale certificate in favour of one or other auction purchaser, will not render the Tribunal powerless to restore possession in favour of the borrower, if such action taken under sub-section (4) to Section 13 is found not in accordance with the Acts and the Rules framed thereunder, and is declared invalid.

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

Re. Question (iii)

18. This question concerns the jurisdiction of the Debt Recovery Tribunal to pass any interim mandatory order relating to restoration of possession or restoration of management,

pending the proceedings under Section 17 of the Securitisation Act. In *Marida Chemicals* case, the Supreme Court has held that the proceedings under Section 17 are not appellate proceedings, it is an initial action, which is brought before the forum as prescribed under the Act raising grievances against the action or measures taken by one of the parties to the contract. It is a stage of initial proceedings like filing a suit in the civil court. Proceedings under Section 17 of the Act are in lieu of the civil suit which remedy is ordinarily available, but for the bar under Section 34 of the Securitisation Act. Section 17(3) provides that if the Tribunal comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act and the rules made thereunder, it can declare such action as invalid and restore possession of the secured assets to the borrower or restore the management of the possession to the borrower, as the case may be. It is, thus, clear that once the possession of the secured asset is taken, there would be no occasion for the Tribunal to order redelivery of possession till final determination of the issue. In other words, it is only when the Tribunal comes to the conclusion that any of the measures, referred to in Section 13(4), taken by the secured creditor are not in accordance with the provisions of the Act and the rules made thereunder, then only the Tribunal can restore possession of such secured

assets to the borrower. By virtue of sub-section (7) of Section 17 of the Securitisation Act read with Section 19(12) of the Recovery of Debts Due to Banks and Financial Institutions Act the Tribunal undoubtedly possess ancillary power to pass interim orders subject to the conditions as it may deem fit and proper to impose, but it does not in any way override the special provisions contained in Section 17(3) of the Securitisation Act. The statutory scheme of the Securitisation Act is such that the borrower could take recourse to application under Section 17 only if one or other measure is taken by the secured creditor, and the Tribunal can restore the status quo ante only if it comes to the conclusion that any of the measure taken by the secured creditor is not in accordance with the provisions of the Act. The scheme cannot be by-passed by issuing a mandatory order for redelivery of the possession before conclusion of the proceedings under Section 17. We may mention that we are supported in our view by an unreported decision of the Division Bench of this Court in the case of *Authorised Officer, Indian Bank vs. The Debt Recovery Appellate Tribunal and 3 others* (Writ Petition No.46413 of 2006 decided on 07.12.2006) and a decision of the Karnataka High Court in *Syndicate Bank Vs. Basalingappa*, AIR 2007 Karnataka 125.

Re.Question (iv)

19. This concerns the scope of the enquiry under Section 17 of the Securitisation Act and the question referred to us is whether the merits of the contentions raised by the borrower

can be decided while dealing with the question relating to the validity of the action taken by the bank under Section 13(4) of the Securitisation Act. It was argued before the Division Bench that the decision in Ramco Super Leathers Ltd., v. UCO Bank (supra) may not be correct in view of the judgment of the Supreme Court in Transcore v. Union of India and another, (supra). In Transcore, the main question, which fell for consideration of the Supreme Court, was whether the withdrawal of an O.A in terms of the first proviso to Section 19(1) of the Recovery of Debts due to Banks and Financial Institutions Act, is a condition precedent to taking recourse to the Securitisation Act. In the context of this question, the Court examined the scheme of the Securitisation Act, and it was observed; -

13. .. The NPA Act is inspired by the provisions of the State Financial Corporations Act, 1951 (SFC Act), in particular Sections 29 and 31 thereof. The NPA Act proceeds on the basis that the liability of the borrower to repay has crystallized; that the debt has become due and that on account of delay the account of the borrower has become sub-standard and non-performing. The object of the DRT Act as well as the NPA Act is recovery of debt by non-adjudicatory process .

22. . On reading Section 13(2), which is the heart of the controversy in the present case, one finds that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing asset then the secured

creditor may require the borrower by notice in writing to discharge his liabilities 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 given in Section 13(4). Reading Section 13(2) it is clear that the said sub-section proceeds on the basis that the borrower is already under a liability and further that, his account in the books of the bank or FI is classified as sub-standard, doubtful or loss. The NPA Act comes into force only when both these conditions are satisfied. Section 13(2) proceeds on the basis that the debt has become due. It proceeds on the basis that the account of the borrower in the books of bank/FI, which is an asset of the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual of liability, determination of liability and liquidation of liability

23. .The point to be noted is that the scheme of the NPA Act does not deal with the disputes between the secured creditors and the borrower. On the contrary, the NPA Act deals with the rights of the secured creditors inter se. The reason is that the NPA Act proceeds on the basis that the liability of the borrower has crystallized and that his account is classified as non-performing asset in the hands of the bank/FI..

24.However, under Section 17(2), the DRT is required to consider whether any of the measures referred to in Section 13(4) taken by the secured creditor for enforcement of security are in accordance with the provisions of the NPA Act and the Rules

made thereunder. If the DRT, after examining the facts and circumstances of the case and the evidence produced by the parties, comes to the conclusion that any of the measures taken under Section 13(4) are not in accordance with the NPA Act, it shall direct the secured creditor to restore the possession/management to the borrower (vide Section 17(3) of NPA Act). On the other hand, after the DRT declares that the recourse taken by the secured creditor under Section 13(4) is in accordance with the provisions of the NPA Act then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to any one or more of the measures specified under Section 13(4) to recover his secured debt.

44. Ultimately, at paragraphs 21 and 22, the Hon'ble Full Bench in **Lakshmi Shankar's** case, held as follows:

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

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

22. In the light of the foregoing discussion, we summarise our findings as follows: -

(i) The right of the bank is not automatically suspended upon filing of an application under Section 17 of the Securitisation Act and the secured creditor can proceed to auction secured asset where no stay is granted by the Tribunal.

(ii) The Tribunal has power to impose the condition relating to deposit for grant of stay of auction.

(iii)The Tribunal has no power to pass any interim mandatory order relating to restoration of possession or restoration of management before the finalisation of the proceedings under Section 17 of the Securitisation Act, and

(iv)All such grounds, which rendered the action of the bank/financial institution illegal, can be raised in the proceedings under Section 17 of the Securitisation Act before the Debt Recovery Tribunal. It is for the Debt Recovery Tribunal to decide in each case whether the action of the bank/financial institution was in accordance with the provisions of the said Act and legally sustainable.

45. All the contentions, now raised in the present writ petition, have been considered by the Hon'ble Full Bench in **Lakshmi Shankar's** case, moreso, emphasis with reference to Section 17(3) and (4) of the SARFAESI Act, 2002. Paragraph No.13 of the Hon'ble Full Bench judgment is the answer.

46. **Mardia Chemical's** case (cited supra) has been rendered on 18.04.2004. While declaring, Section 17(2) of the Act, as unconstitutional, the Hon'ble Apex Court, recognised the ancillary powers of the Tribunal and jurisdiction to pass an interim order, subject to the condition, as it may deem fit and proper. Contention of Mr.G.Masilamani, learned Senior counsel for the

petitioner, when the Hon'ble Apex Court has declared Section 17(2) of the Act as unconstitutional, thereafter the Parliament has not enacted any new provision, imposing a condition precedent, for entertaining an appeal, and thus mere filing of an appeal, amounts to automatic stay of all proceedings challenged under Section 17 of the Act, cannot be countenanced, as the Hon'ble Apex Court in **Mardia Chemical's** case (cited supra), has made it abundantly clear that if the borrower or any person, challenges the proceedings taken under Section 13(4) of the Act, it is always open to him to seek for an interim order, and in such circumstances, the tribunal in exercise of its ancillary powers can pass any interim order, subject to the condition as it may deem fit and proper to impose. When the power is conferred on the Tribunal to exercise its ancillary powers, to grant any interim order, subject to the condition, as it deem fit and proper, we are of the considered view that stay is not automatic and in such circumstances, there is no need for the Parliament to enact a new provision.

47. What is declared as unconstitutional, is Section 17(2) of the Act, which imposed a onerous condition of pre deposit of 75% of the amount claimed in the notice under Section 17(2) of the Act, for entertaining even the appeal

filed under Section 17 of the Act. In the instant case, the appeal filed by the writ petitioner, under Section 17 has already been entertained as S.A.No.106 of 2016, and in that appeal, while exercising the ancillary powers, the Tribunal has passed interim order in I.A.No.919 of 2016 in S.A.No.106 of 2016, dated 20.05.2016, which is, impugned in W.P.No.38156 of 2016.

48. Contention of the learned senior counsel that only after the Tribunal, adjudicating the validity of the action, taken under Section 13(4) of the Act, the secured creditor can take further recourse for recovery under the Act, and therefore, the Sale notice has to be set aside, cannot be countenanced for the reason that under Section 13(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 for the debt.

(c) appoint any person (hereafter 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.”

49. As observed in the foregoing paragraphs, the abovesaid argument, has been precisely negated by the Hon'ble Full Bench of this Court in **Lakshmi**

Shankar's case. Rights of the secured creditor to take possession or to transfer by way of lease, or bring the property mortgaged for sale, for realising the loan amount, are independent and therefore, it is always open to the secured creditors to exercise their rights, separately, notwithstanding the measures already taken. The said aspect has also been considered in **Lakshmi Shankar's** case, dealing with the submissions. Contention of the learned Senior counsel, that **Lakshmi Shanker Mills Ltd's** case (cited supra), requires a revisit, on the grounds that the Hon'ble Full Bench, did not consider the scheme of the Act, cannot be accepted.

50. Order passed in I.A.No.919 of 2016 in S.A.No.106 of 2016, dated 20.05.2016, on the file of the Debt Recovery Tribunal, has not been complied with and on the expiry of the period prescribed therefor, interim order stood vacated on 21.09.2016. Section 18 of the Act states as follows:

18. Appeal to Appellate Tribunal

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal alongwith such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

PROVIDED that different fees may be prescribed for filing an

appeal by the borrower or by the person other than the borrower:

PROVIDED FURTHER that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent. of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

PROVIDED ALSO that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent. of debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

51. If the petitioner was aggrieved over the interim order, dated 20.05.2016, imposing conditions, which according to the petitioner, are onerous and could not be complied with, the same can be challenged by way of an appeal under Section 18 of the Act, instead, the writ petitioner has chosen to challenge the same, by way of writ petition on 01.11.2016, after the expiry of the period, provided therefor. When an alternative remedy is available, a writ petition is not maintainable. Reference can be made to few decisions on the

Securitisation And Reconstructions of Financial Assets Act, 2002.

(i) In **Precision Fastenings v. State Bank of Mysore**, reported in 2010(2)

LW 86, this Court held as follows:

"This Court has repeatedly held in a number of decisions right from the decision in Division Electronics Ltd. v. Indian Bank (DB) Markandey Katju, C.J., (2005 (3) C.T.C., 513), that the remedy of the aggrieved party as against the notice issued under Section 13(4) of SARFAESI Act is to approach the appropriate Tribunal and the writ petition is not maintainable. The same position has been succinctly stated by the Hon'ble the Supreme Court in Transcore v. Union Of India (2006 (5) C.T.C. 753) in paragraph No. 26 wherein the Supreme Court has held as under:—

"The Tribunal under the DRT Act is also the Tribunal under the NPA Act. Under Section 19 of the DRT Act read with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993 (1993 Rules), the applicant bank or FI has to pay fees for filing such application to DRT under the DRT Act and, similarly, a borrower, aggrieved by an action under Section 13(4) of NPA Act was entitled to prefer an Application to the DRT under Section 17 of NPA." (Emphasis

added)

(ii) In **Union Bank of India v. Satyawati Tondon**, reported in 2010 (5)

LW 193, at Paragraphs 16 to 18 and 27 to 29, held as follows:

"16. The facts of the present case show that even after receipt of notices under Section 13(2) and (4) and order passed under Section 14 of the SARFAESI Act, respondent Nos. 1 and 2 did not bother to pay the outstanding dues. Only a paltry amount of Rs. 50,000/- was paid by respondent No. 1 on 29.10.2007. She did give an undertaking to pay the balance amount in installments but did not honour her commitment. Therefore, the action taken by the appellant for recovery of its dues by issuing notices under Section 13(2) and 13(4) and by filing an application under Section 14 cannot be faulted on any legally permissible ground and, in our view, the Division Bench of the High Court committed serious error by entertaining the writ petition of respondent No. 1.

17. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide

import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing

remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for re-dressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of

public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1=1999-2-L.W. 200 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and

trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

28. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act.

29. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

(iii) In *Saraspathy Sundararaj v. Authorised Officer and Assistant General Manager, State Bank of India*, reported in (2010) 5 LW 560, at Paragraphs 1, 5 to 7, 9 and 13, held as follows:

"The petitioner has filed this writ petition praying for a Writ of Certiorarified Mandamus calling for the records relating to the possession notice dated 16.09.2004 issued by the respondent under the SARFAESI Act and consequently direct the respondent to effect the settlement in accordance with the SBI OTS-SME 2010 Scheme as contained in its letter dated 18.03.2010 and unconditionally restore physical possession of the six rooms taken physical possession by it at No. 29, Sarojini Street, T. Nagar, Chennai - 17 with such damages.

5. At the outset, it is a clear case where the petitioner has come to this Court challenging the possession notice dated 16.09.2004 after a period of six years. The possession notice under Section 13(4) of the SARFAESI Act was issued on 16.09.2004 for which the petitioner has not sent any objection or reply. The possession notice was also published in the newspaper on the same day. Even thereafter, the petitioner has not come forward to make any payment. On 28.09.2004, the petitioner sent a letter requesting the respondent for accepting Rs. 30 lakhs towards full and final settlement, but that was negatived by the bank on 09.10.2004. Thereafter, by letter dated 22.02.2005, she increased the offer to Rs. 35 lakhs, which was also declined by the bank on 01.03.2005. The petitioner further increased the offer to Rs. 36 lakhs by her letter dated 01.03.2005 which was not accepted by the bank. The offer was further increased by the petitioner to Rs. 40 lakhs and thereafter she also deposited Rs. 20 lakhs over a period of time from 12.03.2005 to 23.09.2005 for a period of six months in a no lien account. Thereafter, by letter dated 26.06.2006, the petitioner increased the offer to pay Rs. 43 lakhs in full quit but it was not accepted by the bank. On 04.07.2006, the bank directed the petitioner to increase the offer and immediately she increased it to Rs. 45 lakhs and also offered to close the debt with C.I.T. Nagar Branch and close the

personal loan accounts on 09.10.2006. Finally, after a period of one year, on 20.03.2007, she agreed to pay Rs. 44 lakhs towards all the accounts. This was also ultimately rejected by the bank on 27.09.2007 and directed to make arrangement to liquidate the dues without any further loss of time. The bank also sent a telegram on 22.11.2007 directing the petitioner to close all the accounts. The petitioner has not challenged the orders of rejection of her proposal to pay or deposit the amount in one lumpsum before the competent forum namely Debts Recovery Tribunal. After a period of three years, now the petitioner has taken up the whole issue on the basis of a communication dated 18.03.2010 received from the respondents intimating her about the one time settlement offer introduced by the bank. Even for this, the petitioner would contend that she is willing to take up the offer, but she has not paid any amount towards the scheme, but only sent a letter stating that she is ready to deposit the amount provided all the loan should be closed and documents released to her. At this point of time, when the bank came to the knowledge regarding the sale of the secured assets by the petitioner to her son and created encumbrance, the bank declined to extend the benefits of one time settlement to the petitioner. In the counter, it was brought to the notice of this Court regarding clause 1.7 of the one time settlement

scheme introduced by the bank wherein it was stated that fraud, malfeasance and willful default committed by the borrower are not not be eligible for OTS Scheme.

6. It is categorically brought out by the bank that pending the SARFAESI proceedings initiated by the bank, the petitioner, in order to deprive the right of the bank to recover the amount, has clandestinely transferred the secured assets in favour of her son and in that event, the bank has got every right to decline to extend the benefits of One time settlement scheme to the petitioner. Further, the possession notice sent to the petitioner way back in the year 2004, remains unchallenged by her till 2010 by approaching the competent Forum namely Debts Recovery Tribunal. When a specific forum has been created which enables the borrower to challenge the action of the financial institution by filing necessary petition under Section 17, the petitioner is not entitled to invoke the writ jurisdiction of this Court. What could not be achieved by the petitioner by filing a petition before the appropriate Forum, which is at present barred by period of limitation, could not be permitted to be achieved by extending the jurisdiction conferred to this Court under Article 226 of The Constitution of India. Above all, since the petitioner has violated the terms and conditions of the loan by transferring the property in favour of her son, this Court is not inclined to entertain the

petition.

7. In this connection, we are fortified by the decision of the Honourable Supreme Court reported in (*United Bank of India v. Satyawati Tondon and others*) III (2010) BC 495 (SC) = 2010-5-L.W. 193, wherein in para Nos. 17 and 18, it was held thus:—

“17. ...Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage

constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance. It must be

remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order, (underlining added).

9. In the light of the above decision of the Honourable Supreme Court, the writ petition filed by the petitioner seeking to set aside the possession notice issued to her long back is legally not sustainable. We are of the considered

view that this petition has been filed only to drag on the proceedings and to evade repayment of the loan. That be so, the petitioner has no legal right to compel the bank to accept the one time settlement offer made by her.

13. The present case is identical in nature and it is covered by the judgment of the Supreme Court mentioned supra. In this case, the petitioner has violated the condition of mortgage by transferring the secured asset in favour of her son and therefore, as per clause 1.7 of the OTS Scheme offered by the bank, the petitioner has to be excluded from extending the benefits of the scheme which was rightly done by the bank. In any event, without exhausting the alternative remedy, the relief sought for by the petitioner by invoking the discretionary remedy under Article 226 of The Constitution of India cannot be granted."

52. On the contention that the petitioner company has approached BIFR under SICA, 1985 and that a reference has been registered as Case No.130/2015, in which, notice has been ordered, and therefore, no action under SARFAESI Act, 2002, is permissible, we wish to consider the recent decision of the Hon'ble Apex Court in **Madras Petrochem Ltd., v. Board for Industrial and Financial Reconstruction and others** reported in **2016 (4) SCC 1**, wherein, the Hon'ble Apex Court, at Paragraphs 37 to 39, 44, 45, 53 and 54, held as follows:

"37.Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 does not include the Sick Industrial Companies (Special Provisions) Act, 1985 unlike Section 34(2) of the Recovery of Debts Due To Banks and Financial Institutions Act, 1993. Section 37 of the Securities and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 states that the said Act shall be in addition to and not in derogation of four Acts, namely, the Companies Act, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992 and the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993. It is clear that the first three Acts deal with securities generally and the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 deals with recovery of debts due to banks and financial institutions. Interestingly, Section 41 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 makes amendments in three Acts - the Companies Act, the Securities Contracts (Regulation) Act, 1956, and the Sick Industrial Companies (Special Provisions) Act, 1985. It is of great significance that only the first two Acts are included in Section 37 and not the third i.e. the Sick Industrial Companies (Special Provisions) Act, 1985. This is for the obvious reason that the framers of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 intended that the Sick Industrial Companies

(Special Provisions) Act, 1985 be covered by the non obstante clause contained in Section 35, and not by the exception thereto carved out by Section 37. Further, whereas the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 is expressly mentioned in Section 37, the Sick Industrial Companies (Special Provisions) Act, 1985 is not, making the above position further clear. And this is in stark contrast, as has been stated above, to Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, which expressly included the Sick Industrial Companies (Special Provisions) Act, 1985. The new legislative scheme qua recovery of debts contained in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has therefore to be given precedence over the Sick Industrial Companies (Special Provisions) Act, 1985, unlike the old scheme for recovery of debts contained in the Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

38. Another interesting pointer to the same conclusion is the fact that Section 35 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is not made subject to Section 37 of the said Act. This statutory scheme is at complete variance with the statutory scheme contained in Section 34 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in which sub-section (1) of Section 34 containing the non obstante clause is expressly made subject to sub-section (2) (containing the Sick Industrial Companies (Special

Provisions) Act, 1985) by the expression “save as provided under sub-section (2)”.

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

Institutions Act, 1993 is the only other special law, apart from the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, dealing with recovery of debts due to banks and financial institutions. On this interpretation also, the Sick Industrial Companies (Special Provisions) Act, 1985 will not be included for the obvious reason that its primary objective is to rehabilitate sick industrial companies and not to deal with the securities market.

44. It will thus be seen that notwithstanding the non obstante clauses in Section 22(1) and (4), read with Section 32, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will have to give way to the measures taken under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 more particularly referred to in Section 13 of the said Act, and that this being the case, the sale notices issued both in 2003 and 2013 could continue without in any manner being thwarted by Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

45.It was therefore argued that since Section 37 refers to the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and since Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 refers to the Sick Industrial Companies (Special Provisions) Act, 1985, Section 37 should also be construed so as to include a reference to the Sick Industrial Companies (Special Provisions) Act, 1985. Quite apart

from driving a coach-and-four through the object sought to be achieved by the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, this argument does not commend itself to us for the obvious reason that Section 34(2) refers to the Sick Industrial Companies (Special Provisions) Act, 1985 only for the purpose of the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 and for no other purpose. This is quite apart from the fact that, as has been noted hereinabove, the non-reference to the Sick Industrial Companies (Special Provisions) Act, 1985 in Section 37 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was deliberate"

53. Another important aspect as to the construction of the third proviso to Section 15(1) is the meaning of the expression "such reference shall abate". One of the meanings of the expression "abate" is "to put an end to; to curtail; to come to naught". (See Ramanatha Aiyar's Law Lexicon). A reference can be said to abate in one or several ways. One obvious way that a reference abates is where the Board, after inquiry, rejects the reference for the reason that the Board is satisfied that the Company is not a sick industrial company as defined under the Act. Another way in which a reference can abate is where a scheme is implemented successfully, and the sick industrial company is taken out of the woods successfully. A third manner in which a reference can abate is when a scheme or schemes have

failed in respect of the sick industrial company, and in the opinion of the BIFR, the said Company ought to be wound up. A fourth instance of abatement is provided by the third proviso to Section 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985. And that is that a reference which is pending in the sense understood hereinabove shall abate if the secured creditors of not less than 3/4th in value of the amount outstanding against the financial assistance disbursed to the borrower, have taken measures to recover secured debts under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. It is clear that the third proviso to Section 15(1) seeks to strike a balance between getting a sick industrial company out of the woods and secured creditors being able to recover the debt owed to them by such company. The legislature has thought it fit to annul all proceedings before the BIFR only when at least 3/4th of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors have taken the measures listed in Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The balance is therefore struck by the figure of “not less than 3/4th”. The legislature has inserted this provision so that, if 3/4th or more of the secured creditors get together to take measures under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,

they will not be thwarted by the provisions of Section 22 of Sick Industrial Companies (Special Provisions) Act, 1985, and it will not be necessary for them to obtain BIFR permission before taking any such measures....

54. A recent judgment of this Court in **Pegasus Assets Reconstruction P. Ltd. v. M/s. Haryana Concast Limited & Anr.**, (Civil Appeal No. 3646 of 2011), has held, agreeing with a judgment of the Delhi High Court, and disapproving a judgment of the Punjab and Haryana High Court, that a Company Court exercising jurisdiction under the Companies Act, has no control in respect of sale of a secured asset by a secured creditor in exercise of powers available to such creditor under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. Some of the observations made by this Court are interesting in that this Court has held that the Securitisation Act is a complete code in itself, and that earlier judgments rendered in the context of the State Financial Corporation Act, 1951 or the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993 cannot be held applicable to the Securitisation Act. Further, the very incorporation of certain provisions of the Companies Act in the Securitisation Act themselves harmonise the latter Act with the Companies Act in respect of workers debts under Section 529A of the Companies Act. In a significant paragraph, this Court has held:

“The aforesaid view commends itself to us also because of

clear intention of the Parliament expressed in Section 13 of the SARFAESI Act that a secured creditor has the right to enforce its security interest without the intervention of the court or tribunal. At the same time, this Act takes care that in case of grievance, the borrower, which in the case of a company under liquidation would mean the liquidator, will have the right of seeking redressal under Sections 17 and 18 of the SARFAESI Act.”

Ultimately, at Paragraph 57, held as follows:

"57. The resultant position may be stated thus:

1. Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will continue to apply in the case of unsecured creditors seeking to recover their debts from a sick industrial company. This is for the reason that the Sick Industrial Companies (Special Provisions) Act, 1985 overrides the provisions of the Recovery Of Debts Due To Banks And Financial Institutions Act, 1993.

2. Where a secured creditor of a sick industrial company seeks to recover its debt in the manner provided by Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, such secured creditor may realise such secured debt under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, notwithstanding the provisions of Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985.

3. *In a situation where there are more than one secured creditor of a sick industrial company or it has been jointly financed by secured creditors, and at least 60 per cent of such secured creditors in value of the amount outstanding as on a record date do not agree upon exercise of the right to realise their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985 will continue to have full play.*

4. *Where, under Section 13(9) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, in the case of a sick industrial company having more than one secured creditor or being jointly financed by secured creditors representing 60 per cent or more in value of the amount outstanding as on a record date wish to exercise their rights to enforce their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 22 of the Sick Industrial Companies (Special Provisions) Act, 1985, being inconsistent with the exercise of such rights, will have no play.*

5. *Where secured creditors representing not less than 75 per cent in value of the amount outstanding against financial assistance decide to enforce their security under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, any reference pending*

under the Sick Industrial Companies (Special Provisions) Act, 1985 cannot be proceeded with further - the proceedings under the Sick Industrial Companies (Special Provisions) Act, 1985 will abate."

In the light of the above, contentions to the contra, cannot be accepted.

53. Sale notice, dated 01.10.2016 has been challenged, on the grounds interalia that,

“(i) Building and Machinery included in demand notice, dated 04.02.2016, under Section 13(2), has been left out in E-Auction paper publication, dated 02.10.2016.

(ii) E-Notice dated 01.10.2016 and paper publication dated 02.10.2016 are illegal and bad in law as per Judgment rendered in Blue Coast Ltd., v. IFCI Ltd., reported in 2016 SCC Online (Bom.) 2663.

(iii) The total extent of the Property-1 of the said paper publication has not been mentioned in the said paper publication dated 02.10.2016.

(iv) Pump house owned by the petitioner company situated in SF No.371 at Kolumam Village of an extent of 6540 Sq.ft approximately valued at Rs.9 lakhs has been left out of said paper publication dated 02.10.2016.

(v) Buildings situated at the land owned by the company described as Schedule of Property to the demand notice dated 04.02.2016, to an extent of 79,925 sq.ft., valued approximately at

Rs.8.00 Crores (by the Banks themselves) has been left out of the said paper publication, dated 02.10.2016.

(vi) Machineries embedded in the petitioner's company land / building (not included) (i.e. in Property-1) valued at Rs.29.96 Crores by the Banks themselves as revealed in Inter-Se PariPassu Agreement dated 24.01.2012 has been left out of said paper publication, dated 02.10.2016. At 15% depreciation, the present value would come around at Rs.13.38 Crores.

(vii) Property-2 described in the said paper publication dated 02.10.2016 has been valued at Rs.1.35 Crores whereas the present market value would be approximately Rs.2.5 Crores (three floors - 7310 sq. ft. situated at Udumalpet Town).

(viii) Property-3 (Residential Building) described in the said paper publication dated 02.10.2016 has been valued at Rs.1.13 Crores whereas the present market value would be approximately Rs.1.5 Crores (3400 sq.ft. situated at Thudiyalur Village, Coimbatore-34).

(ix) Property-4 (Residential building) described in the said paper publication dated 02.10.2016 has been valued at Rs.39lakhs whereas the present market value would be approximately Rs.50 lakhs. Even in the 2nd respondent Bank Sanction dated 15.10.2014, the value has been assessed at Rs.45 lakhs (1167.57 sq. ft. situated at Goundampalayam, Coimbatore).

(x) Property-5 (Residential building) described in the said paper publication dated 02.10.2016 has been valued at Rs.90 lakhs

whereas the present market value would be approximately Rs.1.20 Crores (2315 sq.ft. situated at Avarampalayam, Coimbatore).

(xi) Property-6 (Residential building) described in the said paper publication has been valued at Rs.51 lakhs whereas the present market value would be approximately Rs.75 lakhs (1084 sq. ft. situated at Thudiyalur, Coimbatore).

(xii) Property-7 (Residential building) described in the said paper publication dated 02.10.2016 has been valued at Rs.30 lakhs whereas the present market value would be approximately Rs.42 lakhs (1512 sq. ft. situated at Modachur Village, Gobichettipalayam)

(xiii) Property-8 described in the said paper publication dated 02.10.2016 has been valued at Rs.1.72 Crores whereas the 2nd respondent Bank has valued the same property at Rs.3.15 Crores in the their own sanction ticket dated 15.10.2014 (29 cents situated at Udayambalayam Village, Coimbatore).

(xiv) Violating Rule 8(5) of SARFEASI Rules, valuation report not furnished to petitioner, borrower. Despite the orders passed by the 1st respondent Tribunal vide Orders, dated 30.06.2016 and 07.09.2016 and ignored the request made by the petitioner to the three respondent banks vide Letter, dated 28.06.2016.”

54. In **Simon's Foot Wear Pvt. Ltd. v. Indian Bank**, reported in (2015)

2 MLJ 166, a Hon'ble Division Bench of this court held as follows:

“9.As against the confirmation of sale and issuance of the sale certificate, the writ petitioners did have their remedy of filing an appeal under Section 18 of the SARFAESI Act before the Debts Recovery Appellate Tribunal. The appeal remedy is an effective and efficacious remedy. When such an effective and efficacious remedy is available, this court will decline exercise of its extraordinary jurisdiction under Article 226 of the Constitution of India.

10.So far as the challenge made to the order dated 24.06.2013 is concerned, since an appeal remedy is available the writ petitioners ought to have exhausted the appeal remedy before approaching this Court with this writ petition.”

55. E-Auction is one of the measures taken by the secured creditor, in terms of Section 13(4) of the Act and the same can also be challenged, under Section 17 of the Act, on the grounds, raised in W.P.No.38157 of 2016. When the petitioner has an effective and alternative remedy, under the provisions of the Securitisation And Reconstructions of Financial Assets Act, 2002, we are not inclined to advert to the merits of the challenge, to the notice, impugned before us.

56. In the light of the discussions and decisions considered, we are of

the view that the writ petitions are not maintainable and accordingly, they are dismissed. Consequently, connected Miscellaneous Petitions are closed. No costs.

(S.M.K., J.) (N.A.N., J.)
08.11.2016

Index: Yes

Internet: Yes

skm

To

The Presiding Officer,
Debts Recovery Tribunal,
Coimbatore.

S. MANIKUMAR, J.
AND
N.AUTHINATHAN, J.

skm

W.P.Nos.38156 and 38157 of 2016
W.M.P.Nos.32692 and 38157 of 2016

08.11.2016

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