

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON : 26.06.2018
ORDER PRONOUNCED ON : 31.07.2018

CORAM:

THE HON'BLE MR.JUSTICE S.MANIKUMAR
and
THE HON'BLE MR.JUSTICE SUBRAMONIUM PRASAD

W.P.No.33561 of 2017
and W.M.P.No.37083 of 2017

Bharath Post Graduate College
Through its authorized signatory,
SPE Trust, through its authorized signatory,
Mr.P.C.Bhaskar, No.8, Karpagambal Nagar,
Mylapore, Chennai - 600 004. ... Petitioner

Vs.

1. Indiabulls Housing Finance Limited,
Rep. by its Manager,
Old No.60-A, New No.20/3,
1st and 3rd Floors, Apex Chambers,
Thiyagaraya Road, T.Nagar,
Chennai - 600 017.
2. The Authorized Officer,
Indiabulls Housing Finance Limited,
Old No.60-A, New No.20/3,
1st and 3rd Floors, Apex Chambers,
Thiyagaraya Road, T.Nagar,
Chennai - 600 017. ... Respondents

PRAYER:

Writ Petition has been filed under Article 226 of the Constitution of India, praying in the nature of Writ of Certiorari, to call for the records pertaining to the order dated 06.12.2017 passed in R.A (S.A) No.102 of 2017 on the file of the Debts Recovery Tribunal, Chennai, and quash the same.

For Petitioner : Mr.Omprakash, Sr.Counsel
M/s. G.Veerapathiran

For Respondents : Mr.J.Sivanandaraaj for
Mr.V.Shankaranarayanan for'
M/s. Adeesh Anto.

O R D E R

SUBRAMONIUM PRASAD, J.

The present Writ Petition seeks to challenge the order of the Debts Recovery Tribunal, Chennai, in R.A.(S.A.) No.102 of 2017 dated 06.12.2017.

2. The facts leading up to the present proceedings, are as follows.

a) The petitioner herein borrowed a sum of Rs.7,55,02,596/- from the first respondent in terms of Loan Agreement dated 30.09.2014 securing the loan through the mortgage of immovable properties.

b) The lands so mortgaged are located in survey numbers 391/1, 392/2, and 392/3 of Varadharajapuram Village, Poonamallee Taluk, Thiruvallur District.

c) The petitioner failed to pay the instalments that were due, and the respondent classified the petitioner as a Non-performing Asset, in the month of March, 2016.

d) Subsequently, the respondent issued the first demand notice dated 10.06.2016 under Section 13 (2) of the SARFAESI Act, 2002, (hereinafter referred to as 'The Act'), for the sum of Rs.7,82,26,477/-.

e) The respondent took possession of the mortgaged properties vide possession notice dated 02.09.2016, sale notice was published on 26.09.2018. The scheduled action pursuant to this sale notice did not take place.

f) The respondent thereafter issued a fresh sale notice dated 02.11.2016.

g) The petitioner approached the Debts Recovery Tribunal, Chennai, which granted a stay to the auction in S.A.No.128 of 2016, on the ground that the mortgaged properties were agricultural properties.

h) Subsequently, the respondent withdrew its first demand notice dated 10.06.2016 vide letter dated 21.12.2016.

i) A second demand notice dated 17.01.2017 under Section 13(2) of the Act was issued by the respondent, and the petitioner sent a representation dated 03.02.2017, under Section 13(3-A) of the Act.

j) Admittedly, before responding to the representation of the petitioner, the respondent issued a possession notice dated 01.04.2017, and a sale notice dated 26.04.2017 was issued.

k) The petitioner once again approached the Debts Recovery Tribunal, Chennai, in S.A.No.104 of 2017 challenging the possession and sale notice issued by the respondent herein. Subsequently, the respondent withdrew the possession notice dated 01.04.2017 vide letter dated 09.05.2017.

l) Thereafter, on 10.05.2017, the respondent, rejected the representation of the petitioner under sub-Section (3-A) of the Act.

m) The respondent issued a fresh possession notice dated 16.05.2017, which was received by the petitioner only on 22.05.2017. The respondent however issued a sale notice on 19.05.2017, before the service of the possession notice on the petitioner, and the auction was scheduled for 29.06.2017.

n) The petitioner herein approached the DRT in S.A.No.130 of 2017, challenging the sale notice on account of the fact that the property was agricultural land, and for the non-compliance of mandatory provisions of the Act.

o) The Debts Recovery Tribunal, vide its letter dated 12.07.2017 allowed S.A.No.130 of 2017 filed by the petitioner, setting aside all the measures that taken by the respondent.

p) The respondent aggrieved by the order of the DRT, approached the Debts Recovery Appellate Tribunal, which by its order, which in R.A.(S.A.) No.102 of 2017 vide order dated 06.12.2017, allowed the appeal of the respondent herein, and restored the measures taken by the respondent herein under the Act. The present Writ Petition, has been filed before this Court assailing the order dated 06.12.2017 of the Debts Recovery Appellate Tribunal.

3. The learned counsel appearing for the petitioner has assailed the order of the Debts Recovery Appellate Tribunal, contending that since the bank had not dealt with the representation dated 03.02.2017 within the period of 15 days as stipulated under Section 13(3-A) of the Act, all the further proceedings initiated by the bank to bring the property to sale is bad. The learned counsel contented that

(a) the Demand Notice under Section 13(2) of the Act is the initiation of proceedings and a first step towards invoking the rights of the secured creditor under SARFAESI Act.

(b) The non compliance of demand and the expiry of the statutory period of 60 days determines the right under the mortgage (security interest) and enables the secured creditor to take further measures under Sections 13(4) of the Act as against the secured asset.

(c) In case of reply and objection to the Demand Notice, Section 13(3-A) steps in, making a mandatory obligation to consider the same and communicate the consideration within 15 days. The failure to comply Section 13(3-A) results in the initiation of the action as null and void and any measures in furtherance thereto under Section 13(4) would be in violation of the provisions of the Act and therefore liable to be interfered under Section 17 by the DRT.

(d) The measures under Section 13(4) vest with the creditor a right in the secured asset and simultaneously divest the right of the mortgagor, except the right of redemption as recognised under the SARFAESI Act in deference to Section 60 of T.P.Act. Right of redemption is available only till the Sale Notice is issued as per the amended Section 13(8) of the Act.

(e) Rule 8 of the Security Interest (Enforcement) Rules sets down the procedure in respect of measures being taken under Section 13(4) which starts with the issuance of Possession Notice.

(f) Right to property being a Constitutional Right, the same can be deprived of only by due procedure as established in law. Any deviation and non compliance of said procedure would vitiate the action taken. In the said context it is required to be strictly complied and is mandatory in nature.

(g) Under Rule 8 the legislature intends that the Possession Notice be issued by delivering, affixing and then publishing. In absence of delivering of the Possession Notice, being in the nature of a ministerial act it cannot be said that the procedure contemplated is complied with.

4. On the other hand the learned counsel appearing for M/s.Indiabulls Housing Finance Ltd., respondents herein contented that the issue as to whether the representation filed under Section 13(3-A) of the Act has to be disposed of within the time limit prescribed in Section 13(3-A) of the Act was not raised before the Tribunal. It was also submitted that the stipulation in Section 13(3-A) of the Act to dispose of the representation within 15 days is only directory and not mandatory.

5. Learned counsel for the respondents would contend that the issue is squarely covered in his favour by judgments of the Gujarat High Court in the case of Kiran Devi Bansai vs. DGM, Small Industries Development Bank of India reported in (2009) SCC on line GUJ 1204 and followed by the Bombay High Court Clarity Gold Pvt. Ltd vs. State Bank of India reported in 2011 (2) MHLJ 778. He would also rely on the Division Bench of this Court in the case of IDBI vs. Kamaldeep Synthetic Ltd, reported in 2007 (2) CTC 397.

6. Learned counsel for the respondents would also contend that the respondent bank had complied with Rule 8(1) as well as Rule 8(2) of the SARFEASI Rules, as the possession notice was affixed on 16.05.2017, the possession notice was published in Business Standard and Makkaral Kurral on 17.05.2017 and the possession notice was sent to the petitioner on 18.05.2017. On 19.05.2017 the first respondent sent the sale notice fixing the e-auction on 29.06.2017. The possession notice sent on 18.05.2017 was received on 22.05.2017. The learned counsel for the respondent would therefore submit that all requirements of Rule 8(1) and Rule 8(2) of the SARFEASI Rules were complied.

7. It is submitted that since Rule 8(1) of the SARFEASI Rules merely defines when possession is taken. According to the learned counsel for the respondent as per Rule 8(1) possession is taken when the possession notice is delivered or when the possession notice is affixed. He would submit that Rule 8(2) also requires publication within 7 days from the date of taking possession which is the date on which the notice was affixed on the property or date of delivery of notice which ever is earlier. In view of the above, learned counsel for the

respondent contends that Rule 8(1) & 8(2) are directory in nature and in case of any minor irregularity, no prejudice will be caused to the debtor/borrower and minor irregularity if any cannot nullify the proceedings.

8. The questions which arise for our consideration are (i) whether the provisions of sub-Section 13(3-A), insofar as they direct the secured creditor to consider the representation of the borrower within a period of 15 days are mandatory or directory? In other words, does the secured creditor has an obligation to respond to the representation of the borrower, within a period of 15 days? (ii) Are the procedures mentioned in Rule 8(1) & Rule 8(2) of the Security Interest (Enforcement) Rules 2002 mandatory?

9. Section 13(1) to 13(3A) of the Act, are reproduced as under:-

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

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

Provided that -

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modification as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;

(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. "

10. This Section must be examined in light of the purpose for which it was enacted, and the reasons for the Act's promulgation. The SARFAESI Act, was enacted in the year 2002 and was intended to give banks and other financial institutions a way to recover the debts due to them, without the intervention of the Court. The statement of objects and reasons for the enactment of the Act, are extracted below:-

"Statement of Objects and Reasons: The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels

of nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction."

11. The Constitutional validity of the Act was challenged before the Supreme Court in the case of Mardia Chemicals Ltd. Vs. Union of India, reported in (2004) 4 SCC 311. The Court while ultimately upholding the validity of the Act, held as under:-

"45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures

under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non- acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under sub- section (4) of Section 13 of the Act.

46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to notice under Section 13(2) of the Act more particularly for

the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13(1) of the Act the creditor is empowered to enforce the security himself without intervention of the Court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets etc.

47. This will also be in keeping with the concept of right to know and lender's liability of fairness to keep the borrower informed particularly the developments immediately before taking measures under sub-section (4) of Section 13 of the Act. It will also cater the cause of transparency and not secrecy and shall be conducive in building an atmosphere of confidence and healthy commercial practice. Such a duty, in the circumstances of the case and the provisions is inherent under Section 13 (2) of the Act."

12. The Hon'ble Court went on to give the following directions with respect to the enforcement of a security interest under the Act,

"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."

13. The Hon'ble Supreme Court ultimately upheld the validity of the SARFAESI Act, 2002, after noting the internal checks and balances that provided within the Act. The Court remarked that though the provisions of the Act, allowing for the sale of assets of a borrower without the leave of the Court, are drastic, they are not constitutionally invalid because of the internal safeguards that are present within the framework of the Act. The Court in paragraph No.80 of its judgment made it clear that the provisions are mandatory, and further made it compulsory for a secured creditor to consider the representation of a borrower, before auction of the secured assets.

14. Parliament, decided to amend Section 13, and introduced sub-Section 3-A to Section 13. The directions in *Mardia Chemicals* (supra), were incorporated into the statute,

and now the secured creditor was required to consider the representation of the borrower under the statute sub-Section 3-A as originally enacted is extracted below:-

"(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 17A."

15. The Parliament vide Act 1 of 2013, amended this provision and increased the time period to respond to the representation of the borrower, from one week to 15 days.

16. Recently, the Hon'ble Supreme Court, while dealing with the question, whether the Parliament intended for a total invalidity to result from the failure to reply and give reasons for the non-acceptance of the borrower's representation, in other words, whether sub-Section (3A) of

Section 13 is mandatory or directory in nature, in the case of ITC Limited Vs. Blue Coast Hotels Ltd. & Ors., in C.A.No.2928-2930 of 2018, 2018 SCC online 237 has held as under:-

"28. We find the language of sub-section (3A) to be clearly impulsive. It states that the secured creditor "shall consider such representation or objection and further, if such representation or objection is not acceptable or tenable, he shall communicate the reasons for non-acceptance" thereof. We see no reason to marginalize or dilute the impact of the use of the imperative 'shall' by reading it as 'may'. The word 'shall' invariably raises a presumption that the particular provision is imperative.

29. There is nothing in the legislative scheme of Section 13(3A) which requires the Court to consider whether or not, the word 'shall' is to be treated as directory in the provision. As the

Section stood originally, there was no provision for the above mentioned requirement of a debtor to make a representation or raise any objection to the notice issued by the creditor under Section 13(2). As it was introduced via sub-section (3A), it could not be the intention of the Parliament for the provision to be futile and for the discretion to ignore the objection/representation and proceed to take measures, be left with the creditor. There is a clear intendment to provide for a locus poenitentiae which requires an active consideration by the creditor and a reasoned order as to why the debtor's representation has not been accepted.

30. Moreover, this provision provides for communication of the reasons for not accepting the representation/objection and the requirement to furnish reasons for the same. A provision which requires reasons to be furnished must be considered as mandatory. Such a provision is an integral part of the duty to act fairly and reasonably and not fancifully. We are not prepared in such circumstances to interpret the silence of the Parliament in not providing for any consequence for non-compliance with a duty to furnish reasons. The provision must nonetheless be treated as 'mandatory'."

17. The Hon'ble Supreme Court therefore took the view that the provisions of Section 3-A are mandatory in nature and the non-compliance with these provision would lead to the sale itself being improper. Merely because there was no consequence provided for non-compliance of the provision did not make the provision directory. The Hon'ble Supreme Court however, was dealing with the mandatory nature of the requirement to consider the representation of the borrower, did not touch upon the question as to whether the requirement to communicate reasons within one week or fifteen days, is mandatory or merely directory.

18. On an examination of the sub-Section, it is clear that the word, "shall" has been used twice. The Secured Creditor "shall" consider the representation of the borrower and "shall" communicate the reasons for the acceptance or the rejection of the representation. The question before this Court in essence is whether the second shall in the sub-Section is mandatory or merely directory.

19. It is a settled principle of law that Courts while interpreting the provisions of a statute, should ordinarily

apply the plain meaning ascribed to words. In the case of Dattatreya Shanker Mote V. Anand Chintaman Datar, reported in (1974) 2 SCC 799, at page No.824, the Hon'ble Supreme Court has held as follows:-

"53. As explained above, even the literal meaning of the words "property in hand" could be said to be wider than that of tangible property in physical possession. After all, a literal meaning or the "plain ordinary meaning" of words used becomes what words employed have come, by common use, to mean and to find recognition as their "dictionary meaning". We need go no further here. For applying the literal Rule of interpretation, which ordinarily suffices unless there is good reason to depart from it, the Dictionary meaning has to be necessarily relied upon."

20. We must examine the true import of the second "shall" to understand whether the requirement to communicate reasons within one is mandatory or directory. It is a well settled principle of law that the mere use of the word "shall" is not conclusive proof of its mandatory nature. The Supreme Court in the case of Rubber House Vs. Excelsior Needle Industries (P) Ltd., reported in (1989) 2 SCC 413 and 424 has held as under:-

"31. The word "shall" in its ordinary import is obligatory. Nevertheless, the word "shall" need not be given that connotation in each and every case and the provisions can be interpreted as directory instead of mandatory depending upon the purpose which the legislature intended to achieve as disclosed by the object, design, purpose and scope of the statute. While interpreting the concerned provisions, regard must be had to the context, subject-matter and object of the statute in question."

21. In the case of Jaswantsingh Mathurasingh Vs. Ahmedabad Municipal Corpn, reported in 1992 Supp (1) SCC 5, the Apex Court has held:-

"5. The appearance of 'shall' is not conclusive, nor per se connotes its mandatory contour. Its meaning must be ascertained in the light of the legislative intent in its employment, the context in which it was couched, the consequences it produces the result it effected and above all the purpose it seek to serve, would all be kept in view. From the fact situation the courts are to cull out the

intention whether the construction to be put up would subserve the purpose of the legislative intent or tend to defeat it. Public interest, is always, a paramount consideration."

22. However, it is also a settled principle of law that where a word has been given a particular meaning under a statute, when the same word is used again, it must be given the same meaning, until and unless there is a strong reason to give it a different meaning.

23. The Supreme Court in the case of Bombay Dyeing & Mfg. Co. Ltd. (3) Vs. Bombay Environmental Action Group, reported in (2006) 3 SCC 434, at page No.484 has held:-

"88. It is well-settled principle of law that in the absence of any context indicating a contrary intention, the same meaning would be attached to the word used in the latter as is given to them in the earlier statute. It is trite that the words or expression used in a statute before and after amendment should be given the same meaning. When the legislature uses the same words in a similar connection, it is to be presumed that in the absence of any context indicating a contrary intention, the same meaning should attach to the words."

24. In the case of Central Bank of India Vs. Ravindra, reported in (2002) 1 SCC 367, at page No.397 as follows:-

"2. It was submitted by the learned amicus and other counsel for the borrowers, that the expression "on such principal sum" as occurring twice in the latter part of Section 34(1), which refers to interest pendente lite and post-decree, should be interpreted to mean principal sum arrived at by excluding the interest even if it has stood capitalised. This would be consistent with the legislative intent as reflected in the report of Joint Committee and sought to be fulfilled by

1956 Amendment. For two reasons this contention has to be rejected. Firstly, entertaining such a plea amounts to begging the question. As we have already held that the interest once capitalised ceases to be interest and becomes a part of principal sum or capital. That being so the interest forming amalgam with the principal, in view of having been capitalized, is principal sum and therefore the question of awarding interest on interest does not arise at all. Secondly, well-settled principles of

interpretation of statutes would frown upon such a plea being entertained. A construction which leads to repugnancy or inconsistency has to be avoided. Ordinarily, a word or expression used at several places in one enactment should be assigned the same meaning so as to avoid "a head-on clash" between two meanings assigned to the same word or expression occurring at two places in the same enactment. It should not be lightly assumed that "Parliament had given with one hand what it took away with the other" [See - Principles of Statutory Interpretation, Justice G.P. Singh, 7th Edition 1999, p.1 13]. That construction is to be rejected which will introduce uncertainty, friction or confusion into the working of the system (ibid, p.1 19). While embarking upon interpretation of words and expressions used in a Statute it is possible to find a situation when the same word or expression may have somewhat different meaning at different places depending on the subject or context. This is however an exception which can be resorted to only in the event of repugnancy in the subject or context being spelled out. It has been the consistent view of Supreme Court that when the Legislature used same word or expression in different parts of the same section or statute, there is a presumption that the word is used in the same sense throughout, (ibid, p.263). More correct statement of the rule is, as held by House of Lords in *Farrell v. Alexander*, [1976] 2 All E.R. 721, 736, "where the draftsman uses the same word or phrase in similar contexts, he must be presumed to intend it in each place to bear the same meaning". The Court having accepted invitation to embark upon interpretative expedition shall identify on its radar the contextual use of the word or expression and then determine its direction avoiding collision with icebergs of inconsistency and repugnancy."

25. It is one of the accepted rules of construction that the courts should presume that ordinarily the Legislature uses the same words in a statute to convey the same meaning. Therefore, the mandatory or directory nature of the second "shall" in sub-Section 3A of Section 13 of the SARFAESI Act, 2002, has to be determined in accordance with the legislature intent, and in light of the judgment of the Supreme Court in the case of *ITC Limited Vs. Blue Coast Hotels Ltd. & Ors.* (supra).

26. The SARFAESI Act, was brought into force so as to

provide secured creditors a faster method of recovering their debts. This process of recovery is done entirely without the intervention of the Court. The predominant reason for providing the secured creditors with this power is to ensure that they can recover their debts, in a quick efficient manner. If under Section 13(4) of the Act, the Bank is authorised by law to take over the possession of the property of a person 60 days after the issuance of a notice under Section 13(2) of the Act, certainly there should be a strict adherence of the time frame given under the Act. The very constitutionality of the Act, was protected in *Mardia Chemicals (supra)* only because of the inherently stringent safeguards. The safeguards in the Act therefore must be followed precisely. This is because the sale of the assets of a person without the intervention of a Court is a power which is not to be taken lightly. It comes with certain ramifications, and therefore, it is reasonable to expect strict compliance with the provisions of the Act. The Supreme Court while dealing with the requirement of a 30 day notice to the borrower before the notified date of sale in the case of *Mathew Varghese Vs. M.Amritha Kumar* reported in (2014) 5 SCC 610 held as under:-

"49. We, therefore, hold that unless and until a clear 30 days notice is given to the borrower, no sale or transfer can be resorted to by a SECURED CREDITOR. In the event of any such sale properly notified after giving 30 days clear notice to the borrower did not take place as scheduled for reasons which cannot be solely attributable to the borrower, the SECURED CREDITOR cannot effect the sale or transfer of the SECURED ASSET on any subsequent date by relying upon the notification issued earlier. In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the SECURED CREDITOR and the borrower. It is therefore, imperative that for the sale to be effected under Section 13(8), the procedure prescribed under Rule 8 read along with 9(1) has

to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Section 13(1) and (8) of the said Act."

27. On an analysis of the abovementioned judgments of the Supreme Court it becomes clear that the stringent safeguards that had been created within the Act, itself must be allowed with full rigour. The Act gives a secured creditor the right to take away and sell the property of a defaulting borrower, without the intervention of the Court. In this manner the secured creditors has the sole power to auction the assets of a borrower. The Supreme Court keeping this in mind in its judgments has held that all the provisions of the Act must be strictly followed. The Supreme Court in its judgments has highlighted the importance of strict compliance with the provisions of the SARFAESI Act, in light of the fact that a person's property is being sold, by his creditor, without the approval of the Court. It is for this reason, that the Supreme Court has time and time again held that the provisions must be held mandatory.

28. The legislative history of the subject also lends a useful tool to interpret the true import of the second 'shall'. Initially the RDB Act, was enacted in the year 1998. It was created as an alternate forum, allowing secured creditors, to speedily get permission to auction the secured assets of their debtors. Even this system was found to be time consuming, and in an effort to speed up this system even more, the SARFAESI Act, was brought in. It allowed the secured creditors to realise his debts, by the sale of the secured assets of the borrower without the leave of the Court. Therefore what can be seen is that allowing a secured creditor to sell the assets of its debtors, as quickly as possible, saving both his time and money, was one of the reasons for the enactment of the Act. If secured creditors are allowed to speedily dispose of the assets of their borrowers, then surely there must be an obligation upon them to consider the representation of the borrower in a speedy manner. We are therefore of the view that the second "shall" used in sub-Section 3-A of the Act, is mandatory in nature, and not directory. Since the entire SARFAESI Act, is meant to give a secured creditor the right to speedily realise his debts, it must also impose an obligation upon secured creditors, to

consider the representation of the borrower. Moreover, in light of the decision of the Supreme Court in the case of ITC Limited Vs. Blue Coast Hotels Ltd. & Ors. (supra), wherein the Supreme Court has held the first "shall" to be mandatory, it would not be correct for the same word in the same provision to have two different meanings, and therefore the second "shall" must be held to be mandatory.

29. The Gujarat High Court in the case of Kirandevi Bansal Vs. DGM Small Industries Development Bank of India reported in 2009 SCC on line GUJ 1204 took the view that the time period contemplated under Section 3-A was merely directory, it held as under:-

"13. Therefore, only when the Bank proceeds to take further action under Section 13(4) of the Act, without communicating any reasons for rejection of representation/objections of the borrower to the notice issued under Section 13(2) of the Act, it can be said that any prejudice or loss is caused to the borrower. Failure to communicate reasons for rejection of the representation/objections within one week's time as stipulated in Sub-section (3A) of Section 13 of the Act would not cause any prejudice or loss to the borrower. But, in a given case, suppose no action is being taken by the secured creditor under Section 13(4) of the Act for a considerable long period, in spite of the objection or representation filed by the borrower against the notice under Sub-section (2) of Section 13 of the Act received by him, it may be possible to infer that the secured creditor is not desirous of proceeding further on the notice issued under Sub-section (2) of Section 13 of the Act. Further, it may also be noticed that as per Sub-section (13) of Section 13, no borrower shall, after the receipt of notice under Sub-section (2) of Section 13, transfer by way of sale, lease any of his secured assets, without prior consent of the secured creditor. It is, therefore, imperative that the secured creditor shall not unduly delay the proceedings once action has been initiated by issuing notice under Section 13(2).

14. In our view, the Legislation has fixed the time-limit of one week in Sub-section (3A) of the Act is to see that the proceedings Initiated under Section 13 of the Act be expedited. Every prescription of a period within which an act must

be done is not the prescription of a period of limitation, with painful consequence, if the act is not done within that period. This principle was laid down by the Apex Court while examining the scope of Rule 9(j) of the Prevention of Food Adulteration Rules, 1955 in Dalchand v. Municipal Corporation, Bhopal and Anr. : (1984) 2 SCC 486 : AIR 1983 SC 303 : 1983 Cri LJ 448. The Court held that Rule 9(j) prescribing a period of 10 days is directory and not mandatory. Same view has been taken by the Apex Court in T.V. Usman v. Food Inspector, Tellicherry Municipality, Tellicherry : AIR 1994 SC 1818 interpreting Rule 7(3) of Prevention of Food Adulteration Rules, which requires a copy of the result of the analysis to be provided to the Local Health Authority within a, period of 45 days. The Court held that the time-limit is only directory."

30. Similarly the Bombay High Court in the case of Clarity Gold P.Ltd. Vs. State Bank of India reported in 2011(2) MHLJ 72, agreed with this decision of the Gujarat High Court and held as under:-

"13. We are in respectful agreement with the judgment of the Gujarat High Court which holds that every prescription of a period within which an act has to be done does not constitute a prescription of a period of limitation, a failure of compliance with which would render the action invalid. The object of sub-section (3A) is to provide an expeditious method for the disposal of objections in order to ensure that the action of the secured creditor is not held up for an unduly long period of time. The period of one week that is prescribed in sub-Section (3A) is clearly directory. That apart, the Petitioners have not established that any prejudice was caused to them by the delay on the part of the Bank in responding to the representation submitted to the notice under Section 13(2). That submission must therefore fail."

31. While both the High Court of Gujarat and Bombay rightly noted that all the time provided under law do not constitute a period of limitation, which if not met would render the action invalid, but we are unable to agree with their view that the time period prescribed in sub-Section 3-A of the Act, is not mandatory. Whenever a period of limitation is provided in

a statute, and the time period of which is not complied with, there is an inherent power on the Court to condone the delay, when appropriate. While dealing with the provisions of the Act, the entire framework, for the sale of the assets of the debtor is without reference to court. Neither the borrower, nor the creditors can be persons who can condone the delay in responding to the Representations under Sub Section 3-A, and therefore in the absence of any adjudicating body, the time period must be mandatory and not merely directory. We therefore respectfully disagree with the views of the Gujrat High Court and Bombay High Court.

32. The Division Bench of this Court in the case of IDBI vs. Kamaldeep Pvt. Ltd. reported in 2007 (2) CTC 379 does not deal with this issue para 9 of the Judgment reads as under:-

"9. The proviso to sub-section (3-A) of section 13 of the SARFAESI Act makes it abundantly clear 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 DRT under Section 17 or the Court of District Judge under Section 17-A of the Act. Thus, the basic object of sub-section (3-A) of Section 13 of the SARFAESI Act is to ensure the element of transparency and fair play in the implementation of the provisions of the SARFAESI Act. Learned counsel for the respondent is unable to demonstrate prejudice or loss that is likely to be caused to the respondent by reason of the possession notice given to it, earlier to the communication of the reasons for non-acceptance of the objections raised by the borrower. In our opinion, at the most, it would amount to a mere irregularity and having regard to the facts and circumstances of the case, we are satisfied that the appellant-bank has substantially complied with the provisions of Section 13(3-A) of the SARFAESI Act."

33. According to this Judgment Section 13(3-A) of the Act in its entirety only directory. This Judgment cannot stand in light of the judgment of the Supreme Court in ITC Limited Vs. Blue Coast Hotels Ltd. & Ors. (Supra).

34. If this second 'shall' is viewed as merely directory, it would lead to a lot of ambiguity. A secured creditor would have an undefined amount of time to reply to the representation of the borrower. After the notice under 13(2) is

issued to the borrower, unless the borrower pays the full amount within a period of 60 days, symbolic possession over his assets can be taken by the secured creditor within a period of 60 days, the Section 13(4) of the Act. If the representation under Section 13(3-A) is to have any meaning, the secured creditor must consider it and communicate his reasons for accepting or rejecting such a representation. The entire process contemplated under Sub Section (3-A) must take place within the 60 days period, between the operation of Section 13(2) and the Section 13(4). Within this 60 days period, the borrower must take stock of his assets, come upon with a plan to repay his debt. If the representation is to be rejected, the borrower would require some time to come up with an appropriate plan, in the remaining period. The secured creditor, on the other hand, only has to consider the financial feasibility and suitability of the representation/plan presented by the borrower, and decide to accept or reject his representation, and a period of 15 days would suffice for this purpose. If the provision is held to be merely directory, the secured creditor may extend this period to however long the secured creditor deems fit, which might not fit within the 60 day time frame.

35. If the provision is interpreted as mandatory, the borrower is guaranteed a quick response to his representation, which will give him some time to make arrangements for funds necessary to pay the debts and is therefore a beneficial interpretation as far as the borrower is concerned is necessary. Insofar as the secured creditor is concerned, this interpretation does not cause any prejudice to him. It is the secured creditor who chooses to invoke its rights under Section 13 of the SARFAESI fails to communicate reasons for accepting or rejecting the representation of the borrower, within 15 days of receipt of a representation under Section 13(3-A) the only prejudice that is caused to him is that he will have to issue a fresh notice under Section (13)(2) of the Act. Since time is of the essence, the failure of the secured creditor to consider the representation of the borrower indicates that the sale of the asset, is not such an urgent requirement as far as the bank is concerned.

36. It may also be noted that when the Gujarat High Court and the Bombay High Court took the view that the time period poun Sub-Section 3-A is merely directory, the time period under the act, was one week. This period has been increased by the Parliament to 15 days. To now hold that this time period is still only directory, would render the amendment meaningless.

37. We therefore hold, that under Section 13(3-A) of the SARFAESI Act, 2002, that in the event that a borrower makes a representation under Section 13(3-A) of the Act, the Secured Creditor, must communicate reasons for accepting or rejecting the representation of the borrower, within 15 days from the receipt of the representation, failing which, the notice under Section 13(2) would be rendered invalid. The secured creditor, would therefore have to issue a fresh notice under Section 13(2) and start the process again.

38. Material on record indicates that the possession notice though dated 16.05.2017 is sent by post only on 18.05.2017 and was delivered on 22.05.2017. The sale notice was issued on 19.05.2017 that is before the possession notice was delivered. Rule 8(1) and 8(2) of the Security Interest (Enforcement) Rules 2002 read as under:-

"8.Sale of immovable secured assets:- (1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2)The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven day from the date of taking possession, in two leading newspapers], one in vernacular language having sufficient circulation in that locality, by the authorised officer."

39. The question that arises is whether affixure of the possession notice alone is sufficient compliance of Rule 8(1) and whether the sale notice can be issued after affixing of notice but before the actual delivery of the possession notice. Rule 8(1) stipulates that the possession notice has to be delivered by both the methods that is by delivery and by affixure. Until both the methods of delivery are not complied with the sale notice cannot be issued. The sale notice has to be issued within 7 days of the date of delivery of the possession notice. The Honourable Supreme Court in Mathew Varghese (supra) in para 43 has observed as under:-

"43.The above principles laid down by this Court also make it clear that though the recovery of public dues should be made expeditiously, it should be in accordance with the procedure prescribed by law and that it should not frustrate a constitutional right,

as well as the human right of a person to hold a property and that in the event of a fundamental procedural error occurred in a sale, the same can be set aside."

40. Not only in Mathew Varghese' case, the Hon'ble Supreme Court in other cases also has equated property rights equal to human rights. As discussed earlier SARFAESI proceeding enable the bank to take possession of the property of a debtor and bring to sale without reference to Court. Mardia Chemicals (supra) has upheld the validity of the Act only because of the inherent safeguards mentioned in the Act and Rules so that the Interest of the Debtor are also safeguarded. Keeping the above mentioned principle in mind it has to be held that before sale notice is issued the possession notice has to be served according to both the modes prescribed in Rule 8(1). Possession Notice cannot be issued after fulfilling the requirement of service only through one mode. The procedure under contemplated under Rule 8(1) and Rule 8(2) having not been followed the sale notice is bad.

41. Another issue that was urged before us, was that the land for the sale of which SARFAESI notices were issued, was agricultural land. Admittedly, the land in question has not been used by the petitioner as Agricultural land, and therefore the argument that this land cannot be subject to the Act, deserves to be rejected in light of the Judgement of the Supreme Court in the case of ITC Limited Vs. Blue Coast Hotels Ltd. & Ors. (supra), which squarely covers this point.

42. As a result the Writ Petition is allowed. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

asi/gsp

To

1. The Manager,
Indiabulls Housing Finance Limited,
Old No.60-A, New No.20/3,
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Thiyagaraya Road, T.Nagar,
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2. The Authorized Officer,
Indiabulls Housing Finance Limited,
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+1cc to M/s.G.Veerapathiran, Advocate, S.R.No.51660
+1cc to M/s.Adeesh Anto, Advocate, S.R.No.52037

W.P.No.33561 of 2017 and
W.M.P.No.37083 of 2017

EV(CO)
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