

GURBAX SINGH
2018.12.04 11:00

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No. 19318 of 2018

Date of decision: November 15, 2018

M/s Shree Shayam Cotex Private Limited and another.

.....Petitioners

Vs.

State Bank of India and others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE AJAY KUMAR MITTAL,
HON'BLE MR. JUSTICE AVNEESH JHINGAN**

Present: Mr. Lalit Thakur, Advocate for Mr. V.K. Sachdeva, Advocate for
the petitioner(s)

Mr. C.S. Pasricha, Advocate for the petitioner(s)
in (CWP No. 7595 & 9681 of 2018).

Mr. Vivek Goyal, Advocate for the petitioner (s)
in (CWP No. 18320, 17948, 18508, 22476 & 8753 of 2018).

Ms. Stuti Bamba, Advocate and Ms. Anna Bansal, Advocate for
Mr. Keshav Gupta, Advocate for the petitioner (s) in
(CWP No. 20025 of 2018).

Mr. C.K. Jha, Advocate for the petitioner (s)
in (CWP No. 10802 of 2018).

Mr. Akhilesh Vyas, Advocate for the petitioner (s)
in (CWP Nos. 9824 & 19807 of 2017).

Mr. Manoj Kaushik, Advocate for the petitioner (s)
in (CWP No. 19856 of 2018).

Mr. Pankaj Gupta, Advocate for the petitioner (s)
in (CWP Nos. 10457 & 9285 of 2018).

Mr. G.S. Anand, Advocate for the petitioner (s)
in (CWP No. 16351 of 2018).

Mr. Neeraj Jain, Advocate for Mr. Jagmohan Ghumman,
Advocate for the petitioner (s) in (CWP No. 17283 of 2018).

Mr. S.S. Momi, Advocate for the petitioner (s)
in (CWP No. 4357 of 2018).

Ms. Jyoti Sareen, Advocate for the petitioner (s) in (CWP No. 12485 of 2018).

Mr. Raghav Goel, Advocate for the petitioner (s) in (CWP No. 2222 of 2018).

Mr. Rakesh Bhatia, Advocate for the petitioner (s) in (CWP No. 813 of 2018).

Mr. F.S. Virk, Advocate for the petitioner(s) in (CWP No. 24504 of 2018)

Mr. APS Madaan, Advocate for the petitioner(s) in (CWP No. 27370 of 2018)

Mr. Rakesh Gupta, Advocate for the petitioner(s) in (CWP No. 9625 of 2018)

Mr. B.B. Bagga, Advocate for the petitioner(s) in (CWP No. 23286 of 2018)

Mr. Gulshan Mehta, Advocate for the petitioner(s) in (CWP No. 20834 of 2018).

Mr. Pawan Kumar Hooda, Advocate for the petitioner (s) in (CWP No. 21663 of 2018).

Mr. Rohit Suri, Advocate for the petitioner(s) in (CWP Nos.10548, 17661, 17674 & 11569 of 2018).

Mr. J.P. Rana, Advocate for the petitioner(s) in (CWP No. 9253 of 2018).

Mr. Rajinder Kumar Singla, Advocate for the petitioner(s) in (CWP No. 6370 of 2018).

Mr. Sanjiv Gupta, Advocate for the petitioner(s) in (CWP No. 22197 of 2018).

Mr. Mukul Aggarwal, Advocate for the petitioner(s) in (CWP No. 21575 of 2018).

Mr. B.B. Bagga, Advocate for the respondent in (CWP No. 19807 of 2017).

Mr. Anandeshwar Gautam, Advocate and Mr. Gaurav Goel, Advocate for the respondent (in CWP Nos. 19855, 18894, 9681, 8753, 19318 & 18720 of 2018)

Mr. Puneet Jain, Advocate for Mr. Rakesh Gupta, Advocate for respondent-SBI in (CWP Nos. 9824 of 2017, 10802, 23932 and 23935 of 2018).

Mr. Sumit Batra, Advocate for respondent-Bank in (CWP No. 11569 of 2018).

Ms. Geeta Sharma, Advocate for respondent-Bank in (CWP No. 20025 of 2018).

Mr. Amit Kumar Goyal, Advocate for respondent-PNB in (CWP No. 15036 of 2018).

Mr. Amit Sharma, Advocate for Mr. Prateek Mahajan, Advocate for respondent No.5 in (CWP No. 4357 of 2018).

Mr. Harsh Chopra, Advocate for respondent-DHFL in (CWP No. 16351 of 2018).

Mr. Vinod Saini, Senior Panel Counsel for respondent-UOI in (CWP No. 19318 of 2018).

Mr. D.K. Singal, Advocate for respondent in (CWP Nos. 10548, 12485 & 17948 of 2018).

Ms. Sona Kaur, Advocate for Mr. Naresh Kumar, Advocate for respondent No.3 (CWP No. 18320 of 2018).

Mr. Ajay Singla, Advocate for respondent No.2 in (CWP No. 7525 of 2018).

Mr. K.P.S. Dhillon, Advocate for respondent Nos. 1 & 2 in (CWP No. 2222 of 2018).

Mr. Rajnish K. Jindal, Advocate for respondent Nos. 3 & 4 in (CWP No. 9824 of 2018).

Mr. Vikas Chatrath, Advocate for respondent-Canara Bank

Mr. C.S. Pasricha, Advocate for respondent Nos. 2 & 3 in (CWP No. 24504 of 2018)

Mr. Arvind Rajotia, Advocate for respondent-Canara Bank in (CWP No. 18508 of 2018).

Mr. Arvind Rajotia, Advocate for respondent-PNB in (CWP No. 813 of 2018).

Mr. Umang Khosla, Advocate for respondent-Bank/Caveator in (CWP No. 9610 of 2018).

Ms. Khushpreet Bains, Advocate for the respondent-Bank in (CWP No. 7595 of 2018).

Mr. Vivek Sethi, Advocate for respondent in (CWP No. 17283 of 2018).

Mr. Raj Kumar, Advocate for respondent No.1-OBC in (CWP No. 18320 of 2018).

Mr. N.C. Sahni, Advocate, Mr. I.P. Singh, Advocate Mr. O.P. Narang, Advocate and Ms. Pooja Chopra, Advocate for respondent-Financial Co. in (CWP No. 4357 of 2018).

Mr. Shailender Kashyap, Advocate for respondent in (CWP No. 15354 of 2018).

Mr. Lalit Thakur, Advocate for Mr. V.K. Sachdeva, Advocate for respondent No. 2 in (CWP No. 17520 of 2018)

Mr. Sandeep Suri, Advocate for the respondent-Bank in (CWP No. 19757 of 2018).

Mr. Nakul Sharma, Advocate for respondent No.1 in (CWP No. 20859 of 2018)

Ms. Puja Chopra, Advocate for respondent No. 2 in
(CWP No. 10457 of 2018)

Ms. Ishneet Kaur, AAG, Punjab

Mr. Ayuwan Singh, AAG, Haryana.

Ajay Kumar Mittal,J.

1. This order shall dispose of a bunch of 58 petitions i.e. CWP Nos. 9824, 19807 of 2017, 19318, 813, 2222, 6370, 7525, 7595, 4357, 23104, 22197, 23194, 23286, 9610, 20243, 20999, 20834, 21249, 20126, 9625, 21575, 21663, 20131, 18779, 22659, 16351, 17661, 8753, 18508, 17948, 16057, 15036, 10802, 19757, 19856, 20859, 20025, 17283, 10457, 19855, 18320, 18720, 17674, 18894, 17956, 17520, 15354, 12485, 11569, 10548, 9681, 9253, 23932, 23935, 24504, 27370, 22476 and 9285 of 2018, as according to the learned counsel for the parties, the issue involved in all these petitions is identical. However, the facts are being extracted from CWP No.19318 of 2018.

2. CWP No.19318 of 2018 has been filed by the petitioners under Articles 226/227 of the Constitution of India for quashing the order dated 16.4.2018, Annexure P.7 passed by respondent No.3 – Debts Recovery Tribunal-III (DRT), Chandigarh vide which SA No.525 of 2017 has been dismissed on the basis of the judgment of the Allahabad High Court Full bench in *M/s Hindon Forge Pvt. Limited and another vs. State of Uttar Pradesh, through DM Ghaziabad and others*, 2018(2) RCR (Civil) 234, holding that without losing physical possession, the borrower cannot approach the DRT by filing securitization application under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, “the 2002 Act”) which view is now unsustainable in view of the previous and subsequent judgments of the

Hon'ble Apex Court. Further direction has been sought to respondent No.3 to decide the above mentioned SA filed by the petitioners on merits in view of the order dated 22.3.2016 passed by this court in CWP No.4529 of 2016.

3. A few facts relevant for the decision of the controversy involved as narrated in CWP No.19318 of 2018 may be noticed. Petitioner No.1 is a private limited company registered under the Companies Act, 1956. In the year 2007, it was granted term loan of ₹ 1.60 crores and cash credit limit of ₹ 80 lacs. On 6.11.2011, the factory suffered a massive fire accident due to which substantial damage was caused to the assets of the company. In spite of that, the petitioner though deposited the amounts regularly but there was some shortfall therein due to which the Bank classified the loan account as Non-performing asset (NPA). The Bank issued notice on 1.12.2012, Annexure P.1 under Section 13(2) of the 2002 Act claiming ₹ 60,56,560/20 against the cash credit limit of ₹ 80 lacs and ₹ 53,44,139/54 on account of term loan. The petitioners tried to regularize the loan account on deposit of substantial payment and also requested the Bank to restructure the loan account. The Bank did not accept the request of the petitioners. The respondent Bank issued notice on 2.7.2013, Annexure P.2 to the petitioners under Section 13(4) of the 2002 Act. The petitioners approached the DRT, Chandigarh by filing SA No. 150 of 2015 which was later on renumbered as SA No.525 of 2017. During the pendency of the SA, the Bank made attempt to sell certain properties for which applications were filed before the Tribunal challenging the same. The Bank had put the property to sale on various occasions including by virtue of sale notices dated 5.6.2015 and 25.7.2015. In the meantime, on 20.11.2015, the Bank had formulated one time settlement scheme, pursuant to which on 30.12.2015, the petitioners submitted proposal for settlement of the loan

account vide letter dated 11.1.2016. The Bank accepted the offer for ₹ 101.27 lacs and upfront money of ₹ 10 lacs came to be adjusted. To the utter surprise of the petitioners, the Bank had taken illegal physical possession of the factory unit on 11.1.2016 at 11 AM. By 12 noon, the Director of the Company along with his son went to the bank and reached there at 1:30:26 PM on 11.1.2016. While the settlement letter was given to them and on the other hand behind their back, physical possession of the running factory was taken through enforcement agency. The petitioners filed application before DRT seeking restoration of the possession but the same was declined on 24.12.2016. The petitioners preferred CWP No.4529 of 2016 in this Court. Pursuant to the order dated 22.3.2016, Annexure P.4 passed by this Court in the said writ petition, the possession was restored. With regard to illegal charges of about ₹ 8 lacs approximately, this court held that the same shall be decided by the DRT in the first instance in appropriate proceedings. The petitioners filed two applications dated 22.3.2016 and 23.10.2016, Annexures P.5 and P.6 before the DRT to adjudicate on the issue regarding the entitlement of the Bank to claim charges from the petitioners for taking illegal physical possession. The Bank filed its reply. The issues remained pending before the DRT. In the meantime, The Allahabad High Court in *M/s Hindon Forge Pvt. Limited's* case (supra) held that no securitization application can be filed by the borrower without first losing physical possession and if such a petition is filed, the same would be pre-mature. Consequently, the DRT dismissed SA No.525 of 2017 filed by the petitioners on the ground that since the physical possession had not been lost, therefore, it is not competent to adjudicate the matter and the SA was premature. According to the petitioners, a number of petitions have been dismissed by the DRT on the basis of the judgment of the Allahabad High Court against which writ petitions are pending in this Court. In these

petitions, notice of motion has been issued and status quo regarding possession has been ordered to be maintained. The petitioners assert that after declaration of the account as NPA in terms of the Master Circular – Prudential norms on Income Recognition, Asset Classification and Provisioning pertaining to Advances, the bank issues notice under Section 13(2) of the 2002 Act giving 60 days time to the borrower during which period he is entitled to submit his objections under Section 13(3A) which are required to be decided by the Bank. In case the objections are not upheld, the Bank proceeds to issue notice under section 13(4) of the 2002 Act i.e. a step towards taking possession of secured asset which is normally symbolic possession taken by the Bank. For taking physical possession, the Bank will have to approach District Magistrate under Section 14 of the 2002 Act to take help of the State machinery. The debtor will lose possession of the property only after execution of an order under section 14 of the 2002 Act. Hence the instant petitions before this Court by the petitioners.

4. We have heard learned counsel for the parties.

5. Learned counsel for the petitioners contended that Section 17 of the 2002 Act cannot be interpreted to mean that it can be invoked only when symbolic or physical possession of the asset is taken from the borrower by the Bank. Reliance was placed on following judgments:-

- I) ***M/s Hindon Forge Pvt. Limited and another vs. The State of Uttar Pradesh through District Magistrate, Ghaziabad and another***, Civil Appeal No.10873 of 2018, decided on 1.11.2018.
- II) ***Mardia Chemicals Limited etc. vs. Union of India and others***, (2004) 4 SCC 311;
- III) ***M/s Transcore vs. Union of India and others***, (2008) 1 SCC 125;
- IV) ***Authorised Officer, Indian Overseas Bank and another vs. M/s Ashok Saw Mill***, (2009) 8 SCC 366;

- V) ***Kaniyalal Lalchand Sachdev and others vs. state of Maharashtra and others, (2011) 2 SCC 782;***
- VI) ***Standard Chartered Bank vs. V. Noble Kumar and others, (2013) 9 SCC 620;***
- VII) ***State Bank of Patiala vs. Mukesh Jain and another, (2017) 1 SCC 53;***
- VIII) ***M/s Punjab Chemical Industries vs. District Magistrate cum Deputy Commissioner, Ludhiana and others, 2014(51) RCR (Civil) 438;***
- IX) ***M/s NCML Industries Limited through Director and another vs. Debts Recovery Tribunal, Lucknow and others, 2018(2) RCR (Civil) 234;***
- X) ***ITC Limited s. Blue Coast Hotels Limited and others, 2018(2) RCR(Civil) 646;***
- XI) ***Dheerendra Kumar and another vs. Authorised Officer Aadhar Housing Finance Limited and another, Writ C No.11706 of 2018 (Allahabad DB) decided on 2.4.2018.***
- XII) ***Sunil Garg vs. Bank of Baroda and others, CWP No.19028 of 2017 decided on 16.4.2017 (Madhya Pradesh).***

6. On the other hand, learned counsel for the respondent Bank supported the impugned order passed by the DRT and submitted that the order has been passed in accordance with the law as laid down under the 2002 Act and no error has been committed by the DRT. Learned counsel relied upon judgment in ***Standard Chartered Bank vs. V.Noble Kumar and others, (2013) 9 SCC 620***. Support was also drawn from decisions of the Supreme Court in ***Mardia Chemicals, Transcore, M/s NCML Industries Limited's*** cases (supra), ***Union Bank of India vs. Satyavati Tandon, (2010) 8 SCC 110***, and Madras High Court in ***M/s Buhariya Traders vs. The Chief Metropolitan Magistrate, Allikulam, Chennai, 2018(1) CWC 64 (Madras)***.

7. The core issue that arises for consideration in these writ petitions is whether on issuance of notice under Section 13(4) of the 2002

Act, the borrower or any other person aggrieved of the action initiated there under can take recourse to Section 17 of the 2002 Act by filing an application thereunder without losing symbolic or physical possession of the secured asset.

8. Before adjudicating the controversy involved, it would be expedient to refer to the relevant statutory provisions of the 2002 Act.

Section 2. Definitions :(1) In this Act, unless the context otherwise requires:-

2(j) "default" means non-payment of any principal debt or interest thereon or any other amount payable by a borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor

2(o) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, 3 [doubtful or loss asset, --

2(zb) "security agreement" means an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor including the creation of mortgage by deposit of title deeds with the secured creditor;

Section 13 relates to enforcement of security interest whereas Section 14 deals with power of Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. Section 15 provides for manner and effect of takeover of management. Under Section 17, an application against measures to recover secured debts lies to the DRT. Section 17A deals with making of application to Court of District Judge in certain cases.

9. The 2002 Act was enacted to regulate securitization and reconstruction of financial assets and enforcement of security interest and to

provide for a central database of security interests created on property rights and for matters connected therewith or incidental thereto. According to the definition of “default”, it means non-payment of any principal debt or interest or any other amount payable by the borrower to the secured creditor consequent upon which the account is classified as non-performing asset in the books of account of the secured creditor. The word “non performing asset” has been defined as classification of the asset or account of the borrower as sub standard by the Bank or financial institution. “Security Agreement” has been assigned the meaning that any agreement or instrument or document or arrangement under which security interest is created in favour of the secured creditor including creation of mortgage of property.

10. [Section 13](#) of the 2002 Act contains detailed mechanism for enforcement of security interest. Sub-section (1) thereof lays down that notwithstanding anything contained in [Sections 69](#) or 69-A of the Transfer of [Property Act](#), 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. Sub-section (2) of [Section 13](#) enumerates many steps needed to be taken by the secured creditor for enforcement of security interest. This sub-section provides 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 with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of [Section 13\(4\)](#). Sub-section (3) of [Section 13](#) lays down that notice issued

under [Section 13\(2\)](#) shall contain details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank or financial institution. Sub-section (3-A) of [Section 13](#) provides that the borrower may make a representation in response to the notice issued under [Section 13\(2\)](#) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for non-acceptance are required to be communicated within fifteen days. Sub-section (4) of [Section 13](#) specifies various modes which can be adopted by the secured creditor for recovery of secured debt. The secured creditor can take possession of the secured assets of the borrower and transfer the same by way of lease, assignment or sale for realising the secured assets. This is subject to the condition that the right to transfer by way of lease, etc. shall be exercised only where substantial part of the business of the borrower is held as secured debt. If the management of whole or part of the business is severable, then the secured creditor can take over management only of such business of the borrower which is relatable to security. The secured creditor can appoint any person to manage the secured asset, the possession of which has been taken over. The secured creditor can also, by notice in writing, call upon a person who has acquired any of the secured assets from the borrower to pay the money, which may be sufficient to discharge the liability of the borrower. According to Sub-section (7) of [Section 13](#), where any action has been taken against a borrower under sub-section (4), all costs, charges and expenses properly incurred by the secured creditor or any expenses incidental thereto can be recovered from the borrower. The money which is received by the secured creditor is required to be held by him in trust and applied, in the first instance, for such costs, charges and expenses and then

in discharge of dues of the secured creditor. Residue of the money is payable to the person entitled thereto according to his rights and interest. Sub-section (8) of [Section 13](#) imposes a restriction on the sale or transfer of the secured asset if the amount due to the secured creditor together with costs, charges and expenses incurred by him are tendered at any time before the time fixed for such sale or transfer. Sub-section (9) of [Section 13](#) deals with the situation in which more than one secured creditor has stakes in the secured assets and lays down that in the case of financing a financial asset by more than one secured creditor or joint financing of a financial asset by secured creditors, no individual secured creditor shall be entitled to exercise any or all of the rights under sub-section (4) unless all of them agree for such a course. Under, Sub-section (10) of [Section 13](#) where dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application before the Tribunal for recovery of balance amount from the borrower. Sub-section (11) states that without prejudice to the rights conferred on the secured creditor under or by this section, it shall be entitled to proceed against the guarantors or sell the pledged assets without resorting to the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets. Sub-section (12) of [Section 13](#) lays down that rights available to the secured creditor under the Act may be exercised by one or more of its officers authorised in this behalf. Sub-section (13) provides that after receipt of notice under sub-section (2), the borrower shall not 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. In terms of [Section 14](#), the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction the secured asset or other documents relating thereto are found

for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor. Section 15 of the Act deals with manner and effect of take over of management.

11. Section 17 of the 2002 Act has been amended w.e.f 1.9.2016. The words “Application against measures to recover secured debts” are substituted in place of the words “Right to appeal”. This section speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of [Section 13](#). Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to [Section 17\(1\)](#) and it has been clarified that the communication of reasons to the borrower in terms of [Section 13\(3-A\)](#) shall not constitute a ground for filing application under [Section 17\(1\)](#). Sub-section (2) of [Section 17](#) casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of [Section 13](#), then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of [Section 13](#) is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any

other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in [Section 13\(4\)](#) for recovery of its secured debt. Sub-section (5) of [Section 17](#) prescribes the time-limit of sixty days within which an application made under [Section 17](#) is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously. [Section 18](#) provides for an appeal to the Appellate Tribunal. Section 31 grants exemption to situations enumerated thereunder.

12. Rule 2 of Security Interest (Enforcement) Rules, 2002 (in short, “the 2002 Rules”) deals with procedure after issue of demand notice, rule 5 prescribes valuation of moveable secured assets, rule 6 relates to sale of moveable secured assets, under rule 7, issue of certificate of sale has been dealt with, rule 8 is relating to sale of immovable secured assets, rule 9 deals with time of sale, issue of sale certificate and delivery of possession whereas under rule 10, provision has been made for appointment of manager to manage the secured assets.

13. The issue involved in the present writ petitions is no longer res integra. The Supreme Court in *M/s Hindon Forge Pvt. Limited’s* case (supra), against the judgment rendered by the Full Bench of the Allahabad High Court had adjudicated similar proposition.

14. The question before the Allahabad High Court was whether an application under Section 17(1) of the 2002 Act at the instance of a borrower is maintainable even before symbolical or actual physical possession of secured assets is taken by banks/financial institutions in exercise of their

powers under Section 13(4) of the Act read with Rule 8 of 2002 Rules. After discussing various provisions of the 2002 Act, the Rules and the judgments of the Supreme Court, the Full Bench came to the conclusion that taking symbolic possession or issuance of possession notice under Appendix IV of the Rules, meeting with any resistance, cannot be treated as measure/s taken under Section 13(4) of the 2002 Act and therefore, the borrower at that stage cannot file an application under Section 17(1) before the DRT. In other words, a securitization application under Section 17(1) of the 2002 Act is maintainable only when actual/physical possession is taken by the secured creditor or the borrower loses actual/physical possession of the secured assets. Further, once the right to approach DRT matures and securitization application under Section 17(1) is filed by the borrower, it is open to the DRT to deal with the same on merits and pass appropriate orders in accordance with law.

15. It would be apposite to refer to various decisions relied upon by the Apex Court in *M/s Hindon Forge Pvt. Limited's* case (supra). The Apex Court referred to its decision in *Mardia Chemicals's case* (supra) wherein it was held that proceedings under Section 17 of the 2002 Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act. On 30.12.2004, the 2002 Act was amended with effect from 11.11.2004. The Supreme Court upheld the validity of the provisions of the said Act except that of sub section (2) of Section 17 which was declared ultra vires Article 14 of the Constitution. The said sub section provides for deposit of seventy five percent of the amount claimed before entertaining an appeal by the Debts Recovery Tribunal under Section 17 of the 2002 Act. It was observed by the Apex Court that in *Mardia Chemicals's case* (supra), it was made clear in para 80 of the judgment that all measures having been

taken under Section 13(4) of the 2002 Act and before the date of sale auction, it would be open for the borrower to file a petition under Section 17 of the 2002 Act. It was recorded that this paragraph appeared to have been missed by the Full Bench of the Allahabad High Court.

16. Reference was also made by the Supreme Court to its judgment in *Transcore's* case (supra) to hold that the word “possession” is a relative concept and that the dichotomy between symbolic and physical possession does not find place under the 2002 Act. The *V. Noble Kumar's* case was also discussed by the Apex Court wherein it was held that it is not necessary to first resort to the procedure under Section 13(4) and on facing resistance, then approach the Magistrate under Section 14. Further, the secured creditor need not avail of any of the remedies under Section 13(4) and can approach the Magistrate straightway under Section 14 of the Act after the 60 days period of the notice under Section 13(2) is over. The Apex Court observed that the said judgment did not deal with the precise problem i.e. whether actual physical possession must first be taken before the remedy under Section 17(1) can be availed of by the borrower. The said decision was distinguished in the following words:-

“21. Another case strongly relied upon by learned counsel for the respondents is *V. Noble Kumar* (supra). This judgment decided that it is not necessary to first resort to the procedure under section 13(4) and, on facing resistance, then approach the Magistrate under section 14. The secured creditor need not avail of any of the remedies under section 13(4), and can approach the Magistrate straightaway after the 60-day period of the notice under section 13(2) is over, under section 14 of the Act. This Court therefore held:

“35. Therefore, there is no justification for the conclusion that the Receiver appointed by the Magistrate is also required to follow Rule 8 of the

Security Interest (Enforcement) Rules, 2002. The procedure to be followed by the Receiver is otherwise regulated by law. Rule 8 provides for the procedure to be followed by a secured creditor taking possession of the secured asset without the intervention of the court. Such a process was unknown prior to the SARFAESI Act. So, specific provision is made under Rule 8 to ensure transparency in taking such possession. We do not see any conflict between different procedures prescribed by law for taking possession of the secured asset. The finding of the High Court in our view is unsustainable.

36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:

36.1. (i) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

36.2. (ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinise the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1-A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be

necessary. After the possession is taken the assets and

documents will be forwarded to the secured creditor.

36.3. (iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinise the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forward them to the secured creditor as under clause 36.2.(ii) above.

36.4. In any of the three situations above, after the possession is handed over to the secured creditor, the subsequent specified provisions of Rule 8 concerning the preservation, valuation and sale of the secured assets, and other subsequent rules from the Security Interest (Enforcement) Rules, 2002, shall apply.”

When this Court referred to the first method of taking

possession of secured assets in paragraph 36.1.(i), this Court spoke of a case in which, once possession notice is given under rule 8(1), no resistance is met with. That is why, this Court states that steps as stipulated under rule 8(2) onwards to take possession, and thereafter, for sale of the secured assets to realise the amounts that are claimed by the secured creditor would have to be taken, meaning thereby that advertisement must necessarily be given in the newspaper as mentioned in rule 8(2), after which steps for sale may take place. This case again does not deal with the precise problem that is before the Court in this case. The observation made in paragraph 36.1.(i), which is strongly relied upon by the Full Bench of the High Court, to arrive at the conclusion that actual physical possession must first be taken before the remedy under section 17(1) can

be availed of by the borrower, does not flow from this decision at all.”

In *Canara Bank vs. M. Amarender Reddy and another*, (2017) 4 SCC 735, after referring to the decision in *Mathew Varghese vs. M. Amritha Kumar and others*, (2014) 5 SCC 610, it was held that possession may be taken over under rule 8 either symbolically or physically making it clear that two separate modes for taking possession are provided for under rule 8 of the Rules. In *ITC Limited's* case (supra), it was concluded by the Apex Court that a secured creditor remains a secured creditor even after possession is taken over as the fiction contained in Section 13(6) of the 2002 Act does not convert the secured creditor into the owner of the asset but merely vests complete title in the transferee of the asset once transfer takes place in accordance with Rules 8 and 9 of the 2002 Rules.

17. After discussing the relevant judgments and provisions of the 2002 Act, the Supreme Court came to the conclusion that Rules 8(1) and 8(2) of the Rules refer to constructive possession whereas Rule 8(3) of the Rules refers to physical possession. The judgment rendered by the Full Bench of the Allahabad High Court was thus set aside and the appeals were allowed. It was declared that the borrower/debtor can approach the Debts Recovery Tribunal under Section 17 of the Act at the stage of the possession notice referred to in Rules 8(1) and 8(2) of the Rules. The appeals were sent back to the Court/Tribunal dealing with the facts of each case to decide the same in accordance with law laid down by the Supreme Court. The operative part of the judgment rendered by the Supreme Court reads thus:-

“Appendix IV-A, therefore, throws considerable light on the controversy before us and recognises the fact that rule 8(1) and 8(2) refer to constructive possession whereas rule 8(3) refers to physical possession. We are therefore of the view that the Full Bench judgment is erroneous and is set aside. The appeals are

accordingly allowed, and it is hereby declared that the borrower/debtor can approach the Debts Recovery Tribunal under section 17 of the Act at the stage of the possession notice referred to in rule 8(1) and 8(2) of the 2002 Rules. The appeals are to be sent back to the Court/Tribunal dealing with the facts of each case to apply this judgment and thereafter decide each case in accordance with the law laid down by this judgment.”

18. In view of the law enunciated by the Apex Court, it is held that remedy available under Section 17(1) of the Act challenging proceedings under Section 13(4) of the 2002 Act would be available without losing symbolic or physical possession. In other words, the borrower or any other aggrieved person would be entitled to invoke the jurisdiction of the DRT under Section 17(1) of the 2002 Act on issuance of notice under Section 13(4) of the said Act.

19. Accordingly, all the writ petitions are allowed. The impugned orders passed by the DRT in all these petitions are set aside. The matter is remitted to the DRT to decide the application under Section 17 of the 2002 Act afresh on merits in accordance with law.

(Ajay Kumar Mittal)
Judge

November 15, 2018
'gs'

(Avneesh Jhingan)
Judge

Whether speaking/reasoned
Whether reportable

Yes
Yes