IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.04.2019

DELIVERED ON : 16.04.2019

CORAM :

THE HON'BLE MRS.VIJAYA K.TAHILRAMANI, CHIEF JUSTICE

AND

The HON'BLE MR.JUSTICE M.DURAISWAMY

C.R.P.(NPD) Nos.1979 and 1999 of 2013 and 170 of 2019 &

M.P.No.1 of 2013 in C.R.P.(NPD) No. 1999 of 2013 &

M.P.Nos.1 to 4 of 2013 in C.R.P.(NPD) No.1979 of 2013 &

C.M.P.No.1381 of 2019 in C.R.P.(NPD) No. 170 of 2019

C.R.P.No.1979/2013

1.Mrs. Vasuki

2. Mrs. R.Mangalam

3. Mr.R.Ganesh ... Petitioners

v.

1. LNG Trade Import and Exports (P) Ltd
Rep. By its Managing Director
189, Chetty Street
Pondicherry – 605 001

2. Union Bank of India
Rep. By its Overseas Branch
No.75, G.N.Chetty Street
Chennai – 600 017

3. Mr.M.K.Ramesh .... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 30.04.2013 made in R.A.(S.A.)No.61 of 2011 on the file of the Debt Recovery Appellate Tribunal at Chennai.

For Petitioners : Mr.S.Sethuraman

For Respondents : Mr.V.Raghavachari
for Mr.R.Marudhachalamoorthy – for R1

Mr.Srinath Sridevan – for R2

Mr.V.Karunakaran – for R3

C.R.P.No.1999/2013

Union Bank of India
Rep. By its Overseas Branch
No.75, G.N.Chetty Street
Chennai – 600 017 ... Petitioner

v.

1. LNG Trade Import and Exports (P) Ltd
Rep. By its Managing Director
189, Chetty Street
Pondicherry – 605 001

2. M.K. Ramesh
3. R. Vasuki
4. R.Mangalam
5. R.Ganesh .... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of

India against the order dated 30.04.2013 made in R.A.(S.A.)No.61 of 2011 on the file of the Debt Recovery Appellate Tribunal at Chennai reversing the order dated 12.03.2010 made in S.A.No.168 of 2007 on the file fo the Debts Recovery Tribunal-II at Chennai.

For Petitioners : Mr.Srinath Sridevan

For Respondents : Mr.V.Raghavachari
for Mr.R.Marudhachalamoorthy – for R1

Mr.V.Karunakaran – for R2

Mr.S.Sethuraman – for R3 to R5

C.R.P.No.170/2019

M.K.Ramesh ... Petitioner

v.

1. LNG Trade Import and Exports (P) Ltd
   Rep. By its Managing Director
   189, Chetty Street
   Pondicherry – 605 001

2. Union Bank of India
   Rep. By its Overseas Branch
   No.75, G.N.Chetty Street
   Chennai – 600 017

3. Mrs. Vasuki

4. R.Mangalam

5. R.Ganesh ... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of

India against the order dated 30.04.2013 made in R.A.(S.A.)No.61 of 2011 on the file of the Debt Recovery Appellate Tribunal at Chennai reversing the order dated 12.03.2010 made in S.A.No.168 of 2007 on the file of the Debts Recovery Tribunal-II at Chennai.

For Petitioner : Mr.V.Karunakaran

For Respondents : Mr.V.Raghavachari
for Mr.R.Marudhachalamoorthy – for R1

Mr.Srinath Sridevan – for R2

Mr.S.Sethuraman – for R3 to R5

COMMON ORDER

VIJAYA K.TAHILRAMANI, CHIEF JUSTICE
AND
M. DURAISWAMY,J.,

Challenging the order passed in R.A.(S.A.)No.61 of 2011 on the file of the Debt Recovery Appellate Tribunal, Chennai reversing the order dated passed in S.A.No.168 of 2007 on the file of the Debts Recovery Tribunal-II, Chennai, the auction purchasers in respect of the 2nd item of the property, have filed a Civil Revision Petition in C.R.P.No.1979 of 2013. Challenging the very same order of the Debt Recovery Appellate Tribunal, Chennai, the Bank has filed a Civil Revision Petition in C.R.P.No.1999 of 2013. Similarly, challenging the said order, the auction purchaser in respect of the 1st item of the property, has filed a Civil Revision Petition in C.R.P.No.170 of 2019.

2. Since all the three Civil Revision Petitions were filed challenging the order passed by the Debt Recovery Appellate Tribunal in R.A.(S.A.)No.61 of 2011, all the Civil Revision Petitions are disposed of by this common order.

3. The 1st respondent availed loan from the Union Bank of India, the petitioner in C.R.P.No.1999 of 2013, in the year 2005 and on subsequent dates. Since the 1st respondent committed default in repaying the loan amount, the bank issued a notice dated 20.01.2007 under section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short 'SARFAESI' Act) calling upon the 1st respondent to repay a sum of Rs.2,52,88,528/- together with future interest. Subsequently a notice dated 23.03.2007 was issued under section 13(4) of the SARFAESI Act. Thereafter, the bank issued another notice dated 24.12.2008 to take possession of the secured assets from the 1st respondent-borrower. According to the 1st respondent, the bank issued

another notice under 13(2) dated 12.07.2007 and section 13(4) notice dated 17.09.2007. Challenging section 13(2) notice dated 12.07.2007 and the possession notice dated 17.09.2007 issued under section 13(4), the 1st respondent filed Securitisation Appeal in S.A.No.168 of 2007 before the Debts Recovery Tribunal-II, Chennai. The Securitisation Appeal was filed in the month of February 2018.

4.1 Earlier, the borrower had filed a Writ Petition in W.P.No.39009 of 2007 before this Court challenging section 13(2) notice dated 12.07.2007 and this Court while rejecting the case of the 1st respondent, gave liberty to the 1st respondent to approach the Debts Recovery Tribunal. Thereafter, the 1st respondent filed an application in I.A.No.212 of 2008 in S.A.No.168 of 2007 to amend the prayer in S.A.No.168 of 2007 to the effect of challenging the possession notice dated 17.09.2007. However, the application filed by the 1st respondent was dismissed for non-prosecution. Thereafter, the bank issued a notice dated 24.12.2008 stating that the possession of the property would be taken on 07.01.2009. Accordingly the possession was also taken on 07.01.2009. Subsequently, the bank issued a sale notice dated 11.06.2009 fixing the auction on 17.07.2009.

Since the sale did not take place on 17.07.2009, a fresh sale notice was issued on 20.08.2009 fixing the auction on 29.09.2009. As scheduled, the auction was conducted on 29.09.2009 and the petitioners in C.R.P. No.1979 of 2013 and the petitioner in C.R.P.No.170 of 2019 were declared as the successful bidders. At the instance of the borrower, the Debts Recovery Tribunal granted an order of interim stay of confirmation of the sale.

4.2 The Debts Recovery Tribunal, by order dated 12.03.2010, dismissed the Securitisation Appeal in S.A.No.168 of 2007 filed by the 1st respondent. After the dismissal of the Securitisation Appeal, the petitioner-bank issued the sale certificates dated 19.03.2010 and 01.11.2010 in favour of the auction purchasers and the same were also registered in their favour.

4.3 According to the auction purchasers, the possession of the property were handed over to them by the tenants, who were in occupation of the property by receiving compensation from them. The auction purchasers have also submitted that after taking possession of the property, they have demolished the dilapidated structure and put up a compound wall.

4.4 As against the order passed by the Debts Recovery Tribunal in S.A.No.168 of 2007, the 1st respondent-borrower filed an appeal in R.A.(S.A.)No.61 of 2011 before the Debt Recovery Appellate Tribunal, Chennai. In the said appeal, the 1st respondent filed an application seeking for an order of interim injunction against the auction purchasers restraining them from demolishing the building or put up any new construction in the property purchased by them.

5. The Debts Recovery Tribunal, by order dated 31.01.2012, granted an ex-parte order of injunction. As against the said order, the petitioners in C.R.P.No.1979 of 2013 filed a Civil Revision Petition in C.R.P.No.559 of 2012 before this Court and this Court disposed of the Civil Revision Petition by protecting the possession of the auction purchasers and also directed the Debt Recovery Appellate Tribunal to dispose of the appeal, within a time frame and also to maintain status quo till then.

6. The Debt Recovery Appellate Tribunal, by order dated 30.04.2013, set aside the order passed by the Debts Recovery Tribunal-II, Chennai and allowed the appeal. Aggrieved over the same, the petitioner viz., the bank and the auction purchasers have filed the above Civil Revision Petitions.

7. The learned counsel appearing for the respective petitioners contended that the Debt Recovery Appellate Tribunal had erroneously set aside the order passed by the Debts Recovery Tribunal-II, Chennai when the 1st respondent has not challenged the possession notice dated 07.01.2009 and the sale notice dated 20.08.2009 including the sale held on 29.09.2009. The learned counsel further submitted that even without a challenge being made in respect of the possession notice dated 07.01.2009 and the sale notice dated 20.08.2009, the Appellate Tribunal erroneously set aside the said possession notice and the sale notice and also the sale conducted on 29.09.2009.

8. The learned counsel appearing for the respective petitioners in support of their contentions, relied upon a judgement reported in **2011(4) SCC 548 [Narayan Chandra Ghosh v. UCO Bank and**

others] wherein the Hon'ble Supreme Court held as follows:-

> 8. It is well-settled that when a Statute confers a right of appeal, while granting the right, the Legislature can impose conditions for the exercise of such right, so long as the conditions are not so onerous as to amount to unreasonable restrictions, rendering the right almost illusory. Bearing in mind the object of the Act, the conditions hedged in the said proviso cannot be said to be onerous. Thus, we hold that the requirement of pre-deposit under sub-section (1) of Section 18 of the Act is mandatory and there is no reason whatsoever for not giving full effect to the provisions contained in Section 18 of the Act. In that view of the matter, no court, much less the Appellate Tribunal, a creature of the Act itself, can refuse to give full effect to the provisions of the Statute. We have no hesitation in holding that deposit under the second proviso to Section 18(1) of the Act being a condition precedent for preferring an appeal under the said Section, the Appellate Tribunal had erred in law in entertaining the appeal without directing the appellant to comply with the said mandatory requirement.

9. Countering the submission made by the learned counsel

appearing for the respective petitioners, the learned counsel appearing for the 1st respondent-borrower submitted that the order passed by the Debt Recovery Appellate Tribunal is proper and that even without challenging the possession notice dated 07.01.2009 and the auction sale notice dated 20.08.2009, the Tribunal has got the power to set side the same, when an action taken under section 13(4) has been challenged by the borrower.

10. The learned counsel appearing for the 1st respondent-borrower, in support of his contentions, has relied upon the following judgments:-

(i) **2009(8) SCC 366 [Authorised Officer, Indian Overseas Bank and another v. Ashok Saw Mill]** wherein the Hon'ble Supreme Court held as follows:-

> "38. The dichotomy in the views expressed by the Bombay High Court and the Madras High Court has, in fact, been resolved to some extent in the Mardia Chemicals Ltd.'s case [2004(4) SCC 311] itself and also by virtue of the amendments effected to Sections 13 and 17 of the principal Act. The liberty given by the learned Single Judge to the appellants to

resist S.A.No.104 of 2007 preferred by the respondents before the DRT on all aspects was duly upheld by the Division Bench of the High Court and there is no reason for this Court to interfere with the same."

(ii) **2018(1) SCC 626 [Agarwal Tracom Private Limited v. Punjab National Bank and others]** wherein the Hon'ble Supreme Court held as follows:-

"27. The reason is that Section 17(2) empowers the Tribunal to examine all the issues arising out of the measures taken under Section 13(4) including the measures taken by the secured creditor under Rules 8 and 9 for disposal of the secured assets of the borrower. The expression "provisions of this Act and the Rules made thereunder" occurring in sub-sections (2), (3), (4) and (7) of Section 17 clearly suggests that it includes the action taken under Section 13(4) as also includes therein the action taken under Rules 8 and 9 which deal with the completion of sale of the secured assets. In other words, the measures taken under Section 13(4) would not be completed unless the entire procedure laid down in Rules 8 and 9 for sale of secured assets is fully complied with by the secured creditor. It is for this reason, the Tribunal has been empowered by Section 17(2), (3) and (4) to examine all the steps taken by the secured creditor with a view to find out as to whether the sale of secured assets was made in conformity with the requirements contained in Section 13(4) read with the Rules or not?

28. We also notice that Rule 9(5) confers express power on the secured creditor to forfeit the deposit made by the auction purchaser in case the auction purchaser commits any default in paying installment of sale money to the secured creditor. Such action taken by the secured creditor is, in our opinion, a part of the measures specified in Section 13(4) and, therefore, it is regarded as a measure taken under Section 13(4) read with Rule 9(5). In our view, the measures taken under Section 13(4) commence with any of the action taken in clauses (a) to (d) and end with measures specified in Rule 9.

29. In our view, therefore, the expression "any of the measures referred to in Section 13(4) taken by secured creditor or his authorized officer" in Section 17(1) would include all actions taken by the secured creditor under the Rules which relate to the measures specified in Section13(4).

30. The auction purchaser (appellant herein) is one such person, who is aggrieved by the action of the secured creditor in forfeiting their money. The appellant, therefore, falls within the expression "any person" as specified under Section 17(1) and hence is entitled to challenge the action of the secured creditor (PNB) before the DRT by filing an application under Section 17(1) of the SARFAESI Act.

(iii) **2019(2) SCC 198 [Hindon Forge Private Limited and another v. State of Uttar Pradesh Through District Magistrate, Ghaziabad and another]** wherein the Hon'ble Supreme Court held as follows:-

"3 ...

105. Thus, the scheme of the provisions of Sections 13 and 17 of the Act, read with Rules 8 and 9 of the Rules, would show that the "measure" taken under Section 13(4)(a) read with Rule 8 would not be complete unless actual (physical) possession of the secured assets is taken by the banks/financial institutions. In our opinion, taking measure under Section 13(4) means either taking actual/physical possession under clause (*a*) of sub-section (4) of Section 13 or any other measure under other clauses of this section and not taking steps to take possession or making unsuccessful attempt to take measure under Section 13(4) of the Act. Similarly, following the procedure laid down under Section 14 and/or Rules 8 and 9, where the bank meets with resistance, would only mean taking steps to seek possession under Section 13(4)(*a*) and the "measure" under sub-section (4)(*a*) of Section 13 would stand concluded only when actual/physical possession is taken or the borrower loses actual/physical possession. It is at this stage alone or thereafter, the borrower can take recourse to the provisions of Section 17(1) of the Act. The transfer of possession is an action. Mere declaration of possession by a notice, in itself, cannot amount to transfer of possession, more particularly where such a notice meets with resistance. When the possession is taken by one party, other party also loses it. In the present case, adverse possession is being claimed by the secured creditor against the borrower. It is not possible that both will have possession over the secured assets. The possession of the secured creditor would only come into place with the dispossession of the borrower. We may also observe that in a Securitisation Application under Section 17(1), the borrower will have to make a categoric statement that he lost possession or he has been dispossessed and pray for possession.

18. Section 17 of the Act reads as follows:

" [*Subs*. for "Right to appeal" by Act 44 of 2016, Section 14(*i*) (w.e.f. 1-9-2016).] [**17. *Application against measures to recover secured debts***].—(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, [*Subs*. for "may prefer an appeal" by Act 30 of 2004, Section 10 (w.r.e.f. 21-6-2002).] [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 measure had been taken:

[*Ins*. by Act 30 of 2004, Section 10 (w.r.e.f. 21-6-2002).] [Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[*Ins*. by Act 30 of 2004, Section 10 (w.r.e.f. 11-11-2004).] [*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 sub-section (1) of Section 17.]

[*Ins*. by Act 44 of 2016, Section 14(*ii*) (w.e.f. 1-9-2016).] [(1-A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

(*a*) the cause of action, wholly or in part, arises;

(*b*) where the secured asset is located; or

(*c*) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

[*Subs*. for sub-sections (2) and (3) by Act 30 of 2004, Section 10 (w.r.e.f. 11-11-2004). Prior to substitution, sub-sections (2) and (3) read as:"17. (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."] [(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.

[*Subs*. by Act 44 of 2016, Section 14(*iii*) (w.e.f. 1-9-2016). Prior to substitution it read as:"17.(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."] [(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 or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order—

(*a*) declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor as invalid; and

(*b*) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(*c*) pass such other direction 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, to be 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.

[*Ins*. by Act 44 of 2016, Section 14(*iv*) (w.e.f. 1-9-2016).] [(4-A) Where—

(*i*) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debts Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy—

(*a*) has expired or stood determined; or

(*b*) is contrary to Section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or

(*c*) is contrary to terms of mortgage; or

(*d*) is created after the issuance of notice of default and demand by the bank under sub-section (2) of Section 13 of the Act; and

(*ii*) the Debts Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under sub-clause (*a*) or sub-clause (*b*) or sub-clause (*c*) or sub-clause (*d*) of clause (*i*), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debts Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

(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.]"

23. The judgment in *Mardia Chemicals* [*Mardia Chemicals Ltd.* v. *Union of India*, (2004) 4 SCC 311] had made it clear in para 80 that all measures having been taken under Section 13(4), *and before* the date of auction-sale, it would be open for the borrower to file a petition under Section 17 of the Act. This paragraph appears to have been missed by the Full Bench in the impugned judgment [*NCML Industries Ltd.* v.*Debts Recovery Tribunal*, 2018 SCC OnLine All 176 : AIR 2018 All 131].

25. When we come to Section 13(4)(*a*), what is clear is that the mode of taking possession of the secured assets of the borrower is specified by Rule 8. Under Section 38 of the Act, the Central Government may make rules to carry out the provisions of the Act. One such rule is Rule 8. Rule 8(1) makes it clear that "the authorised officer shall take or cause to be taken possession". The expression "cause to be taken" only means that the authorised officer need not himself take possession, but may, for example, appoint an agent to do so. What is important is that such taking of possession is effected under sub-rule (1) of Rule 8 by delivering a possession notice prepared in

accordance with Appendix IV of the 2002 Rules, and by affixing such notice on the outer door or other conspicuous place of the property concerned. Under sub-rule (2), such notice shall also be published within 7 days from the date of such taking of possession in two leading newspapers, one in the vernacular language having sufficient circulation in the locality. This is for the reason that when we come to Appendix IV, the borrower in particular, and the public in general is cautioned by the said possession notice not to deal with the property as possession of the said property has been taken. This is for the reason that, from this stage on, the secured asset is liable to be sold to realise the debt owed, and title in the asset divested from the borrower and complete title given to the purchaser, as is mentioned in Section 13(6) of the Act. There is, thus, a radical change in the borrower dealing with the secured asset from this stage. At the stage of a Section 13(2) notice, Section 13(13) interdicts the borrower from transferring the secured asset (otherwise than in the ordinary course of his business) without prior written consent of the secured creditor. But once a possession notice is given under Rules 8(1) and 8(2) by the secured creditor to the borrower, the borrower cannot deal with the secured asset at all as all further steps to realise the same are to be taken by the secured creditor under the 2002 Rules.

11. On a careful consideration of the materials available on record, the submissions made by the learned counsel on either side and also the judgments relied upon by them, it could be seen that the 1st respondent had availed loan from the petitioner-bank and committed default in repaying the same. Hence, a notice dated 20.01.2007 was issued to them under section 13(2) of the SARFAESI Act and also the possession notice dated 23.03.2007 issued under section 13(4) of the SARFAESI Act. According to the 1st respondent, the bank had substituted the same with another notice under section 13(2) on 12.07.2007 and in respect of the possession notice issued under section 13(4), substituted the same with another notice under section 13(4) on 17.09.2007.

12. In the notice dated 20.01.2007, the bank called upon the 1st respondent-borrower to pay a sum of Rs.2,52,88,528/- together with future interest within 60 days. The 1st respondent admitted that they have received the section 13(2) notice on 20.01.2007. However, the 1st respondent neither discharged its liability nor made any objection

to the demand notice. The petitioner-bank proceeded further to enforce the security interest created in favour of them by taking possession of all the properties described in the possession notice dated 23.03.2007. In respect of the possession notice also, the 1st respondent-borrower has not denied or disputed the receipt of the notice. After taking possession of the mortgaged properties, the petitioner-bank issued sale notice dated 23.03.2007 fixing the date of sale on 30.05.2007. Though the 1st respondent-borrower had full knowledge about the possession notice dated 07.01.2009 and the auction sale notice dated 20.08.2009, they had challenged only the section 13(2) notice dated 12.07.2007 and the possession notice dated 17.09.2007 before the Debts Recovery Tribunal in S.A.No.168 of 2007.

13. As already stated, the petitioner prayed for an order of interim stay in S.A.No.168 of 2007 and the Debts Recovery Tribunal, by order dated 08.05.2007, granted an order of interim stay on condition that the 1st respondent-borrower depositing a sum of Rs.55,00,000/- with the bank. Instead of complying with the said order, the 1st respondent filed an appeal before the Debt Recovery Appellate Tribunal. Pending appeal, the bank issued a fresh demand

notice under section 13(2) dated 12.07.2007 calling upon the borrower to pay a sum of Rs.2,36,44,452.24 within 60 days. Thereafter, 2nd possession notice dated 17.09.2007 was issued to the 1st respondent.

14. Aggrieved over the fresh demand notice dated 12.07.2007 issued under section 13(2) of the SARFAESI Act, the 1st respondent filed a Writ Petition in W.P.No.31009 of 2007 before this Court stating that the Securitisation Appeal filed by them challenging the earlier notices issued by the bank on 20.01.2007 under section 13(2) and the possession notice dated 23.03.2007 issued under section 13(4), is pending before the Debts Recovery Tribunal-II, Chennai in S.A. of 168 of 2007 and during the pendency of the appeal the 2nd demand notice under section 13(2) was issued. This Court, by order dated 24.09.2007, dismissed the Writ Petition as not maintainable.

15. Aggrieved over the same, the 1st respondent filed an appeal in W.A.No.1343 of 2007. Along with the appeal, the 1st respondent also filed a stay petition in M.P.No.1 of 2007 and this Court, by order dated 03.01.2008, granted an order of interim stay on condition that the 1st respondent paying a sum of Rs.75,00,000/- on or before

08.02.2008. However, the 1st respondent did not comply with the conditional order dated 03.01.2008. When the Writ Appeal came up for final hearing on 22.02.2008, the Division Bench of this Court, disposed of the Writ Appeal by giving liberty to the 1st respondent to raise all the issues before the Debts Recovery Tribunal. Further, directed the 1st respondent to file an application for amendment of the prayer within 15 days from the date of receipt of a copy of that order.

16. After the disposal of the Writ Appeal, the 1st respondent filed an application in I.A.No.212 of 2008 on 11.03.2008 seeking for amendment. The petitioner-bank opposed the amendment application contending that the borrower has given a go-bye to the earlier application filed on 30.04.2007 and raised new points not permitted by this Court in W.A.No.1343 of 2007. The Debts Recovery Tribunal, after considering the case of both sides, dismissed the amendment application in I.A.No.212 of 2008.

17. After the petitioner-bank took possession of the secured asset on 07.01.2009 and issued the possession notice dated 07.01.2009, the petitioner-bank issued auction sale notice dated

11.06.2009 to bring the schedule mentioned properties to sale on 17.07.2009. When this sale notice was issued, the 1st respondent filed an application in I.A.No.424 of 2009, seeking for stay of the sale scheduled to be held on 17.07.2009. By order dated 13.07.2009, the Tribunal permitted the Bank to proceed with the auction sale fixed on 17.07.2009 and directed the Bank to defer confirmation of sale till 13.08.2009 on condition that the 1st respondent paying a sum of Rs.1,50,00,000/- directly to the Bank on or before 13.08.2009 and also made it clear that if the conditional order is not complied with, the Bank is permitted to confirm the sale. Challenging this order, the 1st respondent filed a Writ Petition before this Court. In these circumstances, the auction scheduled to be held on 17.07.2009 did not take place. Ultimately, the Writ Petition filed by the 1st respondent was dismissed by this Court. Thereafter, the bank issued another sale notice dated 20.08.2009 fixing the auction sale on 29.09.2009. Immediately, the 1st respondent filed an application in I.A.(SR) No.6028 of 2009 to stay the auction scheduled to be held on 29.09.2009. Since the 1st respondent did not comply with the earlier conditional order passed by the Tribunal, by order dated 29.09.2009, the Tribunal dismissed the application. Thereafter, the petitioner-bank proceeded with the auction sale and succeeded in selling item Nos. 1 to 7 in the schedule of properties described in the sale notice dated 20.08.2009. Thereafter, the 1st respondent filed another application in I.A.(SR) No.6247 of 2009 seeking for stay of all further proceedings pursuant to the auction sale conducted on 29.09.2009. By order dated 12.10.2009, the Debts Recovery Tribunal deferred the confirmation of sale on payment of a sum of Rs.25,00,000/- to the bank on or before 13.11.2009. Since the 1st respondent complied with the conditional order, the confirmation of sale was stayed by the Debts Recovery Tribunal.

18. Admittedly, the 1st respondent choose not to challenged the possession notice dated 07.01.2009 and the auction sale notice dated 20.08.2009 and also the sale held on 29.09.2009. It is also pertinent to note that the sale certificates dated 19.03.2010 and 01.11.2010 issued in favour of the auction purchasers-petitioners in C.R.P.Nos.1979 of 2013 and 170 of 2019 were registered in the office of Sub Registrar, Oulgaret. In spite of the same, the borrower has not challenged the sale before the Debts Recovery Tribunal. Taking possession of the secured asset under section 13(4) of the Act on 07.01.2009, issuance

of possession notice dated 07.01.2009 under Rule 8(1) of the Security interest (Enforcement) Rules, 2002, issuance of sale notice dated 20.08.2009 under Rule 8(6) and the sale of the property on 29.09.2009 under Rule 9(1), tantamount of taking recourse to one of the measures contemplated under section 13(4) of the SARFAESI Act. The Debts Recovery Tribunal held that the possession notice dated 07.01.2009 and the sale notice dated 20.08.2009 are valid and the Bank had not contravened, violated or committed illegality while initiating action under the Act to recover the dues from the 1st respondent-borrower.

19. The Debt Recovery Appellate Tribunal, in the appeal preferred by the 1st respondent-borrower, by order dated 30.04.2013, set aside the order passed by the Debts Recovery Tribunal and allowed the appeal. While setting aside the order passed by the Debts Recovery Tribunal, the Appellate Tribunal set aside the measure of taking possession of the secured asset on 07.01.2009 and the issuance of sale notice dated 20.08.2009 and the sale held on 29.09.2009.

20. When the 1st respondent choose not to challenge the possession notice dated 07.01.2009, sale notice dated 20.08.2009 and

also the sale held on 29.09.2009, the Appellate Tribunal set side the same without a challenge being made by the 1st respondent-borrower. When the possession notice dated 07.01.2009 was not the subject matter of the Appeal in S.A.No.168 of 2007, the Appellate Tribunal has given a finding to the effect that the possession notice dated 07.01.2009 was not served on the 1st respondent. If the 1st respondent had challenged the possession notice dated 07.01.2009, in such case, the bank can be fastened with the burden of proof with regard to the service of possession notice dated 07.01.2009. In the absence of any averment stated in the Securitisation Appeal with regard to the possession notice dated 07.01.2009 and the auction sale notice dated 20.08.2009, the Appellate Tribunal should not have come to the conclusion that the possession notice was not served on the 1st respondent-borrower. In the absence of any pleadings with regard to the same, the said finding cannot be sustained. In the absence of any evidence produced by the parties with regard to the service of possession notices the finding given by the Appellate Tribunal to the effect that the possession notice was not served on the 1st respondent-borrower is liable to be set side.

20. In the judgment reported in **2009(8) SCC 366 (cited supra)** relied upon by the learned counsel appearing of the 1st respondent-borrower, the Apex Court held that the Debts Recovery Tribunal is vested with the authority under Section 17(3) of the SARFAESI Act to question the action taken by the secured creditor and the transactions entered into, to even set aside the transaction including sale and to restore the possession to the borrower in appropriate cases. The case of the parties in the said judgment is that the respondent therein, who is the borrower, challenged the possession notice issued under section 13(4) of the SARFAESI Act. While coming to the conclusion that the notice issued under section 13(4) by the respondent therein was not valid, the Hon'ble Supreme court held that the Debts Recovery Tribunal can adjudicate upon or interfere with action taken by secured creditor after the stage contemplated under section 13(4).

21. In the case on hand, the 1st respondent-borrower has not even challenged the possession notice dated 07.01.2009 and even without challenging the possession notice dated 07.01.2009, the 1st respondent cannot rely upon the ratio laid down by the Hon'ble

Supreme Court in the judgment reported in **2009(8) SCC 366 (cited supra)**.

22. The issuance of possession notice dated 07.01.2009 and the auction sale notice dated 20.08.2009 were not the cause of action for filing the Securitisation Appeal in S.A.No.168 of 2007. That being the case, the Tribunal should not have gone beyond the pleadings and set aside the possession notice dated 07.01.2009, sale notice dated 20.08.2009 and the sale conducted on 29.09.2009, which are not the subject matter of Securitisation Appeal in S.A.No.168 of 2007 before the Debts Recovery Tribunal.

23. In these circumstances, the order passed by the Debt Recovery Appellate Tribunal is liable to be set aside. Accordingly, the same is set aside. Consequently, the order passed by the Debts Recovery Tribunal-II, Chennai is restored. The Civil Revision Petitions are allowed. No costs. Consequently, the connected Miscellaneous Petitions are closed

(V.K.T., CJ.) (M.D., J.)
16.04.2019

Index : Yes/No
Speaking Order/Non Speaking Order
Rj

To

1. Union Bank of India
   Rep. By its Overseas Branch
   No.75, G.N.Chetty Street
   Chennai – 600 017

2. The Debts Recovery Tribunal-II
   Chennai

3. The Debt Recovery Appellate Tribunal
   Chennai

THE HON'BLE CHIEF JUSTICE
AND
M. DURAISWAMY,J.,

Rj

Pre-Delivery Order in
C.R.P.(NPD) Nos.1979 and 1999 of 2013
and 170 of 2019 &
M.P.No.1 of 2013 in C.R.P.(NPD) No.1999 of 2013 &
M.P.Nos.1 to 4 of 2013 in C.R.P.(NPD) No.1979 of 2013 &
C.M.P.No.1381 of 2019 in C.R.P.(NPD) No. 170 of 2019

16.04.2019