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Misc. Single No. 20026 of 2017

M/s N.C.M.L. Industries Ltd. through Director and another
Vs.
Debts Recovery Tribunal, Lucknow and others

With

Misc. Bench No. 28806 of 2017

M/s Hindon Forge Pvt. Ltd. and another
Vs.
State of U.P. through D.M. Ghaziabad and others

Appearance:

For the petitioners:
Mr. Jaideep Narain Mathur, Senior Advocate,
with Mr. Amarjeet Singh Rakhra & Mr. Suneet Kumar Sharma, Advocates and
Mr. Dinesh Kumar Pathak, Advocate
with Mr. Shashank Pathak, Advocate.

For the respondents:
Mr. Prashant Chandra, Senior Advocate,
with Mr. Kartikey Dubey, Mr. Prashant Kumar, Mr. Shyam Kumar Raj & Ms. Mahima Pahwa, Advocates.

Hon'ble Dilip B. Bhosale, Chief Justice
Hon'ble Dr. Devendra Kumar Arora, J.
Hon'ble Vivek Chaudhary, J.

(Per Dilip B Bhosale, CJ)

The order of Reference dated 19 September 2017, which has occasioned the constitution of a larger Bench, has been passed by learned Single Judge, after having noticed the divergent opinions expressed by two Division Benches of this Court in **Sushila Steels Vs. Union Bank of India and others (Special Appeal No. 415 of 2014, decided on 23.04.2014),** and **Aum Jewels and others Vs. Vijaya Bank (Writ-C No. 13476 of 2017,**

decided on 30.3.2017) on the question whether an application under Section 17(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'), at the instance of a borrower, is maintainable even before physical (actual) possession of the secured assets is taken by the Bank/FIs in exercise of its powers under Section 13(4) thereof read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 (for short “the Rules”)

2. By means of this petition (No. 20026 of 2017) under Article 226 of the Constitution of India, the petitioners (M/s N.C.M.L. Industries Ltd. and another) called in question the validity of an order dated 2.8.2017, passed by the Debts Recovery Appellate Tribunal, Delhi, (for short “DRAT”), as it then was holding charge of DRAT, Allahabad, whereby an appeal No. 86 of 2017, preferred under Section 18 of the Act, has been disposed of. The appeal was preferred by the respondent-Bank against an order dated 27.02.2017 passed by the Debts Recovery Tribunal, Lucknow (for short 'DRT'), on Securitisation Application No. 435 of 2016 (for short “the Application”), instituted under Section 17(1) of the Act. By this order (27.02.2017), the DRT had granted interim relief in favour of the petitioners, restraining the respondent-Bank from taking physical possession of the secured assets during the pendency of the Securitisation Application. The DRAT, while allowing the appeal inter alia held that the Application under Section 17 of the Act is not maintainable as only “symbolic possession” was taken by the Bank. For taking such a view, the DRAT placed heavy reliance upon the judgment of a Division Bench of this Court in **Sushila Steel (supra)**.

3. The facts leading to filing of the writ petition, to the extent, that are necessary are as follows: The respondent-Bank had extended some financial facilities to the petitioner No.1-Company to which petitioner No.2 stood Guarantor. Since the petitioners made default in repayment of secured debt/installments thereof, the respondent-Bank initiated proceedings under the provisions of the Act by issuing a notice under Section 13(2) on 23.11.2015 requiring the borrower to discharge in full his liability. The

notice was replied by the petitioners by way of a representation/raising objections dated 20.1.2016. The objections/representation however came to be rejected by the respondent-Bank vide its communication dated 9.2.2016. Thereafter, the petitioners claim that they made additional representation dated 14.2.2016 requesting the respondent-Bank to reconsider their earlier representation/objections dated 20.1.2016. According to the petitioners, so far the respondent-Bank has not considered and decided the same.

4. In this backdrop, it appears a notice, under Rule 8 read with Appendix IV of the Rules for possession, was issued by the Bank, stating that a symbolic possession of their immovable secured assets, as described in the schedule to the notice, has been taken under Section 13(4) of the Act. It appears that the Authorised Officer of the Bank did not take physical possession of the secured assets. This notice made reference to the notice, that was issued to the petitioners under Section 13(2) requiring them to repay the due amount alongwith further interest and other charges within sixty days. Since the petitioners failed to repay the amount, the notice under Rule 8 of the Rules was issued to the petitioners as also to the public in general, stating that the Authorized Officer of the Bank has taken “symbolic possession” of the movable and immovable properties in exercise of the powers conferred under Section 13(4) of the Act, read with Rule 4(8) and (9) of the Rules. The petitioners challenged the notice dated 12.5.2016 under Section 17 of the Act by way of Securitisation Application No. 435 of 2016 before the DRT. The prayer made in the application was to set aside the measures taken by respondent-Bank under Section 13(4) of the Act and to restrain the Bank from obtaining possession or selling or disposing of the mortgaged properties (secured assets). It appears, as stated by the petitioners, since the respondent-Bank attempted to take physical possession of the mortgaged properties, an application for grant of interim relief was also filed before the DRT.

5. The DRT vide its order dated 6.2.2016 rejected the application dated 1.12.2016 filed by the respondent-Bank, seeking rejection of the

securitisation application filed by the petitioners under Section 17(1) of the Act even before losing possession, as not maintainable. The DRT, while passing the order, observed that since the respondent-Bank had taken measures by issuing possession notice on 12.5.2016 in terms of Rule 8(1) of the Rules, the same was a measure prescribed under Section 13(4) of the Act and as such the securitisation application would be maintainable. We do not propose to make further reference to the observations made by the DRT, since it may not be relevant for addressing the question that falls for our consideration. It appears that in the said proceedings an interim application filed by the petitioners restraining the respondent-Bank from taking physical (actual) possession, was also heard and allowed by the DRT vide its order dated 27.2.2017. That order was challenged by the respondent-Bank before DRAT. It appears that the order dated 6.2.2016 passed by DRT rejecting the respondent-Bank's application for dismissing the application under Section 17(1) of the Act filed by the petitioners, as not maintainable, was not challenged before DRAT.

6. The DRAT allowed the appeal filed by the respondent-Bank against the order dated 27.2.2017 vide its order dated 2.8.2017. This order has been assailed in the instant petition wherein the following question has been framed and referred to a Larger Bench by learned Single Judge vide order dated 19.9.2017:

> "In view of the observations made by their Lordships of Hon'ble Supreme Court in the case of **Transcore Vs. Union of India and another, (2008) 1 SCC 125** that the dichotomy between symbolic and physical possession does not find place in the SARFAESI Act, which of the two Division Bench Judgements of this Court, either in the case of **Sushila Steels (supra)** or in the case of **Aum Jewels (supra)**, enunciates the correct law so as to constitute a binding precedence on the issue as to whether remedy of filing appeal under section 17 of the SARFAESI Act is available against an order passed/notice issued under section 13(4)(a) of the Act for possession of the secured assets ?"

6.1 The learned Single Judge formulated the aforesaid question in view of the divergent opinions expressed by two Division Benches of this Court in **Sushila Steels (supra)** and **Aum Jewels (supra).**

7. At this stage, it would be relevant and necessary to notice the views (divergent) expressed by two Division Benches, in brief, to understand the controversy and also the purpose for making reference to a Larger Bench. The Division Bench of this Court while dealing with the case of **Sushila Steels (supra)** considered the question whether the proceedings before the Debt Recovery Tribunal under Section 17 of the Act would be maintainable before the "actual possession" is taken. It appears, in that case the secured creditor had issued possession notice dated 22.10.2012 under Section 13(4) of the Act, and on service thereof, the borrower had initiated proceedings before the DRT by filing securitisation application under Section 17 of the Act. In the application, the secured creditor raised primary objection as to its maintainability contending that the notice dated 22.10.2012 did not constitute a "measure" as contemplated under Section 13(4) of the Act. The application instituted by the borrower under Section 17 was dismissed by the DRT as not maintainable vide its order dated 17.12.2012. This order was challenged in a writ petition bearing Writ Petition No. 148 of 2013. The writ petition was also dismissed by learned Single Judge on 21.1.2013. The order of the learned Single Judge was carried in an intra court appeal which was dismissed by the Division Bench vide its judgment and order dated 23.4.2014. The Division Bench, while dismissing the intra court appeal, noticed that their exists a state of uncertainty as regards the remedy available to the aggrieved person in the light of the judgment of the Supreme Court which dealt with law on the subject. It was further observed that mere issuance of possession notice becomes immaterial till the actual possession is taken and that in some cases where there is resistance on the part of the borrower to deliver possession, a recourse to Section 14 can be taken by the secured creditor, then in such a situation also the proceedings under Section 17 of the Act would not lie till the physical possession of the mortgaged property is delivered to the Bank. In short, it was held that no securitisation

application under Section 17 of the Act would lie at the behest of the borrower till he loses actual (physical) possession of the secured assets or the possession thereof is actually delivered to the secured creditor.

7.1 The DRAT, in the present case, while allowing the appeal filed by the respondent-Bank and setting aside the order passed by the DRT placed heavy reliance upon the judgment of the Division Bench in **Sushila Steels (supra).** In **Sushila Steels,** the Division Bench had relied upon the judgment of the Supreme Court in **Mardia Chemicals Ltd. and others Vs. Union of India and others, [(2004) 4 SCC 311].** We propose to make detailed reference to **Mardia Chemicals** little later. At this stage, we would like to notice that the DRAT while allowing the appeal remanded the matter to the DRT for deciding the securitisation application on merits. The learned Single Judge in the judgment considered this part of the order also and observed that if the application under Section 17, at the stage at which the petitioners had instituted, was not maintainable, the remand of the matter by DRAT would be nothing but an exercise in futility. The learned Single Judge also noticed few judgments relied upon by the Division Bench in **Sushila Steels (supra),** namely, **Mardia Chemicals (supra), Authorized Officer, Indian Overseas Bank and another Vs. Ashok Saw Mill, [(2009) 8 SCC 366]** and **Kanaiyalal Lalchand Sachdev and others Vs. State of Maharashtra and others, [(2011) 2 SCC 782].**

8. In **Aum Jewels (supra),** it appears, that after rejecting the objections filed by the borrower under Section 13(3-A) of the Act, the secured creditor had issued a possession notice under Section 13(4) on 6.3.2017. It is this possession notice under Section 13(4) dated 6.3.2017 was under challenge. Before the Court, in this case, an objection was taken by the secured creditor that the petitioners had an statutory remedy of filing an application under Section 17 of the Act against an order passed under Section 13(4) of the Act in view of the law laid down by the Supreme Court in **United Bank of India Vs. Satyawati Tondon and others, [(2010) 8 SCC 110].** On the basis of the judgment of the Supreme Court in **Satyawati Tondon (supra),** the Division

Bench in **Aum Jewels (supra)** dismissed the writ petition filed by the petitioners therein on the ground of availability of statutory alternative remedy under Section 17 of the Act. In short, the Division Bench in **Aum Jewels** held that against an action/measure taken by the secured creditor by issuing a notice/passing an order of "symbolic possession" under Section 13(4) of the Act, a remedy under Section 17 is available and as such the securitisation application/petition filed under Section 17 would be maintainable against such a measure under Section 13(4)(a) of the Act. It is pertinent to note that the Division Bench in **Aum Jewels (supra)** for taking such a view placed heavy reliance upon the judgment of the Supreme Court in **Satyawati Tondon (supra)** and **Transcore Vs. Union of India and another, (2008) 1 SCC 125.** We would make reference to these judgments of the Supreme Court a little later.

8.1 Before we proceed further, it is necessary to clarify that we are dealing with the question where any borrower, as defined by Section 2(f) of the Act, is in possession of the secured assets. In other words, we are not dealing with the question where either lessee or protected tenant is in possession of the secured assets. The rights of a lessee/tenant, insofar as secured assets are concerned, have already been considered by the Supreme Court in **Vishal N. Kalsaria Vs. Bank of India, (2016) 3 SCC 762** and **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Co. Ltd, (2014) 6 SCC 1.** In these judgments the Supreme Court, in short, has held that physical possession from a person holding possession of the assets, as protected tenant or under a pre-existing valid lease, cannot be taken except as per the conditions of lease or Rent Control Act. The provisions of the Act, in short, cannot be used to override the provisions of the Rent Control Act. Similarly, leases under the provisions of Transfer of Property Act, 1882, would not stand automatically determined under action being initiated under Section 13(4) of the Act and eviction of such lessees cannot be done unless the lease is validly terminated. Thus, the question that fall for our consideration will be addressed where the "measures" under Section 13(4) are taken or being taken against the borrower/guarantor.

9. In this backdrop, we have heard learned counsel for the parties at great length and with their assistance gone through the provisions of the Act, the Rules and judgments of the Supreme Court and High Courts, to which our attention was drawn, in the light of the factual matrix, stated in the foregoing paragraphs.

9.1 Mr. Mathur, learned Senior Counsel appearing for the petitioners, after drawing our attention to the relevant provisions of the Act and the Rules and so also the judgments of the Supreme Court in **Mardia Chemicals (supra)**, **Transcore (supra), Satyawati Tondon (supra), Ashok Saw Mill (supra)** etc., in particular, submitted that the Act does not contain any adjudicatory mechanism at the stage of "taking of measures" for recovery of the secured debt. Even consideration of a representation/objections and communication of the order passed thereon by the Bank also requires to be done without their being an adjudicatory process and without any judicial or quasi judicial intervention. Section 34 of the Act provides that no civil court will pass any order of injunction or entertain any suit in respect of any action taken by a bank in pursuance of the powers conferred under the Act. It is in this backdrop that a validity of the provisions contained in Sections 13, 14 and 17 was challenged in **Mardia Chemicals (supra)**. Except Section 17(2) of the Act, the challenge to these provisions was negated. He submitted that Section 13(4) was declared constitutionally valid because the right of appeal or making a securitisation application under Section 17 is available against any of the measures provided under that provision. He submitted that in order to prevent misuse of such wide powers, as are given to the Bank under Section 13 and to prevent prejudice being caused to a borrower on account of an error on the part of the bank, checks and balances were introduced in the Act. Section 17 allows any person including the borrower to approach the DRT against any of the measures referred to Section 13(4) of the Act. He, therefore, submitted that Section 17 of the Act must be interpreted in a manner so as to give it the widest amplitude and an interpretation of such Section which curtails its application or limits recourse to it must be avoided

since such limitation is not provided in the Act. The right under Section 17, as observed by the Supreme Court in **Mardia Chemicals (supra),** cannot be restricted by any means whatsoever.

9.2 Mr. Mathur, submitted that every action taken under Section 13(4) of the Act is amenable to challenge under Section 17. There is no justification for making an artificial distinction between the taking of “actual/physical” possession and taking of “symbolic/constructive” possession. The provisions contained in Section 13(4) do not make any such distinction. Rule 8(1)(3), he submitted, indicate that both species of possession i.e. physical and symbolic, are envisaged under the Act. By serving a notice as prescribed under Appendix IV of the Rules, irrespective of the fact whether a bank takes physical or symbolic possession, is a measure under Section 13(4)(a), and therefore, an application under Section 17 is maintainable before DRT.

9.3 Mr. Mathur, after specifically drawing our attention to the judgment of the Supreme court in **Transcore (supra)** submitted that the dichotomy between symbolic/constructive possession and actual/physical possession does not find place in the Act. Section 13(4) refers to the word “possession” simplicitor which means both, namely, “symbolic” and “physical”. He submitted, it is neither open to the Banks to create such distinction nor can such distinction be read in Section 13(4)(a) of the Act. He also invited our attention to Black's Law Dictionary, Halsburys Law of England and Words and Phrases (Permanent Edition, Volume-33) to contend that while actual possession means a physical occupancy or control over the property, symbolic possession means control or dominion over the property without actual possession. In short, he submitted that the possession can mean symbolic and physical possession both, and taking a symbolic possession also amounts to taking of a measure under Section 13(4) and hence application under Section 17 even in case of symbolic possession is maintainable.

9.4 Mr. Mathur submitted that a perusal of Section 13(4)(a) shows that the right of a secured creditor to transfer by way of lease, its assignment or sale

can be exercised with or without the secured creditor being in actual physical possession and can be exercised even if the secured creditor is in symbolic possession of the property. He submitted that once an action of taking possession whether symbolic or physical, is taken, the right of the secured creditor stands fructified in the property. It is, therefore, immaterial whether physical possession is taken or symbolic, since the consequences are serious and adverse to the borrower. In other words, the borrower loses possessory rights over the property and/or ceases to be the owner of the property.

9.5 Insofar as the judgment of a Division Bench of this Court in **Sushila Steels (supra)** is concerned, he submitted, in the light of the provisions contained in Section 13 and 17 of the Act and the interpretation of the word 'possession' made by the Supreme Court in **Transcore (supra),** the view taken by the Division Bench is erroneous. Insofar as the judgment of the Supreme Court in **Noble Kumar (supra),** he submitted that the controversy in the said case did not relate to whether physical possession was different from symbolic possession. The Supreme Court in the facts of that case ultimately held that the recourse could be taken under Section 14 by the secured creditor even without attempting to obtain possession of its own. He submitted that the judgment of the Supreme Court lays down that the right of appeal is available only after losing possession of the secured assets and losing possession does not mean physical possession but it also means losing symbolic possession. In this backdrop, the Supreme court in **Noble Kumar (supra)** reiterated the view of three Judges Bench in **Mardia Chemicals (supra)** that it would be open to a borrower to file an appeal under Section 17 any time after the measure is taken under Section 13(4) and before the date of sale/auction of the property. The word 'possession', therefore, will have to be read to mean symbolic possession also and in which case a remedy under Section 17 is available to the borrower. He submitted that the law laid down by the Division Bench in **Aum Jewels (supra)** is the correct position of law. The borrower is undoubtedly a person who is affected by the action taken by the secured creditor when it takes over the symbolic

possession of the secured assets and thus such a borrower who has been deprived of “symbolic possession” can also take recourse to the proceedings under Section 17 of the Act.

9.6 Mr. Mathur also invited our attention to the Rules, in particular, Rule 8 and 9 and submitted that the delivery of notice in Appendix IV of the Rules is a measure under Section 13(4)(a) and thus proceedings under Section 17 of the Act are maintainable as soon as it is delivered to the borrower. The notice under Appendix IV is akin to an order under Section 13(4)(a) and is not merely a notice by which a borrower has been required to do or forbear from doing any particular act. It is neither a notice to show cause nor an opportunity to explain but it is clearly akin to an order under Section 13(4)(a) by which the borrower is informed that he has been dispossessed of the secured asset.

10. Mr. Pathak, learned counsel appearing for the petitioners in Misc. Bench No. 28806 of 2017, adopted the submissions advanced by Mr. Mathur and in addition thereto, placed reliance upon two more judgments of the Supreme Court in **Canara Bank Vs. M. Amarender Reddy and Ors., AIR 2017 SC 1441** and of this Court in **Dilip Kumar Singh and another Vs. State of U.P. and others, [Writ-C No. 58329 of 2012.** We have also heard Mr. Anand Mani Tiwari, a member of the Bar, who expressed desire to make submissions in support of the petitioners. He, however, repeated the submissions advanced by Mr. Mathur and, therefore, we do not deem it necessary to make specific reference to his arguments.

11. On the other hand Mr. Prashant Chandra, learned Senior Counsel for the Bank invited our attention to the judgments of the Supreme Court, in particular, **Noble Kumar (supra)** and submitted that unless actual/physical possession is lost, the borrower has no right to file an application under Section 17 of the Act. He submitted that if the arguments advanced by learned counsel for the petitioners are accepted, that will defeat not only the very objective of the Act but it shall also defeat rights of the Bank under the provisions of the Act to recover its dues. It would not be possible for the

Bank to conduct auction and fetch an attractive consideration for the secured asset without taking physical possession and if the borrower, he submitted, is allowed to approach the Tribunal, even at the stage of issuance of a notice under Appendix IV, the proceedings would never come to an end and remain pending before DRT and DRAT for years and as a consequence thereof the financial institutions will never be able to recover their dues. He submitted, the word "measures" employed in Section 13(4) means the measures contemplated under clauses (a) to (d) of Section 13(4) and not a measure/action, to be initiated under these clauses, such as taking steps (measures) to acquire possession under Section 13(4)(a) of the Act. Mr. Prashant Chandra, after taking us through the judgments in **Transcore (supra)** and **Satyawati Tondon (supra)** and so also **Aum Jewels (supra)** submitted that the Division Bench of this Court while interpreting the provisions of law in the light of the judgment of the Supreme Court in **Transcore (supra)** has not understood the spirit of the judgment and has wrongly held that the borrower has a remedy under Section 17 even against the notice issued under Rule 8 in Appendix IV of the Rules. His submissions were based on the judgments of the Supreme Court, in particular, **Mardia Chemicals (supra)** and **Noble Kumar (supra).** In short he submitted that the law laid down by the Supreme Court in these judgments is binding, which make it clear in unequivocal terms that unless the borrower is dispossessed, being a measure under Section 13(4), he cannot take recourse to Section 17 of the Act. Insofar as **Transcore (supra)** is concerned, he submitted, this judgment needs to be read in proper perspective, which also makes it clear that unless the borrower loses actual (physical) possession, he cannot approach the DRT under Section 17 of the Act. Mr. Prashant Chandra submitted that the purpose of the Act is to enable the secured creditor to enforce any security interest without the intervention of the Court or the Tribunal. He invited our attention to sub-section 4(a) of Section 13 and submitted that it permits a Bank to take possession of the secured assets after following the due procedure contemplated by sub-section (2) of sub-section (3-A) of Section 13 in particular. Further, after drawing our attention to sub-

section (3-A) of Section 13 and sub-section 3 of Section 17, he submitted that, under any circumstance, the borrower cannot approach DRT under sub-section (1) of Section 17 at any stage before he loses actual possession. He further submitted that these provisions clearly obliges the borrower to raise all contentions that are possible, including challenge to the reasons recorded by the Bank under sub-section (3-A) of Section 13 at that stage and not before losing actual possession of the asset and before the sale/auction of the assets and the possession thereof is handed over to the purchaser. He submitted that the powers of Authorized Officer are greater than the powers conferred on the Court Receiver under Order XL Rule 1 of the Civil Procedure Code.

12. Before we deal with the question that falls for our consideration, in the light of the provisions of the Act, the Rules, judgments of the Supreme Court and the High Court, it would be advantageous to look into the backdrop against which the Act was introduced. The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short 'DRT Act, 1993') was enacted to facilitate creation of specialized forums, namely, the Debts Recovery Tribunals and Debts Recovery Appellate Tribunals for expeditious adjudication of disputes relating to recovery of the debts due to banks and financial institutions. This Act bars the jurisdiction of the Civil Courts and all pending matters were transferred to the Tribunals from the date of their establishment.

12.1 The primary object of the Act, 1993 was not only to bring into existence special procedural mechanism for speedy recovery of the dues of the banks and financial institutions, but also ensuring that defaulting borrowers are not able to invoke the jurisdiction of Civil Courts for frustrating the proceedings initiated by the banks and other financial institutions. Undoubtedly, this new legislation initially worked well and even the officers appointed to man the Tribunals worked with great zeal for ensuring that cases involving the recovery of the dues of banks and financial institutions are decided expeditiously. However, with the passage of time,

the proceedings before the Tribunals became synonymous with those of the regular Courts and the lawyers representing the borrowers and defaulters used every possible mechanism and dilatory tactics to impede the expeditious adjudication of such cases. In this backdrop, the Government of India asked the very same committee, namely, the M. Narasimham Committee, which was constituted to suggest setting up of special Tribunals with special powers for adjudication of cases involving the dues of banks and financial institutions, to suggest measures for expediting the recovery of debts due to banks and financial institutions. That Committee made various suggestions for bringing about radical changes in the then existing adjudicatory mechanism. The Government of India then constituted one more committee, namely, Andhyarujina Committee for examining banking sector reforms. That Committee also considered the need for changes in the legal system. Both, the Narasimham and Andhyarujina Committees suggested enactment of new legislation for securitisation and empowering the banks and financial institutions to take possession of the securities and sell them without intervention of the Court. The recommendations of both the committees ultimately led to enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'), which can be termed as one of the most radical legislative measures taken by the Parliament for ensuring that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstruction. By this new legislation, the secured creditors have been empowered to take steps for recovery of their dues without intervention of the Courts or Tribunals. It is enacted for quick enforcement of the security.

12.2 In **Mardia Chemicals**, the Supreme Court after noticing the backdrop against which the Act was enacted, made the following observations, which are relevant:

> "**36.** In its Second Report, the Narasimham Committee observed that NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the

Second Report the Narasimham Committee deals about legal and legislative framework and observed:

> *"8.1* A legal framework that clearly defines the rights and liabilities of parties to contracts and provides for speedy resolution of disputes is a sine qua non for efficient trade and commerce, especially for financial intermediation. In our system, the evolution of the legal framework has not kept pace with changing commercial practice and with the financial sector reforms. **As a result, the economy has not been able to reap the full benefits of the reforms process. As an illustration, we could look at the scheme of mortgage in the Transfer of Property Act, which is critical to the work of financial intermediaries....**"

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the asset without intervention of the court and for reconstruction of assets. **It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field.** In the prevalent situation where the amount of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps within the legal framework. **We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances the financial climate world over, if it was thought as a matter of policy, to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy.**"

(emphasis supplied)

12.3 At this stage, it would be relevant to notice the Statement of Object and Reasons for introducing the Act. The relevant portion of the Statement of Object and Reasons read thus:

> "**Statement of Objects and Reasons.**– … … … 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 non-performing 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 21 st 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 non-performing assets by adopting measures for recovery or reconstruction.**
>
> 2. It is now proposed to replace the Ordinance by a Bill, which, inter alia, contains provisions of the Ordinance to provide for –
>
> (a) to (g) … … ...
>
> (h) **empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower's account as non-performing asset in accordance with the directions given or guidelines issued by the Reserve Bank of India from time to time;**
>
> (i) … … …
>
> (j) **an appeal against the action of any bank or financial institution to the concerned Debts**

> **Recovery Tribunal and a second appeal to the Appellate Debts Recovery Tribunal;**
> (k) to (m) … … ...”
>
> (emphasis supplied)

13. In this backdrop, we now proceed to have a close look at the provisions of the Act that are relevant for our purpose. Clause (f) of Section 2 defines “borrower” which means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for financial assistance granted by any bank or financial institution and included a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance or who has raised funds through a debt securities. Thus, the definition of ‘borrower’ is quite exhaustive which covers not only the “borrower” but it also takes in its sweep the “guarantor” also.

13.1 Section 13 of the Act, which is the heart of controversy in the present case, contains detail mechanism for enforcement of security interest. It would be necessary and advantageous to reproduce the relevant portion of Section 13, which reads thus:

> “**13. Enforcement of security interest.--** (1) **Notwithstanding anything contained** in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.
>
> (2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, **the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days** from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4):

Provided that –

…….

(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.

(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 fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:**

Provided that **the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A.**

(4) **In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt,** namely: –

(a) **take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;**

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the

management of such business of the borrower which is relatable to the security for the debt:

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

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

(5-A) to (5-C) … … …

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

(7) Where any action has been taken against a borrower under the provisions of sub-section (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) **Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him is tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations or tender from public or private treaty for transfer by way of lease, assignment or sale of the secured assets,** –

> (i) **the secured assets shall not be transferred** by way of lease assignment or sale by the secured creditor; and
>
> (ii) **in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.**
>
> (9) to (13) … … … ”
>
> (emphasis supplied)

13.2 Sub-section (1) of Section 13 of the Act begins with “Notwithstanding anything contained” under Section 69 of the Transfer of Property Act, 1882 any secured interest can be enforced without intervention of the Court or Tribunal. From perusal of Section 69 of the Transfer of Property Act, it is clear that the mortgaged property cannot be sold without intervention of the Court except in three conditions as enumerated in clauses (a), (b) and (c) of sub-section (1) thereof. It would be advantageous to reproduce Section 69, which reads thus:

> “69. *Power of sale when valid.*-(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of the payment of mortgage-money, without the intervention of the Court, in the following cases and in no others, namely -
>
> (a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State Government, in the Official Gazette;
>
> (b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgagee is the Government;
>
> (c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by mortgage-deed, and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras,

> Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.
>
> (2) No such power shall be exercised unless and until –
>
> (a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or
>
> (b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.
>
> (3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.
>
> (4)-(5) … … …
>
> It is clear that mortgaged property cannot be sold without intervention of the court except in three conditions as enumerated in clauses (a), (b) and (c) of sub-section (1) of Section 69.”

13.2.1 Thus, Section 13(1) provides that notwithstanding anything contained in Section 69 a secured interest can be enforced without intervention of the Court. That is to say, it overrides the provision as contained under Section 69 where it is said that in no cases, other than those as enumerated in clauses (a), (b) and (c), a mortgage shall be enforced without intervention of the Court. Intervention of the Court has been eliminated in case of action/measures to be taken under Section 13(4) of the Act.

13.3 Sub-section (2) of Section 13 enumerates first of 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 liability to a secured creditor, makes any default in payment of secured debt and his account in

respect of such debt is classified as non-performing asset (NPA), 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).

13.4 Sub-section (3) of Section 13 lays down that notices 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.

13.5 Sub-section 13(3-A) of the Act was inserted by amending Act 30 of 2004 after the judgment in **Mardia Chemicals (supra),** whereby borrower is permitted or given an opportunity to make representation/objection to the secured creditor against classification of his account as NPA and for not exercising power under Section 13(4). Sub-section (2) is a condition precedent to the invocation of sub-section (4) by secured creditor. Once the two conditions under sub-section (2) of Section 13 are fulfilled, the next step which the bank or financial institution is to take is, either to take possession of the secured assets of the borrower or to take over management of the business of the borrower or to appoint any manager to manage the secured assets or require any person, who has acquired any of the secured assets from the borrower, to pay the secured creditor towards liquidation of the secured debt. Thus, it is clear that notice under Section 13(2) is not a mere show cause notice and it constitutes an action taken by the bank for the purpose of the Act. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reason for non-acceptance are required to be communicated within one week. The proviso is added to sub-section (3-A) is relevant and important, as it provides that the reasons communicated shall not confer any right upon the borrower to file an application to DRT under Section 17 of the Act.

13.6 The scheme of sub-sections (2), (3) and (3-A) of Section 13 of the Act shows that the notice under sub-section (2) is not merely a show cause notice, it is also a notice of demand, which is based on the footing that the borrower/debtor is under a liability and that his account in respect of such liability has become substandard, doubtful or a loss. In fact, because it is a notice of demand which constitutes an action, sub-section (3-A) provides for an opportunity to the borrower to make representation to the secured creditor. Section 13(2) is a condition precedent to the invocation of sub-section (4) of Section 13 of the Act. The legislature has not conferred any right to the borrower to take a recourse to a remedy under Section 17 at this stage. Communication of reason for rejecting objections/representation is only for the "knowledge" of the borrower, and if he feels aggrieved thereby, he can challenge the same only when it is "legally permissible" to file an application under Section 17 of the Act.

13.7 Sub-section (4) of Section 13, which is relevant for our purpose, specifies various modes/measures 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 realizing the secured assets. The secured creditor can also take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured 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 mange 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. A plain reading of Section 13(2)

read with Section 13(4), would show that the notice under Section 13(2) is not a mere show cause notice, but it constitutes an action taken by the Bank.

13.8 Sub-section (6), *inter alia*, provides that any transfer of secured assets after taking possession or taking any other measure under sub-section (4) by the creditor shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured assets. Therefore, Section 13(6) inter alia provides that once the Bank takes possession of the secured asset, then the right, title and interest in the asset can be dealt with by the Bank as it is the owner thereof. Sub-section (7) of Section 13 lays down that where any action has been taken against the 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.

13.9 Sub-section (8) of Section 13 imposes a restriction on the sale or transfer of the secured assets if the amount due to the secured creditors together with the costs, charges and expenses incurred by him are tendered at any time before the time fixed for such sale or transfer. The argument that by virtue of the provisions contained under sub-section (4) of Section 13, the borrower lose their right of redemption of mortgage. Under sub-section (8) of Section 13, a borrower is given option to tender to the creditor the amount due with costs and expenses incurred, and in which case no further steps for sale of property can be taken. The Supreme Court in **Narandas Karsondas Vs. S.A. Kamtam, [(1977) 3 SCC 247]** had observed that a mortgagor can exercise his right of redemption any time until the final sale of the property by execution of a conveyance. The Supreme Court in **Authorized Officer, Indian Overseas Bank and another Vs. Ashok Saw Mill, [(2009) 8 SCC 366],** observed that the Legislature by introducing sub-section (3) of Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Sub-section (9) deals with the situation in which more than one secured creditor has stakes in the secured assets. Sub-section (10)

lays down that where dues of the secured creditors are not fully specified by the sale proceeds of the secured assets, the secured creditors may file an application before Tribunal under Section 17 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) lays down that rights available to the secured creditor under the Act may be exercised by one or more of its officers authorized in this behalf. Sub-section (13) lays down that after receipt of notice under sub-section (2), the borrower shall not transfer by way of sale, lease or otherwise any of his secured assets referred to in the notice without prior written consent of the secured creditor.

14. Section 14 provides a mechanism for taking possession of secured asset with the assistance of Chief Metropolitan Magistrate or District Magistrate. Section 14 reads thus:

> "**14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. –** (1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, **the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him** –
>
> (a) **take possession of such asset** and documents relating thereto; and
>
> (b) **forward such asset** and documents to the secured creditor:

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that –

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of Section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of Section 13 read with Section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the

secured assets within a period of thirty days from the date of application:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

Provided further that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

(1-A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him, –

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.

(2) **For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.**

(3) **No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any court or before any authority.**"

(emphasis supplied)

14.1 Under this provision, the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction the secured assets are situated or found to take 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. Sub-section (2) empowers the CMM or DM to take such steps and use such force, as may be necessary for the purpose of compliance with the provisions

of sub-section (1) of Section 14. Sub-section (3) lays down that no action of the CMM or DM under Section 14(1)(2) shall be called in question in any Court.

15. The another Section which is relevant for our purpose is Section 17, of which the relevant portion for our purpose reads as under:

> "**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 authorised officer under this chapter, **may make an application** along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter **within forty-five days form the date on which such measure had been taken:**
>
> Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.
>
> *Explanation.* – For the removal of doubts, **it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.**
>
> (1-A) …...
>
> (a), (b), (c) …....
>
> (2) **The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.**
>
> (3) **If, the Debts Recovery Tribunal,** after examining the facts and circumstances of the case and evidence produced by the parties, **comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management 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, **is in accordance with the provisions of this Act and the rules** made thereunder, then, notwithstanding anything contained in any other law for the time being in force, **the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.**

(4-A) Where –

(i) & (ii) ….....

(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) …….....”

(emphasis supplied)

15.1 The proceedings under Section 17 of the Act, in fact, are not appellate proceedings and as observed by the Supreme Court in **Mardia Chemicals (supra)** it is only an application which, in fact, is the initial action brought before a forum as prescribed under the Act, raising a grievance against the action or measures taken by one of the parties to the contract under Section 13(4) of the Act. It is the stage of initial proceeding like instituting a suit in Civil Court. As a matter of fact, the proceedings under Section 17 of the Act are in substitution of a civil suit, the institution of which is otherwise barred under Section 34 of the Act.

15.2 Thus, Section 17 provides remedies to any person, including the borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of Section 13 of the Act. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under Section 13(4). 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).

15.3 Sub-section (2) of Section 17 of the Act casts a duty on the Tribunal to consider whether the measures taken by the secured creditor under Section 13(4) 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.

15.4 Section 17(3) states that if DRT, after examining the facts and circumstances of the case and on the basis of evidence produced by the parties, comes to the conclusion that any of the measures referred to in

Section 13(4), taken by the secured creditor is not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measure is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower.

15.5 Sub-section (4) of Section 17 shows that the secured creditor is free to take recourse to any of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force. Thus, even if the measure undertaken by the secured creditor under Section 13(4) come in conflict with any other law, then notwithstanding such conflict, the provisions of Section 13(4) shall override the local law [see **Transcore (supra)**]. This provision also stands clarified by Section 35 of the Act which states that the provisions of the Act shall override all other laws which are inconsistent with the Act.

15.6 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.

15.7 At this stage, we observe that a conjoint reading of Section 13(4) and Section 17(3) show that if the borrower is dispossessed, not in accordance with the provisions of the Act, then DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if the possession is taken before confirmation of sale, the right of the borrower to get the dispute adjudicated upon is defeated by the Authorised Officer taking possession. The Act, as matter of fact, provides for recovery of possession by adjudicatory process and, therefore, to say that the right of the borrower would be defeated without adjudication would be erroneous.

15.8 A reference to Sections 18, 34 and 35 also is relevant. Section 18 provides for an Appeal to the Appellate Tribunal. Section 34 lays down that

no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. In other words, no interim order of whatsoever nature shall be granted by any Court or authority in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act. Section 35 declares that the provisions of the Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

16. The Rules are made in exercise of the powers conferred by sub-section (1) and clause (b) of sub-section (2) of Section 38 read with sub-sections (4), (10) and (12) of Section 13 of the Act. Rule 3 provides the procedure for issuance of demand notice under sub- section (2) of Section 13 of the Act. Rule 3-A provides the procedure for the borrower to make a representation as contemplated by sub-section (2) of Section 13. Rules 4, 5, 6 and 7 deal with movable secured assets. In the present case, we are not concerned with the same. Rule 8 and Rule 9 are relevant for our purpose, which read thus:

> "**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 days from the date of taking possession, **in two leading newspapers,** one in vernacular language having sufficient circulation in that locality, by the authorised officer.
>
> (2-A) **All notices under these rules may also be served upon the borrower** through electronic mode of service, in addition to the modes prescribed under sub-rule (1) and sub-rule (2) of Rule 8.
>
> (3) **In the event of possession of immovable property is actually taken by the authorised officer,** such property shall be kept in his own custody or in the

custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) **The authorised officer shall take steps for preservation and protection** of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods: –

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction including through e-auction mode; or

(d) by private treaty.

Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State.

(6) **The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):**

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers ….....

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the secured creditor and the proposed purchaser in writing.

9. Time of sale, issues of sale certificate and delivery of possession, etc.—(1) **No sale of immovable property under these rules, in first instance shall take place before the expiry of thirty days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) of Rule 8 or notice of sale has been served to the borrower.**

Provided further that if sale of immovable property by any one of the methods specified by sub-rule (5) of Rule 8 fails and sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower, for any subsequent sale.

(2) **The sale shall be confirmed in favour of the purchaser who has offered the highest sale price in his bid or tender or quotation or offer to the authorised officer and shall be subject to confirmation by the secured creditor:**

Provided that no sale under this rule shall be confirmed, if the amount offered by sale price is less than the reserve price, specified under sub-rule (5) of rule 9:

Provided further that if the authorised officer fails to obtain a price higher than the reserve price, he may, with the consent of the borrower and the secured creditor effect the sale at such price.

(3) **On every sale of immovable property, the purchaser shall immediately, i.e. on the same day or not later than next working day, as the case may be, pay a deposit of twenty five per cent of the amount of the sale price,** which is inclusive of earnest money deposited, if any, to the authorised officer conducting the sale and in default of such deposit, the property shall be sold again.

(4) **The balance amount of purchase price payable shall be paid by the purchaser to the authorised officer on or before the fifteenth day of confirmation of sale** of the immovable property or such extended period as may be agreed upon in writing between the purchaser and the secured creditor, in any case not exceeding three months.

(5) **In default of payment** within the period mentioned in sub-rule (4), the deposit shall be forfeited to the secured creditor and the property shall be resold and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may be subsequently sold.

(6) **On confirmation of sale** by the secured creditor and if the terms of payment have been complied with, the authorised officer exercising the power of sale shall issue a certificate of sale of the immovable property in favour of the purchaser in the form given in Appendix V to these rules.

(7) Where the immovable property sold is subject to any encumbrances, the authorised officer may, if he thinks fit, allow the purchaser to deposit with him the

money required to discharge the encumbrances and any interest due thereon together with such additional amount that may be sufficient to meet the contingencies or further cost, expenses and interest as may be determined by him:

Provided that if after meeting the cost of removing encumbrances and contingencies there is any surplus available out of the money deposited by the purchaser such surplus shall be paid to the purchaser within fifteen days from the date of finalisation of the sale.

(8) On such deposit of money for discharge of the encumbrances, the authorised officer shall issue or cause the purchaser to issue notices to the persons interested in or entitled to the money deposited with him and take steps to make the payment accordingly.

(9) **The authorised officer shall deliver the property to the purchaser free from encumbrances known to the secured creditor on deposit of money as specified in sub-rule (7) above.**

(10) **The certificate of sale issued under sub-rule (6) shall specifically mention that whether the purchaser has purchased the immovable secured asset free from any encumbrances known to the secured creditor or not.**"

(emphasis supplied)

16.1 Appendix IV, is a format of notice under Rule 8 (1) read with Section 13(4) of the Act read with Rule 8 of the Rules. It would be advantageous to reproduce Appendix IV also for better appreciation of the submissions and the question that falls for our consideration in the instant writ petition. Appendix IV reads thus:

"APPENDIX IV

[Rule 8(1)]

POSSESSION NOTICE

(*For Immovable Property*)

Whereas

The undersigned being the authorized officer of the …..... (name of the Institution) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and in exercise of powers conferred under Section 13(12) read with Rule 3 of the Security Interest (Enforcement) Rules, 2002 issued a demand notice dated …..... calling upon the borrower Shri …...../M/s …..... to repay the amount mentioned in the notice being Rs

…..... (in words.....) within 60 days from the date of receipt of the said notice.

The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described herein below in exercise of powers conferred on him under sub-section (4) of Section 13 of Act read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 on this the ….....day of …..... of the year ….....

The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the ….....(name of the Institution) for an amount Rs..... and interest thereon.

The borrower's attention is invited to provisions of sub-section (8) of Section 13 of the Act, in respect of time available, to redeem the secured assets.

Description of the Immovable Property

All that part and parcel of the property consisting of Flat No. ….. /Plot No..... In Survey No. …...../City or Town Survey No. …...../Khasara No. …..... within the registration sub-district …..... and District ….....

Bounded;
On the North by
On the South by
On the East by
On the West by

sd/-
Authorized Officer”

16.2 A glance at Rule 8, read with Appendix V, would show that the Authorised Officer is empowered to take possession by delivering the possession notice prepared in Appendix IV. The notice is required to be affixed on the property (secured assets). This rule deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the Bank has taken possession of the property under Section 13(4) read with Rule 9 of the Rules. From perusal of Rule 9, it is clear that it relates to time of sale, issue

of sale certificate and delivery of possession. In other words, it states that on confirmation of sale, if the terms of payment are complied, the Authorised Officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the Rules. Rule 9(9) states that the Authorised Officer shall deliver the property to the buyer free from all encumbrances known or not known to the secured creditor. Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Rule 8 provides that till issuance of the sale certificate under Rule 9, the Authorised Officer shall take such steps as he deems to be fit to preserve the secured creditor. It is well settled, as observed by the Supreme Court in **Transcore (supra),** that third party interests are created overnight and in many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the Rules.

16.3 From the scheme of Rules 8 and 9, it appears to us that no sale of an immovable property under these Rules should take place before the expiry of 30 days from the date on which the public notice of sale is published in newspapers as referred to in the proviso to sub-rule (6) or Rule 8 or notice of sale has been served to the borrower. Sub-rule (6) of Rule 8 again states that the Authorised Officer should serve to the borrower a notice of 30 days for sale of the immovable secured asset. From a conjoint reading of sub-rule (6) of Rule 8 and sub-rule (1) of Rule 9, it is clear that the service of individual notice to the borrower, specifying clear 30 days' time gap for effecting sale of immovable secured asset is a statutory mandate. It also stipulates that no sale should be effected before the expiry of 30 days from the date on which the public notice of sale is published in the newspaper. The requirement under Rule 8(6) and Rule 9(1), thus, contemplate a clear 30 days’ individual notice to the borrower and also a public notice by way of publication in the newspapers. It is, thus, clear that a safeguard is provided to the borrower and this seems to be only with a view to enable the borrower to arrange repayment of outstanding dues and get the property released before the auction/sale of the immovable assets. Non-compliance of this mandatory

requirement can result in any further action to be declared void and illegal in the proceedings under Section 17 (1) instituted by the borrower.

16.4 In **Canara Bank Vs. M. Amarender Reddy & Anr., AIR 2017 SC 1441**, the Supreme Court dealt with the view expressed by a Division Bench of the High Court of Judicature at Hyderabad that Rule 8(6) read with Rule 9 of the Rules, mandates that the secured creditor must put the borrower on a separate individual notice prior to deciding on the mode of sale of the secured asset. Further, such notice should be in addition to the notice of 30 days' duration to be given by the secured creditor conveying its intention to put the secured asset on sale, which is mandatory. The High Court in that case, had observed that the subject sale notification issued by the bank did not conform to the stated mandatory requirement and was, thus, vitiated on that count. The respondent, who was one of the two guarantors, had approached the High Court for declaration that e-auction notice dated 15.10.2015 was illegal and in contravention of the provisions of the Act and the Rules. While dealing with the writ petition, the High Court took the view that a separate notice of 30 days' duration ought to have been given by the bank to the respondent before the public notice fixing the date of auction/sale was issued. After noticing the provisions of Rules 8 and 9 and the judgment in **Mathew Varghese Vs. M. Amritha Kumar & Ors., (2014) 5 SCC 610**, the Supreme Court in paragraphs 12 and 13 of the judgment in **M. Amarender Reddy (supra)**, observed thus:

> "**12.** The secured creditor, after it decides to proceed with the sale of secured asset consequent to taking over possession (symbolic or physical as the case may be), is no doubt required to give a notice of 30 days for sale of the immovable asset as per sub-rule (6) of Rule 8. However, there is nothing in the Rules, either express or implied, to take the view that a public notice under sub-rule (6) of Rule 8 must be issued only after the expiry of 30 days from issuance of individual notice by the authorized officer to the borrower about the intention to sell the immovable secured asset. **In other words, it is permissible to simultaneously issue notice to the borrower about the intention to sell the secured assets and also to issue a public notice for sale of such**

> **secured asset by inviting tenders from the public or by holding public auction. The only restriction is to give thirty days' time gap between such notice and the date of sale of the immovable secured asset.**
>
> **13. We hold that the High Court has committed a manifest error in assuming that the notice of intention of sale to be given to the borrower and a public notice for sale cannot be simultaneously issued.** The High Court was also not right in observing that after a notice regarding intention to sell the secured asset under sub-rule (6) of Rule 8 is given by the authorized officer to the borrower, only on expiry of 30 days therefrom can the secured creditor take a decision about the mode of sale referred to in sub-rule (5) of Rule 8 after giving notice to the borrower and then issue a public notice after expiry of further thirty days. **By this interpretation, the High Court has virtually re-written the provisions and inevitably extended the time frame of 30 days specified in sub-rule (6) of Rule 8 (at least in relation to the sale of secured asset by inviting tenders from the public or by holding public auction).**"
>
> (emphasis supplied)

16.5 In **Mathew Varghese (supra)**, Supreme Court considered the provisions contained in Rules 8 and 9, in depth, in the light of the provisions contained in Section 13 of the Act. It would be advantageous to notice the contents of paragraphs 30, 31, 33, 35 and 53 to understand the scheme of these provisions better, which read thus:

> "**30.** Therefore, by virtue of the stipulations contained under the provisions of the SARFAESI Act, in particular, Section 13(8), **any sale or transfer of a secured asset, cannot take place without duly informing the borrower of the time and date of such sale or transfer in order to enable the borrower to tender the dues of the secured creditor with all costs, charges and expenses** and any such sale or transfer effected without complying with the said statutory requirement would be a constitutional violation and nullify the ultimate sale.
>
> **31.** Once the said legal position is ascertained, the statutory prescription contained in Rules 8 and 9 have also got to be examined as the said Rules prescribe as to the procedure to be followed by a secured creditor while resorting to a sale after the issuance of the proceedings

under Sections 13(1) to (4) of the SARFAESI Act. **Under Rule 9(1), it is prescribed that no sale of an immovable property under the Rules should take place before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers as referred to in the proviso to sub-rule (6) of Rule 8 or notice of sale has been served to the borrower.** Sub-rule (6) of Rule 8 again states that the authorized officer should serve to the borrower a notice of 30 days for the sale of the immovable secured assets. **Reading sub-rule (6) of Rule 8 and sub-rule (1) of Rule 9 together, the service of individual notice to the borrower, specifying clear 30 days' time-gap for effecting any sale of immovable secured asset is a statutory mandate.** It is also stipulated that no sale should be affected before the expiry of 30 days from the date on which the public notice of sale is published in the newspapers. Therefore, the requirement under Rule 8(6) and Rule 9(1) contemplates a clear 30 days' individual notice to the borrower and also a public notice by way of publication in the newspapers. In other words, **while the publication in newspaper should provide for 30 days' clear notice, since Rule 9 (1) also states that such notice of sale is to be in accordance with the proviso to sub-rule (6) of Rule 8, 30 days' clear notice to the borrower should also be ensured as stipulated under Rule 8(6) as well.** Therefore, the use of the expression "or" in rule 9(1) should be read as "and" as that alone would be in consonance with Section 13(8) of the SARFAESI Act.

33. Such a detailed procedure while resorting to a sale of an immovable secured asset is prescribed under Rules 8 and 9(1). In our considered opinion, it has got a twin objective to be achieved:

33.1. In the first place, as already stated by us, **by virtue of the stipulation contained in Section 13(8) read along with Rules 8(6) and 9(1), the owner/borrower should have clear notice of 30 days before the date and time when the sale or transfer of the secured asset would be made, as that alone would enable the owner/borrower to take all efforts to retain his or her ownership by tendering the dues of the secured creditor before that date and time.**

33.2. Secondly, when such a secured asset of an immovable property is brought for sale, the intending purchasers should know the nature of the property, the extent of liability pertaining to the said property, any other encumbrances pertaining to the said property, the

minimum price below which one cannot make a bid and the total liability of the borrower to the secured creditor. Since, the proviso to sub-rule (6) also mentions that any other material aspect should also be made known when effecting the publication, **it would only mean that the intending purchaser should have entire details about the property brought for sale in order to rule out any possibility of the bidders later on to express ignorance about the factors connected with the asset in question.**

33.3. Be that as it may, the paramount objective is to provide sufficient time and opportunity to the borrower to take all efforts to safeguard his right of ownership either by tendering the dues to the creditor before the date and time of the sale or transfer, or ensure that the secured asset derives the maximum price and no one is allowed to exploit the vulnerable situation in which the borrower is placed.

35. Under **sub-rule (4) of Rule 8, it is further stipulated that the authorized officer should take steps for preservation and protection of secured assets and *insure* them if necessary till they are sold or otherwise disposed of.** Sub-rule (4), governs all secured assets, movable or immovable and a further responsibility is created on the authorized officer to take steps for the preservation and protection of secured assets and for that purpose can even *insure* such assets, until they are sold or otherwise disposed of. **Therefore, a reading of Rules 8 and 9, in particular, sub-rules (1) to (4) and (6) of Rule 8 and sub-rule (1) of Rule 9 makes it clear that simply because a secured interest in a secured asset is created by the borrower in favour of the secured creditor, the said asset in the event of the same having become a non-performing asset cannot be dealt with in a light-hearted manner by way of sale or transfer or disposed of in a casual manner or by not adhering to the prescriptions contained under the SARFAESI Act and the above said Rules mentioned by us.**

53. 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 property 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 Rule 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 Sections 13(1) and (8) of the said Act."
>
> (emphasis supplied)

16.6 The observations made by the Supreme Court in **M. Amarender Reddy (supra)** and **Mathew Varghese (supra)** make the scheme of the Rules absolutely clear and it is not necessary for us to reproduce any portion thereof to hold that the scheme of Rules 8 and 9, read with Section 13, gives ample powers to the Banks/FIs to take physical possession (actual) of the secured assets without interference of the Court and the only remedy open to the borrower is to approach DRT challenging such an action and seeking interim orders including restoration of possession even after transfer of the secured assets by way of sale, lease on the ground that the procedure contemplated under sub-section (4) of Section 13 was not in accordance with the provisions of the Act. Even from the observations made in this judgment, it is clear that physical/actual possession cannot be stalled by the Court at any point of time after taking recourse to the procedure contemplated under Rules 8 and 9 of the Rules. The intent of providing such a procedure under Section 13 read with Rule 8 and Rule 9 for that matter is that the borrower/owner should have clear notice (at every stage) before the date and

time of sale/transfer of the secured assets in order to enable him to tender the dues of the secured creditor with all other charges and to provide a remedy under Section 17(1) at appropriate stage. We will deal with the question what taking “measures” would exactly mean little later.

17. The scheme of Sections 13, 14 and 17, read with Rule 8, 9 and Appendix IV of the Rules, would show that the Legislature has envisaged a clear tilt in favour of Banks/FI's, but at the same time interest of the borrower has been safeguarded by providing for checks and balances, at every stage of the proceedings. After the judgment of the Supreme Court in **Mardia Chemicals (supra),** the Legislature by Act 30 of 2004 (w.e.f. 11.11.2004) inserted sub-section (3-A) in Section 13 and an Explanation, added to Section 17(1). By this amendment, it provided a remedy of making a representation or raising an objection to the notice under sub-section (2), obliging the Bank to consider such representation or objection and if it is found to be not acceptable or tenable, to communicate within fifteen days the reasons for non-acceptance of the representation or objections to the borrower. While inserting sub-section (3-A) in Section 13, the Legislature also made it clear, consistent with the scheme of Section 13 and also keeping in view the object of the Act, that the borrower shall not prefer an application to the DRT under Section 17 or the Court of District Judge under Section 17-A of the Act. Even by way of an explanation added to Section 17(1) doubts have been removed that the borrower shall not be entitled to make an application to DRT against the order not accepting the representation. In other words, the borrower cannot take a remedy under Section 17(1) against the order rejecting his representation/objections. This also makes it clear and supports the scheme of Section 13 that unless measures under sub-section (4) of Section 13 are taken, the borrower cannot approach DRT under Section 17(1), challenging only the order rejecting the representation/objections. It does not mean that the Legislature left the borrower without any remedy. The borrower, as and when takes a remedy after the measures are taken under Section 13(4) or the stage at which he is allowed to take a remedy under Section 17(1) of the Act, can certainly raise

challenge to the reasons for non-acceptance of the representation or objections and to the measures taken under Section 13(4) on the ground that the due procedure was not followed or the possession was not taken in accordance with law and if the DRT is satisfied, it is empowered under sub-section (3) of Section 17 of the Act to restore the possession of the secured assets to the borrower or other aggrieved person declaring that the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor is either invalid; and restore the possession of secured assets who has made an application under sub-section (1) of Section 17 and pass such 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. It is also pertinent to note that the provisions contained in Sections 13 and 17 of the Act, read with Rule 8 and 9 of the Rules, provide a calendar so as to enable both, the Bank as well as the borrower, to take all measures/steps/safeguards in their interest at every stage. For instance, clear 30 days' notice is provided only to enable the borrower to tender the dues before the actual sale/transfer of secured assets is effected. It is also clear that the steps contemplated under these provisions clearly demonstrate that without taking physical possession of the secured assets, it would not be possible to take any steps to sell or transfer the secured assets. The Supreme Court in **Mardia Chemicals (supra)** made it clear that communication of reasons to the borrower, rejecting his objections, is only 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 Bank, who intend to resort to harsh step of taking possession without intervention of the Court. It further makes it clear that he can challenge the reasons only when his right to challenge matures, i.e. after the measures under Section 13(4) are taken.

18. We would like to have a close look at the judgment of Supreme Court in **Mardia Chemicals (supra).** The Supreme Court in this case considered the validity of the Act, more particularly, the provisions as contained in Sections 13, 15, 17 and 34 thereof. In the course of judgment, after referring

to Section 17, in paragraph 40 of the judgment, the Supreme Court observed that an appeal under sub-section (1) of Section 17 would lie only after "some measure" has been taken under sub-section (4) of Section 13 and not before the stage of taking of any such measure. The question that was considered by the Supreme Court was whether there is absolute bar of any remedy to the borrower, before an action is taken under sub-section (4) of Section 13 of the Act, in view of non-obstante clause under sub-section (1) of Section 13 and the bar of the jurisdiction of Civil Courts under Section 34 of the Act.

18.1 The backdrop against which the Act was introduced after considering Narasimham Committee and Andhyarujina Committee reports the Supreme Court in **Mardia Chemicals (supra)** in paragraphs 45, 46, 47 and 48 observed thus:

> "**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 with 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 for not accepting the objections taken by the secured borrower may not be taken to give 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 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 Debts 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 the 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 of the developments

> immediately before taking measures under sub-section (4) of Section 13 of the Act. It will also cater to 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.
>
> **48. The next safeguard available to a secured borrower within the framework of the Act is to approach the Debts Recovery Tribunal under Section 17 of the Act. Such a right accrues only after measures are taken under sub-section (4) of Section 13 of the Act**."
>
> (emphasis supplied)

18.2 From perusal of the observations made by the Supreme Court, it is clear to us that a person against whom measures/steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to know the reason why his application or objections have not been accepted, as a fulfillment of a requirement of reasonableness and fairness in dealing with the same. While so observing the Supreme Court did not forget to state that the borrower may not be entitled to challenge the reasons communicated or likely action of the secured creditor under Section 13(4) of the Act. In other words, the borrower is not intended to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the DRT as provided under Section 17 matures on any measure having been taken under sub-section (4) of Section 13 of the Act. The borrower gets an opportunity either to clear the dues or to furnish his objections making it mandatory for the secured creditor to deal with the objections and apprise the borrower of the reasons 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. In short, it is a responsibility of the secured creditor to keep the borrower informed particularly of the developments immediately after taking measures under sub-section (4) of Section 13 of the Act. Thus, the safeguard available to the borrower to approach the Debt Recovery Tribunal under Section 17 is only after measures are taken under sub-section (4) of Section 13.

18.3 The main thrust in **Mardia Chemicals (supra)** before the Supreme Court while challenging the validity of the Act, was on non-availability of adjudicatory mechanism to the borrower to ventilate his grievance through an independent adjudicatory authority. Access to justice, it was submitted, is the hallmark of our system. While dealing with the challenge, the Supreme Court in paragraphs 68 and 69 of the report observed thus:

> "**68. …** Section 34 of the Act bars the jurisdiction of the civil courts to entertain a suit in matters of recovery of loans. **The remedy of appeal available under the Act as contained in Section 17 can be availed only after measures have already been taken by the secured creditor under sub-section (4) of Section 13 of the Act which includes sale of the secured assets, taking over its management and all transferable rights thereto**. **Virtually it is no remedy at all also in view of the onerous condition of deposit of 75% of the claim of the secured creditor.** Before filing an appeal under Section 17 of the Act, decision is to be taken in respect of all matters by the bank or financial institution itself which can hardly be said to be an independent agency; rather they are a party to the transaction having unilateral power to initiate action under sub-section (4) of Section 13 of the Act. So far as remedy under Article 226 of the Constitution of India is concerned, the submission is that it may not always be available since the dispute may be only between two private parties, the banking companies, co-operative Banks or financial institutions, foreign banks, some of them may not be authorities within the meaning of Article 12 of the Constitution of India against whom a writ petition could be maintainable. Thus the position that emerges is that a borrower is virtually left with no remedy. Where access to the court is prohibited and no proper adjudicatory mechanism is provided such a law is unconstitutional and cannot survive. In support of the aforesaid contentions besides others, reliance has particularly been placed upon the case *L. Chandra Kumar* v. *Union of India*, (1997) 3 SCC 261 : 1997 SCC (L&S) 577 and *Surya Dev Rai* v. *Ram Chander Rai,* (2003) 6 SCC 675. A reference has also been made to the decision of *Kihoto Hollohan v. Zachillhu,* 1992 Supp (2) SCC 651. In the case of *L.Chandra Kumar* (supra) **it is held, some adjudicatory process through an independent agency is essential for determining the rights of the parties, more particularly when the**

consequences which flow from the offending Act defeat the civil rights of a party.

69. On behalf of the respondents time and again stress has been given on the contention that in a contractual matter between the two private parties they are supposed to act in terms of the contract and no question of compliance with the principles of natural justice arises nor the question of judicial review of such actions needs to be provided for. However, at the very outset, it may be pointed that the contract between the parties as in the present case, is no more as private as sought to be asserted on behalf of the respondents. If that was so, in that event parties would be at liberty to seek redressal of their grievances on account of breach of contract or otherwise taking recourse to the normal process of law as available, by approaching the ordinary civil courts. **But we find that a contract which has been entered into between the two private parties, in some respects has been superseded by the statutory provisions or it may be said that such contracts are now governed by the statutory provisions relating to recovery of debts and bar of jurisdiction of the civil court to entertain any dispute in respect of such matters. Hence, it cannot be pleaded that the petitioners cannot complain of the conduct of the banking companies and financial institutions for whatever goes on between the two is absolutely a matter of contract between private parties, therefore, no adjudication may be necessary.**"

(emphasis supplied)

18.4 Then the Supreme Court while dealing with the contentions based on the principles of natural justice exercising of the powers under Section 13, in paragraphs 75, 76, 77 and 78, observed thus:

"**75. In relation to the argument on behalf of the petitioners that they are entitled to be heard before a notice under sub-section (2) of Section 13 is issued failing which there is denial of the principles of natural justice, a reference has been made to certain decisions to submit that in every case, it is not necessary to make a provision for providing a hearing**. For example, in the case of a licensing statute, see *Kishan Chand Arora v. Commr. of Police,* AIR 1961 SC 705 : (1961) 3 SCR 135. The other decisions referred to are : *Lachhman Das v. State of Punjab,* AIR 1963 (SC) 222 *:* (1963) 2 SCR 353, *Chairman, Board of Mining*

Examination v. Ramjee, and (1977) 2 SCC 256 : 1977 SCC (L&S) 226, SCC at p. 262 and *Haryana Financial Corpn. v. Jagdamba Oil Mills*, (2002) 3 SCC 496, SCC at p. 504, para 7 to submit that concept of natural justice is not a straight jacket formula. It, on the other hand, depends upon the facts of the case, nature of the enquiry, the rules under which the Tribunal is acting and what is to be seen is that no one should be hit below the belt. Relationship between the creditor and the debtor, it is submitted, is essentially in the realm of a contract.

76. In regard to the submission made by the parties as indicated in the preceding paragraphs, **we would like to make it clear that issue of a notice to the debtor by the creditor does not attract the application of the principles of natural justice. It is always open to tell the debtor what he owes to repay. No hearing can be demanded from the creditor at this stage. So far as the provision of appeal is concerned, we have already discussed in the earlier part of the judgment that proceedings under Section 17 of the Act have been wrongly described as appeal before the Debts Recovery Tribunal. It is in fact a forum where proceedings are originally initiated in case of any grievance against the creditor in respect of any measure taken under sub-section (4) of Section 13 of the Act**. Hence, the decisions on the point as to whether provision for an appeal is essential or not are not of any assistance in the facts of the present case.

77. It is also true that till the stage of making of the demand and notice under Section 13(2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of court with a bar to approach the court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated so as to demonstrate that the reply of the borrower to the notice under Section 13(2) of the Act has been considered applying mind to it. The reasons, howsoever brief they may be for not accepting the objections, if raised in the reply, must be communicated to the borrower. True, presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest, but **while resorting to such legislation it**

would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery.

78. It was sought to be argued that fairness cannot be a one-way street. **The plea of absence of natural justice lies ill in the mouth of chronic defaulters who have not paid the principal amounts admittedly due to the banks.** The said argument pre-supposes admission of the liability by the borrowers and all of them to be chronic defaulters. It would only be pre-judging an issue. We hope it was not meant to be said that all those who defaulted according to the banks and financial institutions must be condemned unheard who might not deserve any hearing to place their side of the case, unless they must go through the crushing pre-conditions of deposit of 75% of the amount demanded over and above their secured assets already having been taken possession of. We feel this can well be one example of hitting below the belt."

(emphasis supplied)

18.5 In the concluding paragraphs 80 and 81, after dealing with the challenge, Supreme Court observed thus:

"**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 Debts Recovery Tribunal**. The above noted provisions are for the purpose 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 Debts 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 Debts 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 in this behalf, we find that the requirement of deposit of 75% of the amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

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

81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, **we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest**."

(emphasis supplied)

18.6 The Supreme Court in **Mardia Chemicals (supra),** thus holds that the remedy of appeal is available only after measures under Section 13(4) have been taken. The issue of notice under Section 13(2) to the borrower does not attract the application of the principles of natural justice. No hearing at that stage is necessary. The objective of inviting objection is only to make the creditor bear in mind the say of the borrower before the measures under Section 13(4) are initiated so as to demonstrate that the reply of the borrower has been considered applying mind to it. Further, the time of 60 days is provided after the measures under Section 13(4) have been taken so as to enable the borrower to approach the DRT. The Tribunal in such an eventuality in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order, subject to conditions. Thus, the borrower would get a reasonably fair deal and opportunity to get the matter adjudicated upon before DRT. It is clear that where a secured creditor has taken measures/action under Section 13(4) of the Act, only in such cases, it would be open to borrowers to file securitisation application under Section 17 of the Act within the limitation prescribed thereunder.

19. The Supreme Court in **Transcore (supra)** considered the question whether withdrawal of OA in terms of the first proviso to Section 19(1) of the DRT Act, 1993 (inserted by amending Act 30 of 2004) is a condition precedent to take recourse to the Act. While dealing this question, the Supreme Court in paragraph 37 of the judgment framed three questions. We are concern with the question *"whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.* The Act is referred as NPA Act in the said judgment.

19.1 Before we have a look at the relevant observations made by Supreme Court while dealing with the above question, it would be advantageous to reproduce the arguments advanced by counsel appearing for the borrowers so as to understand the context in which the findings on the above question

were recorded by the Supreme Court. The arguments are covered in paragraph 71 of the judgment:

> "**71.** Mr. N.C. Sahni and Mr. Pankaj Gupta, learned advocates appearing on behalf of the respective borrowers submitted that Section 13(4) of the NPA Act empowers the secured creditor to take possession of the secured immovable assets of the borrower on expiry of sixty days and notice served under Section 13(2) of that Act. **It is pointed out that in many cases, the banks/FIs. have taken actual physical possession whereas in other cases they have taken only a symbolic possession**. Learned advocates submitted that in *Kalyani Sales Co.*, the High Court has rightly held that if physical possession is taken on expiry of sixty days, the remedy of application under Section 17 of the NPA Act by the borrower would become illusory and meaningless as the borrower or the person in possession would be dispossessed even before adjudication of the objections by the tribunal. **Learned advocates further submitted that under Section 13(8), the bank/FI is prevented from selling the secured assets, if the dues of the secured creditor with all costs, charges and expenses are tendered to the secured creditor at any time before the date fixed for sale. Learned advocates pointed out that under Rule 8(1) of the 2002 Rules, a secured creditor is empowered to take possession as per notice appended in terms of Appendix IV. That notice cautions the borrower not to deal with the property. Learned advocates submitted that notice in terms of Rule 8(1) of the 2002 Rules operates as attachment. It contemplates a symbolic possession. Learned advocates submitted that actual physical possession of immovable assets can be taken under Rule 8(3), in cases where there is a vacant plot or a property which is lying unattended, but where the immovable property is in actual physical possession of any person, the person in possession cannot be dispossessed by virtue of a notice under Rule 8(1); that actual physical possession is to be delivered only after confirmation of sale under Rule 9(6) read with Appendix V under which the authorised officer is empowered to deliver the property to the purchaser free from all encumbrances in terms of Rule 9(9) of the 2002 Rules**. Learned advocates, therefore, submitted that the High Court was right in holding that the borrower or any other person in possession of the

> immovable property cannot be physically dispossessed at the time of issuing notice under Section 13(4) of the NPA Act so as to defeat the adjudication of his claim by the DRT under Section 17 of the NPA Act, and that, physical possession can be taken only after the sale is confirmed in terms of Rule 9(9) of the 2002 Rules."

19.2 The findings are recorded on the question in paragraphs 73 and 74, which reads thus:

> "**73. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act**. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/ tribunals.
>
> **74.** Keeping the above conceptual aspect in mind, **we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realizing the secured assets**. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4-A) as pleaded on behalf of the borrowers. **Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules**. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 13(4) read with Rule 9 of the 2002 Rules. **Rule 9 relates to time of sale, issue of**

sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances *known to the secured creditor or not known to the secured creditor*. (emphasis supplied) Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. **Section 17(1) of the NPA Act refers to the right of appeal. Section 17(3) states that if DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then DRT is entitled to put the clock back by restoring the *status quo ante.* Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession**. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process; therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. **Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred.**

> **The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9**. Till the time of issuance of sale certificate, the authorised officer is like a Court Receiver under Order 40 Rule 1 CPC. The Court Receiver can take symbolic possession and in appropriate cases where the Court Receiver finds that a third-party interest is likely to be created overnight, he can take actual possession even prior to the decree. **The authorized officer under Rule 8 has greater powers than even a Court Receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorized officer shall take such steps as he deems fit to preserve the secured asset**. It is well settled that third-party interests are created overnight and in very many cases those third parties take up the defence of being a *bona fide* purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. **In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules**."
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> (emphasis supplied)

19.3 The judgment in **Transcore (supra)**, as quoted above, needs to be read in the light of the question that fell for consideration. The question in short was whether taking possession contemplated under Section 13(4) comprehends the power to take actual possession. While dealing with this question, the Supreme Court considered the relevant Rules which prescribe the procedure for taking over possession of secured assets. The Supreme Court did not consider the question whether an application under Section 17(1) of the Act could be filed even before the measures/possession are/is taken as contemplated under sub-section 4 of Section 13. In other words, the Supreme Court did not consider the question whether an application under Section 17(1) of the Act is maintainable before the measures, such as taking

possession as provided for under Section 13(4)(a) is available. A notice under Rule 8 of the Rules, as prescribed with Appendix IV is required to be given to the borrower who has failed to repay the amount informing him and the public that the bank has taken possession of the property under sub-section (4) of Section 13, read with Rule 9 of the Rules.

19.4 The Supreme Court in this case (Transcore) observed that the word "possession" is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. The scheme of Section 13(4), read with Section 17(3), shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then DRT is entitled to put the clock back by restoring the *status quo ante*. After referring to Rule 8, the Supreme Court observes that Rule 8 provides that till issuance of sale certificate under Rule 9, the Authorised Officer shall take such steps as he deems fit to preserve the secured assets. It further observes that under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. From the observations made in this judgment in the light of the provisions contained in Sections 13(2), (3), (3-A) and (4), in particular Section 8, Sections 17(1) (2) of the Act and Rules 8 and 9 of the Rules would show that the borrower can seek restoration of possession.

19.5 Rule (9) relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. Thus it is clear that the provisions of the relevant Rules simply prescribe the procedure to be followed for taking possession and delivering it to the purchaser and it does not deal with the situation whether the procedure contemplated under these

Rules can also be subject matter of the application under Section 17(1) of the Act before the actual possession is taken. The scheme of Section 13(4) read with Section 17(3), as matter of fact, shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if the possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession. Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. If we hold that the borrower cannot be physically dispossessed till the stage of delivering possession to the purchaser under Rule 9, that will frustrate the very objective of the Act. The observations made by the Supreme Court in this case would render nugatory/redundant. The borrower's right to get back possession even after the sale is kept intact or stands recognised under the scheme of the relevant provisions. On the other hand, if the possession (physical) is not with the creditor at the time of sale/auction, no buyer would ever come forward or would hesitate to purchase the secured assets, and as one of the consequences, the assets would not fetch the desired consideration. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order 40 Rule 1 CPC who can take symbolic possession and in appropriate cases where the court receiver finds that a third party interests are created, he can take actual possession even prior to the decree. While making this observation, the Supreme Court was not unmindful of the extraordinary powers of authorised officer under Rule 8. It was categorically observed that the powers of authorised officer of the bank under Rule 8 are greater than the receiver. It is true, the Supreme Court in **Transcore (supra),** has not stated in so many words that a recourse to the remedy provided under Section 17(1) can be taken only after the borrower loses possession, may be for the reason that such was not the question before the Supreme Court. But from the above quoted observations it cannot be accepted that taking possession means symbolic and not actual possession under Section 13(4)(a) of the Act. The question that falls for our

consideration is whether recourse can be taken to Section 17(1) before actually (physically) losing possession.

19.6 It is also necessary to notice the context in which such observations were made by the Supreme Court. The context is clear from the following observations: “it is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the Rules”. After so observing, the Supreme Court held that the dichotomy between symbolic and actual possession does not find place in the scheme of the Act read with the Rules.

20. In **Satyawati Tondon (supra),** the Supreme Court considered the question whether the Division Bench of the High Court was justified in restraining the appellant (Bank) from proceeding under Section 13(4) of the Act against the property of respondent No.1. Respondent no. 1 before the Supreme Court was the guarantor whereas respondent no. 2 was the borrower. Respondent no. 1, for the loan sanctioned in favour of respondent no. 2, gave guarantee for payment of the loan and mortgaged her house property by deposit of title deeds. Since the borrower was irregular in making repayment of loan, the appellant sent letters to both the respondents requiring them to deposit the outstanding dues. In response to the letters, the borrower deposited a paltry amount. In view thereof, the appellant was compelled to issue notice to respondent nos. 1 and 2 under Section 13(2) requiring them to pay the outstanding dues along with future interest and incidental expenses within 60 days. Upon receipt of the notice, respondent no. 1 was called to pay a sum of Rs. 18 lacs for settlement of the loan account, but the appellant did not accept the offer and filed an application under Section 14 of the Act, which was allowed by the District Magistrate, Collector, Allahabad, vide his order dated 25.8.2008. Thereafter the appellant issued notice dated 21.1.2009 to the respondents under Section 13(4) of the Act. Faced with the imminent threat of losing the mortgaged

property, respondent no. 1 filed writ petition and prayed for restrain order. Respondent no. 1 (guarantor) pleaded that the notices issued by the appellant (Bank) for recovery of the outstanding dues are ex facie illegal and liable to be quashed because no action had been taken against the borrower i.e. respondent no.2 for recovery of the outstanding dues.

20.1 While dealing with this situation, the Supreme Court also considered the question whether the appellant could have issued notice to respondent no. 1 under Section 13(2) and (4) and filed an application under Section 14 of the Act without first initiating action against the borrower i.e., respondent No.2 for recovery of the outstanding dues. The question was answered by the Supreme Court in the affirmative in the light of the judgments in **Bank of Bihar Ltd. Vs. Damodar Prasad & Anr (AIR 1969 SC 297), State Bank Of India Vs. Indexport Registered And Ors., [1992 (3) SCC 159]** and **Industrial Investment Bank of India Ltd. Vs. Bishwanath Jhunjhunwala, [(2009) 9 SCC 478]** holding that the High Court completely misdirected itself in assuming that the appellant could not have initiated action against respondent no.1 (guarantor) without making efforts for recovery of its dues from respondent No.2 (borrower).

20.2 In **Satyawati Tondon (supra),** the Supreme Court was essentially considering the question whether the Division Bench of the High Court was justified in restraining the appellant from proceeding under Section 13(4) of the Act against the property of respondent and not the question that falls for our consideration.

20.3 The Supreme Court considered its several judgments including the judgments in **Damodar Prasad (supra), Indexport Registered (supra)** and **Bishwanath Jhunjhunwala (supra), Mardia Chemicals (supra)** and observed that the High Court had completely misdirected itself in assuming that the appellant could not have initiated action against respondent no.1 (guarantor) without making efforts for recovery of its dues from respondent No.2 (borrower). The observations made by the Supreme Court in paragraphs 42 and 43, reads thus:

> "**42.** There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). **The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14.** Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.
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> **43.** Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., **the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person.** Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."
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> (emphasis supplied)

20.4 Further, it is necessary to notice that after referring to several judgments, the Supreme Court considered the remedy under Article 226 of the Constitution of India and observed "in cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and

circumspect in exercising its discretion to grant stay in such matters". The Supreme Court while setting aside the order of the High Court also observed that if "respondent no.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person" shall also explain to mean to cover even borrower. In concluding paragraphs 55 and 56, the Supreme Court observed thus:

> "**55.** It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. **We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.**
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> **56**. Insofar as this case is concerned, we are convinced that **the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act.** In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."
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> (emphasis supplied)

20.5 From bare perusal of the judgment, it is clear that the Supreme Court did not consider the question that falls for our consideration and simply observed that when a remedy under Section 17(1) is available against the action under Section 13(4) or 14, the High Court should not exercise jurisdiction under Article 226 of the Constitution of India. In other words, against the action/measures under Section 13(4) or 14 of the Act, the borrower or a guarantor has a remedy of making an application under Section 17(1) of the Act.

21. The Supreme Court in **Authorized Officer, Indian Overseas Bank and another Vs. Ashok Saw Mill, [(2009) 8 SCC 366],** after considering

the provisions contained in Sections 13 and 17 in paragraph 36 and 39 observed thus:

> "**36**. The intention of the legislature is, therefore, clear that **while the Banks and Financial Institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.**
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> **39.** We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and **it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT.**"
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> (emphasis supplied)

21.1 The further observations made by the Supreme Court in **Ashok Saw Mill (supra)** in paragraphs 29, 34, 35, 36, 37 and 39 are also relevant, which read thus:

> "**29. The said amendments were made in order to give an opportunity to the borrower to approach the DRT at any stage against any measure taken by the secured creditor under Sub-Section (4) of Section 13 which were not in conformity therewith and to have the possession of secured assets restored in the event such action was found to be invalid.** At the same time, more power was given to the secured creditor to exercise control over the management of the business of the borrower which included the right to transfer by way of lease, assignment or sale of the secured assets for releasing the same.
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> **34. The provisions of Section 13 enable the secured creditors, such as Banks and Financial Institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the borrower,** including the right to transfer by way of lease, assignment or sale for realizing secured

assets, subject to the conditions indicated in the two provisos to clause (b) of sub-section (4) of Section 13.

35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

36. The intention of the legislature is, therefore, clear that **while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.**

37. The consequences of the authority vested in DRT under sub-section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. **The legislature by including sub-section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases.** Resultantly, the submissions advanced by Mr. Gopalan and Mr. Altaf Ahmed that the DRT has no jurisdiction to deal with a post 13(4) situation, cannot be accepted.

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, **the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT.**"

(emphasis supplied)

21.2 The Supreme Court in this case, after referring to Sections 13(4) and Section 17 holds that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have already been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore even though possession may have been made over to the transferee. Thus, the borrower can even seek restoration of the status quo ante and the DRT has sufficient powers to deal with such an application if it is satisfied that the measures taken by the secured creditor under sub-section (4) of Section 13 were not in conformity therewith. The safeguard provided under the scheme makes it further clear that if the bank/financial institutions wish to take actual possession of the assets that cannot be stalled by the interference of a Court. In other words, any security interest created in favour of any secured creditor may enforce, without intervention of Court or Tribunal, in accordance with the provisions of the Act.

22. In **Kanaiyalal Lalchand (supra)**, the Supreme Court once again after referring to the provisions contained in Section 13(4) and 17(1) and making detail reference to its several judgments including in **Mardia Chemicals (supra)** in paragraphs 21 and 22 observed thus:

> "**21.** In *Indian Overseas Bank v. Ashok Saw Mill*, the main question which fell for determination was **whether the DRT would have jurisdiction to consider and adjudicate post Section 13(4) events or whether its scope in terms of Section 17 of the Act will be confined to the stage contemplated under Section 13(4) of the Act?** On an examination of the provisions contained in Chapter III of the Act, in particular Sections 13 and 17, this Court held as under (SCC pp. 375-76, paras 35-36 & 39)
>
> "35. **In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of**

> **Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub- section (3) thereof.**
>
> 36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, **safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee.**
>
> *39.* ***We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act.*** **On the** other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT."
>
> **22.** We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT."
>
> (emphasis supplied)

22.1 In this judgment, the Supreme Court after considering the scheme of Sections 13 and 17 observes that certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having been taken for the reliefs indicated in sub-section 3 thereof. Section 17 provides that if DRT after examining the facts and circumstances of the

case and on the basis of evidence produced by the parties, comes to the conclusion that any of the measures referred to in Section 13(4), taken by the secured creditor is not in accordance with provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid and secondly, restore possession to the borrower and can also restore management of the business of the borrower. This is again clear from the observations made by the Supreme Court in **Kanaiyalal Lalchand (supra)**, that taking the measure under Section 13(4)(a) means taking actual possession and the remedy under Section 17(1) is available only after losing possession of the secured assets.

23. In **Aum Jewels (supra),** the Division Bench of this Court was considering challenge to the possession notice issued by the authorized officer of the respondent Bank under the provisions of the Act, read with Rule 8 of the Rules. While dealing with the challenge, the Division Bench considered the judgment of the Supreme Court in **Satyawati Tondon (supra)** and in the concluding paragraphs observed thus:

> "The aforesaid judgment of the Supreme Court in Satyawati Tandon emphasises that a borrower, a guarantor or any other person who may be affected by the action taken under Section 13(4) of the Act have an efficacious and effective statutory remedy of filing an appeal under Section 17 of the Act and, therefore, the High Courts should not overlook the settled law that a petition, in such circumstances, should not be entertained, particularly when matters relating to dues of Bank and other financial Institutions are involved. In fact in all such cases, the High Courts must insist that the alternative remedies under the relevant Statutes are first exhausted.
>
> Thus, when the petitioners have a statutory alternative remedy of filing an appeal under Section 17 of the Act in which all the factual aspects can properly be examined, we do not consider it appropriate to examine these issues in the present petition. The petition is, accordingly, dismissed."

23.1 The Division Bench in **Aum Jewels (supra)** basically considered the question whether a writ petition under Article 226 of the Constitution was

maintainable at the stage when measure under Section 13 is taken or being taken by the creditor. In view thereof, the Division Bench made the above observations. The Division Bench did not discuss the stage at which one can take a remedy under Section 17(1) of the Act. It would not be proper to assume that even the stage at which the writ petition was filed, one can take a remedy under Section 17(1), on the basis of the above observations. It is pertinent to note that the judgments of the Supreme Court in **Mardia Chemicals (supra)** and **Standard Chartered Bank Vs. V. Noble Kumar and others [2013 (2) D.R.T.C. 609 (S.C.)]** were not brought to the notice of the Division Bench. Moreover, the question that falls for our consideration was not framed, considered and decided in that case and the petitioner was simply relegated to a remedy under Section 17(1) of the Act, relying upon the observations made in **Satyawati Tondon (supra).**

24. The Supreme Court in **Harshad Govardhan Sondagar Versus International Assets Reconstruction Company Limited and others, (2014) 6 SCC 1,** while dealing with the provisions of the Act and the Rules including Appendix IV, in paragraphs 26, 28 and 32, observed thus:

> "**26.** The opening words of sub-section (1) of Section 14 of the SARFAESI Act also provides that if any of the secured assets is required to be sold or transferred by the secured creditor under the provisions of the Act, the secured creditor may take the assistance of the Chief Metropolitan Magistrate or the District Magistrate. Where, therefore, such a request is made by the secured creditor and the Chief Metropolitan Magistrate or the District Magistrate finds that the secured asset is in possession of a lessee but the lease under which the lessee claims to be in possession of the secured asset stands determined in accordance with Section 111 of the Transfer of Property Act, the Chief Metropolitan Magistrate or the District Magistrate may pass an order for delivery of possession of secured asset in favour of the secured creditor to enable the secured creditor to sell and transfer the same under the provisions of the SARFAESI Act. **Sub-section (6) of Section 13 of the SARFAESI Act provides that any transfer of secured asset after taking possession of secured asset by the secured creditor shall vest in the transferee all**

rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset. In other words, the **transferee of a secured asset will not acquire any right in a secured asset under sub-section (6) of Section 13 of the SARFAESI Act, unless it has been effected after the secured creditor has taken over possession of the secured asset.** Thus, for the purpose of transferring the secured asset and for realising the secured debt, the secured creditor will require the assistance of the Chief Metropolitan Magistrate or the District Magistrate for taking possession of a secured asset from the lessee where the lease stands determined by any of the modes mentioned in Section 111 of the Transfer of Property Act.

28. A reading of sub- rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 would show that the possession notice will have to be affixed on the outer door or at the conspicuous place of the property and also published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer. **At this stage, the lessee of an immovable property will have notice of the secured creditor making efforts to take possession of the secured assets of the borrower. When, therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the secured asset in respect of which he is the lessee, from the possession notice which is delivered, affixed or published in sub-rule (1) and sub-rule (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, he may either surrender possession or resist the attempt of the secured creditor to take the possession of the secured asset by producing before the authorised officer proof that he was inducted as a lessee prior to the creation of the mortgage or that he was a lessee under the mortgagor in accordance with the provisions of Section 65-A of the Transfer of Property Act and that the lease does not stand determined in accordance with Section 111 of the Transfer of Property Act.** If the lessee surrenders possession, the lease even if valid gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of

the SARFAESI Act and state in the affidavit accompanying the application, the name and address of the person claiming to be the lessee. When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor, consistent with the principles of natural justice, and then take a decision. If the Chief Metropolitan Magistrate or District Magistrate is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65-A of the Transfer of Property Act and that the lease has not been determined in accordance with the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor. But in case he comes to the conclusion that there is in fact no valid lease made either before creation of the mortgage or after creation of the mortgage satisfying the requirements of Section 65-A of the Transfer of Property Act or that even though there was a valid lease, the lease stands determined in accordance with Section 111 of the Transfer of Property Act, he can pass an order for delivering possession of the secured asset to the secured creditor.

32. When we read sub-section (1) of Section 17 of the SARFAESI Act, we find that under the said sub-section "any person (including borrower)", aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under the Chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with Mr. Vikas Singh that the words “any person” are wide enough to include a lessee also. **It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is** dispossessed of the secured asset. But when we read sub-section (3) of Section 17 of the SARFAESI Act, we find that the Debts Recovery Tribunal has powers to restore possession of the secured asset to the borrower only and not to any person such as a

> lessee. **Hence, even if the Debt Recovery Tribunal comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act, it cannot restore possession of the secured asset to the lessee.** Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is in accordance with the requirements of Section 65-A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under Section 17 of the SARFAESI Act to the lessee to protect his lawful possession under a valid lease."
>
> (emphasis supplied)

24.1 In this case also, the Supreme Court after dealing with the provisions contained in Section 13, in particular, sub-section (6) thereof and the provisions contained in Rule 8 observed that any transfer of secured asset after taking possession thereof by the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured assets. In other words, the transferee of a secured asset would acquire right, title and interest in the secured asset under sub-section (6) of Section 13 of the Act, once the secured creditor transfers the asset in his favour and that is possible only if the possession was taken before the sale/transfer. Thus, for the purpose of transferring the secured asset and for realising the secured debt, the secured creditor requires to take possession of the secured asset, may be by taking recourse to the provisions of Section 14 of the Act. The Supreme Court also considered the rights of a lessee in the secured property and, after referring to sub-rule (1) and (2) of Rule 8 of the Rules, held that a lessee may file an application before a Debt Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset and if the DRT comes to conclusion that any of the measures referred

to in sub-section (4) of Section 13 taken by the secured creditor is in accordance with the provisions of the Act, it can even restore the possession to the lessee.

25. The Supreme Court in **Agarwal Tracom Pvt. Ltd. Vs. Punjab National Bank & Ors.**, **Civil Appeal No. 19847 of 2017**, **2018 (126) ALR 472,** considered the question whether the High Court was justified in holding that the remedy of the auction purchaser (appellant) lies in challenging the action of the secured creditor in forfeiting the deposit by filing an application under Section 17 of the Act before the DRT or the remedy of auction purchaser is in filing the writ petition under Article 226/227 of the Constitution of India to examine the legality of such action. Having regard to the facts and circumstances of the case against which the question arose, the Supreme Court, after considering the provisions of Sections 13 (4) and 17 of the Act and Rules 8 and 9 of the Rules, in paragraphs 28 and 29, held thus:

> "28. 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?
>
> 29. 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."
>
> (emphasis supplied)

25.1 In this case, the Supreme Court makes it clear that taking measures under Section 13(4) of the Act would not be completed unless the entire procedure laid down in Rules 8 and 9 for sale of the secured asset is fully complied by the secured creditor. We have already noticed the scheme of these Rules which provide sufficient safeguards to the borrower to protect his property till the actual sale takes place and that he can even seek restoration of possession after the sale is effected.

26. A Division Bench of this Court in **Dilip Kumar Singh & Anr. Vs. State of U.P. & Ors**., **Writ-C No. 58329 of 2012**, decided on 14.12.2012, while dealing with the writ petition instituted for quashing the order passed by the District Magistrate, for providing police help for taking possession of the mortgaged assets, dealt with Rule 8 in the light of the provisions of Sections 14 and 17, and observed as under:

> "**The words "possession notice" as mentioned in Rule 8(1) and (2) is a notice for taking possession both actual possession or otherwise.** Sub-rule (3) of Rule 8 of the Security Interest (Enforcement) Rules, 2002 uses the words **"in the event of possession of immovable property is actually taken" which clearly indicates that taking of possession may be actual or may be constructive. Certain consequences follow after taking actual possession as indicated in sub-rules (3) and (4) of Rule 8.** Thus before proceeding for sale of the mortgaged assets Bank can take actual possession as well as symbolic possession and the scheme of the 2002 Act and the 2002 Rules do not indicate that without taking actual possession, the Bank cannot proceed with the sale of the mortgaged assets."
>
> (emphasis supplied)

26.1 The Division Bench, in the concluding paragraph, recorded its opinion that by mere filing an application under Section 17 of the Act, there is no embargo on the Bank from proceeding under the Act.

27. A Full Bench of the Madras High Court in **Lakshmi Shanker Mills (P) Ltd. & Ors. Vs. Authorised Officer/Chief Manager, Indian Bank & Ors., AIR 2008 Madras 181**, considered the scheme of the provisions of Section 13(4) and Section 17 and in paragraphs 10, 13 and 17, and observed thus:

> "**10.** The first question is whether the right of the Bank to take proceedings under Section 13(4) shall remain suspended on filing an application under Section 17. The second question concerns the jurisdiction of the Debt Recovery Tribunal to impose a condition of deposit for grant of stay of auction. Section 13(4) of the Securitisation Act is pivotal to the whole controversy. It provides that a secured creditor may enforce any security interest without intervention of the court or tribunal irrespective of Section 69 or Section 69-A of the Transfer of Property Act where according to sub-section (2) of Section 13 the borrower is a defaulter in repayment of the secured debt or any instalment of repayment and further the debt standing against him has been classified as a non-performing asset by the secured creditor. Sub-section (2) of Section 13 further provides that before taking any steps in the direction of realizing the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in sub-section (4) of Section 13. Sub-section (4) of Section 13 provides for four measures which can be taken by the secured creditor in case of non-compliance with the notice served upon the borrower namely, (a) to take possession of the secured assets including the right to transfer the secured assets by way of lease, assignment or sale; (b) to take over the management of the secured assets including the right to transfer, (c) to appoint a manager to manage the secured assets which have been taken possession of by the secured creditor, and (d) to require any person who had acquired any secured assets from the borrower or from whom any money is due to the borrower to pay the same as it may be sufficient to pay the secured debt. Sub-section (3-A), which has been

inserted by the amendment, provides that if on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non acceptance of the representation or objection to the borrower. The proviso to sub-section (3-A) provides that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17-A. In Mardia Chemical's case, the Supreme Court has clearly held that such right accrues only if measures are taken under sub-section (4) of Section 13 of the Securitisation Act (para. 48 SCC page 348). **Therefore, only if one or other measure is taken by the secured creditor, a cause of action arises for any person or borrower to prefer an application under Section 17 of the Securitisation Act.**

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

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

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

(emphasis supplied)

27.1 The Full Bench in paragraph 22, summarised its opinion as follows:

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

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

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

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

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

> with the provisions of the said Act and legally sustainable."
>
> (emphasis supplied)

28. Next we would like to make detailed reference to the judgment of the Supreme Court in **Standard Chartered Bank Vs. V. Noble Kumar & Ors., (2013) 9 SCC 620,** heavily relied upon by the Bank. A detailed reference to this judgment perhaps would clinch the issue that falls for our consideration. In that case, the first respondent was a guarantor to a loan transaction. The first respondent had created a mortgage on certain property owned by him to secure the loan. A notice under Section 13(2) of the Act was issued demanding repayment of the loan amount alongwith interest within a period of 60 days. The borrower neither made payment nor raised any objection to the demand. Consequently, the Bank made an application under Section 14 of the Act in the Court of Chief Judicial Magistrate, requesting him to take possession of the secured asset and to handover the same to the Bank. It was argued before the High Court as well as before the Supreme Court that a secured creditor before invoking the authority of the Magistrate under Section 14 must necessarily make an attempt to take possession of the secured assets. Only when the creditor faces resistance to such an attempt, it can resort to the procedure under Section 14 of the Act. According to the borrower, Section 17 of the Act provides an appeal only against the measures taken by the creditor under Section 13(4) of the Act and no such appeal is available against an action taken by the Judicial Magistrate under Section 14 and therefore, permitting the creditor to invoke Section 14 without first resorting to the procedure under Section 13(4) would deprive the owner of the secured assets an opportunity to prefer an appeal to have his grievance adjudicated. In this backdrop, the Supreme Court, after considering the scheme of Sections 13 and 17 of the Act, in paragraphs 26, 27 and 28 , observed thus:

> "**26.** It is in the abovementioned background of the legal frame of Sections 13 and 14, we are required to examine the correctness of the conclusions recorded by the High Court. Having regard to the scheme of

Sections 13 and 14 and the object of the enactment, **we do not see any warrant to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under Section 13(4) and on facing resistance, he may still approach the Magistrate under Section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under Section 14.** The submission that such a construction would deprive the borrower of a remedy under Section 17 is rooted in a misconception of the scope of Section 17.

27. The "appeal" under Section 17 is available to the borrower against any measure taken under Section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under Section 13(4). Alienating the asset either by lease or sale etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (*sic* the secured creditor). **Therefore, the borrower is always entitled to prefer an "appeal" under Section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available.**

28. It can be noticed from the language of the proviso to Section 13(3-A) and the language of Section 17 that an "appeal" under Section 17 is available to the borrower only after losing possession of the secured asset. The employment of the words "aggrieved

> by ... *taken by the* secured creditor" (emphasis supplied) in **Section 17(1) clearly indicates the appeal under Section 17 is available to the borrower only after losing possession of the property. To set at naught any doubt regarding the interpretation of Section 17, the proviso to sub-section (3-A) of Section 13 makes it explicitly clear that either the reasons indicated for rejection of the objections of the borrower or the *likely action* of the secured creditor shall not confer any right under Section 17.**"
>
> (emphasis supplied)

28.1 The Supreme Court also considered the Rules, in particular Rule 8 and having regard to the scheme thereof, in paragraphs 31, 32 and 33, observed thus:

> "**31. Under Rule 8, the secured creditor is required to deliver to the borrower a notice prepared as nearly as possible in Appendix IV to the Rules and by affixing such notice to the property.** Further sub-rule (2) which came to be substituted in 2007 in original provides that the notice contemplated under sub-rule (1) is required to be published in two leading newspapers having sufficient circulation in the locality of which at least one should be in vernacular language. Prior to 2007 the requirement of publication in vernacular newspaper was not there.
>
> **32.** The High Court recognized that the language of Rule 8 does not expressly warrant the compliance with the procedure contemplated therein when Section 14 is resorted to for obtaining possession of the secured asset:
>
> > "In the absence of the rule, the strict compliance with the provisions of Section 13(4) and Rule 8, even in case of possession taken by virtue of an order under Section 14, assumes importance."
>
> **33. We are of the opinion that the High Court clearly erred in recording such a conclusion. The language of Rule 8 does not demand such a construction.** On the other hand, a Magistrate whose functioning is structured by the Code of Criminal Procedure is required to act in accordance with the provisions of the said Code unless expressly ordained otherwise by any other law. It is not a case that Cr.P.C. never prescribed for the procedure to be followed by the Magistrate in a case where the Magistrate is required to

> take possession of property. For example, under Section 83 of the Code, a criminal Court is authorized to attach the movable or immovable property or both belonging to a proclaimed offender. Sub-sections (3) and (4) to Section 83 specifically provide that once an order of attachment under sub-section (1) is made by the criminal Court, the property which is the subject matter of such attachment shall either be seized or taken possession of as the case may be depending upon the fact whether the property is movable or immovable. Both the sub-sections contemplate the appointment of receiver. It is declared under sub-section(6) that the powers, duties and liabilities of a receiver appointed under Section 83 are the same as those of a receiver appointed under the Code of Civil Procedure, 1908."
>
> (emphasis supplied)

28.2 Then, in paragraph 36 of the judgment, the Supreme Court carved out three methods for the secured creditor to take possession of the secured assets. Paragraphs 36 and 37 of the judgment, read thus:

> "**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 scrutinize 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 scrutinize 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, 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.

37. In this connection, it is material to refer to the judgment in *Mardia Chemicals* wherein the Court was concerned with the legality and validity of the SARFAESI Act. The Court held the Act to be valid except Section 17(2) thereof as it then stood. In paras 59, 62 and 76 of the judgment the Court in terms held that in remedy under Section 17 of the Act was essentially like filing a suit in a civil court though it was called an appeal. It is also relevant to note that in the ultimate conclusions in para 80 of the judgment this Court held in sub-para (2) thereof as follows: (SCC p. 362)

> "*80*. (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 Debts Recovery Tribunal."

The grievance of the respondent that it will be left with no remedy is, therefore, misplaced. As held by a Bench of three Judges in *Mardia Chemicals*, it would be open to the borrower to file an appeal under Section 17 any time after the measures are taken under Section 13(4) and before the date of sale/auction of the property. The same would apply if the secured creditor resorts to Section 14 and takes possession of the property with the help of the officer appointed by the Magistrate."

(emphasis supplied)

28.3 Thereafter, in the concluding paragraph 40, the Supreme Court observed thus:

> "**40.** In view of our conclusion on the scope of Section 17 recorded earlier it would normally have been open to the respondent to prefer an appeal under

> Section 17 raising objections regarding legality of the decision of the Magistrate to deprive the respondent of the possession of the secured asset. But in view of the fact that the respondent chose to challenge the decision of the Magistrate by invoking the jurisdiction of the High Court under Article 226 of the Constitution and in view of the fact that the respondent does not have any substantive objection as can be discerned from the record, we make it clear that the respondent in the instant case would not be entitled to avail the remedy under Section 17 as the respondent stalled the proceedings for a period of almost 4 years. It is worthwhile remembering that the respondent did not even choose to raise any objections to the demand issued under Section 13(2) of the Act. **However, we make it clear that it is always open to the respondent to seek restoration of his property by complying with sub-section 8 of Section 13 of the Act.**"
>
> (emphasis supplied)

28.4 The Supreme Court in this case made it absolutely clear that no remedy under Section 17(1) can be taken by the borrower unless he loses actual possession of the secured assets. In other words, the borrower is entitled to prefer an appeal under Section 17 after possession of the secured asset is actually handed over to the secured creditor. The Supreme Court observed that Section 13(4)(a) declares that the secured creditor may take possession of the secured assets and it could be obtained directly by the secured creditor or by restoring to the procedure under Section 14 of the Act. In whatever manner, the secured creditor obtains possession, either through the process contemplated under Section 14 or without restoring to such a process, it is always a measure contemplated by Section 13(4), against which a remedy under Section 17 is available. In other words, before losing actual possession or unless the secured creditor obtains physical possession of the secured asset it is not open to the borrower to take a remedy under Section 17(1) of the Act. The Supreme Court in this judgment has also noticed the safeguards provided to the borrower to protect his property including seeking restoration thereof.

29. The upshot of legal position that emerges from the judgments of the Supreme Court, insofar as the question referred to for our consideration is concerned, briefly stated, is as under:

(a) The remedy of an application under Section 17(1) is available only after the measures under Section 13(4) have been taken by the Bank/FIs against the borrower.

(b) The issue of notice under Section 13(2) to the borrower and communication contemplated by Section 13(3-A) stating that his representation/objection is not acceptable or tenable, does not attract the application of principles of natural justice. In other words, no recourse to an application under Section 17(1), at that stage, is available/maintainable.

(c) The borrower/person against whom measures under Section 13(4) of the Act are likely to be taken, cannot be denied to know the reason why his application or objections have not been accepted, as a fulfillment of the requirement of reasonableness and fairness in dealing with the same.

(d) One of the reasons for providing procedure under Section 13(4) read with Rule 8 for taking possession is that the borrower should have a clear notice before the date and time of sale/transfer of the secured assets, in order to enable him to tender the dues of the secured creditor with all other charges or to take a remedy under Section 17, at appropriate stage.

(e) The time of 60 days is provided after the “measures” under Section 13(4) have been taken so as to enable the borrower to approach DRT and in such an eventuality, the DRT shall have a jurisdiction to pass any order/interim order, may be subject to conditions, on the application under Section 17(1) of the Act.

(f) The scheme of relevant provisions of the Act and the Rules shows that the Bank/FIs have been conferred with powers to take physical (actual) possession of the secured assets without interference of the Court and the only remedy open to the borrower is to approach DRT challenging such an action/measure and seeking appropriate relief, including restoration of

possession, even after transfer of the secured assets by way of sale/lease, on the ground that the procedure for taking possession or dispossessing the borrower was not in accordance with the provisions of the Act/Rules.

(g) If the dues of the secured creditor together with all costs, charges and expenses incurred by them are tendered to them (secured creditors) before the date fixed for sale or transfer, the assets shall not be sold or transferred and in such an eventuality, possession can also be restored to the borrower.

(h) If the possession is taken before confirmation of sale, it cannot be stated that the right of the borrower to get the dispute adjudicated upon is defeated. The borrower's right to get back possession even after the sale remains intact or stands recognised under the scheme of the provisions of the Act.

(i) The borrower is not entitled to challenge the reasons communicated or likely measure, to be taken by the secured creditor under Section 13(4) of the Act, unless his right to approach DRT, as provided for under Section 17(1), matures. The borrower gets all the opportunities, at different stages, either to clear the dues or to challenge the measures under Section 13(4) or even to challenge the reasons rejecting his objections/not accepting the objections, after the measures under Section 13(4) have been taken.

(j) While the banks have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting DRT with authority, after conducting an adjudication into the matters, to declare any such action invalid and also to restore even though the possession may have been made over to the transferee.

(k) The safeguards provided under the scheme make it further clear that if the Bank/FIs proceeds to take actual possession of the assets that cannot be stalled by the interference of a Court.

(l) If DRT after examining the facts and circumstances of the case and on the basis of evidence produced by the parties, comes to the conclusion that any of the measures referred to in Section 13(4), taken by the secured

creditor is not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid and restore possession to the borrower.

(m) Any transfer of secured asset after taking possession thereof by the secured creditor shall vest in the transferee all rights in, or in relation to the secured asset as if the transfer had been made by the owner of such secured assets.

(n) No remedy under Section 17(1) can be taken by the borrower unless he loses actual (physical) possession of the secured assets. In other words, before losing actual possession or unless the secured creditor obtains physical possession of the secured asset under Section 13(4), it is not open to the borrower to take a remedy under Section 17(1) of the Act.

30. It can thus be clearly seen that unless a notice under Section 13(2) of the Act is issued to the borrower, giving him an opportunity to discharge in full his liabilities to the secured creditor within sixty days (from the date of notice), the secured creditor shall not be entitled to exercise all or any of the rights under sub-section (4). Sub-section (3-A) of Section 13 of the Act, as observed earlier, was introduced after the **Mardia Chemicals (supra)** judgment, which gives further opportunity to the borrower, on receipt of the notice under sub-section (2), to make any representation or raise any objection, which the secured creditor is obligated not only to consider but also to record its reasons if it comes to the conclusion that such representation or objection is not acceptable or tenable and communicate the reasons for non-acceptance to the borrower. Though such a procedure is so prescribed, it is also made clear, by adding proviso to sub-section (3-A) and Explanation to sub-section (1) of Section 17 that unless the “measures” under sub-section (4) are taken, the borrower shall not have any right to take recourse under Section 17(1) of the Act, by making an application to DRT for any relief. Thus, under the provisions of the Act, it is not open to the borrower to file an application at any stage till the “measures” under Section 13(4) are taken by the secured creditor.

31. Section 13(4) of the Act provides that if the borrower fails to discharge his liability within the period prescribed under Section 13(2), the secured creditor can take recourse to one of the measures, such as taking possession of the secured assets, including the right to transfer by way of lease, assignment or sale for realising the secured asset. From the language of this provision, it is further clear that taking measure under Section 13(4)(a) would mean taking actual (physical) possession, and if we do not read it in the said provision to say so, the right and power of the secured creditor to transfer the assets by way of lease, assignment or sale for realizing the secured assets, as provided for therein, would render redundant. In other words, putting such an interpretation on the language of Section 13(4) of the Act would be atrocious and would defeat the very objective of bringing the legislation. It is, therefore, not possible to hold that taking “measures” under Section 13(4)(a) also means taking only “symbolic possession” and not “physical possession”. We record further reasons to say so in following paragraph. From the scheme of Section 13(4) and Sections 14 and 17 of the Act and the relevant Rules 8 and 9 of the Rules, it appears to us that unless physical possession is taken, the measure, contemplated under Section 13(4), cannot be stated to have been taken.

31.1 One of the rights conferred on a secured creditor is to transfer by way of lease, the secured asset, possession or management whereof has been taken under clauses (a) or (b) of sub-section (4) of Section 13. We have already held that sale or assignment of the secured assets could only be undertaken if actual physical possession has been taken over by the bank/FI's. If we pose a question whether right to transfer the secured assets by way of lease could be exercised without taking actual physical possession of the secured asset or management of the business of the borrower, our answer would be obviously in the negative.

31.2 The word 'lease' has not been defined under the Act, but it has been used in the Act in the same sense as under the Transfer of Property Act, 1882. Thereunder, Section 105 defines lease as “transfer of a right to enjoy

such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms. Lease is a contract between the lessor and the lessee for the possession and profits of land, etc. on one side and the recompense by rent or other consideration on the other. The estate transferred to the lessee is called the leasehold. The estate remaining in the lessor is called the reversion.

31.3 The absolute owner, who is under no personal incapacity can grant lease for any term he pleases. However, the limited owner like a tenant for life can grant lease but it would not endure beyond his death. The Supreme Court in **Associated Hotels of India Ltd. Vs. R.N. Kapoor, AIR 1959 SC 1262,** while making a distinction between lease and license observed thus:-

> "A lease is a transfer of an interest in land. The interested transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor.
>
> Under S. 52 if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the permissive for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts."

31.4 One of the essential indicia of lease is parting of exclusive possession by the lessor to the lessee with conferment of reciprocal right in the lessee to protect his possession during subsistence of the lease to the exclusion of the lessor. Although in some cases, a licensee may also be given exclusive possession of a property, but as observed above, parting of exclusive possession to the lessee is a *sine qua non* for creating a valid lease. Thus,

where a person is not in physical possession of a property nor in a position to deliver physical possession in future, he is incompetent to create a valid lease. The reason being that he is not in a position to confer upon the lessee the right to enjoy the property to the exclusion of the lessor and everyone else.

31.5 It thus necessarily follow that the ultimate object of taking possession of the secured asset or management of the business of the borrower would not be achieved unless the secured creditor is in a position to further exercise his right to transfer the same, inter alia, by way of lease or sale, which could be possible only if physical (actual) possession has been taken over and not constructive or symbolic possession. The language of Section 13(6) also supports our view. Thus, while there is no bar in first taking symbolic possession of the secured assets, but it is implicit in sub-section (4) of Section 13 that the secured creditor has to thereafter proceed to take physical (actual) possession in order to exercise its right to transfer by way of lease, assignment or sale.

32. It is necessary to bear in mind that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such "action/measure" invalid and also to "restore possession" even though possession may have been made over to the transferee. Sub-section (3) of Section 17 vest the DRT with authority to even set aside the transaction including sale or to restore possession to the borrower in appropriate cases. The provisions contained in Rules 8 and 9, lay down the procedure to take possession of immovable secured assets from the borrower, to conduct its sale and to deliver possession thereof to the transferee. As observed by the Supreme Court in **Noble Kumar (supra),** there are three methods for the secured creditor to take possession of the secured assets, firstly, to give notice under Rule 8(1) of the Rules and take possession where the secured

creditor does not meet with any resistance, secondly, after notice under Rule 8(1), if the secured creditor meets with resistance it would take recourse to the mechanism provided under Section 14 of the Act, and thirdly, to directly approach the Magistrate under Section 14 of the Act to take possession. These observations further support our view that mere issuing a notice in Appendix IV under 8(1) of the Rules, would not, in a given case, amounts to taking "physical possession" particularly when the secured creditor meets with resistance. After notice in Appendix IV, the borrower may resist the attempt of a secured creditor to take "physical possession" and in which case the act of taking actual possession would stand postponed/deferred. In other words, merely because possession notice in Appendix IV is issued, does not mean the measure under Section 13(4) is complete.

33. The possession notice in Appendix IV under Rule 8(1), appended to the Rules, though states that the secured creditor has taken possession of the secured asset, it informs the borrower and the public in general that possession is taken and they are cautioned not to deal with the property. The employment of the language of the notice in Appendix IV further supports our view that giving notice itself would not mean taking physical possession. The word "possession notice" undoubtedly means a notice for taking actual possession or otherwise. The language of Rule 8(3) clearly demonstrates that mere issuance of possession notice (Appendix IV) does not mean the borrower loses possession. This provision starts with the expression "In the event of possession of immovable property is actually taken", which means the first method of taking possession as observed by the Supreme Court in **Noble Kumar (supra),** where borrower hands over possession or does not resist the attempt to take possession by serving the possession notice in Appendix IV. The process of taking measure under sub-section (4) of Section 13 would be complete only when "physical possession" is taken and not either "constructive" or "symbolic" possession. The scheme of the Act and the judgment of the Supreme Court in **Noble Kumar (supra),** thus, would show that in a given case the borrower may resist the attempt or act of the secured creditor to take actual possession of the secured assets and in

which case one may approach the Magistrate under Section 14 of the Act. Taking steps under Rule 8 by issuing possession notice, thus, by itself would not mean the borrower loses possession. Issuing notice in Appendix IV and taking steps, where the secured creditor meets with resistance, in our opinion, would not confer any right on the borrower to prefer any application under sub-section (1) of Section 17 of the Act. If we hold that even taking steps or an attempt of the bank of taking "measures" meeting with resistance under Section 13(4) also attracts the provisions of sub-section (1) of Section 17, that would be disastrous in the sense the very objective of the Act would stand defeated/frustrated and no bank would ever be able to recover the dues on time.

34. 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 Bank/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, adversial possession in 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.

35. Issuance of possession notice, as observed earlier, gives borrower and the public in general an intimation that the secured creditor has taken possession of the property and at that stage, it is quite possible, may be in view of resistance or if the Banks chooses to take only symbolic possession, to state that the secured creditor has taken symbolic/constructive possession and not physical possession, but that by itself would not entitle the borrower to raise challenge under Section 17(1) of the Act, as held by the Supreme Court in **Noble Kumar (supra).** Unless the borrower loses actual (physical) possession, he cannot take recourse to provisions of Section 17(1). Even while taking steps under Section 13(4) of the Act read with Rule 8 of the Rules, in a given case, the bank may not physically dispossess the borrower and wait till it takes steps to conduct actual sale/auction of the secured assets i.e. till he issues notice under Rule 8(6) of the Rules. Even that by itself, from the scheme of the Act and the Rules, in the backdrop of the objective of the Act, in our opinion, does not confer any right to take recourse to Section 17(1). The borrower can file securitisation application under Section 17(1) only when he physically loses possession.

36. Though the provisions of Section 13(4) show that the banks and financial institutions have been vested with stringent powers for recovery of dues, it is seen from various judgments of the Supreme Court, interpreting the provisions of the Act, lots of safeguards are provided at different stages, and when the right to make an application under Section 17(1) matures and the borrower approaches DRT, it is open to the DRT, if it comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13, taken by the secured creditor, are not in accordance with the provisions of the Act, to restore possession of the secured asset to the lessee. In other

words, in order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, checks and balances have been introduced in Section 17, which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to pass such an order that may be necessary in the interest of justice including restoration of possession, even after sale/transfer of the secured assets.

37. In the present case, it appears that the bank had issued notice under Rule 8, read with Appendix IV of the Rules, for possession, and it was specifically mentioned therein that a “symbolic possession” of their immovable secured assets, as described in the Schedule to the notice had been taken under Section 13(4) of the Act. We are not on the language used by the bank in the notice and we are also not considering merits of the case. We are only looking into the provisions of the Act and the judgments of the Supreme Court, interpreting the provisions of the Act and the Rules, so as to answer the question referred to for our consideration. The Bank's wrong, if any, would certainly not guide us in interpreting the provisions of law and to answer the question referred to for our consideration. The right to make an application, as observed earlier, would get matured only when actual (physical) possession is taken under Section 13(4) of the Act. Mr. Mathur, learned counsel for the borrower, vehemently submitted that “every action (including issuing notice under Rule 8 in Appendix V) taken under Section 13(4)” of the Act is amenable to challenge under Section 17 and that there is no justification for making an artificial distinction between the taking of “actual/physical” possession and taking of “symbolic/constructive” possession. The submission “every action taken under Section 13(4)” would, in our opinion, not mean steps taken for taking action/measure under Section 13(4)(a). Merely taking step to take possession is not amenable to challenge under Section 17. The action of taking possession is not an automatic process, in the sense that the moment notice is issued, means “physical possession” is taken or the borrower stands dispossessed physically or loses

possession. The expression “symbolic possession” means “constructive possession” or in other words “paper possession” and not “physical” or “actual possession”.

38. The concept of “symbolic possession” needs to be understood in the light of the scheme of the Act and Rules and also the object in introducing the Act. As observed earlier, the primary objective of the Act was not only to bring into existence special procedural mechanism for speedy recovery of the dues of the banks and financial institutions, but also for ensuring that defaulting borrowers are not able to frustrate the proceedings initiated by the banks and other financial institutions. Even in the Statement of Objects and Reasons, after making reference to the Narasimham Committee and Andhyarujina Committee, it was stated that these Committees, inter alia, have suggested enactment of new legislation for securitisation and empowering the banks and financial institutions to take possession of the securities and sell them without intervention of the Court. The Statement of Objects and Reasons further state that the provisions in the Act would enable banks and financial institutions to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of the securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. Having regard to the objective of the Act and the Rules framed thereunder and also considering the scheme of the relevant provisions, it is not possible for us to hold that taking “symbolic possession” means taking a measure under sub-section (4) of Section 13 so as to attract the provisions of Section 17(1) of the Act. If we so hold, that would only mean that the moment “symbolic possession” is taken and before further steps for seeking actual (physical) possession for recovery of outstanding dues are taken including for transferring the assets by way of lease, assignment or sell, the borrower would be entitled to challenge the action of taking symbolic possession by way of an application under Section 17(1) of the Act, and in which case the DRT would have powers to grant stay of all further proceedings at that stage. This is not the intent of the Legislature.

39. As observed by the Supreme Court in **Noble Kumar (supra)** the grievance of the respondent that it will be left with no remedy, is misplaced. We have also observed in the foregoing paragraphs that there are several stages at which the safeguards are provided in interest of the borrower. The last such a safeguard is to give a notice of thirty days for sale of immovable assets as per sub-rule (6) of Rule 8 so as to enable the borrower to arrange the dues and seek release of the property. We have also seen from the judgments of the Supreme Court and even while looking into the provisions of the Act that how the safeguards are provided in the scheme of the Act and the Rules and why, under any circumstance, it can not be stated that the borrower is not left with any remedy. The borrower is always entitled to prefer an application under Section 17 even after the actual possession of the secured assets is taken and/or handed over to the secured creditor. In our opinion, at the cost of repetition, the scheme of the Act shows that even if the notice under Appendix IV under the Rules is given, it would not mean that actual or physical possession is taken. Such an attempt, if there is a resistance from the borrower, would only amount to taking steps to take physical possession, and therefore, the borrower will have to wait till he loses actual/physical possession for taking recourse to Section 17(1) of the Act. In case of resistance, the secured creditor can file an application, in writing, to the District Magistrate or Chief Metropolitan Magistrate, for the purpose of taking possession of such secured assets. The difference between “taking measures or initiating the measures” and “completing the measures” needs to be understood in the light of the objective of the Act. Till actual (physical) possession is taken, it cannot be stated that the measures taken under Section 13(4) are complete and unless the “measures” are taken that is to say “physical/actual” possession is taken or the borrower loses possession, he shall not have any right to approach DRT under Section 17(1) of the Act on any ground whatsoever.

40. We are, therefore, of the firm and considered opinion 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 Act and, therefore, the borrower at that stage cannot file an application under Section 17(1) before DRT. In other words, a securitisation application under Section 17(1) of the 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. Once the right to approach DRT matures and securitisation application under Section 17(1) is filed by the borrower, it is open to DRT to deal with the same on merits and pass appropriate orders in accordance with law. Thus, the question referred to for our consideration stands answered in terms of this judgment. The judgment of this Court in **Aum Jewels (supra),** in our opinion, does not enunciate the correct law.

41. The Registry is directed to place the writ petitions before appropriate Bench for hearing on merits in the light of the opinion expressed (law laid down) in this judgment.

February 6th, 2018
VMA

(Dilip B Bhosale, CJ)

(Dr. D.K. Arora, J)

(Vivek Chaudhary, J)