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Standard Chartered Bank v. V. Noble Kumar (SC) : Law Finder Doc Id # 489079

2013(180) Comp Cas 137 : 2013(3) BankJ 481 : 2013(10) SCR 762 : 2013(130) AIC 76 : 2013(4) KLT 531 : 2013(10) Scale 540 : 2013(6) CTC 683 : 2014(1) Mh.LJ 627 : 2013(12) JT 177 : 2013(121) R.D. 262 : 2013(2) D.R.T.C. 609 : 2013(9) SCC 620 : 2014(1) M.P.L.J. 396 : 2014(7) R.C.R.(Criminal) 1524 : 2014 All SCR 3025

SUPREME COURT OF INDIA

Before :- H.L. Gokhale and J. Chelameswar, JJ.

Criminal Appeal No. 1218 of 2013 with Criminal Appeal No. 1217 of 2013. D/d. 22.8.2013.

Standard Chartered Bank - Appellant

Versus

V. Noble Kumar and others - Respondents

For the Appellant :- Siddharth Luthra, A.S.G., Sanjay Jain Sanjeev Sagar, Ruchi Jain, Mohd. Irshad Hanif, Ajay Vir Singh J., Sanjay Kanpur, Anmol Chadan and Shubhra Kapur, Advocates.

For the Respondents :- P.B. Suresh, Vipin Nair, U. Banerjee and Venkita Subramonium, Advocates.

A. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 Section 13 (2) For secured creditor to take possession of secured assets, conditions must be satisfied - There must be a security agreement which creates liability of borrower to make repayment to secured creditor of the secured debt - Secured creditor is required to demand borrower by notice in writing to discharge full liability within a period of 60 days from date of the notice.

[Para 17]

B. Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 3-A - Objections, by borrower - Not found tenable by secured creditor - Secured creditor is required to communicate reasons for non-acceptance of objections within 15 days to borrower - Such rejection of objections does not confer any right on borrower to resort to proceedings, contemplate either under Section 17 or 17A.

[Para 21]

C. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Sections 14 and 3A - Possessing of secured assets by secured creditor can be taken directly - To seek assistance of State's coercive power for obtaining possession of secured asset is required to make a request in writing to Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction, secured asset is located.

[Para 23]

D. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 14 (1) - Possession of secured asset by secured creditor - Secured creditor is required to file affidavit giving information as required under sub-clauses of proviso to Section 14(1) of Act - Magistrate to examine factual correctness of assertions made in an affidavit - Only after recording of his satisfaction, Magistrate can pass appropriate orders regarding taking of possession of secured asset.

[Para 27]

E. Security Interest (Enforcement) Rules, 2002, Rule 8 - Possession of secured asset by secured creditor - High Court recognised that Rule 8 does not expressly warrant compliance with procedure contemplated therein when Section 14 is resorted to for obtaining possession of secured asset - Disapproved - No justification for conclusion that receiver appointed by Magistrate is also required to follow Rule 8 of Rules, 2002.

[Paras 33 to 35]

F. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 14 - Security Interest (Enforcement) Rules, 2002, Rule 8 - Possession of secured assets by secured creditor - Three methods for secured creditors to take possession of secured assets are available - One, where secured creditor gives requisite notice under Rule 8 (1) - Two, creditor can take recourse to mechanism provided under Section 14 of Act in case he meets with resistance from borrower by making an application to Magistrate for taking possession of assets and documents - Third one, where secured creditor approaches Magistrate concerned directly under Section 14 of Act - Magistrate will thereafter scrutinise application and then if satisfied, authorise a subordinate officer to take possession of assets and documents and forwards them to secured creditor.

[Para 36]

G. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 14 - Security Interest (Enforcement) Rules, 2002, Rule 8 - First respondent was guarantor for second respondent borrower - Appellant was secured creditor - Notice under Section 13 (2) of Act was served on respondent but same was not responded - No occasion for secured creditor to consider objection - Appellant filed affidavit providing necessary information as contemplated under proviso to Section 14 (1) of Act - Magistrate applied his mind - He satisfied himself that it is necessary to deliver possession and granted request of appellant of delivery of possession - There is no illegality in impugned order.

[Para 40]

H. Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 17 - Appeal - Respondent chose to challenge decision of Magistrate by invoking jurisdiction of High Court under Article 226 of Constitution - Respondent does not have any substantive objection - Respondent not entitled to avail remedy under Section 17.

[Para 41]

Cases Referred :

Indian Overseas Bank v. Sri Aravindh Steels Ltd., AIR 2009 Mad. 10.

Mardia Chemicals Limited v. Union of India, (2004) 4 SCC 311 : 2004 (17) AIC 1 (SC).

Trade Well v. Indian Bank, 2007 Cri LJ 2544.

JUDGMENT

J. Chelameswar, J. - Leave granted.

2. Since both the appeals raise a common question of law, the same are being disposed of by this common judgment. For the sake of convenience, we shall refer to the facts in Criminal Appeal arising out of Special Leave Petition (Criminal) No. 2038 of 2011.

3. This appeal arises out of judgment and order of the High Court of Judicature at Madras in Writ Petition No. 4600 of 2010 dated 23rd January, 2003.

4. The first Respondent is a guarantor of the borrower to loan transaction whereby the second Respondent borrowed money from the Appellant herein. The undisputed facts are that the first Respondent created a mortgage on certain property (Land and building comprised in Re-survey No. 493/2 lying within the sub-registration district of Saidapet hereinafter referred to as the "secured asset") owned by him to secure the abovementioned loan.

Section 2 (zc) - "secured asset" means the property on which security interest is created.

5. On 15.11.2007, a notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act") demanding the repayment of the loan amount along with interest within a period of sixty days was issued inter alia to the borrower as well as the guarantor (Respondent Nos. 2 and 1 herein). The said notice also advised the Respondents to comply with the demand in order to avoid further action under the Act. The first Respondent neither made the payment nor raised any objection to the said demand.

Section 13(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).

6. Consequent upon the failure of the Respondents to make the payments the Appellant herein made an application under Section 143 of the SARFAESI Act in the Court of Chief Judicial Magistrate, Chengalpattu requesting him to take possession of the secured asset and to handover the same to the Appellant.

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. - (1) 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 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 asset, 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 assets and documents to the secured creditor.

7. Pursuant to the abovementioned application, the Chief Judicial Magistrate, Chengalpattu by his proceeding dated 14.12.2009 appointed an Advocate commissioner to take possession of the secured asset and to handover the same to the Appellant herein.

8. Challenging the legality of the proceedings dated 14.12.2009 the first Respondent approached the High Court. By the judgment under appeal, the first Respondent's writ petition came to be allowed by a Division Bench setting aside the order impugned therein.

9. The High Court recorded the submissions made before it as follows:

"3. The learned Counsel appearing for the Petitioner raised two contentions, viz.:

(i) The bank cannot bypass Section 13(4) of the SARFAESI Act and invoke the provisions of Section 14. He would submit, before invoking Section 14, that notice under Section 13(4) is necessary, otherwise the provisions of appeal under Section 17 will become illusory, particularly when the proceedings under Section 14 cannot be questioned by filing appeal before the Tribunal or before a Court.

(ii) In the event the procedures contemplated under Rule 8 of the Security Interest (Enforcement) Rules, 2002, are not followed before Section 14 is invoked, the order passed by the Chief Judicial Magistrate would be contrary to the said Rules and consequently, the order passed under Section 14 is liable to be set aside.

10. It is argued before the High Court as well as before us by the Respondent 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 asset. Only when the creditor faces resistance to such an attempt the creditor could resort to the procedure under Section 14 of the Act. According to the first Respondent, 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 of the Act. 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 asset an opportunity to prefer an "appeal" to have his grievances adjudicated. It is further argued that Rule 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "the Rules") contemplates a procedure to be followed which includes a certain mode of publicity of taking possession to be made, and therefore, even a Magistrate exercising power under Section 14 of the Act is also required to follow the procedure contemplated under Rule 8 though the Rule does not expressly say so. Failure to comply with the requirement of Rule 8 in the instant case vitiated the order of the Magistrate.

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

.....

Explanation - For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section 1 of section 14.

13(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

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

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

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

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

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

11. The abovementioned submissions found favour with the High Court.

12. The learned Counsel appearing for the Appellant argued before us that the Act provided for two alternative procedures for taking possession of the secured assets under Sections 13(4) and 14 respectively. While Section 13(4) authorises the creditor himself to take possession of the secured assets without the aid of the State's coercive power, Section 14 enables the secured creditor to seek the assistance of the State's coercive power for securing the possession of the secured assets. It is submitted that it is always open to the secured creditor to choose one of the above mentioned two procedures in a given case to obtain possession of the secured asset depending upon his own assessment of the situation regarding the possibility of resistance (by the debtor or guarantor as the case may be) for taking possession of the secured assets. It is also submitted that the fact that an "appeal" under Section 17 is available against the measures taken under Section 13(4) and such an "appeal" is not available against the measures taken by the Magistrate under Section 14 does not necessarily mean that the procedure under Section 14 cannot be resorted to without first exhausting the measures contemplated under Section 13(4). Lastly, it is submitted on behalf of the Appellant that the High Court completely erred in recording a conclusion:

"3. In the event the secured creditor bypassing the provision of Section 13(4) and the Rule 8 and files an application under Section 14, a situation may arise that the advocate commissioner may straight away take possession without there being compliance of any of the provisions of Section 13(4) or Rule 8. When both the provisions are read together, we could only come to the conclusion that the legislature had not intended to create such a situation. The objection of Section 14 is only to be invoked in case the secured creditor faces obstruction and not as a routine, bypassing the provisions of Section 13(4)."

13. On the other hand, the learned Counsel appearing for the first Respondent reiterated the submissions made by him before the High Court.

14. To decide the correctness of the judgment under appeal, it is essential that we examine the purpose and the scheme of the Act. One of the professed purposes sought to be achieved by the enactment as evidenced by the Objects and Reasons appended to the Bill is as follows:

"...Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions."

15. In order to achieve the said purpose, Sections 13, 14 and 15 are enacted. Only Sections 13 and 14 are relevant for the present appeal. Section 13(1) enables the secured creditor to enforce a security interest which such creditor has in a secured asset without intervention of the Court or Tribunal. The expression "security interest" is defined under Section 2(zf) as follows:

Section 13(1). Notwithstanding anything contained in section 69 or section 69-A 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.

"security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31;

16. Sub-section (2) authorises the secured creditor to exercise any of the rights under Sub-section (4). Sub-section (2) reads as follows:

(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).

17. It can be seen from the said Sub-section that for the secured creditor to take possession of the secured assets, the following conditions must be satisfied: (i) That there must be a security agreement which creates the liability of the borrower to make repayment to the secured creditor of the secured debt, (ii) The secured creditor is required to demand the borrower by notice in writing to discharge the full liability within a period of 60 days from the date of the notice.

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

18. Sub-section (3) stipulate that such notice shall give the details of (i) the amount payable by the borrower (ii) the interest in the secured asset intended to be enforced by the secured creditor. Sub-section (4) provides for various measures which can be resorted to by the secured creditor in order to recover his debt. Such measures are (1) taking possession of the secured asset or (2) taking over the management of the business of the borrower. The secured creditor is also given the right either to make a further assignment of his interest or lease out the secured assets or sell the same in order to realise his debt. Such right of the secured creditor is hedged with limitations/safeguards designed to protect interest of the borrower so that the secured creditor may not abuse his rights i.e. except to take a possession of the property and alienate the same only to the extent necessary to realise the actual amount due to him. Details of which may not be necessary for the purpose of this case. We are only concerned in this case with the method and manner in which possession of the secured assets could be obtained and the conditions precedents that are required to be satisfied for taking possession of the secured assets.

Sub-section (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.

Section 13 (4) - In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

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

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

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

Provided Further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt.

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

(d) required 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.

Section 2(f) - " borrower" 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 the financial assistance granted by any bank or financial institution any includes 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.

19. Section 13, as originally enacted, did not contain any provision for consideration of objections (if any) the borrower may have to the demand made under Sub-section (2). However, this Court in **Mardia Chemicals Limited v. Union of India, (2004) 4 SCC 311 : 2004 (17) AIC 1 (SC)** where the constitutionality of the Act fell for the consideration of this Court, noticed that Section 13(2) is a very stringent provision and opined:

"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.

20. Consequent upon the said decision, Parliament introduced Sub-section 3A by Act 30 of 2004, which now provides for consideration of the objections, if any raised by the borrower. By definition under Section 2(f) of the Act a borrower includes the guarantor of the debt.

Section 3-A - (3-A) if, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

21. Section 3A further provides that if the secured creditor reaches a conclusion that the objections raised by the borrower are not acceptable or tenable, the creditor shall communicate the reasons for non-acceptance of the objections within a period of 15 days. The proviso to the said Sub-section declares that the rejection of the objections does not confer any right on the borrower to resort to the proceedings, contemplated either under Section 17 or 17A. We may indicate here both Sections 17 or 17A afford an opportunity to the borrower to approach the Debts Recovery Tribunal or (in the cases of Jammu & Kashmir) the concerned District Court against any measure taken under Section 13(4).

22. In every case where the objections raised by the borrower are rejected by the secured creditor, the secured creditor is entitled to take possession of the secured assets. In our opinion, such action - having regard to the object and scheme of the Act - could be taken directly by the secured creditor. However, visualising the possibility of resistance for such action, Parliament under Section 14 also provided for seeking the assistance of the judicial power of the State for obtaining possession of the secured asset, in those cases where the secured creditor seeks it.

23. Under the scheme of Section 14, a secured creditor who desires to seek the assistance of the State's coercive power for obtaining possession of the secured asset is required to make a request in writing to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction, secured asset is located praying that the secured asset and other documents relating thereto may be taken possession thereof. The language of Section 14 originally enacted purportedly obliged the Magistrate receiving a request under Section 14 to take possession of the secured asset and documents, if any, related thereto in terms of the request received by him without any further scrutiny of the matter.

24. However, the Bombay High Court in the case of **Trade Well v. Indian Bank, 2007 Cri LJ 2544** opined;

"2...CMM/DM acting under Section 14 of the NPA Act is not required to give notice either to the borrower or to the 3rd party.

3. He has to only verify from the bank or financial institution whether notice under Section 13(2) of the NPA Act is given or not and whether the secured assets fall within his jurisdiction. There is no adjudication of any kind at this stage.

4. It is only if the above conditions are not fulfilled that the CMM/DM can refuse to pass an order under Section 14 of the NPA act by recording that the above conditions are not fulfilled. If these two conditions are fulfilled, he cannot refuse to pass an order under Section 14.

The said judgment was followed by the Madras High Court in the case of **Indian Overseas Bank v. Sri Aravindh Steels Ltd., AIR 2009 Mad. 10**. Subsequently, Parliament inserted a proviso to Section 14(1) and also Sub-section 1A by Act 1 of 2013.

14(1)..... x x x x

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 has 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 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 :

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.

14(1-A). The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him -

(i) to take possession of such assets of such assets and documents relating thereof; 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 or 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.

25. We must make it clear that these provisions were not in existence on the date of the order impugned in the instant proceedings. These amendments are made to provide safeguards to the interest of borrower. These provisions stipulate that a secured creditor who is seeking the intervention of the Magistrate under Section 14 is required to file an affidavit furnishing the information contemplated under various Sub-clauses (i) to (ix) of the proviso and obligates the Magistrate to pass suitable orders regarding taking of the possession of the secured assets only after being satisfied with the contents of the affidavits.

26. An analysis of the 9 sub-clauses of the proviso which deal with the information that is required to be furnished in the affidavit filed by the secured creditor indicates in substance that (i) there was a loan transaction under which a borrower is liable to repay the loan amount with interest, (ii) there is a security interest created in a secured asset belonging to the borrower, (iii) that the borrower committed default in the repayment, (iv) that a notice contemplated under Section 13(2) was in fact issued, (v) in spite of such a notice, the borrower did not make the repayment, (vi) the objections of the borrower had in fact been considered and rejected, (vii) the reasons for such rejection had been communicated to the borrower etc.

27. The satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset.

28. It is in the above-mentioned 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.

29. 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. 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.

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

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

Mardia Chemicals Limited v. Union of India, (2004) 4 SCC 311=2004(17) AIC 1 (SC), The expression appeal as originally existed in section 17 is substituted by the word representation in view of the judgment of this Court in Mardia Chemicals case.

We may like to observe that proceedings under section 17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in Civil Court. As a matter of fact proceedings under section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under section 34 of the Act in the present case.

30. It can be noticed from the language of the proviso to Section 13(3A) 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" 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 (3A) 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.

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.

31. The same principle is re-emphasised with the newly added explanation in Section 17(1) which came to be inserted by Act No. 30 of 2004:

"Explanation: For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under Sub-section 1 of Section 17."

32. The High Court opined that Rule 8 of the Security Interest (Enforcement) Rules, 2002 provides for certain (i) procedure to be followed by the secured creditor taking possession of the secured asset. The High Court opined that even in a case where procedure contemplated under Section 14 is resorted to for obtaining possession of the secured assets, compliance with Rule 8 is mandatory. Such a requirement according to the High Court arises because in view of the High Court:

Rule 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.

"The object of Section 14 is only to be invoked in case the secured creditor faces obstruction and not as a routine bypassing the provisions of Section 13(4)."

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.

33. The High Court recognised 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 of 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."

34. 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 Code of Criminal Procedure 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 authorised 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. Order 40 of the Code of Civil Procedure deals with the appointment of the receiver. Rule 1 authorizes the Court to appoint a receiver:

1. Attachment of property of person absconding. - (1) The Court issuing a proclamation under section 82 may, for reasons to be recorded in writing, at any time after the issue of the proclamation, order the attachment of any property, movable or immovable, or both, belonging to the proclaimed person:

Provided that where at the time of the issue of the proclamation the Court is satisfied, by affidavit or otherwise that the person in relation to whom the proclamation is to be issued, -

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local jurisdiction of the Court,

it may order the attachment simultaneously with the issue of the proclamation.

(2) Such order shall authorise the attachment of any property belonging to such person within the district in which it is made ; and it shall authorise the attachment of any property belonging to such person without such district when endorsed by the District Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other movable property, the attachment under this section shall be made-

- (a) by seizure ; or
- (b) by the appointment of a receiver ; or
- (c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf ; or
- (d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to the State Government, be made through the Collector of the district in which the land is situate, and in all other cases-

- (a) by taking possession ; or
- (b) by the appointment of a receiver ; or
- (c) by an order in writing prohibiting the payment of rent on delivery of property to the proclaimed person or to any one on his behalf ; or
- (d) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such case the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under the Code of Civil Procedure 1908 (5 of 1908).

"1. Appointment of Receivers.-(1) Where it appears to the Court to be just and convenient, the Court may by order-

- (a) appoint a receiver of any property, whether before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management of the receiver, and
- (d) confer upon the receiver all such powers, as to bringing and defending suits and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit.

(2) Nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.

It can also be noticed from Rule (1) that the power of the Civil Court to appoint a receiver could be exercised either before or after passing of the decree.

35. Therefore, there is no justification for the conclusion that the receiver appointed by the Magistrate is also required to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. The procedure to be followed by the receiver is otherwise regulated by law. Rule 8 provides for the procedure to be

followed by secured creditor taking possession of the secured asset without the intervention of Court. Such a process was unknown prior to the SARFAESI Act. So, specific provision is made under Rule 8 to ensure transparency in taking such possession. We do not see any conflict between different procedures prescribed by law for taking possession of the secured asset. The finding of the High Court in our view is unsustainable.

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

(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.

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

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

37. 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.

38. In this connection, it is material to refer to the judgment in *Mardia Chemicals* (supra) 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 paragraphs 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 paragraph 80 of the judgment this Court held in sub-para 2 thereof as follows:

"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 (supra)*, 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.

39. Coming to the facts of this case, a notice under Section 13(2) was in fact served on the Respondent for which the Respondent did not choose to respond. Therefore, there was no occasion for the Appellant to consider the objections as there was none of the Respondent against the demand made in the said notice. It is brought to our notice that even while making application under Section 14 the Appellant filed an affidavit substantially providing for the necessary information contemplated under the newly introduced proviso to Section 14(1). We have already noticed that there was no statutory requirement as on the date when the application under Section 14 was made in the instant case either to give such an affidavit or regarding the content of the affidavit. Nonetheless the Appellant chose to give such an affidavit. A copy of which is placed before us. We have perused the affidavit and it substantially complies with the conditions stipulated in the newly introduced proviso. May be the Appellant did it by way of abundant caution to avoid any litigation.

40. However, the Respondent submitted before us that there is nothing in the impugned order of the Magistrate which indicates that the Magistrate applied his mind to such an affidavit and satisfied that it is necessary to deliver possession of the secured asset to the Appellant. No doubt that there is no material on record to show that the Magistrate applied his mind to the facts stated in the affidavit filed by the Appellant. On the date of the impugned order the law did not oblige the Magistrate to undertake any such exercise. Apart from that we are satisfied on examination of the content of the affidavit that all the basic requirements necessary for granting the request of the Appellant of delivery of the possession of the secured asset are asserted to have existed on the date of application. Therefore, we do not see any illegality in the impugned order. The appeal is allowed. The order of the High Court is set aside.

41. 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.

Criminal Appeal arising out of SLP (Crl) No. 6560 of 2011

42. The first Respondent in this appeal is the borrower in a transaction to which V. Noble Kumar, the first Respondent in Criminal Appeal arising out of SLP (Cri) No. 2038 of 2011 was the surety. The issue in the appeal is identical. Therefore, for the reasons stated above, this appeal is also allowed.

Appeals Allowed.

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