

(2011) 05 CAL CK 0008
In the Calcutta High Court

Case No : A.P.O. No. 399 of 2010, W.P. No. 63 of 2010 with M.A.T. No. 1351 of 2010 and C.A.N. No. 8887 of 2010

Asset Reconstruction Company (I) Ltd.

APPELLANT

Vs

Kanoria Jute and Industries Ltd.

RESPONDENT

Date of Decision : 19-05-2011

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3A), 13(4), 14
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1)

Citation : (2012) 4 CHN 31

Hon'ble Judges : Shukla Kabir (Sinha), J; Pinaki Chandra Ghose, J

Bench : Division Bench

Advocate : K.K. Bandopadhyay, Anirban Ray and Deb Kumar Sen, for the Appellant; Soumen Sen, Aniruddha Ray, Siddhartha Sankar Ray and Dipak Jain for Respondent Nos. 1 and 2 and Soumya Majumdar, Biswaroop Bhattacharya, Anjun Ray Mukherjee and Tanay Chakraborty for Kanoria Jute Mill, Sangrami Shramik Union, for the Respondent

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against a judgment and/or order dated 17th August, 2010 passed by the Hon'ble Single Judge in W.P. No. 63 of 2010, G.A. No. 786 of 2010, G.A. No. 372 of 2010, W.P. No. 4154 (W) of 2010 wherein His Lordship (Writ Court) was pleased to pass the following order: Having regard to the above observations, it appears that it has been categorically held by the Court that the Bank was not entitled to get any benefit from any of the terms of the terms of settlement. It has also been specifically observed by the Court that the learned Appellate Tribunal committed an illegality by directing issuance of recovery certificate in terms of clause 7(2) of the terms of Settlement dated 30th January, 2004, in favour of ARCIL.

In such circumstances as stated above, I am of the view that no effect can be given in respect of the two impugned notices, dated 17th March, 2009 and 12th

January, 2010, till final disposal of the proceeding pending before the Debt Recovery Tribunal-I, Kolkata. Consequently, no effect shall also be given in respect of the notice dated 19th February, 2010, issued by the respondent ARCIL, till final disposal of O.A. No. 186 of 1995. The writ petition stands disposed of accordingly.

At the time of disposing of the said writ petition the Hon"ble Single Judge has relied on a judgment and order delivered in a Civil Revision case, which was instituted by Kanoria Jute & Industries Ltd. against the Bank of India, Asset Reconstruction Company India Limited and others.

2. The observations made by the Hon"ble Single Judge of this Court in the Civil Revision case, being C.O. No. 2161 of 2010, are reproduced hereunder:-

Thus this Court holds that the decree which was passed by the tribunal on the basis of such compromise petition is illegal and such decree cannot be retained on record. The conclusion of the Appellate Tribunal upto this, is accepted by this Court, for the reasons as aforesaid, without however approving the finding on which such conclusion was drawn by the Appellate Tribunal.

This Court also cannot accept the submission of Mr. Mitra, learned Senior Counsel, who submitted that the default clause as contained in clause 2 of the terms of compromise was attracted on the failure of the petitioner herein to deposit the agreed amount within the stipulated period as per the said compromise petition. This Court holds that the opposite party Nos. 1 and 2 cannot take both hot and cold at the same time. Once they take a stand that the compromise was practically abandoned and/or frustrated due to passage of time and/or change of situation making the terms of compromise unenforceable and/or incapable of implementation, they cannot claim any benefit out of any of the terms of compromise even if it was favourable to them.

As such this Court holds that the bank is not entitled to get any benefit from any of the terms of the said terms of settlement. This Court thus holds that while setting aside the order passed by the learned Presiding Officer of the Debt Recovery Tribunal-I Kolkata on 14th August, 2009, the learned Appellate Tribunal committed an illegality by directing issuance of recovery certificate in terms of Clause 7(2) of the terms of settlement dated 30th January, 2004 in favour of the second appellant, namely Asset Reconstruction Company (India) Ltd.

Accordingly that part of the direction passed by the Appellate Tribunal is set aside in view of the discussion as made hereinabove. The Debts Recovery Tribunal-I Kolkata is now required to consider the application being O.A. No. 186 of 1995 u/s 19 of the said Act on its own merit in accordance with law.

Before parting with, this Court also wants to make it clear that since the decree is set aside the opposite party No. 2 cannot claim any benefit of the alleged assignment of the said decree. The said opposite party No. 2 thus cannot be regarded as an assignee of the said compromise decree and as such the said

company cannot be impleaded as assignee of the decree under Order 22 Rule 10 of the CPC in the said proceeding.

Maintainability of the Appeal:

Since the bank was one of the appellants before the learned Appellate Tribunal, this Court holds that the said appeal at the instance of the bank cannot be held to be not maintainable even assuming that the appellant No. 2 namely opposite party No. 2 herein had no locus to maintain the said appeal. Of course, this Court cannot hold that the said opposite party No. 2 had no locus to maintain the said appeal at the material time as when the appeal was filed, the decree passed by the Tribunal was in operation and as such the assignee of the decree, whose interest was adversely affected by the decree passed by the learned Tribunal, had the right to maintain the said appeal before the Appellate Tribunal with the leave of the Appellate Tribunal and grant of such leave can be presumed as the said appellant was allowed to proceed with the same along with the Bank. As such this Court holds that the appeal at the instance of both the appellants was maintainable.

3. The Hon''ble Single Judge disposed of the said writ petitions and the applications relying on the observation made by the High Court in revisional application holding that the ARCIL cannot be accepted as an assignee in terms of the said compromise decree and further cannot impleaded in the petition as an assignee of the decree under Order 22 Rule 10 of the Code of Civil Procedure. The Court also held that decree passed by the Tribunal on the basis of the compromise petition is illegal. The Court also directed the Tribunal to consider the pending application being O.A. No. 186 of 1995 on merits. Relying on such observation the Hon''ble Single Judge directed that no effect should be given to the notices dated 17th March, 2009 and 12th January, 2010 till O.A. No. 186 of 1995 is finally disposed of by the Tribunal. Consequently directed that no effect shall be given in respect of notice dated 19th February, 2010, issued by ARCIL.

4. Being aggrieved and dissatisfied with the said order dated 17th August, 2010 the appellant herein, the Asset Reconstruction Company India Limited (hereinafter referred to as the "ARCIL") filed this appeal.

5. The facts of the case is on the basis of two notices, which were issued u/s 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "SARFAESI Act"), the first notice dated 17th March, 2009 which was issued u/s 13(2) of the said act by ARCIL and subsequent thereto a notice dated 12th January, 2010 was issued by ARCIL invoking section 13(4) of the said act.

6. It is the case of the appellant that the appellant had entered into an assignment on 31st March, 2008 with Bank of India, whereby the petitioner had acquired interest in financial assets of Bank of India in respect of all financial assistance granted by the Bank of India to the Kanoria Jute & Industries Ltd. (hereinafter referred to as "KJIL").

7. It is stated that in or about September, 1995 the Bank of India had filed an application being O.A. No. 186 of 1995 u/s 19 of the Recovery of Debts Due to Bank and Financial Institution Act, 1993 against the said KJIL before the Tribunal.

8. On 3rd September, 2003, one time settlement was proposed by the KJIL and a joint petition was filed before the Tribunal for recording such Settlement. Subsequently the said compromise had failed.

9. The Bank duly informed the KJIL in respect of the said assignment in favour of the appellant by a letter dated 10th April, 2008. KJIL had offered terms to settle the dues to the ARCIL which was rejected. Thereafter a notice u/s 13(2) of the SARFAESI Act was issued by the ARCIL which duly replied by KJIL.

10. The appellant issued a notice u/s 13(4) of the SARFAESI Act and has taken possession of the factory. Thereafter KJIL filed a writ petition being W.P. No. 63 of 2010. Another writ petition was filed by the Kanoria Jute & Industries Ltd., Sangrami Shramik Union, challenging the action on the part of the appellant. According to the appellant the writ petitions were not maintainable before this Court in view of the expressed alternative remedy being available to the writ petitioners u/s 17 of the SARFAESI Act.

11. Mr. Kalyan Bandopadhyay, learned senior Advocate appearing on behalf of the appellant submitted that the writ petition includes disputed question of facts and therefore cannot be decided under Article 226 of the Constitution of India.

12. The facts of the case briefly are as follows:

On 15th September, 1987 the respondent KJIL was declared as sick by the Board for Industrial and Financial Reconstruction (herein after referred to as the "BIFR"). An appeal was preferred before the AAIRF (hereinafter referred to as Appellate Authority for Industrial and Financial Reconstruction) and ultimately on 26th June, 2001 a Show-cause notice was issued by the as to why the said company should not be wound up. On 31st December, 2002 the BIFR directed to wound up the company KJIL. The appeal was preferred before the BIFR on 20th July, 2005. The said appeal was dismissed by the AAIRF. On 22nd August, 2006 a writ petition was filed before this High Court being W.P. No. 8237(W) of 2006 by the Workers' Union and W.P. No. 7220 (W) of 2007 by the company. On 27th June, 2008 both the writ petitions were disposed of, directing the BIFR to reconsider the question of revival of the company. On 2nd September, 2008, BIFR directed IFCI to issue a notice u/s 18 of the SARFAESI Act. An appeal was filed from the said order. The AAIRF remanded the matter to the BIFR for fresh hearing. Prior to that the Bank of India instituted a proceeding before DRT against KJIL being O.A. No. 186 of 1995 and raised its claim against KJIL.

On 6th January, 2004 the Bank of India agreed to settle its claim and in pursuance thereof a compromise petition was filed before the DRT. The KJIL paid a sum of Rs. 51 lakhs as per terms to the Bank. The DRT refused to pass a decree where the appeal was preferred before the DRT and the Appellate Tribunal

set aside the order passed by the learned presiding officer of the DRT, Kolkata and issued a Recovery Certificate in terms of Clause 7(2) of the Terms of Settlement dated 30th January, 2004 which was challenged in a revisional application and the same was disposed of the High Court.

On 31st March, 2008 a purported deed of assignment executed between the Bank of India and ARCIL. Bank of India duly communicated the company about the said assignment on 10th April 2008 and on 14th November, 2008 ARCIL wrote to the company intimating the assignment and for improving its offer settlement of the dues. In between the BIFR was heard the matter for revival and framing of scheme with the consent and suggestions of Secured Creditor.

On 17th March, 2009 a purported notice under SARFAESI issued by ARCIL and in between April 2009 to June 2009 the petitioner No. 2 from time to time held meetings with the officers of ARCIL and repeatedly requested ARCIL to furnish purported deed of assignment. Since no copy was handed over, the writ petition was filed by the company on 15th June, 2009. The company after waiting for a reasonable time made a representation and reserved right to make further representation after receipt of the purported deed of assignment.

On 16th June, 2009 ARCIL initiates proceedings before the District Magistrate for taking possession of the assets of the company. On 29th June, 2009 ARCIL forwarded a reply to the representations dated 15th June, 2009. On 14th August, 2009 DRT disposed of O.A. No. 186 of 1995 by directing the company to pay Rs. 149 Lacks along with Simple Interest at the rate of 11 per cent per annum to Bank of India within 15 days. The claim of ARCIL was heard and rejected. The company tendered the amount in terms of the order which was refused by Bank of India.

On 3rd September, 2009 an appeal was filed by ARCIL and Bank of India jointly before the DRAT and DRAT refused to stay the order of the DRT. On 3rd September, 2009 the BIFR by an order deletes the name of ARCIL from the mailing list and Bank of India was restored.

On 9th December, 2009 District Magistrate rejects the application of ARCIL u/s 14 of SARFESI Act. On 8th January, 2010 BIFR rejects the application of ARCIL u/s 5 of the SARFAESI Act. On 12th January, 2010 the company made a representation to District Magistrate to render assistance to stop illegal activities of ARCIL and on the same day ARCIL issued and pasted purported notice of possession.

Hence, Kanoria Jute moves writ petition No. 63 of 2010 and an interim order was passed in the said writ petition which was extended until further orders. ARCIL communicates the steps taken by enclosing the Possession Certificate on 29th January, 2010 and on 19th February, 2010 ARCIL issues notice for sale. On 24th February, 2010, the advocate appearing on behalf of the Kanoria Jute protested the steps taken by ARCIL and an interlocutory application being G.A. No. 786 was filed challenging the notice of sale dated 19th February, 2010.

On 6th April, 2010 His Lordship B. Somadder, J., passed an Interim Order inter alia directing ARCIL not to disturb the physical possession of the writ petitioner in respect of the properties in question relating to the jute mill and ARCIL was also directed not to give any effect or further effect to the notice dated 19th February, 2010. On 2nd July, 2010 joint appeal of ARCIL and Bank of India was allowed by DRAT and certificate was directed to be issued in favour of ARCIL.

Being aggrieved Civil Revision Application was made before this Hon''ble Court under Article 227 being C.O. No. 2161 of 2010 and the Court held that ARCIL cannot be regarded as an assignee of the said decree and directed DRT to consider the application being O.A. No. 186 of 1995 u/s 19 of DRT Act.

13. The Court in Civil Revisional application has set aside the part of the direction passed by the Appellate Tribunal and directed the Debts Recovery Tribunal to consider the application being O.A. No. 186 of 1995 u/s 19 of the said Act on its own merit in accordance with law.

14. It is further stated by the Hon''ble Court that since the decree is set aside, the opposite party No. 2 (ARCIL herein) cannot claim any benefit of the alleged assignment of the said decree. It is also held that the said opposite party No. 2 thus cannot be regarded as an assignee of the said com promise decree and as such the said company cannot be impleaded as assignee of the decree under Order 22 Rule 10 of the CPC in the said proceeding. ARCIL in terms of the said order dated 23rd July, 2010 filed an application before DRT for addition of party.

15. The case of the writ petitioner is that the writ petitioner has denied any liability to ARCIL as also the claim of ARCIL. It is also denied that ARCIL is an assignee of Bank of India. The writ petitioner had asked for a copy of the Deed of Assignment and further ARCIL was informed that negotiations are on with Bank of India for settlement of the dues and as such the demand of ARCIL was clearly premature and in any event without any justification. The ARCIL did not make over a copy of the Deed of Assignment to the writ petitioner.

16. It is further submitted on behalf of the writ petitioner that ARCIL had clearly disregarded the mandate of section 13(3A) of the said Act. It is further stated that on the basis of the judgment and order dated 14th August, 2009 the Debts Recovery Tribunal had considered the application filed by the writ petitioner for recording compromise and passed a judgment directing the writ petitioner to pay a sum of Rs. 149 lakhs along with interest at the rate of Rs. 11% per annum. On the basis of such judgment, a certificate was issued on 26th August, 2009. Several pay orders were tendered in accordance with the said direction. It is significant to mention that when the said compromise petition was disposed of ARCIL tried to intervene but the same was disallowed. Instead of accepting such pay order, Bank of India and ARCIL had preferred an appeal. On 3rd September, 2009 the said appeal was rejected.

17. In spite of such order ARCIL approached the District Magistrate u/s 14 of the said Act for taking physical possession of the assets and properties of the wit

petitioner. The writ petitioner was filed a representation to the District Magistrate and the District Magistrate after considering the same refused to exercise his power u/s 14 of the said Act. Thereafter ARCIL issued a possession notice on 12th January, 2010 which contains various interpolations.

18. It is submitted that admittedly there was no steps have been taken u/s 13(2) of the said Act either, by Bank of India or ARCIL. The Deed of Assignment was also challenged by the writ petitioner and during the pendency of the writ petition an appeal was preferred by the Bank of India and ARCIL jointly, DRAT allowed the said appeal. The order of the DRAT was challenged in an application filed under Article 227 of the Constitution of India. In the said Revisional Application the direction was given by the Appellate Tribunal for issuance of certificate in favour of ARCIL was set aside. The Debts Recovery Tribunal was directed to consider the original application on its own merit in accordance with law. Therefore, it is submitted that the original application was filed by Bank of India and by the said judgment and order the Court made it clear that since the decree has been set aside, ARCIL cannot claim any benefit of the alleged assignment of the said decree.

19. The ARCIL filed an application before the Debts Recovery Tribunal in O.A. No. 186 of 1995 which was suppressed before this Court and in the meantime the Court passed an order. No appeal has been preferred from the said order/judgment dated 23rd July, 2010. The said order has reached its finality. The judgment has been accepted and acted upon by ARCIL. ARCIL has by its conduct invited the Tribunal to first decide the issues whether ARCIL could claim itself as an assignee of Bank of India and secondly whether ARCIL has any enforceable right against the writ petitioner. Therefore, at this stage ARCIL cannot give any effect to the notices issued by it.

20. The issuance of notices dated 17th March, 2009 and 12th January, 2010 are clearly without jurisdiction. If an authority assumes a jurisdiction which it does not possess or the said authority does not have jurisdiction at all then its action can be challenged under Article 226 of the Constitution of India. [See Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others,

21. It is further submitted that it is a trite law that jurisdiction under Article 226 is wide and extra ordinary its perennial and not seasonal. If the action of the authority is clearly without jurisdiction, mala fide, arbitrary and in violation of the principle of natural justice the Hon"ble Court in exercise of their high prerogative writ jurisdiction under Article 226 of the Constitution of India had always exercised their power to redress and/or remedy such wrong.

22. Mr. Bandopadhyay, learned Senior Advocate appearing on behalf of the appellant contended that appellant acquires the security interest/assets u/s 5 of the SARFAESI Act. He further stated that the appellant being a reconstruction company allowed to proceed under SARFAESI Act without intervention of Court.

23. He drew our attention to the decision reported in Transcore Vs. Union of

India (UOI) and Another, and submitted that the doctrine of election does not apply to the DRT Act and the SARFAESI Act and both can continue simultaneously.

24. The reply which was given by the respondent after 60 days from the date of the notice issued u/s 13 of the said Act. Therefore, no reply was required to be given by the appellant. It is submitted before the Debt Recovery Tribunal that the compromise has failed. The appellant and the Bank of India preferred appeal before the DRAT. On 9th December, 2009 appellant moves an application u/s 14 of the SARFAESI Act and on 12th January, 2010 ARCIL takes possession of the assets of the borrower u/s 13(4) of the said Act,

25. He further pointed out that from the panchnama it would be evident that it was signed by the representatives of the borrower. The writ petitioner filed the Writ Petition No. 63 of 2010 after the possession was taken and without disclosing the panchnama. He farther stated that no reason has been given as to why remedy u/s 17 of the SARFAESI Act was not availed by the respondent. No reason has been shown with regard to delay in challenging the notice u/s 13(2) of the said Act. Writ petition was filed being W.P. No. 4145 (W) of 2010 challenging the vires of section 15(1) of SICA. He further contended that vires of SARFAESI Act has been upheld by the Supreme Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., .

26. In support of his submission Mr. Bandopadhyay relied upon the following decisions stated at the bar:

- (i) Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,
- (ii) Transcore Vs. Union of India (UOI) and Another,
- (iii) United Bank of India Vs. Satyawati Tondon and Others,
- (iv) Punjab National Bank Vs. O.C. Krishnan and Others,
- (v) Core Ceramics Ltd. and Others Vs. Union of India (UOI) and Others,

27. Mr. Soumen Sen, learned Advocate appearing for the respondent, KJIL, stated that there has been interpolation in the possession notice to show that the appellant has been in physical possession which is of no relevance as the Supreme Court in the case of M/s Transcore (Supra) has clearly stated that there is no dichotomy with regard to possession.

28. Mr. Sen further contended that a sale notice issued by the appellant to receive offers in respect of the assets of the borrower which is challenged by an application being G.A. No. 786 of 2010. He further contended that order passed in C.O. No. 2161 of 2010 upheld the setting aside of the decree passed by the DRT. This Hon"ble Court, in civil revision application, has also set aside the direction of DRAT i.e. drawing up of recovery certificate in terms of the settlement decree, since the appellant ought not to be given the fruits of the compromise when appellants have challenged the compromise. For such reason

the matter was remanded. Therefore, at present there is no compromise decree. The Trial Court did not consider the maintainability of the writ petition and relying on the order passed by the other Court the writ petitions were disposed of.

29. Mr. Sen pointed out in the instant case that ARCIL has no right to issue the notice for the reasons that Court did not accept its position as an assignee, the decree was set aside and the matter was remanded before the learned Tribunal for adjudication. Therefore, at this stage, ARCIL has no right to take action in terms of those notices issued by them. The Hon"ble Single Judge, according to him, correctly held no effect should be given in respect of the said impugned notices dated 17th March, 2009 and 12th January, 2010. Therefore, no effect can be given in respect of the notice dated 19th February, 2010.

30. He further submitted that ARCIL cannot claim themselves as "Secured Creditor" under the SARFAESI Act until the matter is finally decided by the DRT. He further contended that no deed of assignment has been produced before the Court to establish that ARCIL can come within the purview of the said definition of "Secured Creditor" as defined in section 2(zd) of the said Act. Therefore, he submits in these circumstances judgment cited by Mr. Bandopadhyay cannot be a help to his client. Accordingly, he submitted that the appeal should be dismissed. We have noticed that in the case of Mardia Chemicals Ltd. (Supra) the Supreme Court held as follows:

where a secured creditor has taken action u/s 13(4) of the Act, in such cases it would be open to borrowers to file appeals u/s 17 of the Act within the limitation as prescribed therefore, to be counted with effect from the date of this order.

The Supreme Court also held that "Sub-section (4) provides for four measures which can be taken by the secured creditor in case of non-compliance with the notice served upon the borrower. Under clause (a) of sub-section (4) the secured creditor may take possession of the secured assets including the right to transfer the secured assets by way of lease, assignment or sale; may take over the management of the secured assets under Clause (b) including right to transfer; under clause (c) of sub-section (4) a manager may be appointed to manage the secured assets which have been taken possession of by the secured creditor and may require any person who has acquired any secured assets from the borrower or from whom any money is due to the borrower to pay the same to him as it may be sufficient to pay the secured debtor as provided under Clause (d) of section 3(4) of the Act. sub-section (8) of section 13, however, provides that if all the dues of the secured creditor including all costs, charges and expenses, etc. as may be incurred are tendered to the secured creditor before sale or transfer, no further steps be taken in that direction."

The Court also held that now coming to section 17, it provides for filing of an appeal to the Debts Recovery Tribunal within 45 days of any action taken against the borrower under sub-section (4) of section 13 of the Act. It reads as under:

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 authorized officer under this chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in Sub-section (2) of section 13:

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited, under this section.

(3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

It is thus clear 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. According to sub-section (2), the borrower has to deposit 75% of the amount claimed by the secured creditor before his appeal can be entertained.

31. The Supreme Court also held in the said decision that so far as the jurisdiction of Civil Court is concerned there is a bar but Supreme Court also held that jurisdiction of the High Court under Article 226 of the Constitution can not be curtailed.

32. We have also noticed that in *Mardia Chemicals Ltd.* (Supra) the Supreme Court duly considered 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 nothing but a right is given to the borrower to give reply 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. Thereafter 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 by the borrower rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of section 13 of the Act.

33. Such reasons for overruling the objections of the borrower must also be communicated to the borrower by the secured creditor. It is true, as per the provisions under the Act, a borrower may not be entitled to challenge the reasons communicated to him or likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided u/s 17 of the Act matures on any measure having been taken under sub

section (4) of section 13 of the Act.

34. Therefore, the safeguard available to a secured borrower within the framework of the Act is to approach the Debts Recovery Tribunal u/s 17 of the Act. Such a right accrues only after measures are taken under sub-section (4) of section 13 of the Act. In the said decision the purpose of section 34 of the said act has also been considered and the Supreme Court held that the jurisdiction of the Civil Court is barred where a Debts Recovery Tribunal an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of section 13.

35. The proceeding u/s 17 of the said Act, has been held by the Supreme Court is nothing but an initial stage of proceeding like filing a suit in Civil Court. As a matter of fact proceedings u/s 17 of the Act are in lieu of a Civil Suit which remedy is ordinarily available but for the bar created u/s 34 of the Act.

36. Hence the Supreme Court in paragraph 80 of the said decision (Mardia Chemical's case) for the purpose of giving some reasonable protection to the borrower held as follows:

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 u/s 13(4) of the Act have been taken, a mechanism has been provided u/s 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 the may be, must be communicated to the borrower. In connection with this conclusion we have already held as decision 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 u/s 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) u/s 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 conditions as 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) u/s 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.

37. In the decision of M/s Transcore (Supra) the Supreme Court held that DRT act is a complete Code by itself as far as recovery of debt is concerned. It provides for various modes of recovery. Therefore, the debt due under the recovery certificate can be recovered in various ways. The remedies mentioned therein are complementary to each other. The DRT Act provides for adjudication of disputes as far as the debt due is concerned. It covers secured as well as unsecured debts.

38. The Supreme Court held in the said decision as follows:

.....that after examining the facts and circumstances if the DRT as an appellate authority comes to the conclusion that any of the measures u/s 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 anyone or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower.

39. In United Bank of India (Supra) the Supreme Court held that where a person had any tangible grievance against the notice issued u/s 13(4) or action taken u/s 14, then he could have availed remedy by filing an application u/s 17(1) of the Act. The expression "any person" used in section 17(1) is of wide import. It takes within its field, not affected by the action taken u/s 13(4) or section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders u/s 17 and 18 and are required to decide the matters within a aggrieved person under the SARFAESI Act are both expeditious and effective.

40. Hence, the Supreme Court observed that 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.

41. The Supreme Court also held that while expressing the aforesaid view, we are conscious that the power conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative

writs for the enforcement of any of the rights conferred by Part II or for any other purpose are very wide and there is no express limitation on exercise of that power.

42. The Supreme Court held in paragraph 47 of the said decision as follows:

47. In *Thansingh Nathmal vs. Supdt. of Taxes* the Constitution Bench considered the question whether the High Court of Assam should have entertained the writ petition filed by the appellant under Article 226 of the Constitution questioning the order passed by the Commissioner of Taxes under the Assam Sales Tax Act, 1947. While dismissing the appeal, the Court observed as under: (SCC p. 1423, para 7)

7.....The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any restrictions except the territorial restrictions which are expressly provided in the articles. But the exercise of the jurisdiction is discretionary: it is not exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain self-imposed limitations. Resort to that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the petitioner has an alternative remedy, which without being unduly onerous, provides an equally efficacious remedy. Again the High Court does not generally enter upon a determination of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does not therefore act as a Court of Appeal against the decision of a Court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.

43. In paragraph 49 of the said decision the Supreme Court held as follows:-

49. The views expressed in *Titaghur Paper Mills Co. Ltd. vs. State of Orissa* were echoed in *CCE vs. Dunlop India Ltd.* in the following words: (SCC p. 264, para 3)

3....Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill-suited to meet the demands of extraordinary situations, as for instance where the very vires of the statute is in question or where private or public workings are so inextricably mixed up and the prevention of public injury and the vindication of public justice required it that recourse may be had to Article 226 of the Constitution. But then the Courts must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters involving the revenue where statutory remedies are

available are not such matters. We can also take judicial notice of the fact that the vast majority of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

44. The Supreme Court further states in paragraph 50 of the said decision as follows:

50. In Punjab National Bank vs. D.C. Krishnan this Court considered the question whether a petition under Article 227 of the Constitution was maintainable against an order passed by the Tribunal u/s 19 of the DRT Act and observed: (SCC p. 570 paras 5-6)

5. In our opinion, the Order which was passed by the Tribunal directing sale of mortgaged property was appealable u/s 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is a hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this fast-track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless, when there is an alternative remedy available, judicial procedure demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act.

45. In Punjab National Bank (Supra) the Supreme Court held as follows:

The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this fast track procedure cannot be allowed to be derailed either by taking recourse to proceedings under Arts. 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Arts. 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the Court refrains from exercising its jurisdiction under

the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Art. 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act.

46. In *Core Ceramics Ltd. & Ors.* (Supra) the Hon'ble Single Judge of this High Court held that the Bank had issued notice classifying the account as Non-Performing Asset as per RBI guidelines. Once bank authority u/s 13(2) classifies the account as non-performing asset and issues notice, as has been done in the said case, the Writ Courts have little or no role to play in deciding such issue.

47. After analyzing the facts and materials placed before us we find that admittedly in civil Revisional Application the compromise which intended to be entered into and the decree passed by the learned Appellate Tribunal on the basis of such compromise petition has been declared as illegal and the decree was set aside.

48. The Court further held that the Appellate Tribunal also committed an illegality by directing issuance of recovery certificate in terms of Clause 7(2) of the Terms of Settlement dated 30th January, 2004 in favour of the Asset Reconstruction Company (India) Limited. The Court also set aside the said direction of the Appellate Tribunal. The Debts Recovery Tribunal-I Kolkata is also directed to consider the application being O.A. No. 186 of 1995 u/s 19 of the said Act on its own merit.

49. In civil revisional application the Court also held that the opposite party No. 2 i.e., ARCIL cannot be regarded as an assignee of the said compromise decree and further held that the said ARCIL cannot be impleaded as an assignee of the decree under Order 22 Rule 10 of the said CPC in the said proceedings.

50. It is also admitted that on the basis of such assignment the ARCIL took steps in the matter by issuing the notices u/s 13 of the SARFAESI Act. The first of such notice dated 17th March, 2009 which was issued u/s 13(2) of the said Act and subsequent thereto a notice dated 12th January, 2010 was also issued by ARCIL invoking section 13(4) of the said Act.

51. The question at this stage that whether the ARCIL can come within the definition of "secured creditor" as defined in section 2(zd) of the said Act, which is set out hereunder for our consideration:-

Section 2 (zd): "secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes--

- (i) debenture trustee appointed by any bank or financial institution; or
- (ii) securitization company or reconstruction company, whether acting as such or managing a trust set up by such securitization company or reconstruction company for the securitization or reconstruction, as the case may be; or
- (iii) any other trustee holding securities on behalf of a bank or financial

institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance.

52. It is also a fact that deed of assignment has not been placed before, us nor it was produced in any proceeding by the ARCIL. Therefore, on this given facts and materials placed before us we have to come to the conclusion that the appellant is not an assignee yet declared by the Court, since the assignment of the decree has already been set aside by the Court, ARCIL cannot claim itself as an assignee. Furthermore, at this stage, I no decree is subsisting in favour of the Bank. The appellant- cannot come within the purview of "secured creditor" since under the said Act of 2(zd)(iii) the appellant has not been able to produce any document before this Court which can show that the security interest has been created in favour of the ARCIL on behalf of the Bank for due repayment by the writ petitioner/respondent herein.

53. In the absence of production of such vital document in terms of the section 2(zd) of the said Act, in our considered opinion, until the matter is finally decided by the learned Tribunal ARCIL cannot come within the purview of "secured creditor".

54. Therefore, in our considered opinion, until the said assignment is finally accepted by the learned Tribunal, the ARCIL cannot come in the sue of the Bank and claim its right as an assignee. Therefore, until the ARCIL/the appellant reaches such position they cannot have any right under the Act itself to issue notices u/s 13(2) or 13(4) of the said Act or to give effect to their notices which they had issued.

55. Further we have noticed that in this civil revisional application the Court specifically held that the ARCIL cannot be impleaded as an assignee of the decree under order 22 Rule 10 of the CPC in the said proceeding.

56. Therefore, even after noticing the judgment cited before us we do not have any doubt in our mind that the safeguard available to a secured borrower within the framework of the Act is to approach the Debts Recovery Tribunal u/s 17 of the Act. Such a right accrues only after measures are taken u/s 13(4) of the said Act.

57. Therefore, on the given facts we hold that the right of the appellant has not yet been crystallized and therefore, we hold that the order so passed by the Hon"ble Judge in the matter relying on the given facts cannot said to be suffered from any illegality or irregularity.

58. We are conscious that generally the High Court should not exercise its jurisdiction under Articles 226 and 227 Constitution as observed by the Supreme Court, but it appears to us that in a fit case where the steps have already been taken by the authority and possession has already been taken on the basis of an assignment which has already been struck down by the Court on the ground that assignment is bad, in that case, in our considered opinion, the Writ Court can

entertain such application and pass suitable order.

59. For the reasons stated hereinabove, we do not find that there is any reason to interfere with the order so passed by the Hon''ble Single Judge since we do not find that the judgment and/or order of the Hon''ble Single Judge suffer from any illegality or irregularity. We do not find any merit in this appeal.

60. Accordingly, we disposed of this appeal affirming the order of the Hon''ble Single Judge.

61. Before parting, we make it clear that the observations made by the Hon''ble Single Judge or by us would not stand in the way to decide the matter pending before the learned Tribunal without being influenced by the observations made by us.

62. Since the appeal is disposed of, the connected application for stay (being C.A.N. 8887 of 2010 with M.A.T. 1351 of 2010) has become infructuous and the same is disposed of accordingly. Photostat certified copy of this judgment, if applied for, be supplied to the parties.

Shukla Kabir (Sinha), J.

I agree.