

**(2010) 09 DEL CK 0421**

**In the Delhi High Court**

**Case No :** I,A, No. 12908 of 2009 in C.S. (OS) 1886 of 2009

Bharat Steel Tubes Ltd.

APPELLANT

Vs

IFCI Ltd.

RESPONDENT

**Date of Decision :** 10-09-2010

**Acts Referred:**

Banking Regulation Act, 1949 — Section 35A  
Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 39 Rule 2  
Companies Act, 1956 — Section 391, 4A(2), 529A, 529A(1)  
Registration Act, 1908 — Section 17(1)  
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 10, 11, 12A, 13, 14  
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 3(1)  
Transfer of Property Act, 1882 — Section 69, 69A

**Citation :** (2011) 1 CompLJ 51 : (2010) 172 DLT 568 : (2010) 120 DRJ 226

**Hon'ble Judges :** Rajiv Shakdher, J

**Bench :** Single Bench

**Advocate :** T.R. Andhyarujina, Arun Kathpalia, Amit Dhupar, Vivek Malik, Virender Singh Thakur and Dhrupad Das, for the Appellant; N.K. Kaul Suresh Dutt Dobhal and Rashmi Sachdeva, AGM, for the Respondent

## Judgement

Rajiv Shakdher, J.

IA No. 12908/2009 (Order 39 Rule 1 & 2 of CPC)

1. By this order I propose to dispose of the captioned application filed under Order 39 Rule 1 and 2 of the Code of Civil Procedure, 1908 (in short "CPC").
2. In order to dispose of the captioned application the following facts require to be noticed :-
3. The plaintiff, is a company incorporated under the Companies Act, 1956 (hereinafter referred to as "Companies Act"). In 1990, the plaintiff became a sick industrial company within the meaning of Section 3(1)(o) of the Sick Industrial Companies Act, 1985 (hereinafter referred to as SICA). Resultantly, the plaintiff

filed a reference u/s 15 of SICA before the Board of Industrial & Financial Reconstruction (hereinafter referred to as "BIFR"). The proceedings before the BIFR culminated, with a recommendation of the BIFR being sent to this Court to wind up the plaintiff. This Court accepted the recommendation vide order dated 4.08.2003 and consequently directed that the plaintiff be wound up. However, by a subsequent order dated 09.02.2005 the said winding up order was stayed. The promoters, thereafter filed a scheme u/s 391 of the Companies Act which, it appears, is pending consideration by the Company Judge of this Court.

4. It appears that while efforts were made by the promoters of the plaintiff, one of the secured creditors, i.e., Punjab National Bank (in short "PNB") approved a proposal put forth by the plaintiff for One Time Settlement (in short "OTS") of dues owed by the plaintiff to the PNB. This proposal of OTS was approved by the PNB vide its letter dated 02.09.2004. Under the OTS proposal the plaintiff was required to pay a sum of Rs. 2616.33 lacs to PNB.

5. In pursuance of the aforesaid OTS, the plaintiff evidently paid a sum of Rs. 1375 lacs to PNB. It is important to note that said OTS provided the manner in which the amount, equivalent to Rs. 2616.33 lacs, was required to be paid by the plaintiff. Importantly, it was agreed by the plaintiff that it would defray the entire liability by December, 2007. The plaintiff had also agreed that in case there was a default in payment of any one instalment, the breach would render the settlement as failed, and consequently, all reliefs and concessions would lapse automatically; enabling PNB to recover all dues from the plaintiff, after adjusting payments already received by it.

5.1 It appears that since the plaintiff was unable to defray its liability qua its creditors, which included PNB, and other secured and unsecured creditors; it entered into a Memorandum of Understanding dated 05.03.2008 (in short "MOU") with a registered Securitization And Reconstruction Company, by the name of Asset Care Enterprises Ltd. (hereinafter referred to as "ACE"). The MOU pegged the total debt at Rs. 2135.41 lacs. The details of the debt are set out in Schedule 1 to the said MOU. In the schedule the debt owed to PNB is indicated as Rs. 1241.33 lacs (being the balance amount which remained outstanding after due adjustment was made in respect of Rs. 1375 lacs paid against the total OTS amount of Rs. 2616.33 lacs). The MOU was premised on the plaintiff securing assignment of debt in favour of ACE from the financial institutions and banks (which included PNB) in consideration of ACE undertaking to pay the liabilities as reflected in the MOU.

6. Consequent to the execution of the MOU between the plaintiff and ACE, PNB assigned its right and interest created under the financing documents, including the receivables and security interest created thereunder, in favour of ACE vide assignment deed dated 15.07.2008 (in short "the 1st assignment deed").

6.1 It is pertinent to note at this stage that in recital "C" of 1st assignment deed there is a reference to the fact that since the plaintiff/borrower had failed to fulfill

its obligation under the OTS, the same was revoked.

6.2 In the assignment deed there is also a reference to the fact that PNB has filed a recovery proceeding against the plaintiff, in which an amount of Rs. 32762.27 lacs (which included principal amount of Rs. 3284 lacs, and interest of Rs. 29478.27 lacs) has been claimed. Furthermore, in recital "D" there is a reference to PNB's letter dated 28.03.2008, whereby it had agreed to assign its interest in the financial assets of the plaintiff in favour of the ACE. Under the 1st assignment deed the total consideration fixed between PNB and ACE was a sum of Rs. 1501.28 lacs. Out of the said, sum Rs. 722.48 lacs was paid by cheque, and balance consideration of nearly Rs. 778.80 lacs was paid in the form of unsecured debentures, with a repayment period of three years, and minimum coupon rate of 10% per annum payable every six months. Schedule A to the 1st assignment deed clearly stated that the plaintiff, on the date of institution of the recovery suit, i.e., 21.02.2003, was liable to pay a sum of Rs. 32762 lacs alongwith interest, and costs after adjustment of a sum of Rs. 1380 lacs paid post the institution of the suit. The details with respect to financing documents and securities created, as also details of immovable properties, were given in schedules "C" and "D" respectively. In so far as the pending litigation against plaintiff is concerned the detail is set out in schedule "E" which includes, as noticed above, recovery proceedings instituted by the PNB against the plaintiff being: OA No. 12/2003.

7. The plaintiff in the instant suit has filed its correspondence with ACE, which clearly seems to suggest that ACE was aggrieved by the fact that the plaintiff had not adhered to the schedule for payment of interest under the MOU signed with the ACE. In this regard reference may be had to letter dated 13.10.2008, 02.01.2009, 20.01.2009 and 27.03.2009. The plaintiff, however, has also appended some letters to show that it had made atleast some payment.

7.1 The fact, however, remains that there was a default in complying with the terms of the MOU. Consequently, on 02.04.2009 ACE wrote to the plaintiff that on account of defaults in making payments it had assigned the debt owed to it by the plaintiff to the defendant/IFCI along with the underlying securities. A reference was also made to the fact that the MOU, according to ACE, came to an end on 04.03.2009. Furthermore, it was stated that w.e.f. 31.03.2009 ACE was no longer owner of the debts, and that in future the plaintiff should communicate with the defendant/IFCI Ltd.. This assignment deed between ACE and defendant/IFCI Ltd. was evidently executed on 17.04.2009 (hereinafter referred to as "the 2nd assignment deed").

7.2 The plaintiff evidently responded to its communication vide letter dated 19.06.2009 inter alia stating therein that the Securitization and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") does not allow trading in debts, and that MOU executed between the plaintiff and ACE provided for remedies which could be resorted to by ACE in case of default. In this respect plaintiff drew attention of

ACE to Clause 15 of the MOU. A copy of this letter, was also, purportedly sent to the defendant.

7.3 This was followed by yet another letter dated 29.06.2009 by the plaintiff to ACE, with a copy to the defendant. In this letter, the plaintiff referred to its earlier letter of 19.06.2009 whereby, it had sought revocation of the 2nd assignment deed executed between ACE and the defendant/IFCI. The main thrust of this letter was that neither the ACE nor the assignee could recover from the plaintiff the amounts which were over and above the amount crystallized in the MOU.

7.4 By a return letter dated 30.06.2009, ACE refuted the assertions made by the plaintiff in its letters dated 19.06.2009 & 20.06.2009. In particular, ACE detailed out the reasons why it had to resort to assignment of the debt in favour of the defendant. The breach by the plaintiff of its obligations was articulated in great detail in the said communication.

8. What brought the matter to fore was the notice dated 10.08.2009 issued by the defendant u/s 13(2) of the SARFAESI Act. In this notice the defendant/IFCI Ltd. inter alia made a reference to the manner in which it had acquired the debt, and the interest in the underlying securities from the PNB via ACE. Reference in the said notice is also made to the fact that failure on the part of the plaintiff to perform its obligations had rendered its account a Non-Performing Assets (in short "NPA"). It was also pointed out that consequent thereto an irrevocable registered assignment deed was executed by ACE in favour of the defendant/IFCI Ltd. The plaintiff was told that the sum of Rs. 17 lacs already paid would be adjusted against outstanding dues of the plaintiff now payable to defendant/IFCI Ltd. The plaintiff was thus required to repay within a period of 60 days a sum of Rs. 1139.75 lacs together with interest w.e.f. 01.08.2009 at contractual rates, that is, 19.75% per annum along with cost charges etc.

8.1 It is issuance of this notice, which has propelled the plaintiff to institute the present suit.

8.2 At the hearing held on 14.08.2009 the issue of jurisdiction came up for consideration when, it was submitted on behalf of the plaintiff that the defendant/IFCI Ltd. could not have issued a notice u/s 13(2) of the SARFAESI Act as it was not a financial institution within the meaning of Section 4A(2) of the Companies Act, 1956 (in short, the Companies Act). The argument being that with repeal of the Industrial Finance Corporation Act, 1948 and defendant being converted into a limited company, for it to retain the status of a Financial Institution, the G.O.I. had to hold 51% or more of the shareholding in defendant/IFCI Ltd. whereas the actual situation was that it had a shareholding much less than that. The defendant/IFCI Ltd. however, relied upon the notification dated 15.02.1995 issued by Government of India to justify its status as a financial institution. The defendant/IFCI Ltd. took the stand that it would suffice, for the purpose of the fulfillment of requirements of, stipulated u/s 4A(2) of the Companies Act if the

GOI held the requisite shareholding at the point in time when the notification was issued. The change in the equity stake thereafter would make no difference to its status as a financial institution. Since this issue required consideration, the defendant was restrained vide order dated 14.10.2009 from taking further action pursuant to its notice dated 10.08.2009 till the next date of hearing.

8.3 The plaintiff, at this juncture, took time to move an appropriate application for impugning the notification dated 15.02.1995 whereby, the defendant/IFCI Ltd. claimed that it had been classified as a public financial institution by the Government of India. Broadly, the plaintiff was seeking to impugn the said notification as after the date of the notification the Government of India decidedly did not hold either directly or indirectly 51% or more of the shareholding in the defendant/IFCI Ltd. after it had supplanted IFCI which was corporation established under the Industrial Finance Corporation Act, 1948, after its repeal in 1993. This aspect was also subject matter of challenge in a Writ Petition bearing No. 7097/2008 entitled Finite Infratech Ltd. v. IFCI and Ors. before a Division Bench of this Court On 12.07.2010. I was informed that the Division Bench had held vide its Judgment dated 09.07.2010 that the defendant was a public financial institution within the meaning of Section 4A(2) of the Companies Act.

8.4 The learned Counsel for the plaintiff, at this stage, took time to analyse the judgment. The matter was posted for hearing on 02.08.2010. However, at the hearing held on 02.08.2010, the plaintiff sought to submit that while it could not be argued after the judgment of the Division Bench in the Finite Infratech case that the defendant was not a public financial institution, it could certainly be contend that the 2nd assignment deed executed in favour of the defendant/IFCI Ltd., did not give the right to the defendant/IFCI Ltd. to enforce its rights u/s 13(2) of the SARFAESI Act. In other words it was contended that the defendant was not a secured creditor within the meaning of Section 13(2) of the SARFAESI Act. The reason for this, according to the plaintiff, is that acquisition of financial assets can only be made by a securitization company or a reconstruction company as defined under the SARFAESI Act. In aid of this proposition my attention was drawn to the provisions of Section 5 read with Section 2(1)(v) and Section 2(1)(za) of the SARFAESI Act.

9. Mr Andhyarujina, learned senior counsel, who appeared for the plaintiff contended that Section 5 of the SARFAESI Act was a non-obstante provision which indicated in no uncertain terms that a financial asset could only be acquired by a securitization company or a reconstruction company. Reliance in this regard was placed on the language of sub Section (1) of section 5. In support of his submission, as indicated hereinabove, he also drew my attention to the definition of a "reconstruction company" as well as that of a "securitization company". My attention was also drawn to the definition of a "borrower", contained in Section 2(1)(f) of the SARFAESI Act. In particular, stress was laid on the second limb of the definition of borrower to suggest that a "borrower"

included a person who becomes a borrower of a securitization company or a reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institutions in relation to such financial assistance. In this regard, reference was made to the definition of "secured creditors" as given in Section 2(1)(zd). In particular, emphasis was laid on Clause (ii) of Section 2(1)(zd), which alluded to the fact that a secured creditor includes a securitization or a reconstruction company.

9.1 Based on the reading of the SARFAESI Act, Mr Andhyarujina argued that since the defendant/IFCI Ltd. was neither a securitization nor a reconstruction company it could not don the robes of a secured creditor. Furthermore, it could not be a secured creditor as it was admittedly not the original lender of the monies to the plaintiff; the original lender being PNB. In other words, it was the submission of Mr Andhyarujina that the enforcement of security interest could either be by the original lender, i.e., PNB, being a secured creditor, or by a securitization or a reconstructions company which fulfill the indices or the requirements of the SARFAESI Act, and consequent thereto acquires financial assets of a bank or financial institution. In view of the above, it was submitted that the notice dated 10.08.2009 ought to be stayed.

10. On the issue as to whether this was a matter which could be agitated before the Debt Recovery Tribunal (in short "DRT") by taking recourse to proceedings u/s 17 of SARFAESI Act, Mr Andhyarujina submitted that in view of the fact that there was a "fundamental" lack of jurisdiction, the plaintiff could not have approached the DRT under the SARFAESI Act, and that the only remedy available to it was by way of the instant suit. In support of this proposition Mr Andhyarujina relied upon the following judgments:

East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta, ; Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and Cochin International Airport Ltd v. Presiding Officer DRT and Ors. 2010 (114) DRJ 427 (DB).

11. Mr Dobhal in rebuttal submitted that the plaint will have to be returned, as this Court had no jurisdiction to deal with the matter. Mr Dobhal submitted that if this submission was accepted then the interim order would automatically stand vacated. In respect of the submission of Mr Andhyarujina that the defendant was not a secured creditor, Mr Dobhal relied upon the provisions of Section 13 of the SARFAESI Act to demonstrate that there was no limiting factor in so far as the attribute of a secured creditor was concerned. Mr Dobhal submitted that banks and financial institutions had entered into several such transactions, whereby debts were assigned through the modality of an assignment deed by securitization/reconstruction companies in their favour (i.e., banks and financial institutions), resulting in transfer of security interest in the financing documents as well as underlying assets. In this regard, he placed reference on the Circular dated 13.07.2005 issued by the Reserve Bank of India (in short "RBI"). In nutshell, it was Mr. Dobhal's submission that the transaction was valid, and

hence no fault could be found with the 2nd assignment deed executed between ACE and defendant/IFCI Ltd.

12. In rebuttal Mr Andhyarujina reiterated the fact that circulars were issued by the RBI under the provisions of Section 35A of the Banking Regulation Act, 1949. The circular, according to him, could not override the provisions of Section 5 of the SARFAESI Act. Mr Andhyarujina also relied upon another circular of the RBI dated 22.04.2009 which prohibited the engagement between one securitization company and another on the ground that they were not within the ambit of SARFAESI Act.

#### Reasons

13. I have heard the learned Counsel for the parties. Before I proceed further let me advert briefly to the object and purpose with which the SARFAESI Act was enacted, and the scheme of the Act. The purpose and the object with which SARFAESI Act was enacted is briefly adverted to in the statement of object and reasons in the SARFAESI Act of 2002 and the Amendment Act of 2004. The relevant extracts of the statement of object and reasons of the 2002 Act for the sake of convenience are extracted hereinbelow:

....There is no legal provision for facilitating securitization of financial assets of banks and financial institutions. 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....

14. Similarly in the Amendment Act of 2004 the object behind enactment of SARFAESI Act was reiterated in the following purpose:

The Securitization and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2002 was enacted to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected thereto. The Act enables the banks and financial institutions to realize long-term assets, manage problems of liquidity, asset liability mismatch and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realize the secured assets and take over the management of the business of the borrower....

15. In short, the purpose and object appeared to be that a legislation had to be put in place to free the financial assets of banks and financial institutions in order

to enable them to deal with mounting non-performing assets, which in the year 2002 (when the Ordinance which preceded the Act was promulgated) was a staggering sum of Rs. 1,10,000/- crores. Thus, SARFAESI Act was enacted to enable the banks and financial institutions inter alia to trade in debt (apart from debt regulation and reconstruction) by acquiring interest in the financing documents as well as the underlying securities. The SARFAESI Act, therefore, enables not only securitization of debt and its regulation but also the enforcement of the rights which accompany the debt in the form of the underlying security. In sum and substance, what it enables is, to trade in receivables which one may obtain in future against consideration paid in praesenti. The consideration could be in cash, or in the form of debentures and bonds.

### Scheme of SARFAESI

16. The SARFAESI Act is, therefore, concerned with the regulation of such receivable debt which is securitized or reconstructed. The securitized or reconstructed debt is subject matter of the regime stipulated in Chapter II of SARFAESI Act while, the enforcement of security interest created in favour of secured creditor is part of the scheme of Chapter III of the SARFAESI Act.

16.1 In this context it may be relevant to seek an overview of the SARFAESI Act.

16.2 Section 2 of the SARFAESI Act deals with a definition of various words and expressions used in the Act. Sections 3 to 12A deal with the regulation of the securitized debt, that is, the financial asset. In that context provisions are made for registration of a securitization or reconstruction company.

16.3 Section 3 of the SARFAESI Act prohibits a securitization and reconstruction company to commence or carry on business of securitization or asset reconstruction without obtaining a certificate of registration as prescribed under said Section, or having a prescribed amount of owned funds.

16.4 Section 4 of the SARFAESI Act empowers the RBI to cancel certificate of registration granted to a securitization company or a reconstruction company on the grounds set out in Clauses 4(a) to (e).

16.5 Section 5 of the SARFAESI Act deals with acquisition of financial assets of banks and financial institutions by a securitization company or a reconstruction company.

16.6 Section 5A deals with a situation which may arise where a borrower has been given financial assistance by more than one bank and, applications for recovery of debts are filed in two or more DRTs; resulting in the securitization company or reconstruction company's having to seek adjudication in any one of those DRTs. The securitization company and reconstruction company have been granted the liberty to approach the Appellate Tribunal of any one of such DRTs for the purposes of seeking transfer of cases to any one of such DRTs.

16.7 Section 6 deals with a situation where the financial assets of a bank or financial institution is acquired by a securitization company or reconstruction company. The bank or financial institution may give notice of such acquisition to the obligor, that is a person liable to originator; the originator being the person who is the owner of the financial assets, which is acquired by the securitization company and reconstruction company for the purpose of securitization and reconstruction of assets (See Section 2(1)(q) and 2(1)(r). Where no notice of acquisition of financial asset is sent by the bank or financial institution, the money received by the obligor shall remain in trust for the benefit of and on behalf of the securitization company or reconstruction company to enable the securitization company or reconstruction company to raise funds by formulating a scheme for acquisition of financial assets. The securitization or reconstruction company are empowered to issue security receipts to a Qualified Institutional Buyer (in short "QIB") in that behalf. The securitization company or reconstruction company, however, are obliged to maintain separate accounts in respect of funds invested by QIB to ensure that on realization of the financial assets the fund received are used for redemption of investments, and payment of assured returns to QIB on such investments under a specific scheme envisaged for this purpose. Any assets acquired under the scheme through investment made by QIB including the assets acquired by use of such funds infused by QIB are required to be held in trust for the benefit of QIB holding the said security receipts. In case of failure to realize the financial assets which underlie the security receipts QIB holding not less than 75% of the total value of the security receipts under the scheme can convene a meeting, and pass a resolution which will be binding on company issuing the security receipts.

16.8 Section 8 of the SARFAESI Act exempts compulsory registration of the security receipts u/s 17(1) of the of the Registration Act, 1908.

16.9 Section 9 of the SARFAESI Act provides for various measures that a securitization company and reconstruction company may take for the purposes of asset reconstruction having regard to the guidelines framed by the RBI on that behalf. The measures include change or takeover of the management of the business of the borrower; to sell or lease a part or whole of the business of the borrower; reschedule payment of debts owed by the borrower; enforcement of security interest in accordance with provisions of the SARFAESI Act; settlement of dues payable by the borrower; and lastly, to take possession of the secured assets in accordance with the provisions of the SARFAESI Act.

16.10 Section 10 of the SARFAESI Act alludes to the other functions that a securitization or reconstruction company can carry out which, includes acting as an agent for a bank or financial institution for recovery of debts from borrower as also to act as manager under Clause (c) of Sub-section 4 of Section 13. Both these functions can be carried out by a securitization or reconstruction company on payment of mutually agreed fee or charges. A securitization or reconstruction company can also act as a receiver, if so appointed, by a Court or Tribunal.

17. Section 11 provides for a statutory arbitration mechanism in respect of disputes which may arise between bank(s) or financial institution(s) or securitization company and reconstruction company or QIB in relation to securitization and reconstruction or non-payment of amount due including interest.

17.1 Section 12 empowers the RBI in public interest or in the interest of the financial system of the country or in order to prevent affairs of a securitization company and reconstruction company being conducted in a manner which is detrimental to the interest of the investor or to the interest of such companies to determine policy and give directions. Section 12A gives power to the RBI to call for a statement and information.

17.2 Chapter III of the SARFAESI Act includes Section 13 - 19. Section 13 stipulates that notwithstanding anything contained in Section 69 of 69A of the Transfer of Property Act, 1882 security interest created in favour of any secured creditor may be enforced without the intervention of the Court or Tribunal by such a creditor in accordance with the provisions of the Act, i.e., SARFAESI Act. The trigger for enforcement of security interest by a creditor is contained in Sub-section (2) of Section 13 which mandates that only when there is a default by a borrower in repayment of secured debt or any instalment thereof, and the borrower's account has been classified by the secured creditor as a non-performing asset; and on the secured creditor giving the borrower a 60 days notice to discharge his liability in full on the debt remaining unsatisfied, the secured creditor be entitled to exercise all or any of the rights stipulated in Sub-section (4) of Section 13.

17.3 Sub-section (3) of Section 13 of the SARFAESI Act provides that the notice, which is required to be issued to the borrower under Sub-section (2) of Section 13 of the Act, shall contain the details of the amount payable by the borrower, and the secured assets intended to be enforced by the secured creditor in the event of failure on the part of the borrower to pay the secured debt.

17.4 Pursuant to the Judgment of the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, by the Act 30 of 2004 Sub-section 3A has been inserted in Section 13, whereby the borrower has been given a right to make a representation or objection to the notice statutorily required to be served under Sub-section (2) of Section 13 by the secured creditor. If the secured creditor were to reject the representation or objection, the same is required to be communicated to the secured creditor within one week of receipt of such representation or objection, and the reasons for coming to such a conclusion. The proviso further indicates that such reason shall not confer a right upon the borrower to prefer an application u/s 17 to the DRT or, to the court of District Judge u/s 17A.

17.5 Sub-section (4) of Section 13 provides various measures that a secured creditor can take, on failure on the part of the borrower, to discharge his debt

within the period of 60 days.

17.6 Sub-section (5) of Section 13 confers power on the secured creditor to give valid discharge when a notice in writing under the provisions of Clause (d) of Sub-section (4) of Section 13 is served on a person to pay the amount to it (i.e., the secured creditor) which is due or may become due to the borrower by the said person.

17.7 Sub-section 6 of Section 13 provides that where a secured creditor transfers assets (after taking over possession or management under Sub-section (4) of Section 13) it shall vest in the transferee, all such rights as if transfer has been made by the owner of such secured assets.

17.8 Sub-section (7) of Section 13 provides that where upon an action taken by a secured creditor against a borrower under Sub-section (4) of Section 13, moneys" are received, then in the absence of any contract to the contrary, the said money shall be held in trust to be applied: firstly, towards cost, charges and expenses; and secondly, towards discharge of dues of the secured creditors; and lastly, towards payment of dues of persons who are entitled thereto in accordance of their rights and interest.

17.9 Sub-section (8) of Section 13 provides that prior to the date fixed for sale or transfer if payment is tendered to the secured creditor together with payments towards cost, charges and expenses then the secured creditor cannot sell or transfer the secured assets.

18. Sub-section 9 of Section 13 provides that where a financial asset has been financed by one or more secured creditors no secured creditor shall be entitled to take any of the measures provided in Sub-section 4 of Section 13 unless the secured creditors representing at least 3/4th in value of the amount outstanding on the record date agree to such an action. The amounts received from the sale of secured assets of a company in liquidation are required to be distributed under the provisions of Section 529A of the Companies Act, and where a secured creditor opts to realise his security instead of relinquishing his security and proving his debt in accordance with proviso to Sub-section (1) of Section 529 of the Companies Act; such secured creditor may retain the sale proceedings after depositing the dues of the workmen in accordance with the provisions of Section 529A of the Companies Act. In case the debts of the workmen cannot be ascertained then the liquidator is liable to intimate the estimated amount of workmen"s dues to the secured creditor, so that the secured creditor can make allocation in respect of the said estimated dues. If there is a short fall in the workmen"s due the secured creditor is liable to pay the balance sums. An undertaking to that effect is required to be given to the liquidator.

18.1. Under Sub-section 10 of Section 13 a secured creditor has been given the liberty to file an application before the DRT or a competent court having jurisdiction to recover such amounts which are not recovered on sale of the secured assets.

18.2 Sub-section 11 of Section 13 gives an additional right to the secured creditor to proceed against the guarantor or to sell the pledged assets without taking recourse to measures specified in Clauses (a) to (d) of Sub-section (4) of Section 13.

18.3 Sub-section 12 of Section 13 enables any of the authorized officers of the secured creditors to act on behalf of the secured creditor.

18.4 Sub-section 13 of Section 13 prohibits a borrower from dealing with his assets by way of sale, lease or otherwise, that is, other than in ordinary course without the prior written consent of the secured creditor after it has been served with a notice under Sub-section 2 of Section 13.

18.5 Section 14 of the SARFAESI Act provides the manner in which assistance can be taken of the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction any of the secured assets are located.

18.6 Section 15 provides for the manner and the effect of taking over of management as contemplated in Clause (a) of Section 9 and Clause (b) of Sub-section (4) of Section 13.

18.7 Section 16 provides that no compensation for loss of office or premature termination would be paid to director or manager notwithstanding any contract to the contrary with the borrower.

18.8 Section 17 provides the mechanism by which a borrower aggrieved by any of the measures taken under Sub-section 4 of Section 13 can approach the DRT.

18.9 Sub-section 18 provides for an appeal against an order passed by the DRT to the Appellate Tribunal. Section 18A & 18B are not relevant presently for the present case, hence I need not elaborate on the same.

19. Section 19 empowers the DRT to compensate a borrower in case it comes to the conclusion that the possession of the assets by the secured creditor is not in accordance with the provisions of the SARFAESI Act and the Rules made thereunder.

19.1 Chapter IV of the SARFAESI Act essentially deals with the mechanism by which the Act is required to operate. It may be noted that Section 22 provides that the Central Registry constituted u/s 20 of the Act would be required to enter the particulars of transactions in a central register amongst others with regard to securitization and reconstruction of financial assets; and creation of security interest.

19.2 Similarly, Section 24 and 25 makes reference to the fact that where there is a modification of the security interest either by securitization company or reconstruction company or secured creditors that information with regard to such modification should be sent to the Central Registrar. While u/s 25 where payments are received in respect of the security interest either by the securitization company or reconstruction company or the secured creditor

information is to be given to the Central Registrar.

19.3 Section 26 makes a distinction between particulars of securitization, reconstruction or security interest which are required to be entered in the Central Register.

19.4 Section 27 - 30 not being relevant are not referred to by me.

19.5 Chapter VI which relates to miscellaneous provisions, which contains Section 31 - 42. For our purposes Section 34 and 35 are relevant. Section 35 clearly provides that no Civil Court shall have jurisdiction to entertain any suit or proceedings in respect of any matter which the DRT or the Appellate Tribunal is empowered by or under this Act to determine, and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of the powers conferred under this Act (i.e., the SARFAESI Act) or under the Recovery of Debts Due To Banks And Financial Institutions Act, 1993. Section 35 provides that the provisions of SARFAESI Act shall have effect notwithstanding anything inconsistent contained therewith in any other law for the time being in force or any instrument having effect by virtue of any law.

## Analysis

20. The scheme of the SARFAESI Act clearly provides that the provisions of Chapter II when compared with Chapter III are both distinct as well as interlinked at the same time. Section 13(1) confers a right on the secured creditor to enforce a "security interest" without the intervention of any Court or Tribunal. Security interest has been defined in Section 2(1)(zf) to mean a right, title and interest of any kind whatsoever upon a property created in favour of any secured creditor and includes any right created by virtue of a mortgage, charge, hypothecation, assignment other than those specified in Section 31 of the Act. "Secured Creditor" has been defined similarly in Section 2(1)(zd) of the Act. "Secured Creditor" means a bank or financial institutions or any consortium or group of banks or financial institutions and includes amongst others in Clause (ii) a securitization company or a reconstruction company. "Secured Debt" has been defined in Section 2(1)(ze) of the Act to mean a debt which is secured by any security interest.

20.1. A bare reading of the definition of the "Secured Creditor" would show that the meaning assigned to a secured creditor is not what is generally understood in common parlance. A secured creditor is generally defined to mean "A creditor who holds some special pecuniary assurance of payment of his debt, such as a mortgage, collateral or lien" (See Black's Law Dictionary Sixth Edition page 1354) or "A secured creditor is one who has security for his debt" (See Stroud's Judicial Dictionary Fifth Edition Volume 5 page 2359). It appears that the legislature has instead of using such well known and accepted definitions consciously chosen to describe a secured creditor by referring to the entities such as "banks" or "financial institutions". Sub-section (1) of Section 13 confers the right simpliciter on a "secured creditor" to enforce security interest without the

intervention of the court; which in the context of the provisions of SARFAESI Act would confer the right of enforcement of security interest on the entities referred to in Section 2(1)(zd). The right which a secured creditor can enforce under Sub-section 1 of Section 13 is a "security interest" which, has been defined under SARFAESI Act to mean, as noticed above, a right, title or interest of any kind created in a property in favour of a secured creditor including right created by way of mortgage, charge, hypothecation or even by an assignment. A bare reading of Section 2(1)(zd) would show that there is no linkage whatsoever, as was sought to be contended by the learned Counsel for the plaintiff, between the creation of security interest in favour of secured creditor [as defined u/s 2(1)(zd)] and the borrower. The definition of a secured creditor is entity specific. Undoubtedly, the borrower, who borrows against securities, monies from a bank or a financial institution furnishes a security, and thus creates secured debt in favour of a bank or financial institution. Similarly, when a securitization or a reconstruction company acquires an asset it becomes a secured creditor by virtue of the definition of a secured creditor as provided in Section 2(1)(zd)(ii). It is also possible, as in the present case, for a bank or financial institutions to acquire security interest in a property by an assignment deed being executed in its favour by a securitization company or a reconstruction company. Since the assignment deed is executed in favour of a bank or a financial institution, as in the present case, (a fact which is not in doubt), it would be a secured creditor within the meaning of Section 13(1) read with Section 2(1)(zd). The submission of the learned Counsel for the plaintiff that since the defendant was not the original lender/creditor and, therefore, could not acquire the status of a secured creditor within the meaning of Sub-section (1) of Section 13 as an acquisition by such a methodology (i.e., assignment) can only be carried out by a securitization company or a reconstruction company, is in my view, contrary to the scheme of the SARFAESI Act.

21. In my opinion, such an interpretation would go against the ethos, purpose and object which the SARFAESI Act is enacted to achieve. It is not the intent of the SARFAESI Act to prevent trade in securities between a securitization company or reconstruction company and a bank or financial institution. I do not find any such limitation in the SARFAESI Act. As indicated hereinabove, while discussing the scheme of the SARFAESI Act this distinction as regards assets and security interest has been retained through out various provisions of the SARFAESI Act. The observations of the Supreme Court in the case of Transcore Vs. Union of India (UOI) and Another, made at page 137 paragraph 8 to 11 as regards tradability of debt, being relevant, are extracted hereinbelow:

8. Securitisation of credit exposures of banks and credit institutions involves a transfer of outstanding balances in loans/advances and packaging into transferable and tradable securities.

9. Mr Joel Telpner has succinctly defined securitization as under:

Securitisation is a financing tool. It involves creating, combining and recombining

of assets and securities.

10. The Basel Accord II has considered securitization in a broader perspective saying:

A traditional securitization is a structure where the cash flow from an underlying pool of exposures is used to service at least two different stratified risk positions or trenches reflecting different degrees of credit risk. Payments to the investors depend upon the performance of the specified underlying exposures, as opposed to being derived from an obligation of the entity originating those exposures.

11. In the context of securitization of standard assets, Reserve Bank of India has defined securitization as "a process by which a single performing asset or a pool of performing assets are sold....

22. Apart from the above, on a perusal of the averments made by the plaintiff and the documents filed along with the plaint, it appears that the original offer of OTS, which was made by PNB (original lender) to the plaintiff, fell through. Thereafter, the plaintiff entered into an MOU with ACE (which is a securitization/reconstruction company). PNB in turn executed the 1st assignment deed in favour of ACE. As noticed above, in the recitals of the assignment deed it has been clearly stated that the original OTS arrived at between the plaintiff and the PNB had not fructified. However, since the parties involved, which is the plaintiff, ACE and PNB renegotiated a settlement it was broadly provided, that on PNB being paid a sum of Rs. 1501.28 lacs, PNB's interest in its financing documents, along with underlying securities, would stand assigned in favour of ACE. The 1st assignment deed was premised on plaintiff fulfilling its obligation towards ACE by repaying the debt as envisaged in the MOU. It appears from the correspondence noticed hereinabove, that the plaintiff defaulted in repayment of debt owed to ACE; which propelled ACE to assign its security interest in favour of the defendant/IFCI Ltd. It is in these circumstances, that the defendant/IFCI Ltd. acquired the status of a secured creditor.

22.1 The reason, I have mentioned these facts, is that it was argued on behalf of the plaintiff that in terms of the original OTS the plaintiff is required to pay only Rs. 70 lacs; however; by virtue of the security interest having been assigned in favour of the defendant/IFCI Ltd., the defendant/IFCI Ltd. has demanded a staggering sum of Rs. 32762 lacs.

22.2 At this juncture it may be relevant to note that the MOU arrived at between the plaintiff and ACE clearly provided that in case there was a default in respect of the obligations undertaken by the plaintiff, ACE would be at liberty to seek recovery of debt as per the loan documents, which the plaintiff had executed with the original lender, i.e., PNB. Therefore, having defaulted and reneged on its obligation it does not, in my view, lie in the mouth of the plaintiff to make a grievance that the defendant/IFCI Ltd., who is the assignee of the security interest cannot enforce rights under financing documents which led to the creation of security interest in the first instance. If the ACE, which is a

securitization company had not assigned its debt to the defendant/IFCI Ltd., then in its capacity as a secured creditor, a role which is not doubted by the plaintiff, it could seek recovery of entire amount in the event of a default, by the plaintiff. By the same logic I do not see why the defendant/IFCI Ltd. cannot seek recovery of the entire amount once under the Scheme of SARFAESI Act, as discussed above, it enjoys the status of a secured creditor. Of course, the plaintiff in an appropriate proceeding would be entitled to take all such defences, which are available to it (as it would) if proceedings are taken out by the defendant/IFCI Ltd. to recover the said dues.

23. What is curious, and this is a question that I had put to Mr Andhyarujina, as to why the plaintiff has chosen not to implead in the present proceeding either the ACE or PNB. In the absence of such an entities, I am constrained to draw an inference that the stand of ACE (as reflected in the correspondence of ACT), that the plaintiff had defaulted, may possibly be correct. However, I do not wish to draw a definitive conclusion as regards this aspect, as the matter is still to go to trial.

24. Suffice it to say that in view of the aforesaid discussion, in my opinion, on execution of the 2nd assignment deed by ACE in favour of the defendant/IFCI Ltd., the defendant/IFCI Ltd. has acquired a status of a secured creditor, and hence is empowered to enforce his rights u/s 13 of the SARFAESI Act.

25. It is not disputed that, in accordance with sub-Section 2 of Section 13 of SARFAESI Act, the defendant had issued a notice dated 10.08.2009, which is impugned in the present proceedings. In view of the provisions of Section 34 of the SARFAESI Act the jurisdiction of this Court to deal with any issue which may arise as a consequences of challenge to notice dated 10.08.2009; is ousted. Furthermore, in terms of the provisions of the very same section this Court is prohibited from granting any injunction in respect of any action, that is, taken or may be taken in pursuance of the power conferred under SARFAESI Act.

26. In view of the aforesaid, in my opinion, injunction order dated 14.10.2009 deserves to be vacated. It is ordered accordingly.

27. Given the view, that I have taken, the judgments cited by Mr. Andhyarujina do not require discussion. The principles enunciated therein are well known, though their applicability to the facts of present case is doubtful.

28. Needless to say any observations made in the order passed today will not effect the merits of the action which the plaintiff may chose to take u/s 17 of the SARFAESI Act.

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In view of the discussion above, I am of the opinion that this Court has no jurisdiction to entertain and try the instant suit. The plaint is returned for presentation in the appropriate court. Necessary endorsement will be made on the plaint by the registry.