
(2015) 07 BOM CK 0217
In the Bombay High Court
Case No : Writ Petition No. 722 of 2015

Kotak Mahindra Bank Ltd.	Vs	APPELLANT
Trupti Sanjay Mehta and Others		RESPONDENT

Date of Decision : 16-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Companies Act, 1956 — Section 4A
Constitution of India, 1950 — Article 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2, 2(g), 2(ha)
Reserve Bank of India Act, 1934 — Section 45-I
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 13(4), 13(4-A)
Transfer of Property Act, 1882 — Section 130, 58, 58(e), 69

Citation : (2015) 5 ABR 81 : (2015) 131 SCL 699

Hon'ble Judges : V.M. Kanade, J;A.R. Joshi, J

Bench : Division Bench

Advocate : Rajani Iyer, Senior Counsel, Rafeeqe Peermohidin, Nikhil Rajani i/b. V. Deshpande and Co., for the Appellant; Umesh Shetty and Roshan D'Souza instructed by Hina Mody, Advocates for the Respondent

Final Decision : Dismissed

Judgement

V.M. Kanade, J—Heard.

2. Rule. Rule is made returnable forthwith. By consent of the parties, Petition is taken up for final hearing.

3. The short question which falls for consideration before us is: whether the Bank to whom a debt has been assigned by the Non-Banking Financial Corporation ("NBFC") is entitled to adopt proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest, Act, 2002 ("SARFAESI, Act")?

4. Brief facts which are relevant for the purpose of deciding this Petition are as

under:-

5. By this Petition which is filed under Article 226 of the Constitution of India, Petitioner is seeking the following substantive reliefs:-

"a. to hold and declare that regardless of the status of the assignor, if the assignee of a debt along with its underlying security is a bank or Financial Institution it is open to such bank or Financial Institution to adopt steps under the RDDB Act/or SARFAESI Act and/or Civil Law."

"b. to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction calling for the records of the case in Appeal No. 235 of 2014 and in Securitization Application No. 39 of 2014, from the Debts Recovery Appellate Tribunal, Mumbai and after considering the legality veracity and correctness of the impugned order dated 20th January, 2015 read with the Trial Courts order dated 28th November, 2014, this Hon'ble Court be pleased to quash and set aside the same or such part thereof as this Hon'ble Court deems fit and proper."

6. Petitioner No. 1 is a Banking Company incorporated and registered under the Companies Act. Respondent No. 1 and 2 claim to be the owners of Flat No. 55, 5th Floor, "B" Wing, Gita Smruti Premises CHS Ltd., Pandita Ramabai Road, Gamdevi, Mumbai - 400 007. This Flat was given and accepted as security by Respondent No. 4 with Respondent No. 3 for advances made to Respondent No. 4. It is an admitted position that Respondent No. 3 is a Non-Banking Financial Institution, which was pleased to assign this debt to the Petitioner by virtue of a Deed of Assignment dated 18/07/2012 alongwith underlying security.

7. Since Respondent No. 4 had committed defaults in re-payment of his debts, Respondent No. 3 invoked the Arbitration Clause in the agreement and finally an award was passed in favour of Respondent No. 3 on 31/07/2010, directing Respondent No. 4 to pay sum of Rs. 75,30,872/- with interest @ 13.24 % per annum with effect from 25/02/2010 to 31/07/2010 and thereafter @ 14% per annum till the actual payment and/or realization. Thereafter, Respondent No. 3, by a Deed of Assignment dated 18/07/2012, transferred, assigned and released in favour of the Petitioner - Kotak Mahindra Bank Ltd. the entire amount payable by Respondent No. 4 to Respondent No. 3.

8. In view of Deed of Assignment, Petitioner started taking steps for realization of the outstanding amount and invoked the provisions of SARFAESI Act. Initially, notice dated 03/07/2013 under section 13(2) of the SARFAESI Act was issued to Respondent No. 4, calling upon him to pay an amount of Rs. 1,10,39,111/- due and payable as on 02/07/2013 with interest @ 14% per annum. No reply was given to the said notice by Respondent No. 4. Petitioner, thereafter, filed an application under section 14 of the SARFAESI Act in the Court of Chief Metropolitan Magistrate, Esplanade, Mumbai. At the time of taking possession, Respondent No. 1 was found in the premises, though Respondent No. 4 had mortgaged the premises to Respondent No. 3, which mortgage was assigned to

the Petitioner.

9. Respondent Nos. 1 and 2 thereafter claiming to be the owners of the said Flat, challenged the action of the Petitioner by filing Securitization Application being Securitization Application No. 39 of 2014 before the DRT, Mumbai on various grounds and more particularly on the ground that they have been dispossessed by the Petitioner without following due process of law. The principal contention, inter alia, which was raised by Respondent Nos. 1 and 2 was that Respondent No. 3 - Citi Financial Consumer Finance Ltd., being a Non-Banking Financial Corporation, was not entitled to invoke the provisions of SARFAESI Act and, secondly, its Assignee i.e. the Petitioner was also not entitled to invoke the provisions of the SARFAESI Act.

10. The Presiding Officer of Debt Recovery Tribunal-II, by his judgment and order dated 28/11/2014, held that since Respondent No. 3 - Citi Financial Consumer Finance Ltd. was not a Financial Institution within the definition of "financial institution" under the SARFAESI Act, Petitioner, despite being a Bank, was not entitled to exercise any powers or authority as a Bank under the provisions of the said Act against Respondent No. 4. The Securitization Application filed by Respondent Nos. 1 and 2 was allowed and the Petitioner was directed to handover possession of the secured assets to Respondent Nos. 1 and 2. The operation of the order was, however, stayed for a period of one month.

11. Petitioner, being aggrieved by the judgment and order passed by the Presiding Officer, DRT-II, filed an appeal being Appeal No. 235 of 2014 on various grounds. It was inter alia contended that even though the Petitioner - Bank was an Assignee of the debt from NBFC, it was entitled to take action under the provisions of the SARFAESI Act. It was contended that the "debt" as defined under section 2(g) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993 ("RDBFI Act") and 2(ha) of SARFAESI Act, included assignment regardless of the fact as to who the primary holder is. The DRAT by its judgment and order dated 20/01/2015 dismissed the appeal filed by the Petitioner and directed the Petitioner to restore the possession of Respondent Nos. 1 and 2.

12. Being aggrieved by both these orders, Petitioner has filed this Petition under Article 226 of the Constitution of India.

13. Ms. Rajani Iyer, the learned Senior Counsel appearing on behalf of the Petitioner submitted that the Bank which is otherwise eligible to have recourse to the provisions of the SARFAESI Act for enforcement of securities, would be debarred from enforcing the security interest assigned to it by a NBFC. She submitted that both the Courts below had committed a fundamental error in misreading the provisions of the SARFAESI Act. She submitted that the Courts below had committed an error in tracing the origin of the debt to NBFC and holding that after the assignment of such debt by NBFC, Banks, Securitisation Companies and Financial Institutions would not be entitled to enforce the same

through the said Act. The learned Senior Counsel appearing on behalf of the Petitioner invited our attention to section 2(ha) of the SARFAESI Act, 2002 and section 2(g) of the RDDBFI Act, which defines the word "debt". She submitted that both the definitions are identical. She submitted that the words "any liability" whether "secured or unsecured or assigned" and "legally recoverable on the date of the Application" were not properly interpreted. She then invited our attention to the words "secured creditor" and "secured asset" which are defined under section 2(zd) and 2(zc). She then invited our attention to the definition of the term "security interest" under section 2(zf). She then invited our attention to Section 5 and submitted that if an assignment is made transferring the debt alongwith security in favour of the secured creditor then security interest is created in favour of the secured creditor. She submitted that Citi Financial Consumer Finance Ltd. had assigned the debt in favour of the Petitioner and, therefore, security interest was created in favour of the Petitioner as per the aforesaid definition and therefore the third parties such as Respondent Nos. 1 and 2 could not question such assignment. She submitted that as long as assignment is permitted as a lawful banking activity from anybody including NBFC in law then the assignment created in favour of the secured creditor, security interest which was capable of being enforced in accordance with the provisions of the said Act by the Petitioner.

14. The learned Senior Counsel appearing on behalf of the Petitioner further submitted that the assignment was a permitted banking activity in law. In support of the said submission, she invited our attention to the Notification of RBI dated 13/07/2005. She submitted that RBI had clearly, by virtue of the said Notification, permitted assignment of debt with or without security in the course of banking activity and, therefore, such an assignment was legally permissible and, therefore, enforceable. She submitted that, therefore, assignment of debt from NBFC was a permissible banking activity clearly falling within the definition of "debt" under RDDBFI Act and SARFAESI Act. It was submitted that the Banks or Financial Institutions could enforce the security regardless of the fact whether assignor itself was entitled to adopt proceedings under the SARFAESI Act. It was submitted that the definition of "security interest" under section 2(zf) created no bar/requirement that only a secured creditor within the meaning of SARFAESI Act could be the assignor. Reliance was placed on the judgment of the Apex Court in ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Ltd. and Others, AIR 2011 SC 1521 : (2011) 1 BC 178 : (2010) 159 CompCas 443 : (2010) 4 CompLJ 241 : (2010) 10 JT 599 : (2010) 10 SCALE 378 : (2010) 10 SCC 1 : (2010) 9 UJ 4531 : (2010) AIRSCW 6214 : (2011) AIRSCW 1427 : (2010) 5 Supreme 369 . She then assailed the judgment and order passed by the DRT and DRAT.

15. The learned Counsel appearing on behalf of the Respondents submitted that under Section 13 of the SARFAESI Act, securitisation measures can be initiated only by a secured creditor, if borrower fails to discharge his liability within the period specified in sub-section 2 of Section 13 of the said Act. He submitted that

the terms "borrower", "financial assistance", "financial asset", "secured creditor", "bank", "financial institution", "securitisation company", "reconstruction company", "secured assets", "secured interest", "originator" and "secured debt" are defined under Sections 2(f), 2(k), 2(l), 2(zd), 2(c), 2(m), 2(za), 2(v), 2(zc), 2(zf), 2(r) and 2(ze) respectively of the SARFAESI Act. He submitted that upon a conjoint reading of the said definitions alongwith Section 13, it was clear that the measures under the SARFAESI Act can be enforced by a secured creditor only against the borrower as defined under the said Act. He submitted that a person would fall within the definition of the term "borrower" only if he had been granted financial assistance by any Bank or Financial Institution and not by any other person or Non-Banking Financial Institution. He submitted that assignment of debt by Non-banking Financial Company to a Bank would not vest any power in Assignee Bank to apply for recovery of the secured debt under the SARFAESI Act and enforce the provisions of Section 13 of the SARFAESI Act. He relied upon the judgment of the Andhra Pradesh High Court in M/s. Deccan Chronicles Holdings Limited and Others Vs. The Union of India and Others, AIR 2014 AP 78 : (2014) 3 ALD 350 : (2014) 2 ALT 740 : (2014) 3 ARBLR 89 : (2014) 4 BC 189 : (2014) 187 CompCas 85

16. He further submitted that ratio of the judgment of the Apex Court in ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Ltd. and Others, AIR 2011 SC 1521 : (2011) 1 BC 178 : (2010) 159 CompCas 443 : (2010) 4 CompLJ 241 : (2010) 10 JT 599 : (2010) 10 SCALE 378 : (2010) 10 SCC 1 : (2010) 9 UJ 4531 : (2010) AIRSCW 6214 : (2011) AIRSCW 1427 : (2010) 5 Supreme 369 , would not apply to the facts of the present case. He then submitted that the guidelines of RBI dated 13/7/2005 on which reliance has been placed by the Senior Counsel for the Petitioner does not confer the bank with the powers of secured creditor as contemplated under the SARFAESI Act. He further submitted that such guidelines were in the nature of executive instructions. He invited our attention to the judgments of the Apex Court in Dr. Mahachandra Prasad Singh Vs. Hon. Chairman, Bihar Legislative Council and Others, AIR 2005 SC 69 : (2004) 9 JT 218 : (2004) 9 SCALE 81 : (2004) 8 SCC 747 : (2004) AIRSCW 6897 : (2004) AIRSCW 6278 : (2004) 8 Supreme 603 and in Maharao Sahib Shri Bhim Singhji Ors. Vs. Union of India (UOI) and Others, AIR 1981 SC 234 : (1981) 1 SCC 166]. He submitted that, in the present case, no debt secured by any security interest was created by any borrower in favour of the secured creditor as defined under the provisions of the SARFAESI Act. He then invited our attention to Section 17 of the SARFAESI Act and submitted that any person aggrieved by the measures under the SARFAESI Act could invoke the provisions of Section 17 of the said Act. He relied upon the following judgments:-

1. United Bank of India Vs. Satyawati Tondon and Others, AIR 2010 SC 3413 : (2010) 3 BC 495 : (2010) 3 CompLJ 585 : (2010) 7 SCALE 696 : (2010) 8 SCC 110 : (2010) 9 SCR 1 : (2010) 9 UJ 4395 : (2010) AIRSCW 7049 : (2010) AIRSCW 5267

2. Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill, AIR 2009 SC 2420 : (2011) 162 CompCas 324 : (2009) 4 CompLJ 433 : (2009) 9 JT 491 : (2009) 8 SCC 366 : (2009) 94 SCL 73 : (2009) 11 SCR 1599 : (2009) 7 UJ 3168 : (2009) AIRSCW 4949

3. Jagdish Singh Vs. Heeralal and Others, (2014) 1 ABR 124 : (2014) 2 AD 647 : (2013) 11 AD 624 : AIR 2014 SC 371 : (2013) 4 BC 744 : (2013) 117 CLA 173 : (2014) 1 CompLJ 307 : (2014) 1 CTC 652 : (2013) 14 JT 173 : (2013) 13 SCALE 359 : (2014) 1 SCC 479 : (2014) 2 SCJ 460

4. Trade Well, a Proprietorship firm and Mr. Suniel K. Mehta, Proprietor of Trade Well Vs. Indian Bank and The State of Maharashtra, (2007) CriLJ 2544 : (2008) 81 SCL 173

He submitted that the Petitioner, being an aggrieved person, is entitled to invoke the provisions of Section 17 of the SARFAESI Act. He submitted that the judgment of the Apex Court in Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Ltd. and Others, (2014) 5 JT 75 : (2014) 3 RCR(Civil) 501 : (2014) 4 SCALE 484 : (2014) 6 SCC 1 is not applicable to the facts of the present case.

FINDINGS:

17. In our view, submissions made by Ms. Rajani Iyer, the learned Senior Counsel appearing on behalf of the Petitioner cannot be accepted and the question framed in para 3 of this judgment will have to be answered in the negative for the following reasons.

18. In order to decide the issue before us, it will be first necessary to take a bird's eye view of the circumstances under which the SARFAESI Act came to be passed.

19. The Apex Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., AIR 2004 SC 2371 : (2004) 2 BC 397 : (2004) 120 CompCas 373 : (2004) 2 CompLJ 209 : (2004) 2 CTC 759 : (2004) 4 JT 308 : (2004) 138 PLR 271 : (2004) 4 SCALE 338 : (2004) 4 SCC 311 : (2004) 51 SCL 513 : (2004) 3 SCR 982 : (2004) 2 UJ 980 : (2004) AIRSCW 2541 : (2004) 3 Supreme 243 has briefly pointed out the historical background which led to passing of the SARFAESI Act. The Apex Court in Mardia Chemicals Ltd (supra) has observed in paragraphs 34, 36, 37, 42, 43, 44, 66 and 67 as under:-

"34. Some facts which need be taken note of are that the banks and the financial institutions have heavily financed the petitioners and other industries. It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time taken is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequential ill effects.

Considering all these circumstances, the Recovery of Debts Due to Banks and Financial Institutions Act was enacted in 1993 but as the figures show it also did not bring the desired results. Though it is submitted on behalf of the petitioners that it so happened due to inaction on the part of the governments in creating Debt Recovery Tribunals and appointing Presiding Officers, for a long time. Even after leaving that margin, it is to be noted that things in the concerned spheres are desired to move faster. In the present day global economy it may be difficult to stick to old and conventional methods of financing and recovery of dues. Hence, in our view, it cannot be said that a step taken towards Securitisation of the debts and to evolve means for faster recovery of the NPAs was not called for or that it was superimposition of undesired law since one legislation was already operating in the field namely the Recovery of Debts due to Banks and Financial Institutions Act. It is also to be noted that the idea has not erupted abruptly to resort to such a legislation. It appears that a thought was given to the problems and Narasimham Committee was constituted which recommended for such a legislation keeping in view the changing times and economic situation whereafter yet another expert committee was constituted then alone the impugned law was enacted. Liquidity of finances and flow of money is essential for any healthy and growth oriented economy. But certainly, what must be kept in mind is that the law should not be in derogation of the rights which are guaranteed to the people under the Constitution. The procedure should also be fair, reasonable and valid, though it may vary looking to the different situations needed to be tackled and object sought to be achieved."

"36. In its Second Report, the Narasimham Committee observed that the NPAs in 1992 were uncomfortably high for most of the public sector banks. In Chapter VIII of the Second Report the Narasimham Committee deals about legal and legislative framework and observed:

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

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the asset without intervention of the court and for reconstruction of the assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting the attention and the matter was considered in depth by the committees specially constituted consisting of the experts in the field. In the prevalent situation where the amount of dues are huge and hope of early recovery is less, it cannot be said that a more

effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the report of the Narasimham Committee, yet another committee was constituted headed by Mr. Andhyarujina for bringing about the needed steps without the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of debts due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances the financial climate world over, if it was thought as a matter of policy, to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor it is a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy."

"37. Next we come to the question as to whether it is on whims and fancies of the financial institutions to classify the assets as non-performing assets, as canvassed before us. We find it not to be so. As a matter of fact a policy has been laid down by the Reserve Bank of India providing guidelines in the matter for declaring an asset to be a non-performing asset known as "RBI's prudential norms on income recognition, asset classification and provisioning - pertaining to advances" through a Circular dated August 30, 2001. It is mentioned in the said Circular as follows:

"1.1 In line with the international practices and as per the recommendations made by the Committee on the Financial System (Chairman Shri M. Narasimham), the Reserve Bank of India has introduced, in a phased manner, prudential norms for income recognition, asset classification and provisioning for the advances portfolio of the banks so as to move towards greater consistency and transparency in the published accounts."

2.1 Non-performing Assets:

"2.1.1 An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank. A "non-performing asset" (NPA) was defined as a credit facility in respect of which the interest and/or installment of principal has remained "past due" for a specified period of time. The specified period was reduced in a phased manner as under:

2.1.2 An amount due under any credit facility is treated as "past due" when it has not been paid within 30 days from the due date. Due to the improvements in the payment and settlement systems, recovery climate, upgradation of technology in the banking system, etc., it was decided to dispense with "past due" concept, with effect from March 31, 2001. Accordingly, as from that date, a Non-performing Asset (NPA) shall be an advance where

- (i) interest and/or installment of principal remain overdue for a period of more than 180 days in respect of a Term Loan,
- (ii) the account remains "out of order" for a period of more than 180 days, in

respect of an Overdraft/Cash Credit (OD/CC),

(iii) the bill remains overdue for a period of more than 180 days in the case of bills purchased and discounted,

(iv) interest and/or installment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes, and

(v) any amount to be received remains overdue for a period of more than 180 days in respect of other accounts.

4.2.2 Banks should establish appropriate internal systems to eliminate the tendency to delay or postpone the identification of NPAs, especially in respect of high value accounts. The banks may fix a minimum cut off point to decide what would constitute a high value account depending upon their respective business levels. The cut off point should be valid for the entire accounting year. Responsibility and validation levels for ensuring proper asset classification may be fixed by the banks. The system should ensure that doubts in asset classification due to any reason are settled through specified internal channels within one month from the date on which the account would have been classified as NPA as per extant guidelines."

From what is quoted above, it is quite evident that guidelines as laid down by the Reserve Bank of India which are in more details but not necessary to be reproduced here, laying down the terms and conditions and circumstances in which the debt is to be classified as non-performing asset as early as possible. Therefore, we find no substance in the submission made on behalf of the petitioners that there are no guidelines for treating the debt as a non-performing asset."

"42. Mainly it is to be considered as to whether there is absolute bar of any remedy to the borrower, before an action is taken under sub-section (4) of Section 13 of the Act in view of non-obstante clause under sub-section (1) of Section 13 and the bar of the jurisdiction of the civil court under Section 34 of the Act. Sub-section (1) of Section 13 begins with "Notwithstanding anything contained" under Section 69 of the Transfer of Property Act any secured interest can be enforced without intervention of the court or Tribunal. Section 69 of the Transfer of Property Act provides as follows:

"69. Power of sale when valid.-(1) A mortgagee, or any person acting on his behalf, shall, subject to the provisions of this section, have power to sell or concur in selling the mortgaged property, or any part thereof, in default of the payment of mortgage-money, without the intervention of the Court, in the following cases and in no others, namely -

(a) where the mortgage is an English mortgage, and neither the mortgagor nor the mortgagee is a Hindu, Mohammadan or Buddhist or a member of any other race, sect, tribe or class from time to time specified in this behalf by the State

Government, in the Official Gazette;

(b) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by the mortgage-deed, and the mortgagee is the Government;

(c) where a power of sale without the intervention of the Court is expressly conferred on the mortgagee by mortgage-deed, and the mortgaged property or any part thereof was, on the date of the execution of the mortgage-deed, situate within the towns of Calcutta, Madras, Bombay, or in any other town or area which the State Government may, by notification in the Official Gazette, specify in this behalf.

(2) No such power shall be exercised unless and until-

(a) notice in writing requiring payment of the principal money has been served on the mortgagor, or on one of several mortgagors, and default has been made in payment of the principal money, or of part thereof, for three months after such service; or

(b) some interest under the mortgage amounting at least to five hundred rupees is in arrear and unpaid for three months after becoming due.

(3) When a sale has been made in professed exercise of such a power, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(4) and (5)

xxx xxx xxx xxx xxx xxx xxx

It is clear that mortgaged property cannot be sold without intervention of the court except in three conditions as enumerated in clauses (a), (b) and (c) of sub-section (1) of Section 69. Clause (a) relates to English mortgage in which a mortgaged property is permitted to be sold without intervention of the court but in the stricto sensu cl. (a) would not be applicable to the present case as it contains many conditions which obviously are not fulfilled in case in hand. It is however, submitted that the provision for enforcing secured debt was made on the lines of the principle governing English mortgage. It is perhaps sought to be canvassed that if that kind of step namely enforcing the secured debt without intervention of the court is permissible in a case of English mortgage such a provision may legitimately be enacted in respect of mortgages like English mortgages. We find much has been argued on the point as to whether the transactions involved in the cases before us amount to English mortgage or not though none of agreements have been placed before us. Distinction between the two have also been tried to be shown and it has been submitted that English

mortgage is in fact transfer of the property absolutely to the mortgagee with a term of retransfer. Section 58(e) pertaining to English mortgage is quoted below:

"58. "Mortgage", "mortgagor", "mortgagee", "mortgage-money" and "mortgage-deed" defined.-

xxx xxx xxx xxx xxx xxx

(d) English mortgage - Where the mortgagor binds himself to repay the mortgage-money on a certain date, and transfers the mortgaged property absolutely to the mortgagee, but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage.

xxx xxx xxx xxx xxx

It is thus pointed out that in English mortgage, absolute transfer of the property already takes place. Hence the question of intervention of the court may not arise. It has a condition of retransfer. It is submitted that by no means it can be said that the transactions in question are like those as English mortgage. On the basis of the above provision it is further submitted that if the condition of retransfer is not invoked the mortgagee is possessed of all rights absolutely in the property. There are different kinds of mortgages as enumerated in section 58 of the Transfer of Property Act. We feel that it would not be necessary to further go into the matter as to whether the agreements in the cases before us amount to English mortgage or not since the non-obstante clause under Section 13(1) of the Act provides that notwithstanding anything contained in Section 69 a secured interest can be enforced without intervention of the court. That is to say it overrides the provision as contained under Section 69 where it is said that in no cases, other than those as enumerated in clauses (a), (b) and (c), a mortgage shall be enforced without intervention of the court. Once the said condition, as noted above, in section 69 of the Transfer of Property Act, the general law on the subject, has been overridden by the special enactment namely the Securitisation Act, it would not make much of a difference as to whether the transactions in question are akin to or amount to English mortgage or not, since irrespective of the kind of the mortgage the secured interest is liable to be enforced without intervention of the court as per the provision contained under Section 13 of the Act. Needless to refer Section 35 of the Act, which provides as under:

"35. The provisions of this Act to override other laws.- The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

"43. It may, however, be worthwhile to mention here as to why and in what circumstances it had been thought necessary to provide a non-obstante clause in sub-section (1) of Section 13 of the Act. In a nutshell, the position as prevailed in 1882 when the Transfer of Property Act was enacted has undergone a sea-

change. What was conceived correct in the situation then prevailing may not be so in the present day situation. Functions of different institutions including the banking and financial institutions have changed and new functions have been introduced for financing the industries etc. New economic and fiscal environment is around more than 100 years later after the enactment of the Transfer of Property Act. In this connection it has been pointed out on behalf of the respondents that Rajamannar Committee was appointed by Government of India which submitted its report in 1977 indicating the effect of the changed situation and the relevance of the provisions of the Transfer of Property Act in context thereof. Mr. Salve has drawn our attention to the Rajamannar Committee report as quoted in the Narasimham Committee Report 1998, which reads as under :

"The Rajamannar Committee appointed by the Government of India gave its report in 1977 pointing out the development of the law of mortgages and explaining how it had become completely anachronistic in the latter part of the 20th century where mortgages had become a very important instrument to facilitate development of commercial credit. The Rajamannar Committee's recommendations, that were extracted in the Narasimham Report (1998) stated ".... thus a distinction was made in the original schemes as regards mortgages to which Europeans were parties mortgages where the properties were situated in the presidency towns, and mortgages where the mortgages were of native origin and mortgages where the property was situate in the mofussil. This distinction was based on the fact that in the mofussil, it was the money lenders with their unscrupulous methods, who were, by and large, the persons lending against mortgage of immovable property evidently, the situation that prevailed at the time of the enactment of the Transfer of Property Act 1882, justify the legislative action of the then Government of India in limiting the right of sale without the intervention of court economic conditions have vastly changed since the enactment of the Transfer of Property Act in 1882. The role of the unscrupulous money lenders dominating in the field of credit is no longer valid with our reliance on institutionalization of credit, the banks another financing institutions are the major moneylenders of credit today. In their dealings with their mortgagors, it is anachronistic to assume that they will adopt the unscrupulous moneylenders. (Paragraph 1.2.19).

In fact in extending credit, the necessity for suitable safeguards to banks and other financing institutions is now rightly stressed. It is understandable that the legal framework is essentially conceived to deal with unscrupulous moneylenders is no longer appropriate to deal with credit given by banks and other financing institutions..."

"44. As a matter of fact, the Narasimham Committee also advocates for a legal framework which may clearly define the rights and liabilities of the parties to the contract and provisions for speedy resolution of disputes, which is a sine qua non for efficient trade and commerce, especially for financial intermediation. Even the guidelines of the Reserve Bank of India in relation to classifying the NPA's while

stressing the need of expeditious steps in taking a decision for classifying and identification of NPA's says, a system be evolved which should ensure that the doubts in asset classification are settled through specified internal channels within the time specified in the guidelines. It is thus clear that while recommending speedier steps for recovery of the debts it is envisaged by all concerned that within the legal framework, such provisions may be contained which may curtail the delays. Nonetheless dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved."

"66. On behalf of the petitioners one of the contentions which has been forcefully raised is that existing rights of private parties under a contract cannot be interfered with, more particularly putting one party to an advantageous position over the other. For example, in the present case, in a matter of private contract between the borrower and the financing bank or institution through impugned legislation rights of the borrowers have been curtailed and enforcement of secured assets has been provided for without intervention of the court and above all depriving them the remedy available under the law by approaching to the civil court. Such a law, it is submitted, is not envisaged in any civilized society governed by rule of law. As discussed earlier as well, it may be observed that though the transaction may have a character of a private contract yet the question of great importance behind such transactions as a whole having far reaching effect on the economy of the country cannot be ignored, purely restricting it to individual transactions more particularly when financing is through banks and financial institutions utilizing the money of the people in general namely, the depositors in the banks and public money at the disposal of the financial institutions. Therefore, wherever public interest to such a large extent is involved and it may become necessary to achieve an object which serves the public purposes, individual rights may have to give way. Public interest has always been considered to be above the private interest. Interest of an individual may, to some extent, be affected but it cannot have the potential of taking over the public interest having an impact in the socio-economic drive of the country. The two aspects are inter-twined which are difficult to be separated. There have been many instances where existing rights of the individuals have been affected by legislative measures taken in public interest. Certain decisions which have been relied on behalf of the respondents, on the point are *V. Ramaswami Ayyangar and Others Vs. T.N.V. Kailasa Thevar*, AIR 1951 SC 189 : (1951) 2 SCR 292 . In that case by enacting the Madras Agriculturist's Relief Act, relief was given to the debtors who were agriculturists as a class, by sealing down their debts. The validity of the Act was upheld though it affected the individual interest of creditors. In *Dahya Lal and Others Vs. Rasul Mohammed Abdul Rahim*, AIR 1964 SC 1320 : (1963) 3 SCR 1 , the tenants under the

Provisions of the Bombay Tenancy Act, 1939 were given protection against eviction and they were granted the status of protected tenant, who had cultivated the land personally six years prior to the prescribed date. It was found that the legislation was with the object of improving the economic condition of the peasants and for ensuring full and efficient use of land for agricultural purpose. By a statutory provision special benefit was conferred upon the tenants in Madras City where they had put up a building for residential or non-residential purposes and were saved from eviction, it did though affect the existing rights of the landlords. See also *Swami Motor Transport (P) Ltd. and Another Vs. Sri Sankaraswamigal Mutt and Another*, AIR 1963 SC 864 : (1963) 1 SCR 282 Supp , *Raval and Co. Vs. K.G. Ramachandran and Others*, AIR 1974 SC 818 : (1974) 1 SCC 424 : (1974) 2 SCR 629 . Similarly it is also to be found that in the case reported in *Kanshi Ram and Another Vs. Lachhman (Dead) through Lrs. and Others*, AIR 2001 SC 2393 : (2001) 5 JT 324 : (2001) 4 SCALE 253 : (2001) 5 SCC 546 : (2001) 3 SCR 803 : (2001) AIRSCW 2478 : (2001) 5 Supreme 9 the law granting relief to the debtors protecting their property was upheld. Also see *Pathumma and Others Vs. State of Kerala and Others*, AIR 1978 SC 771 : (1978) 2 SCC 1 : (1978) 2 SCR 537 , *Fatehchand Himmatlal and Others Vs. State of Maharashtra*, AIR 1977 SC 1825 : (1977) 2 SCC 670 : (1977) 2 SCR 828 , *Ramdhandas and Another Vs. The State of Punjab*, AIR 1961 SC 1559 : (1961) 3 FLR 48 : (1961) 2 LLJ 102 : (1961) 63 PLR 835 : (1962) 1 SCR 852 ."

"67. It is well known that in different States Rent Control legislations were enacted providing safeguards to the sitting tenants as against the existing rights of the landlords, which before coming into force of such law were governed by contract between the private parties. Therefore, it is clear that it has always been held to be lawful, whenever it was necessary in the public interest to legislate irrespective of the fact that it may affect some individuals enjoying certain rights. In the present we find that case the unrealized dues of banking companies and financial institutions utilizing public money for advances were mounting and it was considered imperative in view of recommendations of experts committees to have such law which may provide speedier remedy before any major fiscal set back occurs and for improvement of general financial flow of money necessary for the economy of the country that the impugned Act was enacted. Undoubtedly such a legislation would be in the public interest and the individual interest shall be subservient to it. Even if a few borrowers are affected here and there, that would not impinge upon the validity of the Act which otherwise serves the larger interest."

Similarly, in *Transcore Vs. Union of India (UOI) and Another*, AIR 2007 SC 712 : (2007) 1 BC 33 : (2007) 135 CompCas 1 : (2007) 1 CompLJ 1 : (2006) 5 CTC 753 : (2006) 12 SCALE 585 : (2008) 1 SCC 125 : (2007) 73 SCL 11 : (2006) 10 SCR 785 Supp also, the Apex Court has briefly discussed the background and the scope and ambit of some of the sections of SARFAESI Act. Following three questions fell for consideration of the Apex Court in *Transcore* (supra):-

(i) Whether the banks or financial institutions having elected to seek their remedy in terms of DRT Act, 1993 can still invoke the NPA Act, 2002 for realizing the secured assets without withdrawing or abandoning the O.A. filed before the DRT under the DRT Act.

(ii) Whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

(iii) Whether ad valorem court fee prescribed under Rule 7 of the DRT (Procedure) Rules, 1993 is payable on an application under Section 17(1) of the NPA Act in the absence of any rule framed under the said Act.

The Apex Court answered all these questions in favour of the Bank and against the principal borrower in para 68 of the said judgment. Again, in this judgment, the entire scheme of the Act and the relevant provisions have been considered. The Apex Court in Transcore (supra) has observed in paragraphs 52, 53, 55 and 56 as under:-

"52. The short question under this head is whether recourse to take possession of the secured assets of the borrower under Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property."

"53. Mr. N.C. Sahni and Mr. Pankaj Gupta, learned advocates appearing on behalf of the respective borrowers submitted that Section 13(4) of the NPA Act empowers the secured creditor to take possession of the secured immovable assets of the borrower on expiry of sixty days and notice served under Section 13(2) of that Act. It is pointed out that in many cases, the banks/FIs have taken actual physical possession whereas in other cases they have taken only a symbolic possession. Learned advocates submitted that in Kalyani Sales Company and Another Vs. Union of India (UOI) and Another, AIR 2006 P&H 107 : (2006) 1 BC 1 : (2006) 142 PLR 1 : (2006) 70 SCL 177 the High Court has rightly held that if physical possession is taken on expiry of sixty days, the remedy of application under Section 17 of the NPA Act by the borrower would become illusory and meaningless as the borrower or the person in possession would be dispossessed even before adjudication of the objections by the tribunal. Learned advocates further submitted that under Section 13(8), the bank/FI is prevented from selling the secured assets, if the dues of the secured creditor with all costs, charges and expenses are tendered to the secured creditor at any time before the date fixed for sale. Learned advocates pointed out that under Rule 8(1) of the 2002 Rules, a secured creditor is empowered to take possession as per notice appended in terms of Appendix IV. That notice cautions the borrower not to deal with the property. Learned advocates submitted that notice in terms of Rule 8(1) of the 2002 Rules operates as attachment. It contemplates a symbolic possession. Learned advocates submitted that actual physical possession of immovable assets can be taken under Rule 8(3), in cases where there is a vacant plot or a property which is lying unattended, but where the

immovable property is in actual physical possession of any person, the person in possession cannot be dispossessed by virtue of a notice under Rule 8(1); that actual physical possession is to be delivered only after confirmation of sale under Rule 9(6) read with Appendix V under which the authorised officer is empowered to deliver the property to the purchaser free from all encumbrances in terms of Rule 9(9) of the 2002 Rules. Learned advocates, therefore, submitted that the High Court was right in holding that the borrower or any other person in possession of the immovable property cannot be physically dispossessed at the time of issuing notice under Section 13(4) of the NPA Act so as to defeat the adjudication of his claim by the DRT under Section 17 of NPA Act, and that, physical possession can be taken only after the sale is confirmed in terms of Rule 9(9) of the 2002 Rules."

"55. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/tribunals."

"56. Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realizing the secured assets. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4-A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. (Emphasis supplied). Section 14 of the NPA Act states that where the

possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL Rule 1 CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorized officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002

Rules."

20. It will be also relevant to consider the objects and reasons of the SARFAESI Act which are as under:-

"Statement of Objects and Reasons.- The financial sector has been one of the key "drivers in India"s efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation 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 nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21 June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery of reconstruction."

"2. It is now proposed to replace the Ordinance by a Bill, which, inter alia contains provisions of the Ordinance to provide for

(a)

(b)

(c)

(d)

(e)

(f)

(g) defining "security interest" as any type of security including mortgage and

change on immovable properties given for due repayment of any financial assistance given by any bank or financial institution;

(h) empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e., classification of the borrower's account as non-performing asset in accordance with the directions given or under guidelines issued by the Reserve Bank of India from time to time;

(i).

(j).

(k)

(l) application of the proposed legislation initially to banks and financial institutions and empowerment of the Central Government to extend the application of the proposed legislation to non-banking financial companies and other entities;

(m)"

Similarly, for the purpose of deciding this issue, it will be necessary to consider some of the key definitions of the words which are defined under the SARFAESI Act under section 2 which are as under:-

Definitions:

"2(f) "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance;"

"2(k) "financial assistance" means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or financial institution;"

"2(c) "bank" means--

(i) a banking company; or

(ii) a corresponding new bank; or

(iii) the State Bank of India; or

(iv) a subsidiary bank; or

(iv-a) a multi-State co-operative bank; or

(v) such other bank which the Central Government may, by notification, specify for the purposes of this Act;"

"2(m) "financial institution" means

(i) a public financial institution within the meaning of section 4A of the Companies Act, 1956 (1 of 1956);

(ii) any institution specified by the Central Government under sub-clause (ii) of clause (h) of section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993);

(iii) the International Finance Corporation established under the International Finance Corporation (Status, Immunities and Privileges) Act, 1958 (42 of 1958);

(iv) any other institution or non-banking financial company as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934), which the Central Government may, by notification, specify as financial institution for the purposes of this Act;"

2(v) "reconstruction company" means a company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of asset reconstruction;"

"2(za) "securitisation company" means any company formed and registered under the Companies Act, 1956 (1 of 1956) for the purpose of securitisation;"

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

"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) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation 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;"

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

"2(r) "originator" means the owner of a financial asset which is acquired by a securitisation company or reconstruction company for the purpose of securitization or asset reconstruction;"

"2(ze) "secured debt" means a debt which is secured by any security interest;"

21. It has to be borne in mind that provisions of Section 13 have to be read alongwith the definitions of the aforesaid words and, if so read, it becomes clear that the measures under the SARFAESI Act can be enforced by a secured creditor only against the borrower as defined under the said Act under the eventualities mentioned under the said section. Since these measures have to be taken against the borrower as defined under the said Act, the term "borrower" becomes very relevant. Section 2(f) defines "borrower" to mean any person who has been granted financial assistance by any bank or financial institution and the borrower must have given financial guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution or he is a person who has become borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance. This definition therefore clearly spells out that only if the financial assistance which is given to the borrower is assigned by reconstruction company or securitisation company to the bank or vice-versa, only such an assignment can be covered and not any other assignment. Therefore, as a natural corollary, it can be seen that measures under section 13(4) against the borrower can be initiated by a bank or financial institution to whom it has given financial assistance or by reconstruction company or securitisation company which has acquired the financial assistance from any bank or financial institution.

(Emphasis supplied).

22. Upon a conjoint reading of the definitions reproduced hereinabove alongwith Section 13 of the said Act read with Sections 17 and 18, it can be seen that though the word "debt" under section 2(ha) of the SARFAESI Act and section 2(g) of the RDBFI Act is identical bringing within its fold any debt whether secured or unsecured or assigned,....by virtue of the definitions quoted hereinabove under the SARFAESI Act and Sections 13, 17, 18 and 31 only the Bank who has assigned the debt to a Financial Institution and vice versa can take recourse to Section 13 sub-clause (2) and (4) of the said Act for the following reasons.

Definition of "borrower" is defined under section 2(f) to mean a person who fulfills two criteria viz (1) who has been granted financial assistance by any Bank or Financial Institution, (2) who has given any guarantee or created any mortgage or pledge as a security for financial assistance granted by any Bank or Financial Institution and (3) it includes a person who becomes a borrower of Securitisation Company or Reconstruction Company upon acquisition by it of any rights or interest of any Bank or Financial Institution in relation to such assistance. The third part, therefore, clearly restricts definition of the term "borrower" of a Bank or Financial Institution who acquires any right or interest and specifically excludes any other type of Institution such as Non-banking Financial Institution or a private person. As a corollary therefore it is clear that by virtue of the restrictive definition, only debts which are assigned to a Bank

from another Financial Institution or to the Financial Institution from a Bank, such debts alone are covered under the term "borrower". If the legislature intended to expand the scope of "borrower" to mean any debt assigned to a Bank or Financial Institution by a Non-Banking Financial Institution or any other private person, it would not have excluded a Non-Banking Financial Institution or any other person in the last part of the definition. The term "borrower" is one of the crucial terms which is to be considered because security interest of borrower within the definition of section 2(f) alone can be enforced under Chapter-III, Section 13 sub-clause (2) and (4) of the said Act.

In our view, therefore, though the term "debt" as defined under the RDDBFI Act and SARFAESI Act includes the words "or assigned" such assignment therefore in view of the definition of the term "borrower" in section 2(f) would have to be restricted to a debt of borrower which is assigned to a Bank by a Financial Institution or vice versa.

The Objects and Reasons of the SARFAESI Act and various provisions of the said Act as well as the mechanism which has been provided under the said Act clearly disclose that this mechanism which is non-adjudicatory in nature has been designed only for the benefit of Banks and Financial Institutions and not for other categories such as Non-banking Financial Institutions etc. This is fortified from the other terms which are defined under the SARFAESI Act. The term "financial assistance" which is defined in section 2(k), again, is restricted to any Bank or Financial Institution. At the same time, definition of "financial institution" under section 2(m) reveals that it does not include a Non-banking Financial Institution nor the term "bank" defined in section 2(c) includes such NBFC. The term "secured creditor" under section 2(zd) is restricted to any Bank or Financial Institution or any consortium or group of Banks or Financial Institutions but does not include a Non-banking Financial Institution. The word "secured creditor", again, is used in the definition of the word "security interest" under section 2(zf) which restricts the meaning of "security interest" which is created in favour of any secured creditor which again means a Bank or a Financial Institution. The word appearing in section 2(zf) viz "assignment" other than those words specifically mentioned in Section 31 therefore will have to be given a restrictive meaning as an assignment by a Bank or Financial Institution and not the assignment made by NBFC.

Lastly, Section 5 of the said Act deals with acquisition of rights and interest in financial assets. Sub-clause (5) of Section 5 was inserted by Amendment Act No. 1 of 2013 with effect from 15/01/2013 and it permits the Securitisation Company or Reconstruction Company an acquisition of financial assets under sub-section (1) which deals with acquisition of financial assets and any Bank or Financial Institution can substitute its name in any pending suit, appeal or other proceedings before the DRT or Appellate Tribunal etc. Chapter-III deals with enforcement of security interest and section 13(2) and (4) makes it clear that a borrower who fails to discharge his liability in full within a period prescribed in

sub-section (2), again, against such a borrower, a secured creditor can take recourse to recover his secured debt. Consequently, therefore, only against such a borrower the debt which is defined under section 2(f) can be enforced under Section 13.

Taking into consideration the scheme of the Act, Objects and Reasons and various provisions of the SARFAESI Act, we have no hesitation in holding that the debt which is assigned to a Bank or Financial Institution by Non-banking Financial Institution is not covered within the definition of the term "borrower" and therefore cannot be enforced under Section 13 of the said Act. The submission made by Ms. Rajani Iyer, the learned Senior Counsel appearing on behalf of the Petitioner, therefore, cannot be accepted and we concur with the view taken by the DRT and DRAT.

23. Ms Rajani Iyer, the learned Senior Counsel appearing on behalf of the Petitioner has relied on the judgment of the Apex Court in ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Ltd. and Others, AIR 2011 SC 1521 : (2011) 1 BC 178 : (2010) 159 CompCas 443 : (2010) 4 CompLJ 241 : (2010) 10 JT 599 : (2010) 10 SCALE 378 : (2010) 10 SCC 1 : (2010) 9 UJ 4531 : (2010) AIRSCW 6214 : (2011) AIRSCW 1427 : (2010) 5 Supreme 369 . Relying on the said judgment, she submitted that the Apex Court has considered, whether assignments were permissible banking activity and whether assignments from a Bank, Financial Institution or NBFC to a Bank, Financial Institution and NBFC is legal and valid. She submitted that the Apex Court, while relying on the guidelines issued by the Reserve Bank of India, upheld the guidelines and further held that assignment from/to NBFC and Financial Institution was valid and legal. She further submitted that City Financial Consumer Finance Ltd. is NBFC and the assignment from NBFC to present Petitioner is permitted under the RBI guidelines. She further submitted that the debt therefore in the hands of the Bank is a "secured debt" within the meaning of section 2(ze) and 2(zf) of the SARFAESI Act and the Petitioner was entitled to enforce the secured asset under the provisions of the SARFAESI Act.

24. In our view, the said submission is without any substance. Perusal of the said judgment and order in ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Ltd. and Others, AIR 2011 SC 1521 : (2011) 1 BC 178 : (2010) 159 CompCas 443 : (2010) 4 CompLJ 241 : (2010) 10 JT 599 : (2010) 10 SCALE 378 : (2010) 10 SCC 1 : (2010) 9 UJ 4531 : (2010) AIRSCW 6214 : (2011) AIRSCW 1427 : (2010) 5 Supreme 369 reveals that the Apex Court was called upon to consider a question as to whether assignment of debts between Non-banking Financial Institutions and Banks was a permissible banking business. While deciding the said issue, the Apex Court, relying on RBI policy, held that it was a permissible banking business. In the said case, the question which fell for consideration and which had been reproduced in para 2 of the said judgment was as under:-

"Whether inter se transfer of non-performing assets ("NPA", for short) by the

banks is illegal under the Banking Regulation Act, 1949 ("the BR Act, 1949", for short) as held by the Gujarat High Court in the impugned judgment?"

Answering the said question, after relying on RBI directives, the Apex Court held that guidelines issued by RBI dated 13/07/2005 have statutory force and are not ultra vires the BR Act, 1949 and it therefore held that assignment of debts of NBFC by one Bank to another Bank is permissible under 1949 Act and not violative of section 130 of the Transfer of Property Act, 1882. In our view, taking into consideration the facts of the said case, the issue which fell for consideration before the Apex Court therefore was entirely different. The issue which falls for consideration before this Court in this case is : whether the Bank to whom a debt has been assigned by the Non-Banking Financial Corporation ("NBFC") is entitled to adopt proceedings under the the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest, Act, 2002? This issue being completely distinct and different from the issue decided by the Apex Court in ICICI Bank Limited Vs. Official Liquidator of APS Star Industries Ltd. and Others, AIR 2011 SC 1521 : (2011) 1 BC 178 : (2010) 159 CompCas 443 : (2010) 4 CompLJ 241 : (2010) 10 JT 599 : (2010) 10 SCALE 378 : (2010) 10 SCC 1 : (2010) 9 UJ 4531 : (2010) AIRSCW 6214 : (2011) AIRSCW 1427 : (2010) 5 Supreme 369 , in our view, ratio of the said judgment will certainly not apply to the facts of the present case. For the same reasons, guidelines issued by RBI dated 13/07/2005 also cannot be relied upon for answering the question raised in this Petition.

25. Reliance was also placed by the learned Senior Counsel appearing on behalf of the Petitioner on the judgment of the Delhi High Court in Kotak Mahindra Bank Limited Vs. Stiefel Und Schuh India Ltd. and Others, (2009) 3 CompLJ 514 : (2009) 5 ILR Delhi 12 . In the said case, original lender was NBFC viz. SBI Home Finance which filed proceedings in the Civil Court for recovery of a mortgaged debt. However, during the pendency of the suit, the debt was assigned to a Bank viz. the State Bank of India, which, in turn, assigned it to Kotak Mahindra Bank Ltd. After assignment, Kotak Mahindra Bank Ltd. applied for transfer of proceedings from Civil Court to DRT on the ground that subsequent assignee - Kotak Mahindra Bank Ltd. was a Bank under RDDB & FI Act, 1993. The learned Single Judge dismissed the application for transferring it to DRT. Appeal Court, however, reversed the decision and held that remedies available in the DRT were permitted to Kotak Mahindra Bank and therefore proceedings in the Civil Court were expressly barred.

26. In our view, it is not possible to accept the view taken by the Delhi High Court. Secondly, Delhi High Court was not required to consider the issue as to whether a debt which is assigned by a Non-banking Financial Institution to a Bank or Reconstruction Company could be enforced under the SARFAESI Act and, therefore, ratio of the said judgment, in any case, will not apply to the facts of the present case.

CONCLUSION:

27. For the aforesaid reasons the question framed in para 3 of this judgment is answered in the negative. We therefore decline to interfere with the order passed by DRT and confirmed by DRAT. Writ Petition is dismissed.

28. At this stage the learned Counsel for the Petitioner seeks extension of stay for a period of eight weeks in view of the statement made by the Counsel for the Respondents. The request is declined since no stay was granted by DRT, DRAT or by this Court.