

(2012) 03 KAR CK 0065

In the Karnataka High Court

Case No : Writ Petition No. 43211 of 2011 (GM DRT)

K.R. Krishnegowda and Another

APPELLANT

Vs

Chief Manager/Authorised Officer, Kotak Mahindra Bank

RESPONDENT

Date of Decision : 27-03-2012

Acts Referred:

Companies Act, 1956 — Section 529 (1), 529 A
Securitization and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 — Section 13 (2), 13 (4), 14
Security Interest (Enforcement) Rules, 2002 — Rule 4, 8, 8 (1), 8 (2), 9 (1)

Citation : AIR 2012 Kar 116 : (2013) 1 BC 445 : (2013) 112 CLA 493 : (2012)
172 CompCas 145 : (2012) ILR (Kar) 1479 : (2012) 5 KarLJ 626

Hon'ble Judges : Vikramajit Sen, C.J;B.V. Nagarathna, J

Bench : Division Bench

Advocate : Swetha P. for M/s H.M. Mariyappa and associates, for the Appellant;
K.N. Krishna Rao, for the Respondent

Final Decision : Allowed

Judgement

B.V. Nagarathna J.

1. This writ petition raises the issue of the requisite procedure to be followed prior to taking possession of a secured asset under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act", for the sake of brevity). The petitioners are debtors, who have filed this writ petition, being aggrieved by the order dated September 6, 2011 passed by the Debts Recovery Appellate Tribunal, Chennai, (DRAT) in R. A. (S.A.)/97 of 2010, as well as the order dated December 27, 2008, passed by the Deputy Commissioner-cum-District Magistrate, in respect of property belonging to the second petitioner, which is situated at B. S. K. III Stage, Bangalore, invoking the provisions of sections 13(4) and 14 of the Act, consequent upon the notice issued u/s 13(2) of the Act. Since the petitioners had failed to repay the debt to the respondent-bank, notice u/s 13(2) of the Act was issued to the first petitioner on July 2, 2008, who is the

principal borrower as well as to the second petitioner who is the guarantor for the loan of Rs. 20 lakhs which was disbursed subject to deposit of title deeds by entering into a registered mortgage deed dated January 24, 2006. The said notice was issued on the premise that there was non-repayment of the loan. The same was replied to on August 3, 2008.

2. The grievance of the petitioners is that after receipt of the reply, the respondent-bank without complying with the procedure prescribed u/s 13(4) of the Act took steps u/s 14 for the purpose of taking possession. More particularly, the contention of the petitioners is that possession was sought to be taken without issuing any prior notice. Therefore, the order of the Deputy Commissioner/District Magistrate dated December 27, 2008, was assailed in S. A. No. 283 of 2009 before the Debts Recovery Tribunal (DRT) by order dated July 20, 2009, contending that there was non-compliance of the principles of natural justice. Therefore, three months' time was granted to the petitioners to regularise the loan account and at the same time, reserving liberty to the respondent-bank, to issue fresh possession notice in accordance with law before taking recourse to section 14 of the Act. The said order was assailed by the respondent-bank before the DRAT, which set aside the order of the DRT restraining the bank from invoking the provisions of section 14 of the Act. It is against the said order that this writ petition has been filed.

3. The respondent-bank has filed statement of objections seeking dismissal of the writ petition.

4. We have heard learned counsel for the parties.

5. It is contended on behalf of the petitioners that Chapter III of the Act deals with enforcement of security interest u/s 13(2). A notice with regard to repayment of secured debt has to be issued in case there is a default and the account of the borrowers is classified as a non-performing asset, granting 60 days' time from the date of the notice to repay in full the liabilities to the secured creditor, failing which rights under sub-section (4) of section 13 could be enforced. In the instant case, no doubt, notice u/s 13(2) has been issued, to which a reply has also been given. Not being satisfied with the reply given by the petitioners/borrowers, respondent-bank has taken recourse to take possession of the secured asset, i.e., the immovable property at BSK III Stage, Bangalore-84. However, in doing so, there has been total non-compliance of the principles of natural justice as well as the procedure envisaged under the Act as well, as the rules framed under the Act.

6. Drawing our attention to rules 4 and 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "the Rules"), it is contended that possession of the secured asset can be taken by issuance of a notice to the borrowers or by affixing it on the place of the property. The said notice has also to be published in two leading newspaper in one vernacular language seven days prior to the date of taking possession and thereafter possession of the

immovable property can be taken. However, in the instant case, what the respondent-bank has resorted to is filing an application before the Deputy Commissioner/District Magistrate, u/s 14 who has directed physical possession of the property be taken. That in the absence of issuance of any notice as prescribed under the Rules before initiating action under sub-section (4) of section 13 of the Act and the District Magistrate also proceeding to pass orders, for taking of physical possession without issuance of notice to, the petitioners u/s 14 of the Act is in total violation of the principles of natural justice. Therefore, learned counsel for the petitioners, relying on certain decisions, has contended that the action of the respondent-bank being a transgression in law, the same requires to be set aside.

7. Per contra, counsel for the respondent-bank has sought to justify the action initiated by the bank by stating that section 13 or the Rules do not contemplate issuance of notice before taking possession, but after the possession is taken, notice would be issued prior to sale of the secured asset and therefore, there is no infraction of the Act or the Rules.

8. Before proceeding to answer the issue raised in this writ petition, it would be useful to extract sections 13, 14 and 17 of the Act and rules 4 and 8 of the Rules :

"13. Enforcement of security interest.--(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

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

Provided that the reasons so communicated or the likely action of the secured

creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the Court of District Judge u/s 17A.

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

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

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

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

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

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

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

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

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

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

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors :

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) :

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator :

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.--For the purposes of this sub-section,--

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this, Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

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

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor.

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

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

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

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

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

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(5) Any application made under sub-section. (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application :

Provided that the Debts Recovery Tribunal may, from time to time, extend the

said period for reasons to be recorded in writing so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (i).

(6) If the application, is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal. (7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

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8. Sale of immovable secured assets.--(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix-IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in sub-rule (1) shall also be published as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

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

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

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

- (b) by inviting tenders from the public;
- (c) by holding public auction; or
- (d) by private treaty.

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

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,--

- (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
- (b) the secured debt for recovery of which the property is to be sold;
- (c) reserve price, below which the property may not be sold;
- (d) time and place of public auction or the time after which sale by any other mode shall be completed;
- (e) depositing earnest money as may be stipulated by the secured creditor;
- (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the internet.

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing."

9. Sub-section (1) of section 13 begins with a non obstante clause which enables the secured creditor to enforce any security interest created in its favour without the intervention of the court or the Tribunal in accordance with the provisions of the Act. Sub-section (2) of section 13 prescribes the issuance of a notice granting a period of 60 days" time from the date of the notice for the discharge of the liabilities to the secured creditor by the borrower, failing which the secured creditor is entitled to exercise all or any of the rights under sub-section (4). The contents of notice are mentioned in sub-section (3) of section 13. Sub-section (3A) of section 13, which has been inserted by an amendment with effect from November 11, 2004, enables a borrower to make a representation or object to the notices issued under sub-section (2) of section 13 on consideration of which, communication of the non-acceptance of the same shall have to be issued to the borrower, which however, is not justiciable as per the proviso thereto. In case the borrower fails to discharge his liability in full within the period of 60 days as

specified in sub-section (2) of section 13, then the secured creditor may take recourse to one or more of the measures stated in sub-section (4) of section 13. For the purposes of this case, clause (a) of sub-section (4) is relevant, i.e., taking possession of the secured asset of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset. In fact, the management of the business of a borrower could also be taken over as also a manager could be appointed to manage the secured assets, possession of which is taken over by the secured creditor or a borrower could be directed to pay so much of the money as is sufficient to pay the secured debt. After possession of the secured asset is taken, transfer of the same by the secured creditor or by the manager on behalf of the secured creditors shall vest with the transferee as if it is a transfer made by the owner as secured asset. Under sub-section (11) of section 13, the rights conferred on the secured creditor in clauses (a) to (d) of sub-section (4) could be exercised against the guarantors also. Once a notice is received under sub-clause (2), no borrower can transfer by way of sale, lease or otherwise the secured assets referred to in the notice without prior written consent of the secured creditor as per sub-section (13) of section 13.

10. Section 14 states that if possession of any secured asset is required to be taken by the secured creditor or if any secured asset is required to be sold or transferred, then the secured creditor, may, for the purpose of taking possession or control or any such secured asset, request in writing to the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto is situated or found, to take possession thereof and the Chief Metropolitan Magistrate or the District Magistrate as the case may be, on such request being made can take possession of such assets and forward such assets and documents to the secured creditor. Under sub-section (3) of section 14, it is stated that the action of the Chief Metropolitan Magistrate or the District Magistrate shall, not be called in question, in any court or before any authority.

11. Section 17 prescribes the right of appeal to any person (including a borrower), being aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under Chapter III; by making an application" to the DRT having jurisdiction in the matter within forty-five days from the date on which such measures have been taken. The DRT can consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security is in accordance with the provisions of the Act and the rules.. If the said actions, are not in accordance with the requirements of the Act and the rules, the DRT can, inter alia, order restoration of possession of the secured assets to the borrower by holding that the measures taken are invalid and thereby restored the possession of the secured assets to the borrower and pass such order as may be necessary with regard to the recourse taken by the secured creditor under sub-section (4) of section 13.

12. Rules 3 and 3A of the Rules prescribe the procedure to be adopted with regard to issuance of a demand notice under sub-section (2) of section 13. Under rule 4, it is stated that if the amount mentioned in the demand notice is not paid within the time specified, then the authorised officer can proceed to realise the amount by adopting any one or more of the measures specified in sub-section (4) of section 13 of the Act for taking possession of movable property, which aspect is not relevant for the present case. Rule 8 deals with the steps to be taken before sale of a secured asset including the taking of possession, as far as immovable secured assets are concerned. The authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to the Rules, to the borrower and by affixing the same on the outer door or at such conspicuous place of the property. Appendix IV is in fact worded as if a possession notice has to be issued after possession has been taken of the property, but sub-rule (1) of rule 8 states that the possession notice to be issued must be as nearly as possible as Appendix IV to the Rules which would manifest art intention to take possession indicating the date of taking possession or otherwise the mere issuance of a notice would render the notice to be vague and purposeless. Sub-rule (2) prescribes the publication of the possession notice seven days prior to the "date of taking possession" in two leading newspapers; one of which is in vernacular language; having sufficient circulation in the locality by the authorised officer: Therefore issuance of a notice to the borrower as well as by newspaper publication is expressly provided and hence would have to be complied with by a secured creditor. Sub-rule (3) states that in the event of possession, of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances; take care of such property till they are sold or otherwise disposed of Sub-rules (5) to (8) of rule 8 and as well as rule 9 pertain to the steps to be taken prior to and during the process of sale of the secured assets.

13. On a conspectus reading of sub-section (4) of section 13 and section 14 with rule 8, the question that would arise is, as to the stage at which notice under rule 8 would have to be issued, as the contention of counsel for the respondent is that the notice regarding possession would be issued after an order u/s 14 is passed and possession is taken and before sale. When once there is non-compliance of the demand made under sub-section (2) of section 13, steps could be initiated under sub-section (4) by taking possession of the secured asset. The question is, as to whether the borrower ought to know as to when exactly possession of the secured asset would be taken, when once the demand under sub-section (2) of section 13 is not complied with by the borrower. Having regard to sub-section (13) read with sub-section (2) of section 13 would imply that the receipt of notice under sub-section (2) results in a virtual attachment of the secured asset. If the demand made in sub-section (2) of section 13 is not

complied with and the representation as well as the objections filed by the borrower are also not accepted and communicated to the borrower, then in that case, steps could be initiated under sub-section (4) of section 13. Having regard to the fact that sub-section (6) of section 13 enables a secured creditor to transfer the secured asset after taking possession would imply that the possession of the secured asset vests with the secured creditor prior to any such transfer. The procedure for taking possession or control of the secured asset by the secured creditor is envisaged in section 14 after the date mentioned in the possession notice at which stage, it is not necessary to actually inform or indicate to the borrower, the taking of possession by the secured creditor. Section 14 in fact does not prescribe an opportunity of hearing the borrower before an order is passed with regard to taking of possession. But we have held that if possession has to be taken by the secured creditor, then in that event, the borrower must be informed or intimated about the taking of possession, more precisely, the actual date on which possession would be taken over from the borrower by the secured creditor which would have to be indicated to the former. It is in this regard, that in so far as immovable property, is concerned, sub-rules (1) and (2) of rule 8 prescribe notices or intimation to the borrower in two ways : (i) by delivery of possession notice; and (ii) by newspaper publication, clearly indicating the date on which possession of the secured asset would be taken by the secured creditor. If on the date indicated in the possession notice, the secured creditor is unable to take possession of the secured asset, then in that case, recourse may be had to section 14 of the Act, at which stage a further, notice to the borrower is not envisaged, under the said section.

14. Therefore, what emerges is the mandatory requirement under the Act read with the Rules, that in order to enable the borrower to know the date on which possession would be taken by the secured creditor, sub-rules (1) and (2) of rule 8 would have to be complied with by issuance of notices indicating the date on which possession would be taken. There is another purpose for issuing the notice prior to taking possession and that is, to enable the borrower to discharge the liability to the secured creditor. Also a person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower can pay the secured creditor, so much of the money as is sufficient to pay the secured debt as per clause (d) of sub-section (4) of section 13 read with sub-section (5) thereof. We have also borne in mind the fact that on an application being filed u/s 14 of the Act before the Magistrate, there is no provision for issuance of notice to the borrower before an order to take possession is issued. We are, therefore, of the considered view that before initiating action under sub-section (4) of section 13 of the Act, the issuance of notice as per sub-rules (1) and (2) of rule 8 has to be complied with indicating the date on which possession of the property would be taken from the borrower by the secured creditor. If on the said date possession of the secured asset cannot be taken or it is not surrendered by the borrower, then the secured creditor can take recourse to section 14 of the Act and take possession of the

secured immovable property, of course, we hasten to add that the notices issued under sub-rules (1) and (2) of rule 8 cannot be assailed per se as the purpose of issuance of such notices is only to indicate the date of taking possession.

15. Therefore the issuance of notice in terms of rule 8 of the Rules is a mandatory requirement having regard to the purpose of following the principles of natural justice so as to prevent miscarriage of justice and so as to ensure fair play in action. Issuance of notice prior to initiation of action under sub-section (4) of section 13 is thus a mandatory processual requirement, the non-observance of which would invalidate the exercise of power. The taking of possession of a secured asset of a borrower under sub-section (4) of section 13 is a drastic measure and the exercise of such a power would definitely visit the borrower with civil consequences. In *Mohinder Singh Gill v. Chief Election Commissioner*, AIR 1978 SC 851, the Supreme Court has opined that civil consequences would cover not merely civil liberties and personal rights of a person but also material deprivations as well as right to property. Therefore, we have held that the issuance of notices in terms of rule 8 of the Rules is a necessary requirement prior to taking possession, although rule 8 speaks of sale of immovable secured assets, even if eventually after taking possession the secured assets are not sold.

16. In this context, we are fortified in our view by the following decisions, which lay emphasis on compliance with the principles of Natural Justice under various provisions of the Act and Rules under considerations.

(a) In the case of *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, , the Supreme Court has emphasised the need to maintain transparency and fairness while dealing with a defaulting borrower in the following words (page 402 of 120 Comp Cas) :

"In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under sub-section (2) of section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of section 13 in the case of non-compliance with notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under sub-section (4) of section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the

secured creditor. It will only be in fulfilment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under sub-section (4) of section 13, At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken to give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of, viz., secured assets without intervention of the court. Such a person in respect of whom steps u/s 13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as provided u/s 17 of the Act matures on any measure having been taken under sub-section (4) of section 13 of the Act.

We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to notice u/s 13(2) of the Act more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of section 13 (1) of the Act the creditor is empowered to enforce the security himself without intervention of the court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets, etc.

This will also be in keeping with the concept of right to know and lender's liability of fairness to keep the borrower informed particularly the developments immediately before taking measures under sub-section (4) of section 13 of the Act. It will also cater to the cause of transparency and not secrecy and shall be conducive in building an atmosphere of confidence and healthy commercial" practice. Such a duty, in the circumstances of the case and the provisions is inherent u/s 13(2) of the Act.

The next safeguard available to a secured borrower within the framework of the Act is to approach the Debts Recovery Tribunal u/s 17 of the Act. Such a right accrues only after measures are taken under sub-section (1) of section 13 of the Act."

(b) In the case of Transcore v. Union of India (2007) 135 Comp Cas 1; Transcore

Vs. Union of India (UOI) and Another, , the Supreme Court has discussed the inter play of sections 13(4) and 14 read with rules 8 and 9 in the following manner (page 41 of 135 Comp Cas) :

"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.

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 u/s 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(4A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4A) 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 u/s 13(4) read with rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor, (emphasis supplied). Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of the NPA Act refers to 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 u/s 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to 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 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. u/s 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 authorised 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 authorised 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."

(c) In the case of *United Bank of India Vs. Satyawati Tondon and Others*, , though the issue was regarding availing of remedy u/s 17 of the Act rather than filing a writ petition under Article 226 of the Constitution of India, at Paragraphs 41 and 42 reference to notices under sub-sections (2) and (4) and Section 13 being issued before filing an application u/s 14 of the Act has been made. In the said case, notice prior to taking action under sub-section (4) of section 13 had been issued and thereafter, section 14 had been invoked. In the said case, it was held that guarantor could also avail the remedy provided u/s 17 of the Act.

(d) Similarly, in the case of Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, while holding that an efficacious, alternative remedy is provided u/s 17 of the Act, to assail an action under sub-section (4) of section 13 of the Act, it is noticed that after the issuance of notice under sub-section (2) of section 13, a public notice in the newspapers had been issued regarding the same and thereafter, application was filed u/s 14 of the Act, for taking possession of the secured assets. After an order was passed u/s 14, another notice was issued to the borrowers to handover possession which was challenged in the writ petition. While holding that a writ petition was not maintainable, the Supreme Court nevertheless noted that newspaper publication prior to taking of possession had been issued in the said case.

(e) In the case of Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill, , it has been held thus (page 336 of 162 Comp Cas) :

"The intention of the Legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though the possession may have been made over to the transferee. The consequences of the authority vested in the DRT under sub-section (3) of section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of section 13(4) of the Act. The Legislature by including sub-section (3) in section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr. Gopalan and Mr. Altaf Ahmed that the DRT has no jurisdiction to deal with a post section 13(4) situation, cannot be accepted."

The secured creditor can also by notice in writing, call upon a person who has previously acquired any of the secured assets from the borrower to pay the money, which may be sufficient to discharge the liability of the borrower.

(f) In the case of Subhash Chandra Panda v. State of Orissa, AIR 2008 Orissa 88, the Division Bench while holding that the financial institution concerned had no jurisdiction to invoke section 13(2) of the Act, nevertheless opined that notice u/s 13(4) has to be issued before the borrower is dispossessed (page 91) :

"23. From the discussion which has been made hereinabove, it is clear that on the dates on which the alleged transactions were made between the petitioner and the opposite party No. 6, it was not a financial institution within the meaning of Securitisation Act and it could not invoke section 13. That being the position, the notice which is issued to the petitioner u/s 13(2) of the Securitisation Act is without jurisdiction. It is highly doubtful whether any notice u/s 13(4) was given. Even if it is given for the same reason, it is wholly without jurisdiction and the

proceeding on the basis of which the petitioner has been dispossessed" from his residential property is illegal and without any authority of law: Thus, the entire action of opposite party No. 6 is unauthorised, illegal and bad in law."

(g) In the case of Mrs. Sunanda Kumari v. Standard Chartered Bank (2007) 135 Comp Cas 604 (Karn) (Division Bench of this court) has dealt with the aspect as to whether the Magistrate has to issue notice before passing an order u/s 14 of the Act and has answered in the negative (page 608 of 135 Comp Cas) :

"Regarding the question whether the Magistrate is required to issue notice to the borrower before passing an order u/s 14, we are of the view that, in the absence of any provision in the Act or the Rules framed thereunder requiring such notice, the Magistrate is not required to issue any notice to the borrower before passing an order u/s 14. Learned counsel for the petitioners contended that even though there is no specific provision in the Act or the rules requiring such notice, the principles of natural justice require that a notice should be issued by the Magistrate before passing an order u/s 14. We are not inclined to agree with the above contention. The borrower is given a notice under sub-section (2) of section 13 which specifically says that if the liabilities are not discharged in full within 60 days from the date of notice the secured creditor shall be entitled to all or any of the rights as mentioned in sub-section (4) of section 13 of the Act. Again the borrower is given a reply under sub-section (3A) stating why his representation or objection against the notice under sub-section (2) is not acceptable and untenable. Thus, the borrower has sufficient notice regarding the steps being initiated, the amount sought to be recovered and the consequences of not discharging the liability within the period stipulated in the notice under sub-section (2). In other words, the borrower is informed in advance that if the liabilities are not discharged within the stipulated period, the secured creditor will be resorting to any of the remedies available under sub-section (4) of section 13 of the Act and may file an application u/s 14 and the Magistrate may pass an order u/s 14. In our view, the above safeguards satisfy the principles of natural justice and no further notice by the Magistrate is required before passing an order u/s 14."

17. However, in none of the aforesaid decisions is there a direct reference to the stage at which notice and publication have to be taken prior to taking possession. Of course, in the context of rule 9 of the Rules dealing with said and delivery of possession, a discussion is made with regarding to rule 8 and section 14 in Transcore Vs. Union of India (UOI) and Another, . But, in every case where possession of the secured asset is taken would not result in a sale of the same. However, notice of taking possession must be given to the borrower, indicating the date of taking possession and thereafter steps could be taken to take possession, if necessary by invoking section 14 of the Act. It is reiterated that at the stage of considering the application filed by the borrower u/s 14, notice need not be issued to the borrower by the Magistrate.

18. In that view of the matter compliance of sub-rules (1) and (2) of rule 8 of

the Rules is a mandatory requirement before possession of the secured asset is sought to be taken by a financial institution. Any violation or infraction of section 13(4) of the Act by the financial institution could be called in question by way of filing an appeal u/s 17 of the Act, and the DRT has the power to restore possession to the borrower.

19. In the instant case, indubitably, no notice has been issued under sub-rule (1) or any publication has been made under sub-rule (2) of rule 8 of the Rules, informing the petitioners on which date possession of the secured asset would be taken. Instead section 14 has been directly resorted to by the respondent, which is clearly without the mandate of the law and is an infraction of the same. Therefore, there has been violation of the principles of natural justice in the instant case. Hence, the order passed on December 27, 2008 by the Deputy Commissioner is quashed. Consequently, the order passed by the DRAT is also quashed and the order of the DRT is restored. The respondent is directed to comply with sub-rules (1) and (2) of rule 8 by indicating the date on which possession of the secured assets would be taken and thereafter, proceed in accordance with law. In the result, the writ petition is allowed. No costs.