(2008) 04 MAD CK 0067

In the Madras High Court

Case No : Writ Petition No''s. 37148 and 37534 of 2007

Lakshmi Shankar Mills (P) Ltd., V. Lakshminarayanan, V.L. Velayutham and L. Shankarnarayanan — APPELLANT

Vs

The Authorised Officer/Chief Manager, Indian Bank, Macrotech Engineers and The Registrar, Debt Recovery Appellate Tribunal
Canara Bank Vs The Debt Recovery Appellate Tribunal, The Debt Recovery Tribunal and BAPL Industries Ltd. — RESPONDENT

Date of Decision : 15-04-2008

Acts Referred:

- Arbitration and Conciliation Act, 1996 — Section 36
- Constitution of India, 1950 — Article 14
- Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(12)
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13, 13(2), 13(4), 15
- Sick Industrial Companies (Special Provisions) Act, 1985 — Section 22
- State Financial Corporations Act, 1951 — Section 29, 31
- Transfer of Property Act, 1882 — Section 69, 69A

Citation : AIR 2008 Mad 181 : (2008) 2 LW 381 : (2008) 85 SCL 421

Hon'ble Judges : A.P. Shah, C.J;V. Ramasubramanian, J;F.M. Ibrahim Kalifulla, J

Bench : Full Bench

Advocate : M.S. Krishnan, S. Sethuraman and Srinath Sridevan, Rajasekaran, in W.P. No. 37148/2007 and Vijay Narayanan for Narmada Sampath W.P. No. 1418/08, V.T. Gopalan, Addl. Solicitor General Assisted by P. Wilson, ASG, for the Appellant; Jayesh B. Dolia, For Respondent 1 in W.P. No. 37148/2007, T.R. Rajagopalan for Ananda Gomathy, For Respondent 2 in W.P. No. 37148/2007, V.T. Gopalan Asst. Solicitor General for F.B. Benjamin George in M.P. No. 3 of 2008, G. Masilanmani for F.B. Benjamin George in M.P. No. 1 of 2008, K.N. Bhat for F.B. Benjamin George in M.P. No. 2 of 2008, T.V. Ramanujun for K. Sivakumar For Respondent 3 in W.P. No. 37534/2007 and Jayesh B. Dolia, For Respondents 2 and 3 in W.P. No. 1418/2008, for the Respondent

Judgement

A.P. Shah, C.J.—Interpretation of the amended provisions of Sections 13 and 17 of the Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002, hereinafter for brevity''s sake referred to as ""the Securitisation Act"", is involved in this

reference made to the larger Bench. By a common order passed in W.P.Nos. 37148 & 37534 of 2007, the Division Bench has referred the

following questions which fall for our determination:

(i) Whether even where no stay is prayed for by the Borrower, during pendency of the proceedings u/s 17 before the Debt Recovery Tribunal, the

Secured Creditor can proceed to auction the secured asset even before a declaration envisaged u/s 17(4) of the SARFAESI Act as made by the

Debt Recovery Tribunal?

(ii) Whether for granting any stay of auction, the Debt Recovery Tribunal can impose any condition relating to deposit?

(iii) Whether, even before finalisation of the proceedings u/s 17 of the SARFAESI Act, the Debt Recovery Tribunal or the Debt Recovery

Appellate Tribunal has any incidental or ancillary power to pass any interim order relating to restoration of possession or restoration of

management, subject to imposition of any reasonable condition as deemed fit and proper?

(iv) What is the scope of enquiry u/s 17 of the SARFAESI Act and whether the merits of the contentions raised by the borrower can be decided

while dealing with the question relating to validity of the action taken by the Bank u/s 13 of the Act?

2. Since the reference arises in the above two writ petitions, we may briefly refer to the relevant facts of the writ petitions.

3. W.P. No. 37148 of 2007

The petitioners availed open cash credit facility and working capital turnover limit on various occasions since 1991 from the first respondent-Indian

Bank. The Bank issued a demand notice u/s 13(2) of the Securitisation Act and took possession of the mortgaged properties. Aggrieved by the

action of the Bank, the petitioners approached the Debts Recovery Tribunal and in the I.A. for interim relief taken out by the petitioners the Debts

Recovery Tribunal directed the petitioners to deposit a sum of Rs. 28.25 lakhs within three weeks from the date of receipt of its order and allowed

the Bank to proceed with the auction, but defer further proceedings including the confirmation of sale, etc till further orders. It was further directed by the Tribunal that the stay would stand automatically vacated if the petitioners fail to comply with the condition imposed in the order. The Bank,

thereafter, conducted auction and the second respondent herein emerged as the highest bidder. Since the petitioners failed to deposit the amount as

per the condition imposed by the Tribunal, the Bank proceeded with issuing confirmation letter to the purchaser and subsequently issued sale

certificate to the purchaser. The petitioners then, preferred an appeal to the Debts Recovery Appellate Tribunal, Chennai (In SARFAESI) No.

744 of 2007 wherein stay of further proceedings was granted on condition that the petitioners shall deposit a sum of Rs. 30 lakhs in two

instalments. The Debts Recovery Appellate Tribunal ultimately vacated the interim relief by order dated 28th November, 2007. Aggrieved by the

order of the Debts Recovery Appellate Tribunal, the present petition has been filed.

4. W.P. No. 37534 of 2007

This petition is preferred by the Canara Bank The petitioner Bank on behalf of the third respondent issued a Deferred Payment Guarantee (DPG)

in favour of a foreign Bank namely, Raiffeisen Zentral Bank, Oesterrich, Vienna, Austria to finance for the installation of a spinning mill. The DPG

was for 19,000,000/- Austrian Shillings, which is equivalent to Rs. 6,04,13,421/- in Indian currency as on 28.1.1998. The value of the guaranteed

amount less commission was credited to the account of the third respondent by the said Austrian Bank. The third respondent executed a counter

indemnity in favour of the petitioner undertaking to reimburse the outstanding debt if ultimately the DPG is crystallized and devolved as a liability on

the petitioner. The third respondent also mortgaged its immovable property at Nallatipalayam Village, Pollachi Taluk by deposit of title deeds. At

this stage, we do not deem it necessary to narrate the further facts in detail, suffice it to say that the third respondent failed to pay the instalments to

the foreign Bank and consequently, the petitioner Bank initiated proceedings under the Securitisation Act. The Bank also filed O.A. No. 92 of

2005 for recovery of its dues and the same is pending before the Debt Recovery Tribunal, Coimbatore. Meanwhile, the third respondent

approached the Debt Recovery Tribunal, Coimbatore in I.A. No. 538 of 2005 wherein the Tribunal stayed all further proceedings in pursuance to the possession notice issued u/s 13(4) of the Securitisation Act and directed the company to deposit a sum of Rs. 2,60,00,000/- with the petitioner

bank. The company filed appeal before the Debt Recovery Appellate Tribunal, which came to be allowed and the amount ordered to be paid was

reduced to Rs. 2 crores from Rs. 2.60 crores and it was further directed that the counter claim said to have been made by the third respondent in

the OA may also be taken up along with the SARFAESI appeal, heard and disposed of simultaneously. The petitioner Bank is mainly aggrieved by

the reduction of the deposit amount from Rs. 2.60 crores to Rs. 2 crores.

5. Before the Division Bench it was submitted by the learned Counsel appearing for the borrowers that till the application u/s 17(1) of the

Securitisation Act is decided and as contemplated u/s 17(4) of the Act the Debts Recovery Tribunal declares that the recourse taken by the

secured creditor u/s 13(4) is in accordance with the provisions of the Act, the secured creditor shall not be entitled to take further recourse to one

or more measures specified under Sub-section (4) of Section 13 to recover the secured debt. It was submitted that the right of the secured

creditor to auction the property remains in abeyance until the Tribunal declares that the recourse taken by the secured creditor u/s 13(4) was in

accordance with the provisions of the Securitisation Act. It was therefore argued that the Tribunal has no power to direct the borrower to deposit

any amount as a condition of stay failing which the secured creditor can auction the property even before such proceedings are finalized on merit.

On the other hand, on behalf of the banks it was submitted that mere filing of an application u/s 17 of the Securitisation Act should not be

construed as an automatic stay as held by a Division Bench of this Court in Ramco Super Leathers Ltd. and 4 Ors. v. UCO Bank and Anr. (2007)

5 MLJ 986. It was submitted that there is no occasion for the Tribunal to order redelivery of the possession before the final determination of the

issue. A contention was also raised by the learned Counsel for the banks that the decision of the Division Bench in Misons Leather Ltd. Vs.

Canara Bank, , wherein it is observed that it is open to the borrower to raise all questions, may not be correct in view of the decision of the

Supreme Court in Transcore Vs. Union of India (UOI) and Another, . The Division Bench felt that the questions raised by the counsel for the parties are of seminal importance and similar questions are being raised time and again and therefore the matter is required to be decided by a

larger Bench so that the legal position can be authoritatively laid down for future guidance of the courts including the tribunals.

6. We have heard Mr.T.R.Rajagopalan, Mr. T.V. Ramanujun, learned senior counsel and Mr.Rajasekaran, learned Counsel appearing for the

borrowers; Mr.A.L.Somayaji, learned senior counsel, Mr.Jayesh Dolia, learned Counsel appearing for the respective banks; Mr. V.T. Gopalan,

learned Additional Solicitor General appearing for the Union of India; Mr.G.Masilamani, Advocate General, Mr.K.N.Bhat, learned senior counsel,

Mr.S.Sethuraman and Mr. Srinath Sridevan, learned Counsel appearing for the intervenors on behalf of the banks and Mr.Vijay Narayanan

learned senior counsel and Mr.M.S.Krishnan, learned Counsel appearing for the intervenors-borrowers. Mr.M.S.Krishnan, Mr.Rajasekaran and

Mr.Srinath Sridevan, also filed their written submissions.

7. In Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., the validity of the Securitisation Act and, in particular, the vires of

Sections 13, 15, 17 and 34 thereof had been challenged. It was contended that the Securitisation Act vested arbitrary powers in the banks,

without any guidelines for the exercise thereof and also without providing any appropriate and adequate mechanism to decide the disputes relating

to the correctness of the demand, its validity and the actual amount of dues sought to be recovered from the borrowers. In paragraph - 33 of the

judgment, the Supreme Court formulated inter alia, the following questions which fell for determination:

(i) ...

(ii) Whether provisions as contained under Sections 13 and 17 of the Act provide adequate and efficacious mechanism to consider and decide the

objections/disputes raised by a borrower against the recovery, particularly in view of bar to approach the civil court u/s 34 of the Act?

(iii) Whether the remedy available u/s 17 of the Act is illusory for the reason it is available only after the action is taken u/s 13(4) of the Act and the

appeal would be entertainable only on deposit of 75% of the claim raised in the notice of demand?

(iv) ...

(v) ...

(vi) Whether provision for sale of the properties without intervention of the court u/s 13 of the Act is akin to the English mortgage and its effect on

the scope of the bar of the jurisdiction of the civil court?

In paragraph 45, the Supreme Court stated that it would consider as to what forums or remedies were available to the borrower to ventilate their

grievances. While doing so, the Supreme Court observed that there must be some meaningful consideration of the objections raised by the

borrower in answer to the notice u/s 13(2) before proceeding to take measures u/s 13(4). The Supreme Court observed that it would be

necessary for the banks to apprise the borrower the reasons for not accepting the objections or points raised in the reply to the notice u/s 13(2)

and communicate the same to the borrower.

The Supreme Court then proceeded to hold as under:

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 (4) of Section 13 of the Act.

However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged

to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the

scope is permissible to bring an action in the civil court in the case of English mortgages.

The challenge was upheld in respect of Sub-section (2) of Section 17 which require a deposit of 75% of the amount of the demand notice before

an appeal could be entertained by the Tribunal.

The Supreme Court thereafter summarized the judgment as under:

79. Some submissions have been made pointing out that in certain circumstances it would not be clear as to in what manner the provisions of the

Act would be workable. We feel the objections pointed out are not such which render the statute invalid or unconstitutional. Such problems about

working of any particular provision of the Act in any particular factual situation, may be considered as and when they may arise. We, therefore, do not think it necessary to go into those questions.

80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures u/s 13(4) of

the Act have been taken, a mechanism has been provided u/s 17 of the Act to approach the Debts Recovery Tribunal. The above noted provisions

are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from

different provisions of the Act, is as follows:

1. Under Sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days'' notice before proceeding to take any of the

measures as provided under Sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts

for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not

accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have

already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the

information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal u/s 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under Sub-section (4) of Section 13 and before the date of sale/auction of the

property it would be open for the borrower to file an appeal (petition) u/s 17 of the Act before the Debts Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem

fit and proper to impose.

4. In view of the discussion already held in this behalf, we find that the requirement of deposit of 75% of the amount claimed before entertaining an

appeal (petition) u/s 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is

invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited

grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.

81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the

borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of

some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be

unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of

capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the

public interest.

82. We, therefore, subject to what is provided in para 80 above, uphold the validity of the Act and its provisions except that of Sub-section (2) of

Section 17 of the Act, which is declared ultra vires Article 14 of the Constitution of India.

8. It is important to note two amendments to the Securitisation Act after the judgment of the Supreme Court in Mardia Chemicals Case. These

amendments were pursuant to and in consonance with the judgment in Mardia Chemicals and the observations therein. Firstly, in Section 13 of the

Act, the following was added after Sub-section (3), as Sub-section (3-A):

(3-A) If, on receipt of the notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall

consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not

acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the

representation or objection to the borrower:

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 17-A.

9. Secondly, Sub-section (2) of Section 17, which was held to be unconstitutional by the Supreme Court was deleted and Sub-sections (2) to (6)

were inserted in Section 17 and original Sub-section (3) was re-numbered as

Sub-section (7). The provisions of Section 17 of the Act after the

amendment read as follows:

17. Right to appeal - (1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by

the secured creditor or his authorized officer under this Chapter, (may 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]

(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 creditors assets 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 (1).

(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 party

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.

Re.Question Nos. (i) & (ii)

10. The first question is whether the right of the bank to take proceedings u/s 13(4) shall remain suspended on filing an application u/s 17. The

second question concerns the jurisdiction of the Debt Recovery Tribunal to impose a condition of deposit for grant of stay of auction. Section

13(4) of the Securitisation Act is pivotal to the whole controversy. It provides that a secured creditor may enforce any security interest without

intervention of the court or tribunal irrespective of Section 69 or Section 69-A of the Transfer of Property Act where according to Sub-section (2) of Section 13 the borrower is a defaulter in repayment of the secured debt or any instalment of repayment and further the debt standing against him

has been classified as a non-performing asset by the secured creditor. Sub-section (2) of Section 13 further provides that before taking any steps

in the direction of realizing the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities

within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in Sub-section (4) of

Section 13. Sub-section (4) of Section 13 provides for four measures which can be taken by the secured creditor in case of non-compliance with

the notice served upon the borrower namely, (a) to take possession of the secured assets including the right to transfer the secured assets by way

of lease, assignment or sale; (b) to take over the management of the secured assets including the right to transfer; (c) to appoint a manager to

manage the secured assets which have been taken possession of by the secured creditor; and (d) to require any person who had acquired any

secured assets from the borrower or from whom any money is due to the borrower to pay the same as it may be sufficient to pay the secured debt.

Sub-section 3-A, which has been inserted by the amendment, provides that 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. The proviso to Sub-section 3-A

provides 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 17-A. In Mardia

Chemical''s case, the Supreme Court has clearly held that such right accrues only if measures are taken under Sub-section (4) of Section 13 of the

Securitisation Act (para.48 SCC page 348). Therefore, only if one or other measure is taken by the secured creditor, a cause of action arises for

any person or borrower to prefer an application u/s 17 of the Securitisation Act.

11. Under Sub-section (1) of Section 17 any person aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the

secured creditor can prefer an appeal (application) to the Debts Recovery Tribunal within 45 days from the date on which such measures had been

taken. Under Sub-section (2) of Section 17, the Tribunal is bound to consider whether any of the measures referred to under Sub-section (4) of

Section 13 taken by the secured creditors are in accordance with the provisions of the Act. Under Sub-section (3) of Section 17, after examining

the facts and circumstances of the case, and evidence produced by the parties, if the Tribunal 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 the Act and the rules, and

require restoration of the management of the business or restoration of possession of the secured assets to the borrower, it may declare such action

as invalid and restore possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case

may be. As a necessary corollary, Sub-section (4) of Section 17 provides that if the Tribunal declares that the recourse taken by the secured

creditor under Sub-section (4) of Section 13 was in accordance with the provisions of the Act and the rules made thereunder, then,

notwithstanding anything contained in the Act or 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.

12. On a plain reading of Section 17, it is seen that the Tribunal has wide powers to restore possession in favour of the borrower, if such action

taken under Sub-section (4) of Section 13 is declared invalid. Even where the property is sold or dealt with, pending hearing of the application u/s

17, the Tribunal is not rendered powerless to restore possession in favour of the borrower, if such action taken under Sub-section (4) of Section

13 is declared invalid. In such an eventuality, Sub-section (3) of Section 17 gives ample powers to the Tribunal to direct restoration of the

possession or restoration of management, as the case may be or to pass such other order, as it may consider proper and necessary in relation to

any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

13. Learned Counsel for the borrowers however argued that the use of the expressions ""if"" and ""then"" would only mean that the bank can take one

or more measures laid down u/s 13(4) only if the Tribunal declares that the action taken already is in accordance with the provisions of the

Securitisation Act and the rules made thereunder. It was submitted that the use of the word ""if"" connotes a condition precedent and no further

action can be taken unless the condition is fulfilled. We are unable to accept the submission of the learned Counsel for the borrowers. The

provisions of Sections 13 and 17 are amended after the Marida Chemicals case. The Statement of Objects and Reasons makes it manifestly clear

that the amendment has been effected in view of the judgment of the Supreme Court and to discourage the borrowers to postpone the repayment

of their dues and also to enable the secured creditor to speedily recover their dues, if required by enforcement of security or other measures

specified in Sub-section (4) of Section 13 of the Act. Legislature was clearly aware of the ruling in Marida Chemicals case which interpreted

Section 17 as granting to the Tribunal a discretionary power of stay. Accepting the submission of the borrowers would mean that the Legislature

intended to undo this by enacting Section 17 so as to suspend the power of the banks to take appropriate measures u/s 13. It is a recognized rule

of interpretation of Statutes that expressions used therein should ordinarily be understood in a sense in which they harmonized with the object of

the statute and which effectuate the object of the legislature (See New India Sugar Mills Ltd. Vs. Commissioner of Sales Tax, Bihar,). The

provisions of Section 17 must therefore receive such construction at the hands of the Court as would advance the object and at any event not

thwart it. In other words, the principle of purposive interpretation should be applied while construing the said provision. The Securitisation Act is

enacted to provide a speedy and summary remedy for recovery of thousands of crores which were due to the banks and financial institutions and

accepting the interpretation suggested by the counsel for the borrowers would defeat the very object of the Act.

14. The matter can be viewed from another angle. It is well known that when the Legislature wants to grant a statutory stay, it would expressly say

so. For example, Section 36 of the Arbitration and Conciliation Act, 1996 pursuant to which an award can be enforced only after the expiry of the period for making an application u/s 34 or, if such an application is made, till it is refused by the Court. Section 22 of the Sick Industrial

Companies (Special Provisions) Act, 1985 is another example of statutory stay. There is nothing in Section 17 of the Securitisation Act which

would indicate that the Legislature intended that there would be automatic stay of proceedings u/s 13(4) on filing an application u/s 17.

15. As regards the second question, there is no specific provision made u/s 17 of the Securitisation Act or under any other provisions of the said

Act empowering the Tribunal to pass any interim order. But under Sub-section (12) of Section 19 of the Recovery of Debts due to Banks and

Financial Institutions Act, 1993, the Tribunal has been empowered to pass various interim orders. If Sub-section (7) of Section 17 of the

Securitisation Act is read along with Sub-section (12) of Section 19 of the Recovery of Debts due to Banks and Financial Institutions Act, it would

be clear that the Tribunal also has jurisdiction to pass interim orders u/s 17 of the Securitisation Act in appropriate cases. In Marida Chemicals

case, in Clause (iv) of paragraph 80 of the judgment, the Supreme Court has categorically held that the Tribunal in exercise of its discretionary

power shall have jurisdiction to pass any stay/interim order, subject to the condition as it may deem fit and proper to impose. Earlier, there was a

controversy as to whether the Tribunal has power to grant ad-interim orders u/s 19(12) of the Recovery of Debts due to Banks and Financial

Institutions Act, but that had been set at rest in The Industrial Credit and Investment Corporation of India Ltd. Vs. Grapco Industries Ltd. and

Others, . The Tribunal is thus empowered to grant interim stay subject to such conditions as may be deemed proper including condition of deposit.

We may add that even u/s 69 of the Transfer of Property Act, the only remedy of the borrower, whose mortgagee has invoked Section 69 of the

Transfer of Property Act, is to file a civil suit. In such suit, the power of the Court to grant injunction and to impose condition for the grant thereof

has been recognized in Jagijivan v. Shridhar ILR 1878 Bom. 252 and V. Narasimhachariar Vs. Egmore Benefit Society, 3rd Branch Ltd., .

16. Repelling a similar argument, a Division Bench of this Court in Ramco Super Leathers Ltd. v. UCO Bank, (supra) has also held that there is no

automatic stay or prohibition on the secured creditor to take recourse to one or more measures under Sub-section (4) to Section 13 of the

Securitisation Act to recover its secured debts, till an interim order is passed by the Tribunal. The following observations of the Bench are

pertinent:

The finding of the Supreme Court at Clause (4) of paragraph-80 aforesaid, is the answer to the question raised by the writ petitioner, wherein the

Supreme Court held that the Tribunal, in exercise of its ancillary power, shall have jurisdiction to pass any stay/interim order, subject to the

condition as it may deem fit and proper to impose. The corollary is that, there is no automatic stay or prohibition on the secured creditor to take

recourse to one or more measures under Sub-section (4) to Section 13 of the SARFAESI Act to recover its secured debts, till an interim order is

passed by the Tribunal.

From the aforesaid Section 17, it will be evident that any person, including borrower, could file an appeal (application) u/s 17 at any stage,

including the stage when management of business is taken or possession of secured assets of the borrower, including right to transfer is taken over

by the secured creditor. In such a case, the Tribunal has power to restore possession in favour of the borrower, if such action taken under Sub-

section (4) to Section 13 is declared invalid. Merely because a secured creditor has taken possession of secured asset, or issued notice inviting

application for sale of secured asset, or issued a sale certificate in favour of one or other auction purchaser, will not render the Tribunal powerless

to restore possession in favour of the borrower, if such action taken under Sub-section (4) to Section 13 is found not in accordance with the Acts

and the Rules framed thereunder, and is declared invalid.

17. We accordingly hold that there will be no automatic stay on filing of an application u/s 17 of the Securitisation Act, and the Tribunal while

granting stay of auction can impose a condition relating to deposit.

Re. Question (iii)

18. This question concerns the jurisdiction of the Debt Recovery Tribunal to pass any interim mandatory order relating to restoration of possession

or restoration of management, pending the proceedings u/s 17 of the Securitisation Act. In Marida Chemicals case, the Supreme Court has held

that the proceedings u/s 17 are not appellate proceedings, it is an initial action, which is brought before the forum as prescribed under the Act raising grievances against the action or measures taken by one of the parties to the contract. It is a stage of initial proceedings like filing a suit in the

civil court. Proceedings u/s 17 of the Act are in lieu of the civil suit which remedy is ordinarily available, but for the bar u/s 34 of the Securitisation

Act. Section 17(3) provides that if the Tribunal 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 the Act and the rules made thereunder, it can declare such action as invalid

and restore possession of the secured assets to the borrower or restore the management of the possession to the borrower, as the case may be. It

is, thus, clear that once the possession of the secured asset is taken, there would be no occasion for the Tribunal to order redelivery of possession

till final determination of the issue. In other words, it is only when the Tribunal comes to the conclusion that any of the measures, referred to in

Section 13(4), taken by the secured creditor are not in accordance with the provisions of the Act and the rules made thereunder, then only the

Tribunal can restore possession of such secured assets to the borrower. By virtue of Sub-section (7) of Section 17 of the Securitisation Act read

with Section 19(12) of the Recovery of Debts Due to Banks and Financial Institutions Act the Tribunal undoubtedly possess ancillary power to

pass interim orders subject to the conditions as it may deem fit and proper to impose, but it does not in any way override the special provisions

contained in Section 17(3) of the Securitisation Act. The statutory scheme of the Securitisation Act is such that the borrower could take recourse

to application u/s 17 only if one or other measure is taken by the secured creditor, and the Tribunal can restore the status quo ante only if it comes

to the conclusion that any of the measure taken by the secured creditor is not in accordance with the provisions of the Act. The scheme cannot be

by-passed by issuing a mandatory order for redelivery of the possession before conclusion of the proceedings u/s 17. We may mention that we are

supported in our view by an unreported decision of the Division Bench of this Court in the case of Authorised Officer, Indian Bank v. The Debt

Recovery Appellate Tribunal and 3 Ors. (Writ Petition No. 46413 of 2006 decided on 07.12.2006) and a decision of the Karnataka High Court

in Syndicate Bank Vs. Sri Basalingappa Hosamani, .

Re.Question (iv)

19. This concerns the scope of the enquiry u/s 17 of the Securitisation Act and the question referred to us is whether the merits of the contentions

raised by the borrower can be decided while dealing with the question relating to the validity of the action taken by the bank u/s 13(4) of the

Securitisation Act. It was argued before the Division Bench that the decision in Ramco Super Leathers Ltd., v. UCO Bank (supra) may not be

correct in view of the judgment of the Supreme Court in Transcore v. Union of India and another, (supra). In Transcore, the main question, which

fell for consideration of the Supreme Court, was whether the withdrawal of an O.A in terms of the first proviso to Section 19(1) of the Recovery

of Debts due to Banks and Financial Institutions Act, is a condition precedent to taking recourse to the Securitisation Act. In the context of this

question, the Court examined the scheme of the Securitisation Act, and it was observed; -

13. ...The NPA Act is inspired by the provisions of the State Financial Corporations Act, 1951 (""SFC Act""), in particular Sections 29 and 31

thereof. The NPA Act proceeds on the basis that the liability of the borrower to repay has crystallized; that the debt has become due and that on

account of delay the account of the borrower has become sub-standard and non-performing. The object of the DRT Act as well as the NPA Act

is recovery of debt by non-adjudicatory process....

22. ...On reading Section 13(2), which is the heart of the controversy in the present case, one finds that if a borrower, who is under a liability to a

secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing asset then

the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice failing

which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4). Reading Section 13(2) it is clear that the said

sub-section proceeds on the basis that the borrower is already under a liability and further that, his account in the books of the bank or FI is

classified as sub-standard, doubtful or loss. The NPA Act comes into force only when both these conditions are satisfied. Section 13(2) proceeds

on the basis that the debt has become due. It proceeds on the basis that the account of the borrower in the books of bank/FI, which is an asset of

the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual

of liability, determination of liability and liquidation of liability....

23. ...The point to be noted is that the scheme of the NPA Act does not deal with the disputes between the secured creditors and the borrower.

On the contrary, the NPA Act deals with the rights of the secured creditors inter se. The reason is that the NPA Act proceeds on the basis that the

liability of the borrower has crystallized and that his account is classified as non-performing asset in the hands of the bank/FI....

24. ...However, u/s 17(2), the DRT is required to consider whether any of the measures referred to in Section 13(4) taken by the secured creditor

for enforcement of security are in accordance with the provisions of the NPA Act and the Rules made thereunder. If the DRT, after examining the

facts and circumstances of the case and the evidence produced by the parties, comes to the conclusion that any of the measures taken u/s 13(4)

are not in accordance with the NPA Act, it shall direct the secured creditor to restore the possession/management to the borrower (vide Section

17(3) of NPA Act). On the other hand, after the DRT declares that the recourse taken by the secured creditor u/s 13(4) is in accordance with the

provisions of the NPA Act then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be

entitled to take recourse to any one or more of the measures specified u/s 13(4) to recover his secured debt.

20. In Mison Leathers Ltd., v. Canara Bank, Chennai (2007) 3 LW 500 the constitutional validity of the amended Section 17 was challenged on

the ground that the remedy of filing application u/s 17 of the Act which is declared to be in the nature of the suit by the Supreme Court is totally

taken away by the amendment and in any event, the remedy is only an empty formality and does not protect the rights of the borrowers,

mortgagors and guarantors. Repelling this contention, the Division Bench observed:

10. We are afraid that the contention is totally mis-conceived. The provisions of Section 17(1) of the Act provides remedy for the

borrower/guarantor/mortgagor to challenge the action of the Bank u/s 13(4) of the Act before the Debt Recovery Tribunal. The Debt Recovery

Tribunal is required to decide whether the action of the Bank/Financial institutions, u/s 13(4) is in accordance with the provisions of the Act and the

rules framed thereunder. It is open to the borrower/guarantor /mortgagor to demonstrate before the Debt Recovery Tribunal that resort to Section

13 of the Act is not permissible by law. In a given case, the claim of the Bank/ Financial Institutions may be barred by limitation or there may be

cases, where the adjustment of the amount paid is not reflected in the notice or the calculation of interest may not be in accordance with the

contract between the parties. Needless to say that all such grounds, which render the action of the Bank/Financial Institutions illegal can be raised

in the proceedings u/s 17 of the Act before the Debt Recovery Tribunal.

11. Learned Additional Solicitor General and the learned Counsel appearing for banks and financial institutions fairly stated that all the objections

which can be legally raised in the reply to the notice u/s 13(2) of the Act can also be raised in the proceedings u/s 17(1) of the Act. It would be for

the Debt Recovery Tribunal to decide in each case whether the action of the bank is in accordance with the provisions of the Act and is legally

sustainable.

21. As can be seen from the Statement of Objects and Reasons of the Securitisation Act, the main purpose of the Securitisation Act, and in

particular Section 13 thereof, is to enable and empower the secured creditors to take possession of their securities and to deal with them without

the intervention of the Court. Therefore, in an application u/s 17, the Tribunal is concerned only with the validity of the acts of the secured creditor

in taking possession of the securities and dealing with the same u/s 13. In our opinion, the Division Bench has rightly held that all such grounds,

which would render the action of the bank/financial institution illegal, can be raised before the Tribunal in the proceedings u/s 17. It is for the

Tribunal to decide in each case whether the action of the bank was in accordance with the provisions of the Act and legally sustainable. However,

we hasten to add that while considering the question of validity of the action of the bank, it is not necessary for the Tribunal to adjudicate the exact

amount due to the secured creditors. In other words, the purpose of an application u/s 17 is not the determination of the quantum of claim per se as the Tribunal is concerned with the issue of the validity of the measures taken by the banks/financial institutions u/s 13(4). In our opinion, the

judgment of the Division Bench in Mison Leathers Ltd., lays down the law correctly and does not require any reconsideration.

22. In the light of the foregoing discussion, we summarise our findings as follows:

(i) The right of the bank is not automatically suspended upon filing of an application u/s 17 of the Securitisation Act and the secured creditor can

proceed to auction secured asset where no stay is granted by the Tribunal.

(ii) The Tribunal has power to impose the condition relating to deposit for grant of stay of auction.

(iii) The Tribunal has no power to pass any interim mandatory order relating to restoration of possession or restoration of management before the

finalisation of the proceedings u/s 17 of the Securitisation Act, and

(iv) All such grounds, which rendered the action of the bank/financial institution illegal, can be raised in the proceedings u/s 17 of the Securitisation

Act before the Debt Recovery Tribunal. It is for the Debt Recovery Tribunal to decide in each case whether the action of the bank/financial

institution was in accordance with the provisions of the said Act and legally sustainable.

23. The reference is answered accordingly. Registry is directed to place the petitions before the appropriate Court dealing with the matter.