
(2016) 05 AHC CK 0061
In the Allahabad High Court
Case No : C.M.W.P. No. 26145 of 2016

Punjab National Bank

APPELLANT

Vs

State of Uttar Pradesh

RESPONDENT

Date of Decision : 30-05-2016

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 14

Citation : (2016) 11 ADJ 582 : (2016) 118 ALR 765 : (2017) 2 BC 500 : (2017) 1 DRTC 342 : (2016) 132 RD 665

Hon'ble Judges : Krishna Murari and Prashant Kumar, JJ.

Bench : Division Bench

Advocate : Sanjai Singh, Advocate, for the Appellant; C.S.C, for the Respondent

Final Decision : Allowed

Judgement

Krishna Murari and Prashant Kumar, JJ.—Petitioner, Punjab National Bank has approached this Court challenging the order dated 12.4.2016 passed by respondent no.2-Additional District Magistrate (Finance & Revenue) Shahjahanpur rejecting the application made by the petitioner under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the SARFAESI Act, 2002) for obtaining possession of the secured assets.

2. In view of the fact that the issue being raised is a pure question of law and there is no factual controversy, as such we are proceeding to decide the writ petition finally without putting private respondent no.3 to notice. However, its right to seek variations/modifications in the order, in case he feels aggrieved, is being kept reserved.

3. Factual matrix of the case in brief are as under. Respondent No.3 which is a proprietorship firm availed cash credit facility from the petitioner-Bank. Property in question were pledged as security for the credit facility in the form of secured assets with the Bank. Admittedly, the loan account of respondent no.3 became

irregular and unsatisfactory and when despite various demand notices, the account was not regularized, it was classified as non performing asset on 16.5.2015. Thereafter the petitioner-bank recalled the loan and in order to enforce the security interest created in its favour by the borrower-respondent no.3 initiated proceedings under the SARFAESI Act, 2002. A notice under Section 13(2) of the Act of 2002 was issued requiring respondent no.3 to clear the entire outstanding liability of Rs. 4,65,931/- along with further interest until payment in full within 60 days.

4. Aggrieved by the notice under Section 13(2) of the Act 2002, respondent no.3 approached this Court by filing Writ Petition No.40196 of 2015 making a prayer to permit repayment of entire outstanding dues in easy instalments. The said writ petition was dismissed on 22.7.2015 by making following observations :-

"After hearing learned counsel for the parties, in our view, the Court cannot order rescheduling the instalments of the loan. The petitioner himself has breached the contract and not deposited regular instalments of loan in time. However, a sympathetic view can be taken by the Bank by rescheduling instalments of loan if the petitioner approaches the Bank and comply with any terms and conditions to show his bona-fide as may be imposed by the Bank.

For the aforesaid reasons, we are not inclined to interfere with the matter in exercise of extraordinary power under Article 226 of the Constitution of India. The writ petition is accordingly dismissed."

5. Thereafter petitioner-bank issued a notice dated 23.12.2015 under Section 13(4) of the said Act read with Rule 8 of the Rules. Subsequently, after a publication and following the procedure, the bank auctioned the secured asset namely commercial plot standing in the name of Firoz Khan (respondent no.3) situate at Near Jali Kothi, Mohalla Khalil Garbi District Shahjahanpur on 30.3.2016 in favour of one Smt. Urmila Dixit and Smt. Manju Dixit. The petitioner confirmed the bid/offer of Rs. 28.05 lakh. Petitioner-bank also made an application under Section 14 of the SARFAESI Act, 2002 seeking assistance of the District Magistrate for taking possession/control of the secured asset.

6. The proceedings were transferred by the Collector to be decided by the Additional District Magistrate who vide order dated 12.4.2016 rejected the application on the ground that since the auction of the property was made during the pendency of the proceedings as such same is illegal.

7. Learned counsel for the petitioner contends that view taken by the Additional District Magistrate that auction could not have been made during pendency of the proceedings under Section 14 of the said Act, is patently erroneous and illegal. It is further submitted that the petitioner bank could have exercised the right given by Section 14 of the Act 2002 to approach the District Magistrate for taking possession of the secured assets at any time after issuance of the notice under Section 13(2) of the Act.

8. View taken by the authority while passing the impugned order appears to be that an auction could only be made after the possession of the secured asset is obtained by the Bank.

9. In order to appreciate the controversy, it may be relevant to refer the provisions of Section 13 of the SARFAESI Act, 2002, which provides for enforcement of security interest and Section 14 of the Act prescribing a Chief Metropolitan Magistrate or a District Magistrate to provide assistance to the secured creditor in taking possession of the secured asset on an application made in this behalf. The two Sections read as under :-

"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 the 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 subsection (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.

(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 fifteen days) 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 under section 17 or the Court of District Judge under section 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 secured assets 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 or 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.

(5-A). Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5-B). Where the secured creditor, referred to in sub-section (5A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under subsection (4) of section 13.

(5-C). The provisions of section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under subsection (5A).

(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 subsection (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 [sixty per cent] 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 subsection (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the work men'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 creditors the work men's dues in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such work men's dues cannot be ascertained, the liquidator shall intimate the estimated amount of work men'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 workman's dues, such creditor shall be liable to pay the balance of the work men'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 work men'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 [sixty per cent] 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 subsection (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 assets and documents to the secured creditor.

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring

that -

- (i) the aggregate amount of financial assistance grant and the total claim of the Bank as on the date of filing the application;
- (ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;
- (iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;
- (iv) the borrower has committed default in repayment of the financial assistance grant aggregating the specified amount;
- (v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;
- (vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;
- (vii) the objection or representation in reply to the notice received from the borrower has not been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;
- (viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;
- (ix) that the provisions of this Act and the rules made thereunder had been complied with;

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets;

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,-

- (i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets 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 [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any court or before any authority."

10. A perusal of the provisions of Section 13 of the Act goes to show that it begins with non obstinate clause. It provides that notwithstanding anything contained in Sections 69 or 69-A of the Transfer of Property Act, any security interest created in favour of a secured creditor may be enforced without the intervention of the Court, by such creditor in accordance with the provisions of this Act. Under Section 13(2) of the Act, in case, if a borrower makes any default in repayment of a secured debts and his account has been classified as non performing assets, the secured creditor may issue notice in writing to the borrower to discharge the outstanding liability within 60 days from the date of notice, failing which the secured creditor shall be well within its rights to exercise or any of the rights provided to it under Section 13(4) of the Act. Section 13(3) of the Act provides for the contents of notice to be issued under Section 13(2) of the Act such as details of the outstanding liability payable by the borrower and also details of the secured assets which the creditor intends to enforce in the event of non-payment by the borrower. Section 13(3)(A) of the Act contemplates of a representation/objection by the borrower and puts the secured creditor under an obligation to decide the same and to communicate the reasons for non acceptance of the representation/objection to the borrower. Section 13(4) of the Act provides that in case the borrower fails to discharge his liability within the period specified in the notice issued under Section 13(2) of the Act, the secured creditor is entitled either to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale of the same or to take over management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realisation of its outstanding dues. Section 13(4) of the SARFAESI Act, 2002 proceeds on the premises that the borrower who is under a liability has failed to discharge the same within the period provided by a notice to him under Section 13(2) of the Act and, thus the secured creditor is entitled to take recourse to the measures provided under Section 13(4) of the Act, one of which is taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realisation of its dues. Section 14 of the Act vests a secured creditor with the power to take assistance from the District Magistrate and also from Chief Metropolitan Magistrate in obtaining possession of the secured assets. From a bare reading of the provisions of Section 14 of the SARFAESI Act, 2002, quoted

herein above, it is clear that no distinction has been drawn as to when the said power is to be exercised either before exercising the right to transfer the secured assets either by way of lease, assignment of sale or after that. It simply talks of assistance of the authority named in the Section for the purposes of taking possession. Further Section 13(4) of the SARFAESI Act, 2002 clearly empowers the secured creditor to take possession of the secured assets in case, the borrower has failed to discharge his liability in full within the period of 60 days specified in the notice to be given under Section 13(2) of the SARFAESI Act, 2002. Section 13(4)(a) as well as (b) of the SARFAESI Act, 2002 further provides that right to take possession of the secured assets or the management of the business shall include the rights to transfer by way of lease, assignment or sale. Thus, it becomes immaterial when an application is made under Sections 14 of the SARFAESI Act, 2002. Further time factor as to when application under Section 14 of the SARFAESI Act, 2002 is to be made becomes immaterial as the right to take possession of the secured assets can be exercised by the secured creditor at any point of time after expiry of the period of 60 days from the date of notice under Section 13(2) of the SARFAESI Act, 2002. There may be cases where there may not arise any occasion for the secured creditor to make an application under Section 14 of the SARFAESI Act, 2002, one such case being where the borrower may handover possession of the secured assets willingly to the secured creditor. In other cases, the secured assets may be in possession of a third person or might have been illegally transferred to a third person by the borrower after issuance of notice under Section 13(2) of the SARFAESI Act, 2002, in such cases secured creditor may have to take recourse to the provisions of Section 14 of the SARFAESI Act, 2002 seeking assistance for taking possession of the secured assets. As already stated above, the Act does not prescribe any stage at which the provisions of Section 14 of the SARFAESI Act, 2002 could be invoked by the secured creditor. Recourse to Section 14 of the SARFAESI Act, 2002 can be taken by the secured creditor at any point of time after expiry of a period of 60 days from the date of issuance of notice under Section 13(2) of the SARFAESI Act, 2002, either before the transfer of the secured assets or any time after that in case the secured creditor is not in a position to obtain peaceful possession of the secured assets.

11. It may also be relevant to refer to Rule 8 of the Security Interest (Enforcement) Rules, 2002. Rule 8(1) provides that where the secured assets 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 same on the outer door or at any conspicuous place of the property. It may also be relevant to refer to Rules 8(3) and 8(4) of the Rules which clearly indicate that possession of the secured assets can be taken in case it is an immovable property, even before its sale or disposal. The said Rules read as under :-

"(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."

12. A perusal of the aforesaid Rules once again clearly establishes that the possession of a secured asset can be taken by the secured creditor at any time even before the auction sale or disposal of the said property. The issue incidentally came up for consideration before the Hon"ble Apex Court in the case of Transcore v. Union of India and another, 2008(1) SCC-125. The issue for consideration before the Hon"ble Apex Court in the aforesaid case was whether withdrawal of an O.A. in terms of the first proviso to Section 19(1) of the Debts Recovery Tribunal Act, 1993 is a condition precedent to take recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The Hon"ble Apex Court after analysing the provisions of the SARFAESI Act, 2002 as well as Debts Recovery Tribunal Act, 1993, while considering the point no.2 which was whether recourse to take possession of the secured assets of the borrower under Section 13(4) of the SARFAESI Act, 2002 comprehends the power to take actual possession of the immovable property, held as under :-

"73. 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.

74. Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realising the secured assets. Section 13 (4-A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4-A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession

notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 14(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. (emphasis supplied). Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the disputed adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order 40, 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 disputed 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."

13. The arguments advanced before the Hon"ble Apex Court that physical possession can be taken only after sale is confirmed in terms of Rule 9(9) of 2002 Rules was not accepted for the above reasons. The ratio of the aforesaid decision is clear that once the borrower who is under liability has failed to discharge the same within the period prescribed in notice under Section 13(2) of the SARFAESI Act, 2002, the secured creditor is entitled 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 realising secured assets.

14. In view of the aforesaid facts and discussions, the view taken by respondent no.2 in rejecting the application made by the petitioner under Section 14 of the Act on the ground that auction of secured assets made during pendency of the application under Section 14 renders it void and illegal and against the provisions of the SARFAESI Act, 2002 is patently erroneous and cannot be sustained. At this stage, it may also be relevant to mention that the objection filed by the respondent no.3 in the proceedings under Section 14 of the SARFAESI Act, 2002 dated 14.3.2016 that he was ready to deposit the amount was of no consequence inasmuch as Section 13(8) of the SARFAESI Act, 2002 provides that the dues with all costs, charges and expenses incurred are to be tendered to the secured creditor at any time before the date fixed for sale or transfer and in that eventuality no further steps shall be taken for transfer of sale of the secured assets. Respondent no.3, the borrower only made an application in this regard but the amount was not actually tendered either to the secured creditor, i.e. the petitioner or even to the authority where the proceedings were pending prior to the date of auction. The requirement of Section 13(8) of the SARFAESI Act, 2002 is actual tender of the outstanding dues including all costs, charges and expenses and not a mere offer to clear the dues. Since outstanding dues were not tendered prior to the date of auction, no fault can be found with the action of the petitioner-bank proceeding to auction the secured assets and for this reason also the impugned order rejecting the application on the ground that auction has been made without adjudication on the offer made by respondent no.3, to clear the dues is also rendered illegal and bad in law, and cannot be sustained.

15. In view of the above facts and discussions, the impugned order dated

12.4.2016 passed by respondent no.2 is not liable to be sustained and is hereby quashed. Writ petition accordingly stands allowed. District Magistrate, Shahjahanpur is directed to decide the application of the petitioner under Section 14 of the SARFAESI Act, 2002 afresh in accordance with law and in the light of the observations made herein above expeditiously preferably within a period of six weeks from the date of production of a certified copy of this order before him.