

(2017) 03 GUJ CK 0009
In the Gujarat High Court

Case No : Special Civil Application No. 10353 of 2014 With Special Civil Application No. 11437 of 2014 With Special Civil Application No. 15599 Of 2016 With Civil Application No. 3340 of 2017

Sagar Innovative Private Limited

APPELLANT

Vs

Punjab National Bank

RESPONDENT

Date of Decision : 23-03-2017

Acts Referred:

Constitution of India, 1950 — Article 226, Article 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, Section 17

Citation : (2017) 141 SCL 141

Hon'ble Judges : Mr. C.L. Soni, J.

Bench : Single Bench

Advocate : Special Civil Application No. 10353 of 2014; Mr. Ashok L. Shah, Advocate, for the Petitioner No. 1; Ms. Nalini S. Lodha, Advocate and Rule Served, for the Respondent Nos. 1 to 2; Special Civil Application No. 11437 of 2014; Mr. Ashok L. Shah, Advocate, for the Petitioner No. 1; Mr. Saurabh Soparkar, Sr Advocate with Mr. A.S. Panesar, Advocate, for the Respondent Nos. 1 to 2; Mr. Swapneshwar Gautam, AGP, for the Respondent No. 3; Special Civil Application No. 15599 of 2016; Mr. A.R. Gupta and Aditya A. Gupta, Advocates, for the Petitioner Nos. 1 to 8; Ms. Kshna V. Sheth and Sunil D. Bhavsar, Advocates, for the Respondent No. 1; Civil Application No. 3340 of 2017; Ms. Kshna V. Sheth and Sunil D. Bhavsar, Advocates, for the Applicants; Aditya A. Gupta, Advocate, for the Respondent No. 1 to 8

Final Decision : Disposed Off

Judgement

Mr. C.L. Soni, J.(Oral) - All these matters are filed under Articles 226 and 227 of the Constitution of India being aggrieved by the action taken under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the Act"). Though in all these matters, the parties are different, however since one of the common issues raised is that the guarantor cannot be termed as borrower for the purpose of

taking action under Section 13 of the Act, all these petitions are heard and decided together. One additional issue raised in Special Civil Application No.11437 of 2014 is that the respondent No.1, which is a securitisation and reconstruction company, has no jurisdiction to take measures under Section 13(4) of the Act to recover Rs.10 crore independently lent to the petitioners and not part of the financial assets.

2. In Special Civil Application No.10353 of 2014, following prayers are made in para 26:-

"(a) This Hon"ble may be pleased to issue a writ of certiorari or any other writ, direction or order in the nature of certiorari declaring that provisions of Section 13(2) and 13(4) do not apply to the petitioner and therefore, the notice dated 13.01.2014 issued by the second Respondent purportedly under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the taking over of symbolic possession of the properties of the petitioner by the Respondent No.2 is illegal, null and void and without any authority of law.

(b) That the advertisement dated 03.05.2014 published by the Respondent No.2 in Free Press Journal, Mumbai dated 9.5.2014 be declared to be illegal, null and void and is without authority of law.

(c) That pending the admission, hearing and final disposal of this Petition the Respondent, their servants and agents be restrained by an order of this Hon"ble Court from in any manner dealing with the properties of the Petitioner at Survey No.119/120/123 Moje Navagam, Taluka Ankleshwar, Dist. Bharuch.

(d) That pending the admission, hearing and final disposal of this Petition, the Respondents, their servants and agents be restrained by an order of this Hon"ble Court in any manner proceeding further in furtherance of the newspaper advertisement dated 03.05.2014 published by the Second Respondent in "Free Press Journal", Mumbai.

(e) That pending the admission, hearing and final disposal of this Petition, the respondents be directed to handover back to the petitioner possession of their properties at Survey No.119/120/123 Moje Navagam, Taluka Ankleshwar, Dist. Bharuch.

(f)

(g)"

3. In Special Civil Application No.11437 of 2014, following prayers are made in para 48:-

(a) This Hon"ble Court may be pleased to issue a writ of certiorari or any other writ, direction or order in the nature of certiorari declaring that in view of the facts and circumstances of the case provisions of Sections 13(2) and 13(4) do not apply to the Petitioner and therefore, the notice dated 18.11.2013 issued by

the second Respondent purportedly under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is illegal, null and void and without any authority of law.

(b) That this Hon''ble Court may be pleased to declare that the order of learned District Magistrate dated 21.7.2014 rejecting the application of the Petitioner for copies of the Application No.E.C./M.A.G./Secu/Vasi 2713 of 2014 and documents produced therewith and for granting tile to the Petitioners to file their reply is illegal, null and void and against the principles of natural justice.

(c) That this Hon''ble Court be pleased to declare that the order of the learned District Magistrate, Vadodara, on Application No.E.C./M.A.G./Secu/Vasi 2713 of 2014 is illegal, null and void and is without jurisdiction and be further pleased to quash and set aside the same.

(d) That pending the admission, hearing and final disposal of this Petition the Respondents, their servants and agents be restrained by an order of this Hon''ble Court from in any manner taking over possession of the said properties of the Petitioner dealing with the properties of the Petitioners at R.S. No.111/paiki admeasuring about 32647 Sq. Mtrs. of village Vadadala (Devpura) in the sub-registration District Savli, Registration District Vadodara as also its plant and machineries and other movable properties.

(e) That pending the admission, hearing and final disposal of this Petition the operation and implementation of the order dated 28.7.2014 of the learned District Magistrate, Vadodara, passed on Application No.E.C./M.A.G./Secu/Vasi 2713 of 2014 be stayed.

(f)

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4. In Special Civil Application No.15599 of 2016, the petitioners have made following prayer in para 28:-

"(a) Your Lordships Be Pleased to issue a writ of certiorari, or any other writ, direction or order in the nature of certiorari declaring the provisions of Section 13(2) and 13(4) do not apply to the petitioners and therefore, the notice dated 08.06.2016, at Annexure B to this petition issued by the Respondent under the provisions of Section 13(2) of the Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the taking over of symbolic possession vide possession Notice dated 24.08.2016, issued by the Respondent at Annexure E, is illegal, null and void and without jurisdiction and to issue a writ of mandamus, certiorari or any other writ, direction or order to quash and set aside the aforesaid notices in the interest of justice.

(b) Your Lordships Be Pleased to quash and set aside the possession notice dated 24.08.2016 under Section 13(4) read with Rule 8(2) of the Security Interest (Enforcement) Rules, 2002, issued by the Respondent at Annexure E to this

petition, as being illegal and issued in violation of Rule 8(2) of the Security Interest (Enforcement) Rules, 2002 and to issue a writ of mandamus, certiorari or any other writ, direction or order to quash and set aside the aforesaid notice in the interest of justice.

(c) Your Lordships Be Pleased to restrain Respondent No.1 and/or their agents, servants to take further steps under the SARFAESI Act, 2002 and the Security Interest (Enforcement) Rules, 2002 qua the immovable property of the petitioners/ guarantors pending admission, hearing and final disposal of this petition.

(d)"

In this petition, Civil Application is preferred by the respondent authorised officer of the Bank of India seeking to vacate the interim relief granted in the main matter. Such Civil Application is not required to be considered as the main matter is finally heard.

5. Learned advocate Mr. Ashok L. Shah appearing for the petitioners in Special Civil Application Nos.10353 of 2014 and 11437 of 2014 and learned advocate Mr. Gupta appearing for the petitioner in Special Civil Application No.15599 of 2016 submitted that the Act does not apply to the petitioners as they are not the borrowers who have taken the loan but they are the guarantors. They submitted that the action under Section 13 of the Act could be taken only against the borrower who makes default in repayment of the loan and whose account with secured creditor is classified as NPA. They submitted that since the guarantor is not responsible to repay the financial assistance, there is no question of making any default or classifying his account as NPA. They submitted that though the guarantors are included in the definition of "borrower" in Section 2(f) of the Act, however in the context of taking any action under the Act, the borrowers are of two kinds; i.e. "borrower-in fact" and "borrower-in law". Referring to provisions of Section 13, they submitted that the actions contemplated under Section 13 are against the borrower who had taken financial assistance and not against the guarantor or the mortgagor. Referring also to definition of "default", they submitted that non-payment of debt is referable to the borrowers who have availed of loan and not to the guarantors and therefore, the provisions of the Act, especially Section 13, would not apply to them. Learned advocate Mr. Gupta raised additional argument that the possession of the property of the petitioner was taken in purported exercise of powers under Section 13(4) of the Act without following the mandatory procedure under Rule 8 of the Security Interest (Enforcement) Rules, 2002 ("the Rules") and therefore, the petitioner is justified to invoke extraordinary jurisdiction of this Court. Learned advocate Mr. Shah also raised additional submission in Special Civil Application No.11437 of 2014 that the respondent is neither a bank nor financial institution but it is a securitisation company which has no jurisdiction to enforce the provisions of Section 13 against the guarantor to recover the dues of the loan independently granted to the borrower. Mr. Shah submitted that measures under Section 13(4) of the Act could

be taken by the reconstruction company to recover the financial assets but not for recovery of fresh loan/ financial assistance granted to the borrower. He submitted that the petitioner of this petition was given Rs.10 crore as fresh loan and for recovery of the dues in connection with such fresh loan, the Act does not apply. Referring to Section 5(2) of the Act, he submitted that securitisation or the asset reconstruction company cannot be considered as deemed lender under the Act for independent lending to the petitioner. He submitted that if the reconstruction company is not the deemed lender within Section 5(2) of the Act, it is not authorised to recover any dues from the guarantor by resorting to the provisions of Section 13 of the Act in connection with fresh lending done by it to the borrower. He further submitted that Section 9 provides for rescheduling of debts- NPA but not restructuring of other dues. Mr. Shah submitted that since the measure of taking possession of the property of the petitioners under Section 13(4) of the Act is without jurisdiction, the Court may exercise its extraordinary powers under Article 226 of the Constitution of India.

6. Learned senior advocate Mr. Saurabh Soparkar appearing with learned advocate Mr. Panesar in Special Civil Application No.11437 of 2014, learned advocate Ms. Lodha appearing in Special Civil Application No.10353 of 2014 and learned advocate Mr. Bhavsar appearing in Special Civil Application No.15599 of 2016 submitted that since against the measures taken under Section 13(4) of the Act, the statutory remedy of appeal under Section 17 of the Act is available, the petitioners should be relegated to avail of such statutory remedy. They submitted that the "borrower" defined under the Act would also mean a person who has given any guarantee or created any mortgage or pledge as security for financial assistance granted by any bank or financial institution. They submitted that when the purpose to enact the Act is to reduce NPAs by adopting measures for speedy recovery of the financial assets by enforcement of the security interest, the legislature could be said to have intended that the Act would apply even to the guarantors/ mortgagors and actions envisaged under Section 13 could well be taken against such guarantors and mortgagors. In Special Civil Application No.11437 of 2014, learned senior advocate Mr. Soparkar argued that since respondent No.1 is a private company, the petition under Article 226 of the Constitution of India would not be maintainable against it. He submitted that even otherwise, financial assistance of Rs.10 crore given to the borrower was part of the restructured dues/debt and the respondent company is since a secured creditor within the meaning of definition of secured creditor, it has jurisdiction to take action under Section 13 of the Act.

7. The Court having heard learned advocates for the parties finds that all the petitions are filed after the measure of taking possession of the secured assets of the petitioners is taken under Section 13(4) of the Act. Section 17 of the Act provides for remedy of appeal to any person including the borrower aggrieved by any of the measures referred to in sub-section (4) of Section 13 of the Act taken by secured creditor or his authorised officer. As per sub-section (2) of Section 17, Debts Recovery Tribunal (DRT) has jurisdiction to consider whether any of the

measures referred to in sub-section (4) of Section 13 taken by secured creditor for enforcement of the security is in accordance with the provisions of the Act or the Rules made thereunder. As provided in sub-section (3), if the DRT finds that measures taken under Section 13(4) of the Act are not in accordance with the provisions of the Act or the Rules and requires restoration of the management of the secured assets to the borrower or restoration of the possession of the secured assets to the borrower, it may by order declare that the recourse to any of the measures taken under Section 13(4) of the Act by secured creditor is invalid and restore possession of the secured assets to the borrower or restore the management of the secured assets to the borrower and pass such further order as it may consider appropriate and necessary in relation to the recourse taken under sub-section (4) of Section 13. Thus, statutory remedy of appeal under Section 17 available to any person aggrieved by measures taken under sub-section (4) of Section 13 of the Act is efficacious and exhaustive.

8. However, it is argued on behalf of the petitioners that when the Act does not apply to the petitioners or that the action taken under sub-section (4) of Section 13 against the petitioners is without jurisdiction, the petitioners are entitled to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India and they may not be relegated to the alternative remedy.

9. The contentions that the Act does not apply to the petitioners and that the action taken under Section 13(4) is without jurisdiction are mainly on the premise that the petitioners since have not taken financial assistance but has given guarantee as security for financial assistance taken by the borrowers, they cannot be said to be borrower responsible to repay the loan and committed default in repayment of such loan and also on the premise that since the accounts of the guarantors are not maintained by secured creditor, there is no question of classifying the account of the guarantor as NPA.

10. As regards the question whether the guarantor/ mortgagor could be proceeded against under Section 13 for recovery of the secured debt, the Court finds from the statement of objects and reasons for enacting the Act and from the Scheme of the Act that if the guarantors or the mortgagors are taken to be excluded from the purview of the Act, it would run counter to the objects intended to be achieved by the legislature. The Statement of objects and reasons reads as under:-

"The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to

commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise longterm assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce nonperforming assets by adopting measures for recovery or reconstruction."

As stated in the statement of objects and reasons, to come out from the slow place of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions, the Act is enacted to regulate securitisation and reconstruction of the financial assets and enforcement of the security interest and for the matters connected therewith or incidental thereto.

11. The definition of "borrower" takes in its sweep even a person who has given guarantee or created any mortgage or pledge as a security for the financial assistance granted by any bank or financial institution. The security interest means right, title or interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31. The creation of security interest to secure the debt of the bank or financial institution does not fall within Section 31 of the Act. Security interest could be created under the security agreement as defined in section 2(zb) of the Act and on creation of such security interest, the debt of the bank or financial institution is secured. Therefore, a person who has given any guarantee or created any mortgage or pledge as security for financial assistance granted by any bank or financial institution, is a borrower within the meaning of "borrower" under the Act.

12. Sub-Section (1) of Section 13, which provides for enforcement of any security interest created in favour of any secured creditor in accordance with the provisions of the Act, notwithstanding anything contained in Section 69 and 69A of the Transfer of Property Act and without intervention of the Court or the Tribunal, clearly indicates the legislative intent that the Act applies to the guarantor or the mortgagor for recovery of the secured debt by enforcing

security interest against them.

13. Sub-section (2) of Section 13 when read with sub-section (3) thereof, it becomes clear that when the borrower, who is under liability to a secured creditor under security agreement makes default in repaying the secured debt or any instalment thereof and his account in respect of such debt is classified as NPA, the secured creditor can issue notice to the actual borrower of loan/ financial assistance, who is referred as "borrower in-fact" by learned advocate Mr. Shah and also to the guarantor/ mortgagor who is referred as "borrower in-law" by Mr. Shah for discharging liability to secured creditor under the security given by them and on failure to discharge such liability, can enforce secured assets by taking measures under Section 13(4) of the Act.

14. Thus, though default in making repayment of the financial assistance is by the person who is actual borrower of such financial assistance and to whom definition of "default" could be said to be applied, however when the person who has given guarantee or created mortgage as a security for financial assistance given by the bank or the financial institution, is specifically included in the definition of "borrower", the guarantor/ mortgagor would stand covered in Section 13(2) and 13(4) for taking measures to recover secured debt.

15. When the object of the Act is for speedy recovery of the secured debts which are NPAs, which could be achieved by enforcement of security interest without intervention of the Court or the Tribunal, the guarantors/ mortgagors are very much intended to be proceeded against under the provisions of the Act for recovery of the secured debt. The provisions made in sub-section (11) of Section 13 is one more indication of the legislative intent to apply the provisions of Section 13(2) and 13(4) against the guarantor/ mortgagor for recovery of the secured debt. It provides that without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors to sell the pledged assets without first taking any measures specified in Clauses (a) to (d) of sub-section (4) in relation to the secured assets under the Act. Thus, sub-section (11) would go to show that the secured creditor does have right to proceed against the guarantor or the mortgagor under Section 13 for enforcement of the security. In such view of the matter, the contention that the Act does not apply to the guarantors or the mortgagors and that no action can be taken against them under Section 13 of the Act cannot be accepted. The guarantors or the mortgagors aggrieved by the measures taken under sub-section (4) of Section 13, can have their statutory remedy of appeal under Section 17 of the Act.

16. In the case of *United Bank of India v. Satyawati Tondon and others* reported in (2010)8 SCC 110, Hon"ble Supreme Court while examining the question whether the appellant therein could have issued notices to respondent No.1 therein- guarantor under Section 13(2) and 13(4) and filed an application under Section 14 of the Act without first initiating action against the borrower, i.e. respondent No.2 therein, for recovery of the outstanding dues, has held and

observed in para 42 and 43 as under:-

"42. There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

17. In the case of Jagdish Singh v. Heeralal and others reported in (2014)1 SCC 479, Hon"ble Supreme Court on the question of availability of remedy of appeal under Section 17 of the Act has held and observed in para 19 to 25 as under:-

"19. The expression "any person" used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13(4) of the Securitisation Act. Reference may be made to the judgment of this Court in Satyavati Tondon's case.

20. Therefore, the expression "any person" referred to in Section 17 would take in the plaintiffs in the suit as well. Therefore, irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of Section 17 of the Securitisation Act, in case the bank (secured creditor) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest.

21. Section 34 of the Securitisation Act ousts the civil court jurisdiction. For easy reference, we may extract Section 34 of the Securitisation Act, which is as follow:

"34. Civil Court not to have jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

22. The scope of Section 34 came up for consideration before this Court in Mardia Chemicals Ltd. and this court held as follow:

"50. It has also been submitted that an appeal is entertain able before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr. Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under subsection (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13."

23. Section 13, as already indicated, deals with the enforcement of the security interest without the intervention of the court or tribunal but in accordance with the provisions of the Securitisation Act.

24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing the secured assets. Any person aggrieved by any of the "measures" referred to in subsection (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have jurisdiction to

entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression "in respect of any matter" referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. Civil Court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9, CPC as well.

25. We are of the view that the civil court jurisdiction is completely barred, so far as the "measure" taken by a secured creditor under sub-section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal, to determine as to whether there has been any illegality in the "measures" taken. The bank, in the instant case, has proceeded only against secured assets of the borrowers on which no rights of Respondent Nos.6 to 8 have been crystallised, before creating security interest in respect of the secured assets.

18. Learned advocate Mr. Gupta however submitted that in the case of his petitioners, mandatory procedure as envisaged in Rule 8 of the Rules has not been followed before taking possession of the secured assets from the petitioners and therefore, the action taken against the petitioners could be said to be without jurisdiction and since the action is without jurisdiction, this Court may exercise its extraordinary powers under Article 226 of the Constitution of India. The Court, however, finds that any action taken by secured creditor in contravention of the provisions of the Act or the Rules could well be subject to scrutiny by the Tribunal in exercise of the powers under Section 17 of the Act. Sub-section (2) of Section 17 in terms provides that the Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken by secured creditor for enforcement of the security are in accordance with the provisions of the Act and the Rules made thereunder. The Tribunal has also power to restore the management of the assets or to restore the possession of the assets if it finds that the measures taken are contrary to the provisions of the Act or the Rules. Therefore, simply because it is alleged that the mandatory procedure of Rule 8 is not followed before taking possession of the secured assets, that by itself is no ground to bypass the statutory remedy of appeal.

19. In the case of *Kanaiyalal Lalchand Sachdev and others v. State of Maharashtra and others* reported in (2011)2 SCC 782, Hon"ble Supreme Court has held and observed in para 21 to 23 as under:-

"21. In *Indian Overseas Bank and Anr. v. Ashok Saw Mill*, the main question

which fell for determination was whether the DRT would have jurisdiction to consider and adjudicate post- Section 13(4) events or whether its scope in terms of Section 17 of the Act will be confined to the stage contemplated under Section 13(4) of the Act? On an examination of the provisions contained in Chapter III of the Act, in particular Sections 13 and 17, this Court, held as under :

"35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

36. 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 possession may have been made over to the transferee.

.....

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT."

(Emphasis supplied by us)

22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT.

23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well-settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See: *Sadhana Lodh v. National Insurance Co. Ltd. and Anr.*, *Surya Dev Rai v. Ram Chander Rai* and *SBI v. Allied Chemical Laboratories.*)

20. In Special Civil Application No.11437 of 2014, as regards the contention that

the petition is not maintainable under Article 226 of the Constitution, it is required to note that the reconstruction company is to function as statutorily required to take action under Section 13 of the Act and therefore, it cannot be said that writ petition is not maintainable. But, since the statutory remedy is available, the Court may not entertain the petition under Article 226 of the Constitution. However, learned advocate Mr. Shah for the petitioner submitted that since the impugned action taken by the respondent- reconstruction company is not to recover financial assistance, but to recover the dues of Rs.10 crores which were independently lent by the respondent company, it could neither be said to be a bank or financial institution or a secured creditor and therefore, the respondent No.1 company has got no jurisdiction to take any action under the Act to recover dues of Rs.10 crore from the petitioners. Learned senior advocate Mr. Soparkar however submitted that the measures taken against the petitioners under Section 13(4) of the Act are to recover restructured dues of financial assistance, for non-payment of which the respondent No.1 company as a deemed lender and secured creditor is entitled to take action under the provisions of Section 13 of the Act against the petitioners. Mr. Soparkar drew the attention of the Court to the contents of the notice issued under Section 13(2) of the Act to the original borrower and also to the petitioner who is the mortgagor to point out that additional loan of Rs.10 crore was given to the petitioner for the purpose of restructuring of acquired loans. He also drew the attention of the Court to the affidavit of respondent No.1 to support the stand taken that grant of additional facility to the borrower was a part of restructuring of the dues. He also took the Court to a document at Annexure-R4, annexed with the affidavit-in-reply, which is a communication dated 13.9.2010 addressed to the Chairman of the borrower company, stating that on the terms and conditions agreed between the parties, additional facility was granted as part of restructuring of the dues. Copy of the Annexure referred in the said communication containing the terms and conditions for such additional facility is found placed at page 133.

21. The Court finds that when the stand taken by respondent No.1 is that advancing financial assistance of Rs.10 crore to the borrower was not independent loan given to the borrower but was part of the restructured loan which was made for restructuring of dues/ financial assistance, it is a stand taken contrary to the stand taken by the petitioner and gives rise to a dispute which could be resolved only on considering or appreciating the evidence including documentary evidence and this Court under Article 226 of the Constitution of India may not go into disputed questions of fact. Though learned advocate Mr. Shah submitted that the action could be taken under Section 13 of the Act only in respect of the financial assistance acquired by the securitization or reconstruction company and that respondent No.1 company is neither bank nor financial institution or that it would not satisfy the definition of " Secured Creditor" as measures taken under Section 13(4) of the Act against the petitioners is not for secured debt but to recover the dues of independent loan advanced by respondent No.1, however once the respondent No.1 has taken

stand with supporting documents placed on record that Rs.10 crore given to the petitioner was part of restructuring of the financial assets, the Court would not enter into disputed question of such fact when a remedy of statutory appeal under Section 17 of the Act is available to the petitioners against the measures taken against them under Section 13(4) of the Act.

22. In the case of Bharat Steel Tubes Limited v. IFCI Limited reported in (2010)14 SCC 77, Hon"ble Supreme Court has held an observed in para 32 and 33 as under:-

32. In this case, we have a situation in which moneys were admittedly borrowed by the Petitioner- Company from the Punjab National Bank which it was unable to repay in full. Ultimately, a One-Time Settlement was arrived at between the Petitioner- Company and the Punjab National Bank for a sum of Rs.26.16 crores. Out of the said amount, the Petitioner-Company paid a sum of Rs.13.80 crores and defaulted in payment of the rest. It entered into an agreement with ACE to pay off the entire dues of Punjab National Bank, which it did. The entire dues of the Bank, therefore, stood satisfied, but a new liability was created by the Petitioner-Company in favour of ACE which assigned its rights to IFCI Ltd. As explained hereinbefore, by virtue of Section 3 of the SARFAESI Act, 2002, a reconstruction company, such as ACE, would be entitled to carry on the business of securitisation.

33. We are not, therefore, impressed with Mr. Andhyarujina's submission that once the dues of the Bank were liquidated and a separate arrangement was entered into by the Petitioner-Company with ACE, the demand under section 13(2) of the said Act ceased to exist and IFCI Ltd, which acquired the interest of ACE in the Memorandum of Understanding with the Petitioner-Company, could not take action against the Petitioner-Company under the SARFAESI Act. There is no dispute that IFCI Ltd. is a financial institution which is an assignee of the interest of ACE in dues recoverable from the Petitioner-Company.

23. In light of the above and since statutory remedy of appeal is available to all the petitioners under Section 17 of the Act against the actions impugned in the petitions, the petitions are not entertained and are rejected, leaving it open to the petitioners to avail of alternative remedy before appropriate forum. Rule discharged.

24. At this stage, learned advocates appearing for the petitioners request to continue the interim relief for a period of four weeks to enable them to approach the higher forum. Such request is opposed by learned advocates appearing for the respondents. The Court however finds that since the interim relief has remained in operation till these matters are finally decided, no prejudice would be caused to the respondents if interim relief is extended for a period of three weeks from today. Hence, it is directed that no coercive steps shall be taken against the petitioners in connection with their secured assets for a period of THREE WEEKS from today to enable them to approach the higher forum.

25. Since the main petitions are disposed, the civil application stands disposed of accordingly.