The High Court Of Madhya Pradesh: Jabalpur

(DIVISION BENCH)

Writ Appeal No. 784 of 2018

Aditya Birla Finance Limited ……. APPELLANT

Versus

Shri Carnet Elias Fernandes Vemalayam ..… RESPONDENTS and others

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CORAM:

Hon'ble Mr. Justice Hemant Gupta, Chief Justice

Hon'ble Mr. Justice Vijay Kumar Shukla, Judge

Appearance:

Shri H.C. Kohli and Shri Sanjeev Singh, Advocates for the Appellant.

Shri Naman Nagrath, Senior Advocate with Shri Vishal Bhatnagar, Advocate for the respondent Nos. 1 and 2.

Shri Amit Seth, Government Advocate for the respondent Nos.3 to 5/State

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Whether Approved for Reporting: **Yes**

Law Laid Down:

- ✓ The provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act") override all other provisions of the law which are inconsistent therewith, therefore, will prevail over the provisions of all other Statutes and so as the Arbitration and Conciliation Act, 1996 to the extent of inconsistencies. Thus, the proceedings initiated by the appellant under Section 14 of the Act cannot be said to be illegal on account of a Receiver appointed in proceedings under Section 9 of the Arbitration and Conciliation Act. - ***Reliance is placed upon;*** (2018) 3 SCC 85, **(Authorized Officer, State Bank of Travancore and another vs. Mathew K.C.);** (2009) 4 SCC 94 **(Central Bank of India vs. State of Kerala and others);** (2004) 4 SCC 311 **(Mardia Chemicals Ltd. and others etc. etc. vs. Union of India and others, etc. etc.**); and a Division Bench decision of this

Court in M.P. No.2271/2018 **(M/s Crest Steel and Power Private Limited and others vs. Punjab National Bank & others**) decided on 10.05.2018.

- ✓ Section 14 of the Act contemplates disclosure on nine different points and where all nine points have been mentioned specifically in the affidavit filed, precondition mentioned in Section 14 of the Act is satisfied. Thus, non-disclosure of order passed by the Bombay High Court in proceedings under Section 9 of the Arbitration and Conciliation Act, 1996 was found to be not mandatory or even to have caused any prejudice to the petitioner.

- ✓ The Act does not contemplate symbolic or actual possession - Reliance is placed upon Supreme Court judgments reported as (**2008) 1 SCC 125 (Transcore vs. Union of India and Another**) as approved in **(2009) 4 SCC 94 (Central Bank of India vs. State of Kerala and others**).

- ✓ In terms of Section 14 of the Act, the District Magistrate is duty bound to hand over physical possession to the secured creditor.

- ✓ The proceedings under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are not the proceedings to adjudicate the rights of the parties. Therefore, no notice is contemplated to be served upon debtor, as such proceedings are taken only after serving notice under Section 13 of the Act. - ***Followed*** - Judgment of the Supreme Court reported as **(2013) 9 SCC 620 (Standard Chartered Bank, etc. vs. V. Noble Kumar and others, etc**) and Bombay High Court decision rendered in **Trade Well vs. Indian Bank, (2007 Cri LJ 2544 (Bom.).**

Significant Paragraph Nos. : **11 to 28**

Heard/Reserved on: 10.07.2018

O R D E R

(Passed on this 13th day of July, 2018)

Per : Hemant Gupta, Chief Justice:

The challenge in the present writ appeal is to an order passed by the learned Single Bench on 11.04.2018 in Writ Petition No.8077/2017 (Shri Carnet

Elias Fernandes Vemalayam and another vs. District Magistrate and others) whereby an order passed by the District Magistrate, Bhopal on 28.04.2017 under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act") has been set aside.

02. The sole reason for setting aside the order of the District Magistrate is that the Bombay High Court in Arbitration Petition No.1118/2015 (Aditya Birla Finance Limited vs. Mr. Carnet Elias Fernandes and another) has passed an order on 04.09.2015 to hand over the physical possession of the property to the Receiver in proceedings initiated by the appellant under Section 9 of the Arbitration and Conciliation Act, 1996 (for short "the Arbitration Act"). It was found that since symbolic possession of the property is with the Receiver, therefore, an order passed by the District Magistrate cannot override the order dated 04.09.2015 passed by the Bombay High Court. The relevant extract from the order dated 11.04.2018 (Annexure A-1) passed by the learned Single Bench, reads, thus:

> "**19**. So far as ground No.3 and 4 regarding physical possession of the properties is concerned, the Bombay High Court while passing the interim order has directed to hand over the physical possession of the properties to the receiver. Thus, as per the interim order passed by the Bombay High Court, symbolic possession of the properties has been given to the receiver and, thus, as the symbolic possession of the properties is with the receiver, the order passed by respondent No.3 ceased to have any effect and cannot override the order dated 04/09/2015 passed by the Bombay High Court. The order passed by the Bombay High Court is certainly having a binding effect and cannot override and ceased by taking shelter of any other law, be it SARFAESI Act. Respondent No.3 has concealed the fact about the order passed by the Bombay High Court on 04/09/2015 and that the properties as of now are not with the petitioners and it is with the receiver of the Bombay

> High Court. As these facts were not brought to the notice of respondent No.1, therefore, the said order deserves to be quashed."

03. Though the learned Single Bench has held that there is no alternative remedy against an order passed by the District Magistrate under Section 14 of the Act, but, a Division Bench of this Court in **W.P. No.19028/2017** (**Sunil Garg vs. Bank of Baroda and others**) decided on 16.04.2018 has held that remedy of an aggrieved person against an order passed by the District Magistrate is before the Debts Recovery Tribunal under Section 17 of the Act. Therefore, such finding of the learned Single Bench cannot be sustained.

04. Since the learned Single Bench has held that an order passed by the District Magistrate overrides the order of the Bombay High Court, whether such reasoning is legal and proper, needs to be examined.

05. The parties have entered into an agreement on 28.09.2012 whereby the appellant sanctioned loan of Rs.18.00 Crore to the writ petitioners (respondent Nos.1 and 2 herein). The stand of the writ-petitioners is that they faced an acute financial stress on account of an order of the Hon'ble Supreme Court cancelling the coal blocks and the Reserve Bank of India advised the Banks to curtail their exposures on power sector based industries. Thereafter, the writ-petitioners availed a housing loan from the appellant and that the appellant demanded the entire housing loan on 08.01.2015. The stand of the writ-petitioners is that though the agreement contemplated resolution of dispute at Bhopal but the appellant initiated arbitration proceedings in Mumbai by unilaterally altering the arbitration clause. The sole Arbitrator was appointed. The appointment of which was disputed by the writ-petitioners. However, the Arbitrator announced the Award on 05.10.2016 holding the writ-petitioners jointly and severally liable to

pay to the appellant a sum of Rs.23,65,07,643/- together with interest thereon @ 12.5% per annum from 01.04.2015 till the date of payment/realization of the amount by the appellant/claimant from the writ-petitioners. The writ-petitioners have filed a petition (Annexure P-6 to the writ petition) under Section 34 of the Arbitration Act, which is pending adjudication before the High Court of Bombay. It is also pleaded by the writ petitioners that a writ petition being W.P. No.11671/2015 (Carnet Elias Fernandes and another vs. Superintendent of Police, Bhopal and others) has been filed before this Court seeking direction for registration of an FIR, which is pending.

06. The appellant filed an application under Section 9 of the Arbitration Act before the Bombay High Court bearing Arbitration Petition No.1118/2015 (supra), on which, vide order passed on 04.09.2015, Court Receiver, High Court, Bombay was appointed as a Receiver in respect of the property of the respondents described in Ex.'U' of the said petition with a direction to appoint the respondents or any person found in possession of the said properties as an agent of the Court Receiver on usual terms and conditions including payment of royalty and on furnishing security. It was made clear that if the respondents (writ-petitioners herein) or such third party do not accept the agency of the Court Receiver on the usual terms and conditions within two weeks from the date of such offer, the Court Receiver shall have power to take physical possession of the said property. It may be mentioned that against an order dated 04.09.2015 passed in proceedings under Section 9 of the Arbitration Act, an appeal was preferred by the writ-petitioners being Appeal (L) No.725 of 2015 (M/s Carnet Elias Fernandes and Another vs. Aditya Birla Finance Limited), wherein, a Division Bench of the Bombay High Court passed an interim order

on 18.11.2015, directing the Court Receiver to take symbolic possession and that the writ-petitioners shall be appointed as the agent of the Court Receiver without payment of royalty and security deposit for the time being. Therefore, the writ-petitioners continued to be in actual physical possession though the Court Receiver was appointed.

07. The appellant initiated proceedings under the Act by serving a notice under Section 13(2) of the Act on 12.09.2016. It may be stated that the appellant was conferred rights as that of secured creditor under the Act on 05.08.2016 when a notification was issued by the Ministry of Finance. The writ-petitioners filed reply/objections to such notice issued under the Act. Thereafter, the appellant issued a notice under Section 13(4) of the Act. The writ-petitioners filed an application under Section 17 of the Act before the Debts Recovery Tribunal, Jabalpur being S.A. No.28/2017 (Shri Carmet Elias Fernandes and another vs. Aditya Birla Finance Limited) against the said action initiated by the appellant. The said proceedings are pending. It is, thereafter, the appellant initiated the proceedings under Section 14 of the Act. The District Magistrate without issuing any notice and giving any opportunity of hearing passed the impugned order on 28.04.2017. It is the said order, which has been set aside by the learned Single Bench.

08. Learned counsel for the appellant argued that the Act is a special Act providing speedier process of recovery of the secured assets and in terms of Section 35 of the Act, the provisions of such Act will have priority over the provisions of all other laws including the Arbitration Act, which is an Act for adjudication of the disputes. Since the Act has been given an overriding effect over any other laws in force, therefore, the proceedings under Section 14 of the

Act cannot be said to be in conflict with the proceedings under the Arbitration Act. It is contended that the proceedings under the Act and the Arbitration Act can continue independently but the proceedings under the Act will have preference over the proceedings under the Arbitration Act. In this context, reliance has been placed upon a judgment of the Supreme Court reported as **(2017) 16 SCC 741 (M.D. Frozen Foods Exports Private Limited and others vs. Hero Fincorp Limited**) and a Division Bench decision of this Court reported as **2018 SCC OnLine MP 325** (**Authorized Officer and Chief Manager vs. Prafulla Kumar Maheshwari**) rendered in Writ Appeal No.17/2018 decided on 01.05.2018.

09. On the other hand, the argument of Shri Naman Nagrath, learned senior counsel appearing for the writ-petitioners is that the District Magistrate cannot be conferred with the power to nullify an order passed by the Bombay High Court appointing a Receiver and handing notional possession of the property to the Receiver. The reliance has also been placed upon another decision of the Supreme Court reported as **(2000) 1 SCC 742 (Usha Harshadkumar Dalal vs. ORG Systems and others**) wherein, it was held that when a Court Receiver is appointed in respect of any property, it is said to be in *custodia legis* and the Court holds the property for the benefit of the true owner. The Court Receiver acts on behalf of the Court. The Court Receiver will have no power to deal with such property without the leave of the Court. The relevant extract of the said decision reads as under:-

> "**13**. Some of the basic and admitted facts of the case before us are that under the leave and licence agreement dated 7-9-1970, the premises in question was given to Suhrid Geigy Trading Ltd. for a period of five years. This licence was never renewed. During the subsistence of this leave and

> licence agreement, the Bombay Rent Act came to be amended and such of the licensees who were in possession pursuant to a valid licence on 1-2-1973 shall be deemed to have become the tenant of the landlord in respect of the premises or any part thereof in its possession (Section 15-A inserted by Maharashtra Act 17 of 1973). When the Receiver took the symbolic possession Suhrid Geigy Trading Limited was in occupation and by virtue of Section 15-A of the Bombay Rent Act such a licensee shall be deemed to be a tenant. The first respondent came in possession in 1979 pursuant to the amalgamation scheme approved by the Gujarat High Court on 24-12-1987. In view of these admitted facts the question is as to whether induction of the first respondent in the premises without leave of the Court and/or without any intimation to the Court Receiver will be valid or otherwise. It is a well-settled principle that when a Court Receiver is appointed in respect of any property it is said to be in custodia legis and the court holds the property for the benefit of the true owner. The Court Receiver acts on behalf of the court. Even the Court Receiver will have no power to deal with such property without the leave of the court. It is the duty of the Court Receiver to maintain the status quo and also to protect the property from being put to waste or allow it to diminish its value. The Court Receiver cannot encumber the property in any manner without the leave of the court....."

10. It is further argued that in an application filed before the District Magistrate, the appellant has not disclosed about the order passed by the Bombay High Court appointing a Receiver nor has it filed an affidavit as required under Section 14 of the Act. The affidavit filed, is a short affidavit, which states that the averments made in the application under Section 14 of the Act are true and correct, but, in terms of the provisions of Section 14, the affidavit itself has to contain nine-point information, as delineated in Section 14 of the Act. It is also argued that the writ-petitioners were not granted any opportunity of hearing before an order was passed by the District Magistrate. Therefore, the order passed by the District Magistrate violates the principles of natural justice.

11. In view of the aforesaid arguments advanced by the learned counsel for the parties, the first question which emerges for consideration is as to what is the relation between the Act and the Arbitration Act. Section 14 of the Act empowers the Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured assets while Section 35 of the Act gives overriding effect to the Act. The relevant provisions of the Act are reproduced as under:

> **"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.--**(1) Where the possession of any secured assets 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--
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> (a) take possession of such asset and documents relating thereto; and
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> (b) forward such assets and documents to the secured creditor.
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> 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—
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> (i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;
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> (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;
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> (iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;
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> (iv) the borrower has committed default in repayment of the financial assistance granted 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 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 within a period of thirty days from the date of application:

Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

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.

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

12. The object of enactment of the Act is that our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted into slow pace of recovery of defaulting loan and mounting level of non-performing assets (NPA) of Banks and Financial Institutions. Such Act was amended by the Central Act No.31 of 2016 known as the Insolvency and Bankruptcy Code, 2016 relating to reorganization and insolvency resolution of corporate persons, partnership firms and individuals in a time bound manner for maximization of value of assets of such persons, to promote entrepreneurship, availability of credit and balance the interests of all the stakeholders including alteration in the order of priority of payment of Government dues etc.

13. The Supreme Court in its decision on the subject reported as **(2004) 4 SCC 311 (Mardia Chemicals Ltd. and others etc. etc. vs. Union of India and others, etc.**) held as under:-

"**67**. …..... Therefore, it is clear that it has always been held to be lawful, whenever it was necessary in the public interest to legislate irrespective of the fact that it may affect some individuals enjoying certain rights. In the present we find that the unrealized dues of banking companies and financial

> institutions utilizing public money for advances were mounting and it was considered imperative in view of recommendations of experts committees to have such law which may provide speedier remedy before any major fiscal set back occurs and for improvement of general financial flow of money necessary for the economy of the country the impugned Act was enacted. Undoubtedly such a legislation would be in the public interest and the individual interest shall be subservient to it. Even if a few borrowers are affected here and there, that would not impinge upon the validity of the Act which otherwise serves the larger interest."

14. A three Judge Bench of the Supreme Court in a judgment reported as **(2009) 4 SCC 94 (Central Bank of India vs. State of Kerala and others**), held that the enactment of the Act can be treated as one of the most radical legislative measures taken by the Government for ensuring that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstruction. For the first time, the secured creditors have been empowered to take measures for recovery of their dues without the intervention of the courts or tribunals. The extract read as under:-

> "**92**. An analysis of the abovenoted provisions makes it clear that the primary object of the DRT Act was to facilitate creation of special machinery for speedy recovery of the dues of banks and financial institutions. This is the reason why the DRT Act not only provides for establishment of the Tribunals and the Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of recovery of the amount determined by the Tribunal or the Appellate Tribunal but also bars the jurisdiction of all courts except the Supreme Court and the High Courts in relation to the matters specified in Section 17. The Tribunals and the Appellate Tribunals have also been freed from the shackles of procedure contained in the Code of Civil Procedure. To put it differently, the DRT Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of banks and financial institutions, but also made provision for ensuring that

defaulting borrowers are not able to invoke the jurisdiction of civil courts for frustrating the proceedings initiated by the banks and financial institutions.

93. The enactment of the Securitisation Act can be treated as one of the most radical legislative measures taken by the Government for ensuring that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstruction. For the first time, the secured creditors have been empowered to take measures for recovery of their dues without the intervention of the courts or tribunals.

94. The Securitisation Act has also brought into existence a new dispensation for registration and regulation of securitisation companies or reconstruction companies, facilitating securitisation of financial assets of banks and financial institutions, easy transferability of financial assets by the securitisation company or reconstruction company to acquire financial assets of banks and financial institutions by issue of debentures or bonds or any other security in the nature of debenture, empowering the securitisation companies or reconstruction companies to raise funds by issue of security receipts to qualified institutional buyers, facilitating reconstruction of financial assets acquired by exercising power of enforcement of securities or change of management, declaration of any securitisation company or reconstruction company as a public financial institution for the purpose of Section 4-A of the Companies Act, defining "security interest" as any type of security including mortgage and charge on immovable properties given for due payment of any financial assistance given by any bank or financial institution, classification of borrowers' account as non-performing asset and above all empowering banks and financial institutions to take possession of securities given for financial assistance and sale or lease the same or take over management.

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108. The DRT Act and Securitisation Act were enacted by Parliament in the backdrop of recommendations made by the expert committees appointed by the Central Government for examining the causes for enormous delay in the recovery of dues of banks and financial institutions which were adversely affecting fiscal reforms.

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116. The non obstante clauses contained in Section 34(1) of the DRT Act and Section 35 of the Securitisation Act give overriding effect to the provisions of those Acts only if there is anything inconsistent contained in

> any other law or instrument having effect by virtue of any other law. In other words, if there is no provision in the other enactments which are inconsistent with the DRT Act or Securitisation Act, the provisions contained in those Acts cannot override other legislations.....
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> *** *** ***
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> **128**. If the provisions of the DRT Act and Securitisation Act are interpreted keeping in view the background and context in which these legislations were enacted and the purpose sought to be achieved by their enactment, it becomes clear that the two legislations, are intended to create a new dispensation for expeditious recovery of dues of banks, financial institutions and secured creditors and adjudication of the grievance made by any aggrieved person qua the procedure adopted by the banks, financial institutions and other secured creditors, but the provisions contained therein cannot be read as creating first charge in favour of banks, etc."

15. In another recent judgment reported as **(2018) 3 SCC 85, (Authorized Officer, State Bank of Travancore and another vs. Mathew K.C.)**, the Supreme Court *inter-alia* held that the loan advanced does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The extract from the Judgment reads as under:-

> "**8**. The Statement of Objects and Reasons of the SARFAESI Act states that the banking and financial sector in the country was felt not to have a level playing field in comparison to other participants in the financial markets in the world. The financial institutions in India did not have the power to take possession of securities and sell them. The existing legal framework relating to commercial transactions had not kept pace with changing commercial practices and financial sector reforms resulting in tardy recovery of defaulting loans and mounting non-performing assets of banks and financial institutions. The Narasimhan Committee I and II as also the Andhyarujina

Committee constituted by the Central Government Act had suggested enactment of new legislation for securitisation and empowering banks and financial institutions to take possession of securities and sell them without court intervention which would enable them to realise long term assets, manage problems of liquidity, asset liability mismatches and improve recovery. The proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as 'the DRT Act') with passage of time, had become synonymous with those before regular courts affecting expeditious adjudication. All these aspects have not been kept in mind and considered before passing the impugned order.

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15. It is the solemn duty of the Court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex-parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the taxpayer's expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in *United Bank of India vs. Satyawati Tandon,* (2010) 8 SCC 110, has also not been kept in mind before passing the impugned interim order. (SCC pp. 123-124, para 46)

> "46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such

> matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, AIR 1969 SC 556; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; and, Harbanslal Sahnia v. Indian Oil Corpn. Ltd, (2003) 2 SCC 107, and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order."

16. A Division Bench of this Court in a decision rendered in **Misc. Petition No.2271/2018 (M/s Crest Steel and Power Private Limited and others vs. Punjab National Bank & others**) decided on 10.05.2018, while examining the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 relied upon the judgment of the Supreme Court rendered in **Central Bank of India (supra)** to return a finding that primary object of the said Act is to facilitate creation of special machinery for speedy recovery of the dues of the Banks and Financial Institutions. The Tribunals and the Appellate Tribunals have also been freed from the shackles of procedure contained in the Code of Civil Procedure. The relevant extract from the said Division Bench decision, reads, thus:

> "**8.** The Act was enacted for establishment of Tribunal and Appellate Tribunals for expeditious adjudication and recovery of Debts due to Banks and Financial Institutions in the year 1993, consequent to the report of the Committee on the Financial System headed by Shri M. Narasimham. The three Judge Bench of the Hon'ble Supreme Court in a Judgment reported as *Central Bank of India v. State of Kerala, (2009) 4 SCC 94*, found that the primary object of the Act is to facilitate creation of special machinery for speedy recovery of the dues of Banks and Financial Institutions. The Act not only provides for establishment of the Tribunals and the Appellate Tribunals with the jurisdiction, powers and authority to make summary adjudication of applications made by banks or financial institutions and specifies the modes of recovery of the amount determined by the Tribunal or the Appellate Tribunal. The Tribunals and the Appellate Tribunals have also been freed

> from the shackles of procedure contained in the Code of Civil Procedure. Thus the Act has not only brought into existence special procedural mechanism for speedy recovery of the dues of Banks and Financial Institutions, but also made provision for ensuring that defaulting borrowers are not able to invoke the jurisdiction of civil courts for frustrating the proceedings initiated by the Banks and Financial Institutions."

17. Thus, the provisions of the Act override all other provisions of the law which are inconsistent therewith. Therefore, the provisions of the Act will prevail over the provisions of all other Statutes and so as the Arbitration Act to the extent of inconsistencies.

18. The judgment in **Usha Harshadkumar Dalal (supra)** is a judgment where the Court Receiver was appointed in exercise of power conferred under Order XL Rule 1 and 3 of the Code of Civil Procedure. There is no dispute that the Receiver is *custodia legis* and the Court holds the property for the benefit of the true owner. In the context of the present proceedings, the Bank as a secured creditor has a preferential right over any other creditor. In fact, the Court Receiver was appointed and symbolic possession was given to the writ petitioners in proceedings under Section 9 of the Arbitration Act. The Receiver was appointed to protect the property in terms of Section 9 of the Arbitration Act. But such proceedings will not create any encumbrance on the rights of secured creditor to enforce its rights against the secured assets as such right is being exercised in terms of later and special statute giving overriding effect to the Act. The Court Receiver appointed under Section 9 of the Arbitration Act will not have preference over the later and special Act which also gives overriding effect to such Act. Therefore, when the District Magistrate passes an order under Section 14 of the Act, it is not interfering with an order passed by the High Court under Section 9 of the Arbitration Act. The District Magistrate is

exercising power conferred upon him by a special Central Statute. It is the jurisdictional Court which has passed an order under the Arbitration Act. The District Magistrate is conferred with the power to secure possession in favour of a secured creditor in a summary manner. The District Magistrate is deriving its power not by the authority of its office but by an authority of the Central Statute, which has given overriding effect over all other laws including the Arbitration Act. The question of rank of the officers will not be relevant as the District Magistrate is not in the hierarchy of the officers under the Arbitration Act. Both statutes operate in different field with the Act having overriding effect. Therefore, such judgment is of no help to the argument raised by the learned counsel for the writ-petitioners.

19. Learned counsel for the appellant relies upon an order passed by a Division Bench of the Bombay High Court on 06.10.2016 in **Appeal (L) No.162/2016 (Pratap G. Somaiya and others vs. Rajesh Thakker and others**), wherein, the Receiver appointed by a Civil Court in Hyderabad sought execution of the award announced by the Arbitrator. In proceedings under the Act, the Court Receiver declined to hand over possession. The Bank sought intervention of the Court and after considering the argument raised, the Court held as under:-

> "**41**. Dr. Sathe, the learned Senior Counsel for the Appellant submitted that without proper adjudication of the debts, possession should not be handed over to the Bank. This submission is required to be stated to be rejected. It is a well settled position in law that proceedings under the SARFAESI Act are non-adjudicatory in nature and this is settled by a long line of decisions of the Apex Court and this Court. The Apex Court in Mardia Chemicals (supra) has considered various provisions of the Act and thereafter upheld the constitutional validity of the said Act. Division Bench of this Court in M/s

> Trade Well, a Proprietorship Firm, Mumbai and Anr. vs. Indian Bank and Anr (2007 Cri.L.J.2544) has also in terms held that the proceedings under the said Act are non-adjudicatory in nature. The Apex Court in Transcore vs. Union of India and Anr. (AIR 2007 SC 712) has also at great length discussed this issue and made observations on the scope and nature of the proceedings which are initiated and the measures which are to be taken by the Bank under Section 13(4) of the said Act. The Apex Court as well as this Court have noted that though initially RDDB Act was passed in 1993, it was noticed that debts due to Financial Institutions and Banks could not be recovered and therefore the SARFAESI Act was passed in 2001 which came into force in 2002 and therefore Banks were permitted to take measures under Section 13(4). The said contention is therefore without any substance."

20. Therefore, we find that the proceedings initiated by the appellant under Section 14 of the Act cannot be said to be illegal on account of a Receiver appointed in proceedings under Section 9 of the Arbitration Act.

21. We also do not find any merit in the argument that the appellant has not filed detailed affidavit, as required in terms of Section 14 of the Act. Section 14 of the Act contemplates the disclosure on nine different points. Such disclosure has been made in an application under Section 14 of the Act (Annexure P-12 to the writ petition). Such an application is accompanied with an affidavit of Shri Rohit Wadhwa, Regional Collection Manager, Aditya Birla Finance Ltd. to the effect that the total amount due to the appellant is Rs.28,63,11,181/- and that the property described therein is mortgaged in favour of the appellant and that notice under Section 13 has been issued and that reply to the notice received, has been considered and that the appellant is intending to take over possession in terms of Section 13(4) of the Act. It is also asserted that the appellant has complied with the provisions of the Act and the Rules made thereunder. Such affidavit, which is available at page 368 (I to K) of the paper-book shows that all nine points have been mentioned specifically in the affidavit. Therefore, it

cannot be said that the appellant has not specified the precondition mentioned in Section 14 of the Act.

22. In respect of an argument that the appellant has not disclosed an order passed by the Bombay High Court in proceedings under Section 9 of the Arbitration Act, suffice it to state that such fact is not contemplated to be disclosed in the proceedings under Section 14 of the Act. The disclosure on affidavit is in respect of nine points as mentioned in Section 14 of the Act. The petitioners have not suffered any prejudice on account of non-disclosure of such fact as such disclosure was not mandatory on an application under Section 14 of the Act.

23. The Act does not contemplate symbolic or actual possession, which has been so held by the Supreme Court in a judgment reported as (**2008) 1 SCC 125 (Transcore vs. Union of India and Another**). The relevant extract of the judgment reads 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 realizing the secured assets. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy in sub-section (4-A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. .....Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the *status quo ante*. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL Rule 1 CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. ....."

(emphasis supplied)

24. Such judgment has been followed by a three Judge Bench judgment in **Central Bank of India's case (supra**) wherein it was held as under:-

> "**151**. The Court in *Transcore case (Transcore v. Union of India, (2008) 1 SCC 125 then considered the three provisos inserted in Section 19(1) of the DRT Act by amending Act 30 of 2004 and held that withdrawal of the OA pending before the Tribunal under the DRT Act is not a condition precedent for taking recourse to the Securitisation Act."*

25. This Court in WP No. 19028 of 2017 (**Sunil Garg Vs. Bank of Baroda)** decided on 16.4.2018 held that there is no distinction between symbolic and physical possession either under Section 13(4) or under Section 14 of the Act or for that matter in any other provisions of the Act. The Court held as under:-

> "**06**. Sub-section (4) of Section 13 of the Act authorizes the secured creditor to take possession of the secured assets including that the secured creditor has a right to transfer by way of lease, assignment or sale for realising the secured debts. Still further, the District Magistrate or the Chief Metropolitan Magistrate or any Officer authorised by him is competent to take possession of any secured asset. There is no distinction between symbolic and physical possession either under Section 13(4) or under Section 14 of the Act or for that matter in any other provisions of the Act or the Rules made thereunder."

26. The argument of Shri Nagrath, learned senior counsel for the respondent Nos.1 and 2 that since the District Magistrate has not dealt with the fact of the order passed by the Bombay High Court appointing Receiver, therefore, matter should be remitted back to the District Magistrate, is based upon a judgment of Madras High Court reported as **II (2016) BC 567 (DB) (Mad.) (Telesat Media Matrix Pvt. Ltd. vs. Chief Metropolitan Magistrate and others**) rendered in Writ Petition No.17840 of 2015 and M.P. Nos. 1 and 2 of 2015 decided on 21.07.2015.

27. We do not find any merit in the said argument as well. The issue raised was a question of fact as to whether the petitioner is in possession of the

property in question on the basis of lease agreement. The said judgment refers to the Supreme Court judgment reported as (2014) 6 SCC 1 (Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and others) to hold that such question is required to be decided while considering an application under Section 14 of the Act. But, present is not a case where any such question is required to be decided. The property in question is mortgaged in favour of the appellant; therefore, it is a secured asset. In respect of secured assets, the District Magistrate is duty bound to hand over physical possession to the secured creditor in terms of Section 14 of the Act. Therefore, such judgment provides no assistance to the argument raised.

28. Coming to the argument that opportunity of hearing was not granted to the writ-petitioners and that the order passed by the District Magistrate violates the principles of natural justice is again not tenable. The Bombay High Court in a judgment reported as **2007 Cri LJ 2544 (Bom.) (Trade Well vs. Indian Bank)** has held that the District Magistrate is not required to give notice either to the borrower or to the third party. He is only to verify from the Bank whether notice under Section 13(2) of the Act has been issued or not. The said judgment has been quoted with approval by the Supreme Court in a judgment reported as **(2013) 9 SCC 620 (Standard Chartered Bank, etc. vs. V. Noble Kumar and others, etc**), wherein it was held as under:-

> **"22.** However, the Bombay High Court in *Trade Well v. Indian Bank [2007 Cri.L.J. 2544 (Bom.)*] opined;
>
> "2 ...CMM/DM acting under Section 14 of the NPA Act is not required to give notice either to the borrower or to the third party.
>
> 3. He has to only verify from the bank or financial institution whether notice under Section 13(2) of the NPA Act is given or not and whether the secured assets fall within his jurisdiction. *There is no adjudication*

of any kind at this stage.

4. It is only if the above conditions are not fulfilled that the CMM/DM can refuse to pass an order under Section 14 of the NPA Act by recording that the above conditions are not fulfilled. If these two conditions are fulfilled, he cannot refuse to pass an order under Section 14."

(emphasis supplied)

The said judgment was followed by the Madras High Court in *Indian Overseas Bank v. Sree Aravindh Steels Ltd. [AIR 2009 Mad. 10*]. Subsequently, Parliament inserted a proviso to section 14(1) and also sub-section (1-A) by Act 1 of 2013.

*** *** ***

25. The satisfaction of the Magistrate contemplated under the second proviso to section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset."

29. Thus, the proceedings under Section 14 of the Act are not proceedings to adjudicate the rights of the parties. Therefore, no notice is contemplated to be served upon the debtor, as such proceedings are taken only after serving notice under Section 13 of the Act.

30. In view of the aforesaid, we find that the order of the learned Single Bench allowing the writ petition cannot be sustained in law. The same is set aside and the order of the District Magistrate is restored. The present appeal stands **allowed.**

(HEMANT GUPTA)
CHIEF JUSTICE

(VIJAY KUMAR SHUKLA)
JUDGE

S/