

**Smt. Aradhana Seth Wife of Sri Rajendra Prasad Seth and Ajai Krishna Khanna S/O Sri Gopal Krishna Khanna Vs. Presiding Officer, Debt Recovery Tribunal,**

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**Court :** Allahabad

**Decided On :** Aug-22-2008

**Reported in :** AIR2009All41; 2009(1)AWC740

**Judge :** V.K. Shukla, J.

**Appellant :** Smt. Aradhana Seth Wife of Sri Rajendra Prasad Seth and Ajai Krishna Khanna S/O Sri Gopal Krishna Kh

**Respondent :** Presiding Officer, Debt Recovery Tribunal, ;union Bank of India Through Its Authorized Officer and ;

**Disposition :** Petition allowed

**Judgement :**

**V.K. Shukla, J.**

1. Petitioners have filed present writ petition for quashing of order dated 16.07.2008 (annexure-5 to the writ petition) passed by Presiding Officer, Debts Recovery Tribunal, Allahabad, rejecting application moved on their behalf under Section 17(1) of the Securitisation and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 (SARFAESI Act) as being time barred.

2. Brief background of the case is that petitioners were guarantors in respect of cash credit facility which was extended to M/S Ayush Enterprises, a proprietorship concern of one Rajesh Kumar Singh, who had agency dealership of Tractors, Two wheelers etc. Cash Credit hypothecation of goods facility of Rs. 1,50,000/- was given to the said Enterprises to promote its business and sale service. Petitioners had mortgaged immovable properties by virtue of being guarantors. As per R.B.I. guidelines, the account of M/S Ayush Enterprises became irregular and was declared as Non-Performing Asset, as such in consonance with the said guidelines Bank requested the borrower to regularise the said account, but no heed was paid and ultimately Bank was left with no option but to issue notice under Section 13(2) of the SARFAESI Act. Petitioners after receipt of the said notice failed to comply with the same and entire dues along with interest was not paid. Thereafter the Bank in question issued notice for recovery of Rs. 1,61,48,377.02 as on 30.06.2007. Said amount was not paid within 60 days as per Bank and then notice was issued for taking action under Section 13(4) of the said Act on 29.09.2007 fixing 09.10.2007 as the date for taking possession. Possession was taken on 09.10.2007. On 07.11.2007 an application was moved under Section 17(1) of SARFAESI Act before the Debts Recovery Tribunal along with an application to condone the delay. To the said application no objection was filed. Writ petition No. 31033 of 2007 was filed before this Court, wherein this Court asked the Debt Recovery Tribunal to decide the matter. Thereafter, Tribunal heard the matter and proceeded to reject the application as being barred by time. At this juncture, present writ petition has been filed.

3. With the consent of the parties, present writ petition is being heard and finally decided.

4. Sri C.K. Parekh, learned Counsel for petitioner, contended with vehemence that in present case, possession had been taken on 09.10.2007 and application under Section 17(1) of the Act was filed well within 45 days on 07.11.2007, in this background application moved was not at all time barred, and the view taken against the petitioners by Debts Recovery Tribunal is incorrect view having the

effect of taking away the first remedy provided for under SARFAESI Act, as such writ petition be allowed and the Debt Recovery Tribunal be directed to decide the application under Section 17(1) of SARFAESI Act on merits as per mandate of law.

5. Sri Sanjeev Singh, Advocate, appearing for the respondent Bank, on the other hand, contended that petitioner has got statutory remedy of appeal under Section 18 of the SARFAESI Act, and writ petition be not entertained rather it should be dismissed on the ground of alternative remedy, and on merits, the view taken is correct view, as such writ petition be dismissed.

6. In order to appreciate the respective arguments, the provisions of Sections 13, 17 and 18 of SARFAESI Act are being looked into. These provisions are being quoted below:

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

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

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

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

representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under Section 17 or the Court of District Judge under Section 17A.

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

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

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

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

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

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

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

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

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

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

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

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

Provided that in the case of accompany in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of Section 529A of the companies Act, 1956:

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

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's dues in accordance with the provisions of Section 529A of the Companies Act, 1956 and in case such workmen's dues under that Section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

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

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

Explanation- For the purpose of this sub-section-

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

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

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

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

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

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

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

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

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

section (1) of Section 17.

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

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

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

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

Provided that the Debs Recovery tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making such application made under Sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in Sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.

18. Appeal to Appellate Tribunal.- (1) Any person aggrieved, by an order made by the Debts Recovery Tribunal under Section 17, may prefer an appeal along with such fee, as may be prescribed to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal.

Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:

Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less.

Provided also that the Appellate Tribunal may, for reasons to be recorded in writing, reduce the amount to not less than twenty five per cent of debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.

7. A bare perusal of the provisions quoted above would go to show that Chapter III of the Act deals with enforcement of security interest and clearly provides that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. Sub-section (2) of Section 13 provides that where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4). Sub-section (3) obligates secured creditor to give full details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. Sub-section (3A) provides that in the event of receipt of notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. A proviso has been attached to this sub-section, as per which, reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debt Recovery Tribunal under Section 17 or the Court of District Judge under Section 17A. Sub-section (4) of Section 13 clearly provides that in case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:

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

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

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

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

Thereafter full-fledged procedure has been provided for and remedy has been provided for against measure taken under Sub-section (4) of Section 13. Section 17 of the Act provides that any person (including borrower) aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorized officer under this Chapter, may make an application along with such fee, as may be prescribed, to the Debt Recovery Tribunal having jurisdiction in the matter within forty five days from the date on which such measures has been taken under Sub-section (4) of Section 13. Under Sub-section (3) of Section 17 the Debts Recovery Tribunal is authorized to restore back possession of secured assets as well as management to the borrower, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13, declaring that the recourse taken by a secured creditor under Sub-section (4) of Section 13, is not in accordance with the provisions of this Act. Section 18 provides for appeal to the Appellate Tribunal and further provides that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. Said amount is liable to be reduced subject to recording of reasons in writing.

8. The provisions of the SARFAESI Act in question has been subject matter of interpretation in the case of *Mardia Chemicals Ltd. v. Union of India* : AIR 2004 SC2371 , and therein the appeal which has been described under Section 17 has

been interpreted to be one at par with the suit and therein provisions of pre-deposit of 75% has been declared to be ultra vires. Relevant paragraphs of the aforementioned judgment are being quoted below:

33. Taking an overall view of the rival contentions of the parties, we feel the main questions which broadly fall for consideration by us are:

i) Whether it is open to challenge the statute on the ground that it was not necessary to enact it in the prevailing background particularly when another statute was already in operation?

ii) Whether provisions as contained under Section 13 and 17 of the Act provide adequate and efficacious mechanism to consider and decide the objections/disputes raised by a borrower against the recovery, particularly in view of bar to approach the Civil Court under Section 34 of the Act?

iii) Whether the remedy available under Section 17 of the Act is illusory for the reason it is available only after the action is taken under Section 13(4) of the Act and the appeal would be entertainable only on deposit of 75% of the claim raised in the notice of demand?

iv) Whether the terms or existing rights under the contract entered into by two private parties could be amended by the provisions of law providing certain powers in one sided manner in favour of one of the parties to the contract?

v) Whether provision for sale of the properties without intervention of the Court under Section 13 of the Act is akin to the English mortgage and its effect on the scope of the bar of the jurisdiction of the Civil Court?

vi) Whether the provisions under Section 13 and 17(2) of the Act are unconstitutional on the basis of the parameters laid down in different decisions of this Court?

vii) Whether the principle of lender's liability has been absolutely ignored while enacting the Act and its effect?

38. We may now consider the main enforcing provision which is pivotal to the whole controversy namely, Section 13 in Chapter III of the Act. It provides that a secured creditor may enforce any security interest without intervention of the Court or Tribunal irrespective of Section 69 or Section 69-A of the Transfer of Property Act where according to Sub-section (2) of Section 13, the borrower is a defaulter in repayment of the secured debt or any instalment of repayment and further the debt standing against him has been classified as a non-performing asset by the secured creditor. Sub-section (2) of Section 13 further provides that before taking any steps in direction of realising the dues, the secured creditor must serve a notice in writing to the borrower requiring him to discharge the liabilities within a period of 60 days failing which the secured creditor would be entitled to take any of the measures as provided in Sub-section (4) of Section 13. It may also be noted that as per Sub-section (3) of Section 13 a notice given to the borrower must contain the details of the amounts payable and the secured assets against which the secured creditor proposes to proceed in the event of non-compliance with the notice given under Sub-section (2) of Section 13.

39. Sub-section (4) provides for four measures which can be taken by the secured creditor in case of non-compliance with the notice served upon the borrower. Under Clause (a) of Sub-section (4) the secured creditor may take possession of the secured assets including the right to transfer the secured assets by way of lease, assignment or sale; may take over the management of the secured assets under Clause (b) including right to transfer, under Clause (c) of Sub-section (4) a manager may be appointed to manage the secured assets which have been taken possession of by the secured creditor and may require any person who has acquired any secured assets from the borrower or from whom any money is due to the borrower to pay the same to him as it may be sufficient to pay the secured debtor as provided under Clause (d) of Section 13(4) of the Act. Sub-section (8) of Section 13, however, provides that if all the dues of the secured creditor including all costs, charges and expenses etc. as may be incurred are tendered to the secured creditor before sale or transfer no further steps be taken in that direction.

40. Now coming to Section 17, it provides for filing of an appeal to the Debt Recovery Tribunal within 45 days of any action taken against the borrower under

Sub-section (4) of Section 13 of the Act. It reads as under:

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

(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent, of the amount claimed in the notice referred to in Sub-section (2) of Section 13:

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

(3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder.

It is thus clear that an appeal under Sub-section (1) of Section 17 would lie only after some measure has been taken under Sub-section (4) of Section 13 and not before the stage of taking of any such measure. According to Sub-section (2), the borrower has to deposit 75% of the amount claimed by the secured creditor before his appeal can be entertained.

41. So far jurisdiction of Civil Court is concerned we find that there is a bar to it as provided under Section 34 of the Act quoted below:

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).

45. In the background we have indicated above, we may consider as to what forums or remedies are available to the borrower to ventilate his grievance. The purpose of serving a notice upon the borrower under Sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under Sub-section (4) of Section 13 in case of non-compliance of notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than to ritually reject them and proceed to take drastic measures under Sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under Sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable for the unsavoury steps contained under Sub-section (4) of Section 13. At the same time, more importantly we must make it clear unequivocally that communication of the reasons not accepting the objections taken by the secured borrower may not be taken give an occasion to resort to such proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower, would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor who intends resort to harsh steps of taking over the management/business of viz. secured assets without intervention of the Court. Such a person in respect of whom steps under Section

13(4) of the Act are likely to be taken cannot be denied the right to know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debt Recovery Tribunal as provided under Section 17 of the Act matures on any measure having been taken under Sub-section (4) of Section 13 of the Act.

48. The next safeguard available to a secured borrower within the framework of the Act is to approach the Debt Recovery Tribunal under Section 17 of the Act. Such a right accrues only after measures are taken under Sub-section (1) of Section 13 of the Act.

59. We may like to observe that proceedings under Section 17 of the Act, in fact are not appellate proceedings. It seems to be a misnomer. In fact that it is the initial action which is brought before a Forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in Civil Court. As a matter of fact proceedings under Section 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar under Section 34 of the Act in the present case. We may refer to a decision of this Court reported in : [1974]3SCR882 , Smt. Ganga Bai v. Vijay Kumar and Ors., where in respect of original and appellate proceedings a distinction has been drawn as follows:..There is a basic distinction between the right of suit and the right of appeal. There is an inherent right in every person to bring a suit of civil nature and unless one's choice. It is no answer to a suit, howsoever frivolous to claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and, therefore, an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute.

60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the

respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on basis of one sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one-sidedly in favour of the party, who so far has alone been the party to decide the amount and the fact of default and classifying the dues as NPAs without participation/association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the concerned authority. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory.

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal. (ii) there is no determination of the amount due as yet (iii) the secured assets or its management with transferable interest is already taken over and under control of the secured creditor (iv) no special reason for double security in respect of an amount yet to be determined and settled (v) 75% of the amount claimed by no means would be a meagre amount (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, Sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution.

76. In regard to the submission made by the parties as indicated in preceding paragraphs, we would like to make it clear that issue of a notice to the debtor by the creditor does not attract the application of principles of natural justice. It is

always open to tell the debtor what he owes to repay. No hearing can be demanded from the creditor at this stage. So far the provision of appeal is concerned, we have already discussed in the earlier part of the judgment that proceedings under Section 17 of the Act have been wrongly described as appeal before the Debt Recovery Tribunal. It is in fact a forum where proceedings are originally initiated in case of any grievance against the creditor in respect of any measure taken under Sub-section (4) of Section 13 of the Act. Hence, the decisions on the point as to whether provision for an appeal is essential or not are not of any assistance in the facts of the present case.

77. It is also true that till the stage of making of the demand and notice under Section 13(2) of the Act, no hearing can be claimed for by the borrower. But looking to the stringent nature of measures to be taken without intervention of Court with a bar to approach the Court or any other forum at that stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is initiated. So as to demonstrate that the reply of the borrower to the notice under Section 13(2) of the Act has been considered applying mind to it. The reasons howsoever brief that may be for not accepting the objections, if raised in the reply, must be communicated to the borrower. True, presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to fiscal and economic policies resorted to in the public interest but while resorting to such legislation it would be necessary to see that the persons aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery.

80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

1. Under Sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under Sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under Sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debt Recovery Tribunal.

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

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil Court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the Court.

81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the

Debt Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest.

9. The issue relating to entertaining writ petitions when alternative remedy is available has been examined on various occasions by Hon'ble Apex Court. In the case of *Whirlpool Corporation v. Registrar of Trade Marks* : AIR 1999 SC22 , Hon'ble Apex Court has taken the view that alternative remedy is not an absolute bar in entertaining the writ petition, when Court is satisfied (i) of infringement of fundamental right; (ii) of violation of principles of natural justice; (iii) of passing order without jurisdiction; and (iv) questions of ultra vires are involved. Again in the case of *Harbansh Lal Sahania v. Indian Oil Corporation* AIR 2003 same principle has been reiterated, by mentioning that the rule of exclusion of writ jurisdiction by availability of alternative remedy is a rule of discretion and not one of compulsion and the Court must consider the pros and cons of the case and then may interfere if the Court comes to conclusion that the petitioner seeks enforcement of any of the fundamental rights, where there is failure of principles of natural justice or where the proceedings are wholly without jurisdiction or the vires of an Act is challenged. Hon'ble Apex Court in the case of *U.P. State Bridge Corporation Ltd. v. U.P. Setu Karmchari Sangh* : (2004)IILLJ9SC , has taken the view that when dispute relates to enforcement of right or obligation under the statute and specific remedy is provided for, then departure shall not be made, unless strong case is made out for departure.

10. On the touchstone of the provisions quoted above and the parameters set out in the judgment of Hon'ble Apex Court referred to above, the facts of the present case are being looked into. Undisputed position is that notice for taking possession was given on 13.09.2007, copy of which has been annexed as Annexure-3 to the supplementary affidavit, and therein clearly it was mentioned that 'we do hereby inform you that officials and representatives of the Bank shall take or cause for taking possession of the secured assets wherever it may be situated/stored on

date and time mentioned below:

Date: 09.10.2007

Time: 12.00 Noon.

11. Possession was, thus, to be taken on 09.10.2007 and had been taken on the said date. Proceedings under Section 13(4) of the SARFAESI Act are to be undertaken in case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), then the secured creditor is entitled to take recourse to one or more of the measures referred to in Sub-section (4) of Section 13. One of the prescribed modes under Sub-section (4) is to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset. Here in the present case, possession had been taken on 09.10.2007. Application under Section 17(1) of the Act has to be filed before the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures have been taken. This particular date i.e. the date on which measures have been undertaken, has to be specific. In the present case measures had been taken on 09.10.2007 and thus limitation for filing application under Section 17(1) of the Act would be within 45 days from the said date. Limitation has to be computed from the date when measures have been undertaken and not from the date when measures have been proposed to be taken. Right to approach Tribunal matured on measures being taken and not before taking of such measures were proposed. In the present case admitted position is that measures had been undertaken on 09.10.2007 and application under Section 17(1) was filed on 09.11.2007, which was well within 45 days, as such application under Section 17(1) of the Act was well within 45 prescribed days, and the Debts Recovery Tribunal has totally misdirected itself while rejecting the application on the ground that it was beyond the period of limitation, and thus depriving the petitioner to get reasonably fair deal and opportunity to get the matter adjudicated, at the first instance.

12. In the present case, it is true that against the order passed under Section 17, there is remedy of appeal to the appellate Tribunal within thirty days from the date of receipt of the order of Tribunal subject to deposit of 50% of the amount of debt,

as claimed by secured creditor or determined by the Debts Recovery Tribunal. In the facts of the present, alternative remedy is not being treated as absolute bar, as the facts of the case noted herein above clearly show that the order which has been passed has already deprived the petitioner of fair deal and opportunity to get the matter adjudicated upon before Debts Recovery Tribunal as observed by Hon'ble Apex Court in paragraph 81 in the case of Mardia Chemicals (supra). The first remedy provided for to petitioner under Section 17(1) of the Act on account of taking such approach by Debts Recovery Tribunal has been made virtually illusory, and the door of justice has been shut on totally wrong premises, which is staring on the face of it, and requires no probe on factual front, as two dates are undisputed; 09.10.2007, the date of taking possession and 07.11.2007, the date when application under Section 17(1) of the SARFAESI Act was moved, which is well within forty five days. Order passed is totally contrary to law, resulting in miscarriage of justice, on account of the fact that totally wrong question was posed qua limitation, and totally wrong answer/conclusion is there. The order, in fact, violates the principles of natural justice, and if it is permitted to stand, it would not advance the cause of justice, rather the same would thwart the cause of justice, as possession of the property has already been taken by respondent Bank. There is one more reason, for not sending the petitioner to Appellate forum. Had Debts Recovery Tribunal determined the dispute raised on merits, there was no occasion to by-pass the remedy of appeal. Here Debts Recovery Tribunal, as mentioned above, has shut the door of justice on totally wrong premises, that same was barred by limitation, as such admittedly, there is no adjudication of dispute on merits. For preferring an appeal on minimum side, twenty five per cent of debt referred to in second proviso has to be deposited as condition precedent, which in the present case is not less than forty lacs. Possession of property has already been taken over by the Bank, and Hon'ble Apex Court in the case of J.M. Baxi & Co. v. Commissioner of Customs (2001) 9 SCC 275, in the special facts of case where demand raised was for forty six lacs and same had to be deposited before filing of appeal, proceeded to entertain the writ petition, and directed the High Court to decide the matter. Here also special features of the case have been noted in extenso in earlier part of the judgment, that first remedy provided for to the petitioner under Section 17(1) has been taken away, in totally arbitrarily manner,

by giving reasons which cannot be subscribed in law.

13. Consequently alternative remedy is not absolute bar, as the order which has been passed is unsustainable on the face of it, as application under Section 17(1) of the Act was certainly within the prescribed period of 45 days, and the same has been wrongly rejected.

14. Consequently, writ petition succeeds and is allowed. The impugned order dated 16.07.2008 is hereby quashed and the Presiding Officer, Debts Recovery Tribunal is directed to decide the application of petitioners under Section 17(1) of the SARFAESI Act, within four months from the date of receipt of a certified copy of this order, without granting any unnecessary adjournment to parties concerned.

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