

international Asset Vs. Union of India and ors.

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Court : Mumbai

Decided On : Aug-20-2011

Judge : Ranjana Desai; Ranjit More, Jj.

Acts : Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 - Section 14(1), 13(1) (2), 17(2) (3) (4), 35; [Constitution of India](#) - Articles 226 and 227; General Clauses Act. - Section 21; NPA Act - Section 35; [Recovery of Debts Due to Banks and Financial Institutions Act, 1993](#)

Appeal No. : CRI. PUBLIC INTEREST LITIGATION NO.24 OF 2011

Appellant : international Asset

Respondent : Union of India and ors.

Advocate for Pet/Ap. : Ms. Revati Mohite Dere, Adv.

Judgement :

1. Criminal Writ Petition No.184 of 2011 was filed by International Asset Reconstruction Company Private Limited, who is the petitioner in the instant petition, praying that learned District Magistrates, Dadra & Nagar Haveli, Silvassa be directed to pass appropriate orders under Section 14(1) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the SARFAESI Act") for taking possession of the secured assets

and for handing over the same to the petitioners. It was noticed by the Division Bench of this court presided over by A.M. Khanwilkar, J. that the subject matter of the application under Section 14 of the SARFAESI Act had been disposed of. Learned counsel for the petitioner, however, submitted that a number of such applications are pending before the courts across the State and since public money is involved, appropriate directions need to be issued to the concerned Magistrates asking them to dispose of the said applications expeditiously. The said petition was, therefore, permitted to be converted into public interest litigation and has been renumbered as Public Interest Litigation No.24 of 2011.

2. By amending the petition, the petitioners have added Union of India through the District Magistrate, Daman & Diu and State Maharashtra as respondents 2 and 3. Kotak Mahindra Bank Limited, the Shamrao Vithal Co-operative Bank Limited and Janakalyan Sahakari Bank Limited had filed intervention applications. Their intervention was granted by this court and pursuant to the liberty granted by this court, they have been brought on record as respondents 4 to 6 respectively. The prayer clause has been suitably amended. We must, at the outset, note that though at first blush, it appears that through this petition, the banks and financial institutions are trying to serve their personal interest as they are seeking possession of secured assets, we cannot lose sight of the fact that ultimately, the banks and financial institutions deal with public money and it is in the interest of general public to see that they take possession of the secured assets and recover money advanced by them where the borrower is under liability and his account has become nonperforming. If any guidelines are issued, that purpose would be served. The petition is, therefore, perfectly maintainable as a public interest litigation.

3. Before we go to the relevant judgments, it is necessary to state that admittedly, there is huge pendency of applications filed under Section 14 of the SARFAESI Act in some districts. The data collected by the petitioners, which covers the period from 1/1/2005 to 31/12/2010, has not been disputed by the State. The maximum number of applications are pending in Mumbai, Pune and Thane. We are informed that disposal of such applications take excessively long time.

4. Mr. Ardeshir, learned counsel for respondent 3 and Mr. Kamat, learned counsel for respondents 4 and 5 have supported Ms. Mohite-Dere, learned counsel for the petitioners. Counsel submitted that in *Transcore v. Union of India & Anr.* (2008) 1 SCC 125, the Supreme Court has made the scope of Section 14 of the SARFAESI Act, clear. The Division Bench of this court to which one of us (Smt. Ranjana Desai, J.) was a party, has in *M/s. Trade Well & Anr. v. Indian Bank & Anr.* 2007 Cri.L.J. 2544, after following the judgments of the Supreme Court in *Transcore* and in *Mardia Chemicals Limited v. Union of India* (2004) 4 SCC 311, laid down certain guidelines which the District Magistrates (for short, "the DMs") and Chief Metropolitan Magistrates (for short, "the CMMs") are expected to follow while disposing of applications under Section 14 of the SARFAESI Act. The view taken by the Supreme Court in *Transcore* has been reiterated by it in *United Bank of India v. Satyawati Tondon & Ors.* (2010) 8 SCC 110 and in *Kanaiyalal Lalchand Sachdev & Ors. v. State of Maharashtra & Ors.* (2011) 2 SCC 782. Counsel submitted that the functions performed by the DMs and CMMs under Section 14 of the SARFAESI Act are ministerial in nature. No hearing is supposed to be given to the borrowers. It is not even necessary to issue notices to them. Counsel submitted that in the teeth of the law laid down by the Supreme Court, the intervention applications of persons who with oblique motive try to obstruct the banks' efforts to take possession of the secured assets are granted, the borrowers and intervenors are unnecessarily asked to submit large number of documents and the DMs and the CMMs enter into adjudication of various issues which they cannot, in law, do. The entire exercise is given trappings of a civil suit. This leads to delay in disposal of the applications and it defeats the purpose of the SARFAESI Act. Counsel relied on the judgment of the Division Bench of this court in *Union Bank of India v. State of Maharashtra & Ors.* AIR 2010 Bom. 150 and judgment of learned Single Judge of this court in *Kotak Mahindra Bank Limited v. State of Maharashtra & Ors.* decided on 26/9/2008 in Criminal Writ Petition No.161 of 2008. Counsel also relied on the judgment of the Delhi High Court in *Sajay Bansal v. Rakesh K. Ahlawat & Ors.* (2006) 130 Comp. Cases 634 (Delhi) and judgment of the Madras High Court in *Sree Lakshmi Products v. State Bank of India*, AIR 2007 Madras 148. Written submissions were submitted by the petitioners and by respondents 4 and 5, which we have carefully perused.

5. In order to find out what could be the difficulties faced by the DMs and CMMs while disposing of applications under Section 14 of SARFAESI Act and what leads to such phenomenal pendency of the said applications, we had directed the Registrar (Judicial) to call for the report from CMM, Esplanade, Mumbai and DM, Thane. We felt that the said reports would give a general pattern of the difficulties faced by all the DMs and CMMs across the States and Union Territories. Both the reports state that the law is correctly understood by the concerned DMs and CMMs. Difficulties faced by them are set out in the said reports.

6. Mr. Pol, learned Public Prosecutor has, relying on Report dated 6/7/2011 submitted by Chief Metropolitan Magistrate, Esplanade, Mumbai, Report dated 11/7/2011 submitted by District Magistrate, Thane and on the basis of information collected by him, submitted that pendency of the applications is the result of number of practical difficulties faced by the DMs and CMMs. He submitted that pressure of other heavy work, lack of staff and infrastructural facilities contribute to the delay in disposal. He submitted that it would be, therefore, not proper to lay down any outer limit for disposal. He submitted that a direction be given to dispose of the applications as expeditiously as possible.

7. In Transcore, the Supreme Court stated the reasons for enactment of the SARFAESI Act as follows: "The NPA Act, 2002 is enacted to regulate securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. The NPA Act enables the banks and financial institutions to realize long term assets, manage problems of liquidity, asset liability mismatch and to improve recovery of debts by exercising powers to take possession of securities sell them and thereby reduce non- performing assets by adopting measures for recovery and reconstruction. The NPA Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. The said Act also empowers the said asset reconstruction companies to take over the management of the business of the borrower."

8. The Supreme Court further made it clear that the [Recovery of Debts Due to Banks and Financial Institutions Act, 1993](#) (for short, "the DRT Act") did not provide for assignment of assets to Securitization Companies. The secured assets could not be liquidated in time. The SARFAESI Act was enacted to reduce mounting non-performing assets by empowering banks to liquidate the assets and secure interest. The SARFAESI Act deals with crystallized liabilities and it proceeds on the basis that the asset is created in favour of bank which could be assigned to the assets management company which steps into the shoes of the secured creditors. The Supreme Court further clarified that Section 13(2) thereof, proceeds on the basis that the borrower is under a liability and his account in the books of account of the bank is classified as sub-standard or doubtful or loss. Since Section 13(2) deals with liquidation of liability on the basis that the account of the borrower has become non-performing, there is no scope for any dispute regarding liability. The SARFAESI Act does not deal with disputes between the secured creditors and the borrowers but it deals with the rights of the secured creditors inter se. The Supreme Court further clarified that Section 13(1) and Section 13(2) of the SARFAESI Act proceed on the basis that the security interest in the bank and financial institution needs to be enforced expeditiously without the intervention of the court and that enforcement could take place by non-adjudicatory process. The SARFAESI Act provides for recovery of possession by non-adjudicatory process and it removes all fetters on the right of the secured creditor. The Supreme Court further clarified that under Section 17(2) of the SARFAESI Act, the DRT is required to consider whether any of the measures referred to in Section 13(4) are in accordance with the provisions of the SARFAESI Act and the Rules made thereunder and if while examining the application under Section 17, the DRT comes to the conclusion that any of the measures taken under Section 13(4) are not in accordance with the SARFAESI Act, it shall direct the secured creditor to restore the possession to the borrower or restore management to the borrower. The Supreme Court further clarified that if the DRT declares that the recourse taken under Section 13(4) is in accordance with the provisions of the SARFAESI Act then notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to anyone or more of the measures as specified under Section 13(4)

to recover his secured debt. It was further clarified that Section 17(4) shows that the secured creditor is free to take recourse to any one of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force. Section 35 of the SARFAESI Act gives an overriding effect to it over all other laws if they are inconsistent with it. The Supreme Court further clarified that since 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 SARFAESI Act, the DRT is entitled to restore status quo ante, 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 authorized officer taking possession. The Supreme Court referred to Rule 8 of the Security Interest (Enforcement) Rules, 2002 (for short, "the said Rules"), which deals with sale of immovable assets and Rule 9 which deals with time of sale, issue of sale certificate and delivery of possession, etc. The Supreme Court observed that the disputes which are sought to be avoided by Rule 8 read with Rule 9 of the said Rules are those where third party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice.

9. In *Satyawati Tondon*, the Supreme Court reiterated its view in *Transcore*. The Supreme Court made it clear that in terms of Section 14 of the SARFAESI Act, the secured creditor can file an application before the DMs or the CMMs within whose jurisdiction the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the DM or CMM, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor. The Supreme Court further observed that Section 17 of the SARFAESI Act speaks of the remedies available to any person including the borrower, who may have grievance against the action taken by the secured creditor under sub-section (4) of Section 13. The Supreme Court further clarified that Sub-section (2) of Section 17 casts a duty on the DRT to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the SARFAESI Act and the said Rules. Pertinently, the Supreme Court observed that if respondent 1 therein had

any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14 of the SARFAESI Act, then she could have availed remedy by filing an application under Section 17(1) of the SARFAESI Act. The Supreme Court clarified that the expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. The Supreme Court emphasized that it is evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective and the High Court cannot be oblivious of the rules of self-imposed restraint evolved by the Supreme Court as regards powers conferred upon it under Article 226 of the [Constitution of India](#) since, alternative remedy is provided under the SARFAESI Act.

10. In *Kanaiyalal Lalchand Sachdev*, the Supreme Court referred to *Transcore* and *Satyawati Tondon* and reiterated that Section 14 of the SARFAESI Act provides that the secured creditor can file an application before the concerned DM or CMM within whose jurisdiction, the secured asset or other documents relating thereto are found, for taking possession thereof and if any such request is made, the DM or CMM, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor. Therefore, the secured creditor, in order to enforce his rights under Section 13(4), in particular Section 13(4)(a), may take recourse to Section 14 of the SARFAESI Act. The Supreme Court further clarified that an action under Section 14 constitutes an action taken after the stage of Section 13(4) and, therefore, the same would fall within the ambit of Section 17(1) of the SARFAESI Act. Thus, the SARFAESI Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT.

11. In *Trade Well*, this court was concerned with the question whether the DM or the CMM while dealing with the written request made by secured creditor under Section 14 of the SARFAESI Act is required to give notice to the borrower or any

other person, who may be in possession of the secured assets and give him a hearing. After referring to Transcore, this court answered the question in the negative and gave the following directions. "1. The bank or financial institution shall, before making an application under section 14 of the NPA Act, verify and confirm that notice under section 13(2) of the NPA Act is given and that the secured asset falls within the jurisdiction of CMM/DM before whom application under section 14 is made. The bank and financial institution shall also consider before approaching CMM/DM for an order under section 14 of the NPA Act, whether section 31 of the NPA Act excludes the application of sections 13 and 14 thereof to the case on hand.

2. CMM/DM acting under section 14 of the NPA Act is not required to give notice either to the borrower or to the 3rd 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 that 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.

5. Remedy provided under section 17 of the NPA Act is available to the borrower as well as the third party.

6. Remedy provided under section 17 is an efficacious alternative remedy available to the third party as well as to the borrower where all grievances can be raised.

7. In view of the fact that efficacious alternative remedy is available to the borrower as well as to the third party, ordinarily, writ petition under Articles 226 and 227 of the [Constitution of India](#) should not be entertained.

8. In exceptional cases of gravest injustice, a writ petition could be entertained by this court.

9. Great care and caution must be exercised while entertaining a writ petition because in a given case it may result in frustrating the object of the NPA Act.

10. Even if a writ petition is entertained, as far as possible, the parties should be relegated to the remedy provided under section 17 of the NPA Act before the DRT by passing an interim order which will protect the secured assets. Adjudication and final order should be left to the DRT as far as possible."

12. In Union Bank of India, the Division Bench of this court was again concerned with the similar question. This court referred to Trade Well and other relevant judgments of other High Courts and concurred with the view that Section 14 of the SARFAESI Act does not permit any adjudication in respect of any dispute between the parties. It was observed that the Magistrate having exercised the said power under Section 14 virtually becomes functus officio. There is finality to the order passed under Section 14 of the SARFAESI Act and he cannot reconsider the issue with the aid of Section 21 of the General Clauses Act. The Division Bench followed the view taken by the Supreme Court that remedy provided under Section 17 is an efficacious and alternative remedy available to the third parties and the borrowers where all their grievances can be raised.

13. In Kotak Mahindra Bank Limited, the petitioner therein had applied before the CMM under Section 14 of the SARFAESI Act for possession of the secured assets. That application was allowed. The CMM directed the Assistant Registrar to take possession of the secured assets. The CMM directed that the possession will be taken by the Assistant Registrar after issuing notice of taking possession and after giving reasonable time of not more than 15 days to hand over possession. Learned Single Judge (A.S. Oka, J.) referred to Trade Well and observed that before passing order under Section 14 of the SARFAESI Act, learned CMM is not required to give notice or hearing either to the borrower or to the affected third party. There was no occasion for the CMM to issue 15 days' notice before taking possession. Learned Single Judge observed that if the law does not contemplate

notice before passing the order under Section 14, no direction of issuing notice could have been given after passing the order under Section 14 of the SARFAESI Act.

14. It is distressing to note that despite the authoritative pronouncements of the Supreme Court and of this court, the DMs and CMMs continue to issue notices to the borrowers, adjudicate the disputes between the parties, grant intervention applications and give long hearing to the intervenors. At the cost of repetition, it must be stated that in Transcore, the Supreme Court specifically referred to Section 35 of the SARFAESI Act, which gives an overriding effect to it. The relevant paragraph of the Supreme Court judgment in Transcore needs to be quoted.

"34. In our view, Section 17(4) shows that the secured creditor is free to take recourse to any of the measures under Section 13(4) notwithstanding anything contained in any other law for the time being in force, e.g., for the sake of argument, if in the given case the measures undertaken by the secured creditor under Section 13(4) comes in conflict with, let us say the provision under the State land revenue law, then notwithstanding such conflict, the provision of Section 13(4) shall override the local law. This position also stands clarified by Section 35 of the NPA Act which states that the provisions of NPA Act shall override all other laws which are inconsistent with the NPA Act. Section 35 is also important from another angle. As stated above, the NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for enforcement of securities. Section 35 gives an overriding effect to the NPA Act with all other laws if such other laws are inconsistent with the NPA Act. As far as the present case is concerned, the remedies are complimentary to each other and, therefore, the doctrine of election has no application to the present case." (emphasis supplied.)

15. The following observations of the Supreme Court in Transcore also need to be quoted.

"It is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for

value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules."

16. In *Sajay Bansal*, the petitioner therein had raised a contention that he was in physical possession of the mortgaged property as a tenant and was protected under the provisions of the Delhi Rent Control Act. He contended that he cannot be dispossessed under Section 14 of the SARFAESI Act. Following the judgment of the Supreme Court in *Mardia Chemicals*, the Delhi High Court repelled the contention and held that the protection under the Delhi Rent Control Act was not available against the mortgagee who seeks to enforce his right under the SARFAESI Act against the principal borrower who had mortgaged the property in question by duly and validly executing the memorandum of mortgage in favour of the mortgagee.

17. In *Sree Laxmi Products*, the Division Bench of Madras High Court was considering the contention of the petitioners that a tenant cannot be dispossessed in pursuance of the recovery proceedings against borrower under the SARFAESI Act and, therefore, even if the landlord of the petitioner is indebted to the respondent- bank the respondent bank has to take possession only by due process of law, it cannot take forcible possession from the tenant. The Madras High Court considered the Supreme Court judgment in *Transcore* and the Delhi High Court judgment in *Sajay Bansal* and held as under : "9. On a plain reading of the observations made in *Transcore* case it is clear that the bank/FI is entitled to take actual possession of the secured assets from the borrower or from any other person in terms and Section 13(4) of the SARFAESI Act. Any transfer of secured assets after taking possession of the same by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured assets. Any party aggrieved by such dispossession will have to take recourse to approaching the DRT under Section 17(4) of the SARFAESI Act. If the party 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. By virtue of Section 17(4) read with Section 35 of the SARFAESI Act, if in a given case the measures undertaken by the secured creditor under Section 13(4) come in conflict with the provisions of any State law, then notwithstanding to such conflict, the provisions of Section 13(4) shall override the local law. Section 13(13) of the SARFAESI Act operates as an attachment/injunction restraining the borrower from disposing of the secured assets and therefore, any tenancy created after such notice would be null and void. Any tenancy created by the mortgagor after the mortgage in contravention of Section 65-A would not be binding on the bank/FI, and in any event, such tenancy rights shall stand determined once action under Section 13(4) has been taken by the bank/FI. When the petition is claiming a tenancy prior to the creation of mortgage and such tenancy is disputed by the bank the remedy of the petition is to approach DRT by way of an application under Section 17 of the SARFAESI Act to establish its rights."

18. A careful reading of the above judgments lead us to issue certain directions to the DMs and CMMs, who despite above settled legal position, are issuing notices to borrowers, granting intervention applications and adjudicating rights of the parties while dealing with applications under Section 14 of the SARFAESI Act. Such exercise is totally contrary to law laid down by the Supreme Court, this court and various other High Courts. At that stage, adjudication of rights is not contemplated at all.

19. It would be appropriate to refer to the judgment of the Division Bench of this court presided over by Dr. Justice D.Y. Chandrachud on 28/6/2011 in The Saraswat Co-operative Bank Limited v. The State of Maharashtra & Anr. in Writ Petition No.4344 of 2011. In that case, the Collector had taken nearly six months to dispose of the application under Section 14 of the SARFAESI Act. Noticing the guidelines laid down by this court in Trade Well, the Division Bench expressed that the Collector was bound to follow the principles of law which has been laid down by this court. The Division Bench, in the circumstances, gave a general direction to all the Collectors and District Magistrates to endeavour to conclude the hearing of such applications and pass final orders thereon as expeditiously as possible and in

any event within a period of two months.

20. In the aforementioned circumstances, it is necessary for this court to issue certain guidelines to streamline the procedure. The DMs and CMMs have in their reports submitted pursuant to our order, set out their difficulties.

We find that heavy workload, lack of staff and infrastructural facilities are some of the reasons which lead to slow disposal of the applications. But, those difficulties will have to be sorted out either at the Government level or on the administrative side of this Court, but solely on those grounds, we cannot overlook the delay in disposal of the applications which is frustrating the object of the SARFAESI Act. We deem it appropriate to lay down the following Guidelines which will be in addition to the Guidelines laid down in Trade Well.

GUIDELINES

(i) The Banks / Financial Institutions shall annex a copy of the notice issued under Section 13(2) of the SARFAESI Act along with proof of despatch of the said notice and affidavit of service to that effect to their application under Section 14 of the SARFAESI Act.

(ii) The application shall contain a statement that the secured assets which are intended to be taken over are within the jurisdiction of the DM/CMM concerned.

(iii) On receipt of an application, the office of the DM/CMM shall number the same serially in the Register maintained specifically for this purpose.

(iv) Within 15 days of filing of the application, the office of the DM/CMM shall verify whether the banks / financial institutions have complied with the requirements / guidelines and if that is not done then in that event, the DM/CMM shall direct the banks / financial institutions to comply with the same immediately.

(v) On the date on which all objections are complied with, the office of the DM/CMM shall immediately inform the applicant the date of hearing before the DM/CMM. (vi) As already laid down by this court in the case of Trade Well,

DM/CMM is not required to issue any notice to the borrower or any other person at the time of hearing of the application filed under Section 14 of the SARFAESI Act.

(vii) The borrower / mortgagor or any other person has no locus to participate / object / be heard at the time of the passing of order or any other stage including the execution or implementation of the order.

(viii) All applications filed under Section 14 which are in compliance with the requirements and the guidelines shall be disposed of by the DM / CMM as expeditiously as possible and in any event, within a period of two months from the date of proper presentation of the application.

(ix) The order passed on the application filed under Section 14 shall (i) authorize the taking of physical possession of the secured asset with reasonable force which includes the breaking open of locks, wherever necessary; (ii) direct the police station concerned to provide help / assistance in taking possession.

(x) The representative of the DM/CMM who takes possession of the secured asset shall draw panchnama and take inventory of the secured assets before handing over physical possession to the Authorized Officer of the banks/financial institutions;

(xi) The possession of the secured asset shall be taken by the designated representative of the DM/CMM as expeditiously as possible after the passing of the order under the application by the DM/CMM.

21. The petition is disposed of.

22. The Registrar General of this court is directed to send a copy of this judgment to all the DMs/CMMs within the jurisdiction of this court, immediately.

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