

M/S HINDON FORGE PVT. LTD. & ANR.

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v.

THE STATE OF UTTAR PRADESH THROUGH DISTRICT  
MAGISTRATE GHAZIABAD & ANR.

(Civil Appeal No. 10873 of 2018)

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NOVEMBER 01, 2018

[R. F. NARIMAN AND NAVIN SINHA, JJ.]

*Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002: s.17(1) – Whether an application under s.17(1) of the SARFAESI Act at the instance of a borrower, is maintainable even before physical or actual possession of secured assets is taken by banks/financial institutions in exercise of their powers under s.13(4) of the Act r/w r.8 of the Rules, 2002 – Held: The scheme of s.13(4) r/w r.8(1) makes it clear that the delivery of a possession notice together with affixation on the property and publication is one mode of taking “possession” under s.13(4) – Once possession is taken under rr.8(1) and 8(2) r/w s.13(4)(a), s.17 gets attracted, as this is one of the measures referred to in s.13(4) that is taken by the secured creditor under Chapter III – Thus, borrower/debtor can approach the Debts Recovery Tribunal under s.17 of the Act at the stage of the possession notice referred to in rr. 8(1) and 8(2) of the 2002 Rules – Security Interest (Enforcement) Rules, 2002 – rr.8(1) and 8(2).*

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**Allowing the appeals, the Court**

**HELD: 1.1 A reading of section 13 would make it clear that where a default in repayment of a secured debt or any instalment thereof is made by a borrower, the secured creditor may require the borrower, by notice in writing, to discharge in full his liabilities to the secured creditor within 60 days from the date of notice. It is only when the borrower fails to do so that the secured creditor may have recourse to the provisions contained in section 13(4) of the Act. [Para 10] [1054-B-C]**

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*Mardia Chemicals Ltd. v. Union of India (2004) 4 SCC 311 : [2004] 3 SCR 982 – relied on.*

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A           **1.2 Rule 8(1) makes it clear that “the authorised officer shall take or cause to be taken possession”. The expression “cause to be taken” only means that the authorised officer need not himself take possession, but may, for example, appoint an agent to do so. What is important is that such taking of possession is effected under sub-rule (1) of rule 8 by delivering a possession notice prepared in accordance with Appendix IV of the 2002 Rules, and by affixing such notice on the outer door or any other conspicuous place of the property concerned. Under sub-rule (2), such notice shall also be published within 7 days from the date of such taking of possession in two leading newspapers, one in the vernacular language having sufficient circulation in the locality. Appendix IV provides the format of possession notice wherein the borrower in particular, and the public in general is cautioned by the said possession notice not to deal with the property as possession of the said property has been taken. From this stage on, the secured asset is liable to be sold to realise the debt owed, and title in the asset is divested from the borrower and complete title given to the purchaser, as is mentioned in section 13(6) of the Act. There is, thus, a radical change in the borrower dealing with the secured asset from this stage. At the stage of a section 13(2) notice, section 13(13) interdicts the borrower’s from transferring the secured asset (otherwise than in the ordinary course of his business) without the prior written consent of the secured creditor. But once possession notice is given under rule 8(1) and 8(2) by the secured creditor to the borrower, the borrower cannot deal with the secured asset at all as all further steps to realise the same are to be taken by the secured creditor under the 2002 Rules. [Para 11] [1054-E-H; 1055-A-B]**

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**1.3 The scheme of section 13(4) read with rule 8(1) therefore makes it clear that the delivery of a possession notice together with affixation on the property and publication is one mode of taking “possession” under section 13(4). This being the case, it is clear that section 13(6) kicks in as soon as this is done as the expression used in section 13(6) is “after taking possession”. Also, it is clear that rule 8(5) to 8(8) also kick in as soon as “possession” is taken under rule 8(1) and 8(2). The statutory scheme, therefore, in the present case is that once possession is taken under rule 8(1) and 8(2) read with section**

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13(4)(a), section 17 gets attracted, as this is one of the measures referred to in section 13(4) that can be taken by the secured creditor under Chapter III. Rule 8(3) begins with the expression “in the event of”. These words make it clear that possession may be taken alternatively under sub-rule (3). The further expression used in sub-rule (3) is “actually taken” making it clear that physical possession is referred to by rule 8(3). Thus, whether possession is taken under either rule 8(1) and 8(2), or under rule 8(3), measures are taken by the secured creditor under section 13(4) for the purpose of attracting section 17(1). [Paras 12, 13] [1055-C-G]

2.1 The argument for the respondents that section 13(4)(a) has to be read in the light of sub-clauses (b) and (c) is incorrect and must be rejected. Under sub-clause (c), a person is appointed as the manager to manage the secured assets, the possession of which has been taken over by the secured creditor only under rule 8(3). Further, the rule of *noscitur a sociis* cannot apply. Sub-clause (b) speaks of taking over management of the business of the borrower which is completely different from taking over possession of a secured asset of the borrower. Equally, sub-clause (d) does not speak of taking over either management or possession, but only speaks of paying the secured creditor so much of the money as is sufficient to pay off the secured debt. These arguments must therefore be rejected. [Para 14] [1055-G; 1056-A-B]

2.2 Section 17(3) is a provision which arms the Debts Recovery Tribunal to provide certain reliefs when applications are made before it by the borrower. One of the reliefs that can be given is restoration of possession. Other reliefs can also be given under the omnibus section 17(3)(c). Merely because one of the reliefs given is that of restoration of possession does not lead to the sequitur that only actual physical possession is therefore contemplated by section 13(4), since other directions that may be considered appropriate and necessary may also be given for wrongful recourse taken by the secured creditor to section 13(4). [Para 16] [1056-F-G]

2.3 In the Statement of Objects and Reasons of the original enactment, paragraphs 2(i) and 2(j) make it clear that the rights

A of the secured creditor are to be exercised by officers authorised  
in this behalf in accordance with the rules made by the Central  
Government. Further, an appeal against the action of any bank or  
financial institution is provided to the concerned Debts Recovery  
Tribunal. It can thus be seen that though the rights of a secured  
B creditor may be exercised by such creditor outside the court  
process, yet such rights must be in conformity with the Act. If  
that is not the case, such an action is liable to be interfered with  
by the Debts Recovery Tribunal in an application made by the  
debtor/borrower. Thus, it can be seen that the object of the  
original enactment also includes secured creditors acting in  
C conformity with the provisions of the Act to realise the secured  
debt which, if not done, gives recourse to the borrower to obtain  
relief from the Debts Recovery Tribunal. Equally, the Statement  
of Objects and Reasons of the Amendment Act of 2004 also makes  
it clear that not only do reasons have to be given for not accepting  
D objections of the borrower under section 13(3-A), but that  
applications may be made before the Debts Recovery Tribunal  
without making the onerous pre-deposit of 75% which was struck  
down by this Court in *Mardia Chemicals*. The object of the Act,  
therefore, is also to enable the borrower to approach a quasi-  
judicial forum in case the secured creditor, while taking any of  
E the measures under section 13(4), does not follow the provisions  
of the Act in so doing. Take for example a case in which a secured  
creditor takes possession under rule 8(1) and 8(2) before the 60  
days' period prescribed under section 13(2) is over. The borrower  
does not have to wait until actual physical possession is taken  
F (this may never happen as after possession is taken under rule  
8(1) and 8(2), the secured creditor may go ahead and sell the  
asset). The object of providing a remedy against the wrongful  
action of a secured creditor to a borrower will be stultified if the  
borrower has to wait until a sale notice is issued, or worse still,  
until a sale actually takes place. It is clear, therefore, that one of  
G the objects of the Act, as carried out by rule 8(1) and 8(2) must  
also be subserved, namely, to provide the borrower with instant  
recourse to a quasi-judicial body in case of a wrongful action being  
taken by the secured creditor. [Para 17] [1056-H; 1057-A-G]

H 3.1 Another argument for the respondents is that the taking  
of possession under section 13(4)(a) must mean actual physical

possession or otherwise, no transfer by way of lease can be made as possession of the secured asset would continue to be with the borrower when only symbolic possession is taken. This argument also must be rejected for the reason that what is referred to in section 13(4)(a) is the right to transfer by way of lease for realising the secured asset. One way of realising the secured asset is when physical possession is taken over and a lease of the same is made to a third party. When possession is taken under rule 8(1) and 8(2), the asset can be realised by way of assignment or sale. This being the case, it is clear that the right to transfer could be by way of lease, assignment or sale, depending upon which mode of transfer the secured creditor chooses for realising the secured asset. Also, the right to transfer by way of assignment or sale can only be exercised in accordance with rules 8 and 9 of the 2002 Rules which require various pre-conditions to be met before sale or assignment can be effected. Equally, transfer by way of lease can be done in future in cases where actual physical possession is taken of the secured asset after possession is taken under rule 8(1) and 8(2) at a future point in time. If no such actual physical possession is taken, the right to transfer by way of assignment or sale for realising the secured asset continues. This argument must also, therefore, be rejected. [Para 18] [1057-G-H; 1058-A-D]

**3.2 Banks and financial institutions can recover their debts by selling properties outside the court process under the SARFAESI Act by adhering to the statutory conditions laid down by the said Act. It is only when such statutory conditions are not adhered to that the Debts Recovery Tribunal comes in at the behest of the borrower. Under the Recovery of Debts Act, banks/ financial institutions could not recover their debts without intervention of the Debts Recovery Tribunal, which the SARFAESI Act has greatly improved upon, the only caveat being that this must be done by the secured creditor following the drill of the SARFAESI Act and rules made thereunder. [Para 19] [1058-E-G]**

*Transcore v. Union of India & Anr.* (2008) 1 SCC 125 : [2006] 9 Suppl. SCR 785; *Standard Chartered Bank v. V. Noble Kumar & Ors.*, (2013) 9 SCC 620 : [2013] 10 SCR 762 – distinguished.

A *ITC Limited v. Blue Coast Hotels Ltd. and Ors.* **AIR 2018 SC 3063 – relied on.**

*Canara Bank v. M. Amarender Reddy & Anr.* (2017) 4 SCC 735 : [2017] 3 SCR 748; *Mathew Varghese v. M. Amritha Kumar and Ors.* (2014) 5 SCC 610 : [2014]

B 2 SCR 736 – referred to.

C 4. Appendix IV-A recognises the fact that rule 8(1) and 8(2) refer to constructive possession whereas rule 8(3) refers to physical possession. The borrower/debtor can approach the Debts Recovery Tribunal under section 17 of the Act at the stage of the possession notice referred to in rules 8(1) and 8(2) of the 2002 Rules. [Para 25] [1067-C-D]

Case Law Reference

	[2004] 3 SCR 982	relied on	Para 3
	[2013] 10 SCR 762	distinguished	Para 6
D	[2006] 9 Suppl. SCR 785	distinguished	Para 20
	[2017] 3 SCR 748	referred to	Para 22
	[2014] 2 SCR 736	referred to	Para 22
	AIR 2018 SC 3063	relied on	Para 23

E CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10873 of 2018.

From the Judgment and Order dated 06.02.2018 of the High Court of Judicature at Allahabad, Lucknow Bench in Misc. Bench No. 28806 of 2017

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Civil Appeal No. 10874 of 2018.

G Neeraj Kishan Kaul, C. U. Singh, Ranjit Kumar, Sr. Advs., Sanchit Garga, Harsh Chopra, Ashutosh Garga, Pahlad Singh Sharma, Shashank Pathak, Samar Kachwaha, Chanan Parwani, Ramchandra Madan, Abhay Chauhan, Dincur Bajaj, D. K. Pathak, Vivek Gupta, Mrinmay Bhattmewara, Pranav Kaashyap, O. P. Gaggar, Ankur Prakash, Suresh Dobhal, Rohit Dhyani, Ms. Sonakshi Dhiman, Saaranish Parasher, Rishi Sharma, Das, Ms. Kusum Lata, Mahesh K. Chaudhary, Sanjeev Singh, Ms. Anandita Singh, Sudhanshu Palo, Ashok Kumar Dhandhanian, Arup

H Paul, Ms. Soumya Mukharjee, Ms. Jyoti Chaturvedi, Praveen Chaturvedi,

Ashish Dholakia, Sanjay Kapur, Ms. Megha Karnwal, Ms. Sheena Taqui, Ms. Shubhra Kapur, Piyush Hans, Ashok Malik, Vishisht, Ms. Saloni, Bhal Singh Malik, Muneesh Malhotra, Achin Mittal, Advocates for the appearing parties. A

The Judgment of the Court was delivered by

**R. F. NARIMAN, J.** 1. Leave granted. B

2. These matters come to us from a Full Bench judgment of the Allahabad High Court dated 06.02.2018. By an order of reference dated 19.09.2017, a learned Single Judge noticed divergent opinions expressed by two different Benches of the Allahabad High Court on the question whether an application under section 17(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as the “**SARFAESI Act**” or the “**Act**”), at the instance of a borrower, is maintainable even before physical or actual possession of secured assets is taken by banks/financial institutions in exercise of their powers under section 13(4) of the Act read with rule 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the “**2002 Rules**”). After discussing the various provisions of the Act, the 2002 Rules and judgments of the Supreme Court, the Full Bench summarised the true legal position according to it as follows: C  
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“**29.** The upshot of legal position that emerges from the judgments of the Supreme Court, insofar as the question referred to for our consideration is concerned, briefly stated, is as under:

(a) The remedy of an application under Section 17(1) is available only after the measures under Section 13(4) have been taken by the Bank/FIs against the borrower. F

(b) The issue of notice under Section 13(2) to the borrower and communication contemplated by Section 13(3-A) stating that his representation/objection is not acceptable or tenable, does not attract the application of principles of natural justice. In other words, no recourse to an application under Section 17(1), at that stage, is available/maintainable. G

(c) The borrower/person against whom measures under Section 13(4) of the Act are likely to be taken, cannot be denied to know the reason why his application or objections have not been H

- A accepted, as a fulfilment of the requirement of reasonableness and fairness in dealing with the same.
- (d) One of the reasons for providing procedure under Section 13(4) read with Rule 8 for taking possession is that the borrower should have a clear notice before the date and time of sale/
- B transfer of the secured assets, in order to enable him to tender the dues of the secured creditor with all other charges or to take a remedy under Section 17, at appropriate stage.
- (e) The time of 60 days is provided after the “measures” under Section 13(4) have been taken so as to enable the borrower to approach DRT and in such an eventuality, the DRT shall have a jurisdiction to pass any order/interim order, may be subject to conditions, on the application under Section 17(1) of the Act.
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- (f) The scheme of relevant provisions of the Act and the Rules shows that the Bank/FIs have been conferred with powers to take physical (actual) possession of the secured assets without interference of the Court and the only remedy open to the borrower is to approach DRT challenging such an action/measure and seeking appropriate relief, including restoration of possession, even after transfer of the secured assets by way of sale/lease, on the ground that the procedure for taking possession or dispossessing the borrower was not in accordance with the provisions of the Act/Rules.
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- (g) If the dues of the secured creditor together with all costs, charges and expenses incurred by them are tendered to them (secured creditors) before the date fixed for sale or transfer, the assets shall not be sold or transferred and in such an eventuality, possession can also be restored to the borrower.
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- (h) If the possession is taken before confirmation of sale, it cannot be stated that the right of the borrower to get the dispute adjudicated upon is defeated. The borrower’s right to get back possession even after the sale remains intact or stands recognised under the scheme of the provisions of the Act.
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- (i) The borrower is not entitled to challenge the reasons communicated or likely measure, to be taken by the secured creditor under Section 13(4) of the Act, unless his right to approach DRT, as provided for under Section 17(1), matures.
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The borrower gets all the opportunities, at different stages, either to clear the dues or to challenge the measures under Section 13(4) or even to challenge the reasons rejecting his objections/ not accepting the objections, after the measures under Section 13(4) have been taken. A

(j) While the banks have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting DRT with authority, after conducting an adjudication into the matters, to declare any such action invalid and also to restore even though the possession may have been made over to the transferee. B C

(k) The safeguards provided under the scheme make it further clear that if the Bank/FIs proceeds to take actual possession of the assets that cannot be stalled by the interference of a Court.

(l) If DRT after examining the facts and circumstances of the case and on the basis of evidence produced by the parties, comes to the conclusion that any of the measures referred to in Section 13(4), taken by the secured creditor is not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid and restore possession to the borrower. D E

(m) Any transfer of secured asset after taking possession thereof by the secured creditor shall vest in the transferee all rights in, or in relation to the secured asset as if the transfer had been made by the owner of such secured assets. F

(n) No remedy under Section 17(1) can be taken by the borrower unless he loses actual (physical) possession of the secured assets. In other words, before losing actual possession or unless the secured creditor obtains physical possession of the secured asset under Section 13(4), it is not open to the borrower to take a remedy under Section 17(1) of the Act.” G

The court then went on to hold:

“31. Section 13(4) of the Act provides that if the borrower fails to discharge his liability within the period prescribed under Section 13(2), the secured creditor can take recourse to one of the H

A measures, such as taking possession of the secured assets, including the right to transfer by way of lease, assignment or sale for realising the secured asset. From the language of this provision, it is further clear that taking measure under Section 13(4)(a) would mean taking actual (physical) possession, and if we do not read it in the said provision to say so, the right and power of the secured creditor to transfer the assets by way of lease, assignment or sale for realizing the secured assets, as provided for therein, would render redundant. In other words, putting such an interpretation on the language of Section 13(4) of the Act would be atrocious and would defeat the very objective of bringing the legislation. It is, therefore, not possible to hold that taking “measures” under Section 13(4)(a) also means taking only “symbolic possession” and not “physical possession”. We record further reasons to say so in following paragraph. From the scheme of Section 13(4) and Sections 14 and 17 of the Act and the relevant Rules 8 and 9 of the Rules, it appears to us that unless physical possession is taken, the measure, contemplated under Section 13(4), cannot be stated to have been taken.

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**31.1.** One of the rights conferred on a secured creditor is to transfer by way of lease, the secured asset, possession or management whereof has been taken under clauses (a) or (b) of sub-section (4) of Section 13. We have already held that sale or assignment of the secured assets could only be undertaken if actual physical possession has been taken over by the bank/FI’s. If we pose a question whether right to transfer the secured assets by way of lease could be exercised without taking actual physical possession of the secured asset or management of the business of the borrower, our answer would be obviously in the negative.

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**31.2.** The word ‘lease’ has not been defined under the Act, but it has been used in the Act in the same sense as under the Transfer of Property Act, 1882. Thereunder, Section 105 defines lease as “transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the

transfer on such terms. Lease is a contract between the lessor and the lessee for the possession and profits of land, etc. on one side and the recompense by rent or other consideration on the other. The estate transferred to the lessee is called the leasehold. The estate remaining in the lessor is called the reversion. A

**31.3.** The absolute owner, who is under no personal incapacity can grant lease for any term he pleases. However, the limited owner like a tenant for life can grant lease but it would not endure beyond his death. The Supreme Court in *Associated Hotels of India Ltd. v. R.N. Kapoor*, AIR 1959 SC 1262, while making a distinction between lease and license observed thus:— B

“A lease is a transfer of an interest in land. The interested transferred is called the leasehold interest. The lessor parts with his right to enjoy the property during the term of the lease, and it follows from it that the lessee gets that right to the exclusion of the lessor. C

Under S. 52 if a document gives only a right to use the property in a particular way or under certain terms while it remains in possession and control of the owner thereof, it will be a licence. The legal possession, therefore, continues to be with the owner of the property, but the licensee is permitted to make use of the permissive for a particular purpose. But for the permission, his occupation would be unlawful. It does not create in his favour any estate or interest in the property. There is, therefore, clear distinction between the two concepts.” D

**31.4.** One of the essential indicia of lease is parting of exclusive possession by the lessor to the lessee with conferment of reciprocal right in the lessee to protect his possession during subsistence of the lease to the exclusion of the lessor. Although in some cases, a licensee may also be given exclusive possession of a property, but as observed above, parting of exclusive possession to the lessee is a *sine qua non* for creating a valid lease. Thus, where a person is not in physical possession of a property nor in a position to deliver physical possession in future, he is incompetent to create a valid lease. The reason being that he is not in a position to confer upon the lessee the right to enjoy the property to the exclusion of the lessor and everyone else. F G H

A           **31.5.** It thus necessarily follow that the ultimate object of taking  
possession of the secured asset or management of the business  
of the borrower would not be achieved unless the secured creditor  
is in a position to further exercise his right to transfer the same,  
inter alia, by way of lease or sale, which could be possible only if  
B           physical (actual) possession has been taken over and not  
constructive or symbolic possession. The language of Section  
13(6) also supports our view. Thus, while there is no bar in first  
taking symbolic possession of the secured assets, but it is implicit  
in sub-section (4) of Section 13 that the secured creditor has to  
C           thereafter proceed to take physical (actual) possession in order  
to exercise its right to transfer by way of lease, assignment or  
sale.”

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D           **“34.** Thus, the scheme of the provisions of Sections 13 and 17 of  
the Act, read with Rules 8 and 9 of the Rules, would show that  
the “measure” taken under Section 13(4)(a) read with Rule 8  
would not be complete unless actual (physical) possession of the  
secured assets is taken by the Bank/Financial Institutions. In our  
opinion, taking measure under Section 13(4) means either taking  
actual/physical possession under clause (a) of sub-section (4) of  
E           Section 13 or any other measure under other clauses of this  
Section and not taking steps to take possession or making  
unsuccessful attempt to take measure under Section 13(4) of  
the Act. Similarly, following the procedure laid down under Section  
14 and/or Rules 8 and 9, where the Bank meets with resistance,  
would only mean taking steps to seek possession under Section  
F           13(4)(a) and the “measure” under sub-section (4)(a) of Section  
13 would stand concluded only when actual/physical possession  
is taken or the borrower loses actual/physical possession. It is at  
this stage alone or thereafter, the borrower can take recourse to  
the provisions of Section 17(1) of the Act. The transfer of  
G           possession is an action. Mere declaration of possession by a  
notice, in itself, cannot amount to transfer of possession, more  
particularly where such a notice meets with resistance. When  
the possession is taken by one party, other party also loses it. In  
the present case, adversial possession in being claimed by the  
secured creditor against the borrower. It is not possible that both  
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will have possession over the secured assets. The possession of the secured creditor would only come into place with the dispossession of the borrower. We may also observe that in a securitisation application under Section 17(1), the borrower will have to make a categorical statement that he lost possession or he has been dispossessed and pray for possession.

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**35.** Issuance of possession notice, as observed earlier, gives borrower and the public in general an intimation that the secured creditor has taken possession of the property and at that stage, it is quite possible, may be in view of resistance or if the Banks chooses to take only symbolic possession, to state that the secured creditor has taken symbolic/constructive possession and not physical possession, but that by itself would not entitle the borrower to raise challenge under Section 17(1) of the Act, as held by the Supreme Court in *Noble Kumar* (supra). Unless the borrower loses actual (physical) possession, he cannot take recourse to provisions of Section 17(1). Even while taking steps under Section 13(4) of the Act read with Rule 8 of the Rules, in a given case, the bank may not physically dispossess the borrower and wait till it takes steps to conduct actual sale/auction of the secured assets i.e. till he issues notice under Rule 8(6) of the Rules. Even that by itself, from the scheme of the Act and the Rules, in the backdrop of the objective of the Act, in our opinion, does not confer any right to take recourse to Section 17(1). The borrower can file securitisation application under Section 17(1) only when he physically loses possession.”

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**40.** We are, therefore, of the firm and considered opinion that taking “symbolic possession” or issuance of possession notice under Appendix IV of the Rules, meeting with any resistance, cannot be treated as “measure”/s taken under Section 13(4) of the Act and, therefore, the borrower at that stage cannot file an application under Section 17(1) before DRT. In other words, a securitisation application under Section 17(1) of the Act is maintainable only when actual/physical possession is taken by the secured creditor or the borrower loses actual/physical possession of the secured assets. Once the right to approach DRT matures and securitisation application under Section 17(1)

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A is filed by the borrower, it is open to DRT to deal with the same on merits and pass appropriate orders in accordance with law. Thus, the question referred to for our consideration stands answered in terms of this judgment. The judgment of this Court in *Aum Jewels* (supra), in our opinion, does not enunciate the correct law.”

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3. Shri Neeraj Kishan Kaul, learned Senior Advocate, appearing on behalf of the appellants, has placed before us all the relevant sections under the SARFAESI Act as well as the relevant rules under the 2002 Rules. He has referred to the Statement of Objects and Reasons of both the original Act as well as the Amendment Act made in 2004 pursuant to a judgment of this Court in **Mardia Chemicals Ltd. v. Union of India**, (2004) 4 SCC 311 (“**Mardia Chemicals**”). According to Shri Kaul, the scheme of section 13 is that a notice of default once served under section 13(2) of the Act may call upon the borrower to discharge in full his liability to the secured creditor within 60 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) of section 13. He relied upon section 13(3-A) which made it clear that even though reasons are communicated under the said sub-section, since no measures were actually taken under section 13(4), there is no right at that stage for the borrower to prefer an application to the Debts Recovery Tribunal under section 17 of the Act.

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According to the learned Senior Advocate, section 13(4)(a) makes it clear that “possession” of the secured assets of the borrower may be taken under this provision. Obviously, such possession is to be taken under the rules framed under the Act. Rule 8(1) makes it clear that possession is taken under the 2002 Rules by delivering a possession notice prepared in the form contained in Appendix IV to the rules, and by affixing the notice on the outer door or at such conspicuous place of the property. Once this is done, and the possession notice is published in two leading newspapers under sub-rule (2), the form contained in Appendix IV makes it clear that notice is given to the public in general that possession has been taken in exercise of powers contained under section 13(4) of the Act read with rule 8 of the 2002 Rules. As soon as this takes place, according to Shri Kaul, since “symbolic possession” has been so taken, the right of the borrower to approach the Debts Recovery Tribunal for relief under section 17 gets crystallized. He also relied upon sub-rule (3) to argue that possession may be taken under this sub-rule which is “actual” as opposed to “symbolic” possession under

sub-rule (1). According to the learned Senior Advocate, the moment possession is taken either under rule 8(1) or under rule 8(3), section 13(6) gets attracted thereby making it clear that a transfer of secured asset, after taking such possession, 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. According to Shri Kaul, after symbolic possession is taken under rule 8(1), rules 8(5) to 8(8) and rule 9 can then be followed in order to effect sale of property of which symbolic possession has been taken. Shri Kaul attacked the judgment of the Full Bench, stating that the conclusion of the Full Bench that the borrower would have to wait until actual physical possession of the secured asset is taken would create great hardship in that a running business of the borrower would be taken over without the borrower being able to approach the Debts Recovery Tribunal, and would have to wait until after the sale takes place to recover possession under section 17(3), even if he is able to show that the steps taken by the secured creditor are in violation of the provisions of the Act. Thus, if symbolic possession is taken contrary to section 13(2) prior to 60 days from the date of the notice mentioned therein, all borrowers would have to wait until physical possession is taken and/or a sale notice is issued to get back their running business after the business is brought to a grinding halt. This could not possibly have been the intention of the legislature.

4. Shri C.U. Singh, learned Senior Advocate, appearing on behalf of respondent no. 2, took us through the statutory provisions and the 2002 Rules and argued that the High Court may have gone beyond what was argued by his predecessor before the High Court. Shri Singh emphasised that his limited argument before this Court is that the stage of symbolic possession is not a stage at which any prejudice is caused to the borrower as he may continue to run his business. Section 13(6) does not come in at this stage at all, and section 13(13), which interdicts a borrower after receipt of a notice under section 13(2) to transfer by way of sale, lease or otherwise, other than in the ordinary course of business, any of his secured assets without prior written consent of the secured creditor, is the only restraint that continues to attach after symbolic possession is taken. According to him, as no prejudice is caused to the borrower at this stage, it is clear that “possession” spoken of in section 13(4) can only mean actual physical possession. This becomes clear on a reading of section 13(4)(c) which makes it clear that a manager can only manage the secured assets the possession of which has been

A taken over by the secured creditor, if actual physical possession has  
been parted with. According to the learned Senior Advocate, therefore,  
the object of the Act will be defeated if a debtor can approach the Debts  
Recovery Tribunal at such stage when no prejudice is caused to him,  
thereby rendering what is statutorily granted to a creditor futile. He relied  
B upon observations in various Supreme Court judgments to buttress his  
stand that it is only at the stage of actual physical possession that an  
application can be filed under section 17 and not before.

5. Shri Ranjit Kumar, learned Senior Advocate, appearing on behalf  
of the respondents in Civil Appeal arising out of SLP(C) No.12841 of  
2018, went on to argue that all the sub-clauses in section 13(4) must be  
C construed together. If that is done, it is clear that under sub-clauses (b)  
and (c), management and possession must physically be taken over.  
Therefore, under sub-clause (a), the expression “possession” must also  
mean actual physical possession. According to the learned Senior  
Advocate, the measures taken under section 13 must also be read with  
D sections 14 and 15. It is clear that under section 14, actual physical  
possession is to be handed over by the Chief Metropolitan Magistrate or  
the District Magistrate to the secured creditor, and under section 15,  
management of the business has actually to be taken over as two  
managements cannot possibly continue at the same time. Read in this  
E light, the scheme of the Act, therefore, is clear and it becomes equally  
clear that only actual physical possession is referred to in section 13(4)(a)  
before a section 17 application can be filed. He also referred to section  
17(3) to further argue that restoration of possession of secured assets  
could only refer to restoration of actual physical possession thereby  
strengthening his interpretation of sections 13 and 17 of the Act.  
F According to him, under section 19, compensation is also payable where  
possession taken is not in accordance with the provisions of the Act and  
2002 Rules, again making it clear that when the Court or Tribunal directs  
the secured creditor to return such secured asset to the borrowers,  
compensation may be paid. Returning secured assets obviously would  
mean assets of which physical possession has been taken. When it came  
G to reading rules 8(1) and 8(3) of the 2002 Rules, according to Shri Ranjit  
Kumar, rule 8(3) is the next step after symbolic possession is taken over  
under rule 8(1), and without taking of actual physical possession under  
rule 8(3), no sale can be made of any secured assets. Like Shri C.U. Singh  
before him, he agreed that the High Court had perhaps gone a little too  
H far in its conclusion, and that the moment any real prejudice is caused to

the borrower, the borrower can certainly approach the Tribunal. This would also include the stage at which a sale notice is issued under rule 8. A

6. Shri Ashish Dholakia, learned Advocate, appearing for the intervenor, State Bank of India, referred to the objects of the 2002 Act and relied upon the judgment of this Court in **Standard Chartered Bank v. V. Noble Kumar & Ors.**, (2013) 9 SCC 620 (“**Noble Kumar**”). He argued that if we were to grant an opportunity to a debtor to approach the Tribunal at the stage of symbolic possession, there would be little difference between the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the “**Recovery of Debts Act**”) and the SARFAESI Act, and thus, we would destroy the very object for which the SARFAESI Act was enacted, namely, so that banks could recover their debts by selling properties outside the court process, something that the Recovery of Debts Act did not envisage. He also referred to and relied upon section 3 of the Transfer of Property Act for the definition of “a person is said to have notice” and Explanation II in particular, which referred to actual possession. According to him therefore, the correct stage would be the stage at which actual physical possession has been taken, upon which a debtor may then approach the Debts Recovery Tribunal under section 17. B C D

7. Having heard learned counsel for the parties, we may first set out the Statement of Objects and Reasons for the 2002 Act. The Statement of Objects and Reasons for the 2002 Act read as follows: E

“**Statement of Objects and Reasons.**—The financial sector has been one of the key drivers in India’s efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. F G H

- A Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new
- B legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court. Acting on these suggestions, the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002 was promulgated on the 21st June, 2002 to regulate securitisation and reconstruction of financial assets and enforcement of security
- C interest and for matters connected therewith or incidental thereto. The provisions of the Ordinance would enable banks and financial institutions to realise long-term assets, manage problem of liquidity, asset liability mismatches and improve recovery by exercising
- D powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction.
2. It is now proposed to replace the Ordinance by a Bill, which, inter alia, contains provisions of the Ordinance to provide for—
- E (a) registration and regulation of securitisation companies or reconstruction companies by the Reserve Bank of India;
- (b) facilitating securitisation of financial assets of banks and financial institutions with or without the benefit of underlying securities;
- F (c) facilitating 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 a debenture;
- (d) empowering securitisation companies or reconstruction
- G companies to raise funds by issue of security receipts to qualified institutional buyers;
- (e) facilitating reconstruction of financial assets acquired by exercising powers of enforcement of securities or change of management or other powers which are proposed to be
- H conferred on the banks and financial institutions;

(f) declaration of any securitisation company or reconstruction company registered with the Reserve Bank of India as a public financial institution for the purpose of Section 4-A of the Companies Act, 1956; A

(g) defining “security interest” as any type of security including mortgage and charge on immovable properties given for due repayment of any financial assistance given by any bank or financial institution; B

(h) empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower’s account as non-performing asset in accordance with the directions given or guidelines issued by the Reserve Bank of India from time to time; C

(i) the rights of a secured creditor to be exercised by one or more of its officers authorised in this behalf in accordance with the rules made by the Central Government; D

(j) an appeal against the action of any bank or financial institution to the concerned Debts Recovery Tribunal and a second appeal to the Appellate Debts Recovery Tribunal;

(k) setting-up or causing to be set-up a Central Registry by the Central Government for the purpose of registration of transactions relating to securitisation, asset reconstruction and creation of security interest; E

(l) application of the proposed legislation initially to banks and financial institutions and empowerment of the Central Government to extend the application of the proposed legislation to non-banking financial companies and other entities; F

(m) non-application of the proposed legislation to security interests in agricultural lands, loans not exceeding Rupees One lakh and cases where eighty per cent of the loans are repaid by the borrower. G

3. The Bill seeks to achieve the above objects.”

Section 13 with which we are concerned reads as follows:

“**13. Enforcement of security interest.**—(1) Notwithstanding anything contained in Section 69 or Section 69-A of the Transfer H

A of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

B (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):

C <sup>1</sup>[Provided that—

D (i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

E (ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;]

F (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.

G <sup>2</sup>[(3-A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate <sup>3</sup>[within fifteen days] of receipt of such

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<sup>1</sup> *Ins.* by Act 44 of 2016, S. 11(i) (w.e.f. 1-9-2016).

<sup>2</sup> *Ins.* by Act 30 of 2004, S. 8 (w.r.e.f. 11-11-2004).

H <sup>3</sup> *Subs.* for “within one week” by Act 1 of 2013, S. 5(a) (w.e.f. 15-1-2013).

representation or objection the reasons for non-acceptance of A  
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 B  
application to the Debts Recovery Tribunal under Section 17 or  
the Court of District Judge under Section 17-A.]

(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:— C

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

<sup>4</sup>[(b) take over the management of the business of the borrower  
including the right to transfer by way of lease, assignment or D  
sale for realising the secured asset:

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

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

(c) appoint any person (hereafter referred to as the manager),  
to manage the secured assets the possession of which has F  
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 G  
borrower, to pay the secured creditor, so much of the money  
as is sufficient to pay the secured debt.

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<sup>4</sup> Subs. by Act 30 of 2004, S. 8 (w.r.e.f. 11-11-2004). Prior to substitution it read as:  
“(b) take over the management of the secured assets of the borrower including  
the right to transfer by way of lease, assignment or sale and realise the secured  
asset;”

A (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.

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

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

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

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

F xxx xxx xxx

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

G Section 14(1) of the Act reads as follows:

**“14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured**

H <sup>5</sup> *Ins.* by Act 1 of 2013, S. 5(b) (w.e.f. 15-1-2013)

**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 assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him—

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor:

xxx xxx xxx”

Section 15(1) of the Act reads as follows: D

**“15. Manner and effect of takeover of management.—**

(1) <sup>6</sup>[When the management of business of a borrower is taken over by a <sup>7</sup>[asset reconstruction company] under clause (a) of Section 9 or, as the case may be, by a secured creditor under clause (b) of sub-section (4) of Section 13], the secured creditor may, by publishing a notice in a newspaper published in English language and in a newspaper published in an Indian language in circulation in the place where the principal office of the borrower is situated, appoint as many persons as it thinks fit—

(a) in a case in which the borrower is a company as defined in the Companies Act, 1956 (1 of 1956), to be the directors of that borrower in accordance with the provisions of that Act; or

(b) in any other case, to be the administrator of the business of the borrower.

xxx xxx xxx” G

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<sup>6</sup> Subs. for “When the management of business of a borrower is taken over by a secured creditor” by Act 30 of 2004, S. 9 (w.r.e.f. 11-11-2004).

<sup>7</sup> Subs. for “securitisation company or a reconstruction company” by Act 44 of 2016, S. 3(i) (w.e.f. 1-9-2016).

A Section 17 of the Act reads as follows:

“<sup>8</sup>**[17. Application against measures to recover secured debts].**—(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, <sup>9</sup>[may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken:

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<sup>10</sup>[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

C

<sup>11</sup>[*Explanation.*—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the 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.]

D

<sup>12</sup>[(1-A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction—

E

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

F

<sup>13</sup>[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of Section 13 taken

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<sup>8</sup> Subs. for “Right to appeal” by Act 44 of 2016, S. 14(i) (w.e.f. 1-9-2016).

<sup>9</sup> Subs. for “may prefer an appeal” by Act 30 of 2004, S. 10 (w.r.e.f. 21-6-2002).

<sup>10</sup> Ins. by Act 30 of 2004, S. 10 (w.r.e.f. 21-6-2002).

<sup>11</sup> Ins. by Act 30 of 2004, S. 10 (w.r.e.f. 11-11-2004).

<sup>12</sup> Ins. by Act 44 of 2016, S. 14(ii) (w.e.f. 1-9-2016).

<sup>13</sup> Subs. for sub-sections (2) and (3) by Act 30 of 2004, S. 10 (w.r.e.f. 11-11-2004). Prior to substitution sub-sections (2) and (3) read as:

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“(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

by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder. A

<sup>14</sup>[(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 restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,— B

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and C

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and D

(c) pass such other direction 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.] E

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Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-section (2) of Section 13: E

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.” F

<sup>14</sup> Subs. by Act 44 of 2016, S. 14(iii) (w.e.f. 1-9-2016). Prior to substitution it read as: “(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 restoration of the management of the business 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 creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business 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.”. G H

A (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 to one or more of the measures specified under sub-section (4) of Section 13 to recover his secured debt.

B <sup>15</sup>[(4-A) Where—

C (i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—

D (a) has expired or stood determined; or  
 (b) is contrary to Section 65-A of the Transfer of Property Act, 1882 (4 of 1882); or  
 (c) is contrary to terms of mortgage; or  
 (d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of Section 13 of the Act; and

E (ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

F (5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

G Provided that the Debts 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

H <sup>15</sup> *Ins.* by Act 44 of 2016, S. 14(iv) (w.e.f. 1-9-2016).

application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1). A

(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. B C

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

Rule 8 of the 2002 Rules reads as follows:

“**8. Sale of immovable secured assets.**—(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property. E

(2) <sup>16</sup>[The possession notice as referred to in sub-rule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers], one in vernacular language having sufficient circulation in that locality, by the authorised officer. F

<sup>17</sup>[(2-A) All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes prescribed under sub-rule (1) and sub-rule (2) of rule 8.] G

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<sup>16</sup> *Subs.* for “The possession notice as referred to in sub-rule (1) shall also be published in two leading newspaper” by S.O. 1837(E), dated 26-10-2007 (w.e.f. 26-10-2007).

<sup>17</sup> *Ins.* by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016). H

- A (3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.
- B (4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.
- C (5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:—
- D (a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or  
(b) by inviting tenders from the public;
- E <sup>18</sup>[(c) by holding public auction including through e-auction mode; or]  
(d) by private treaty.
- F (6) the authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):
- G Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,—
- (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;

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<sup>18</sup> Subs. by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016). Prior to substitution it read as:

H “(c) by holding public auction; or”

(b) the secured debt for recovery of which the property is to be sold; A

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed; B

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property. C

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet.

(8) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled <sup>19</sup>[between the secured creditor and the proposed purchaser in writing].” D

Appendix IV to the 2002 Rules reads as follows:

“APPENDIX IV

[See rule 8(1)]

**POSSESSION NOTICE** E

*(for immovable property)*

Whereas

The undersigned being the authorised officer of the ..... (name of the Institution) under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest <sup>20</sup>[Act, 2002 (54 of 2002)] and in exercise of powers conferred under Section 13(12) read with <sup>21</sup>[Rule 3] of the Security Interest (Enforcement) Rules, 2002 issued a demand notice dated ..... calling upon the borrower Shri ..... /M/s ..... to repay the amount mentioned in the F G

<sup>19</sup> Subs. for “between the parties in writing” by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016).

<sup>20</sup> Subs. for “Ordinance” by S.O. 103(E), dated 2-2-2007 (w.e.f. 2-2-2007).

<sup>21</sup> Subs. for “Rule 9” by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016). H

A notice being Rs ..... (in words ..... ) within 60 days from the date of receipt of the said notice.

B <sup>22</sup>[The borrower having failed to repay the amount, notice is hereby given to the borrower and the public in general that the undersigned has taken possession of the property described herein below in exercise of powers conferred on him under sub-section (4) of Section 13 of Act read with Rule 8 of the Security Interest Enforcement) Rules, 2002 on this the .....day of ..... of the year.....]

C The borrower in particular and the public in general is hereby cautioned not to deal with the property and any dealings with the property will be subject to the charge of the ..... (name of the Institution) for an amount Rs. .... and interest thereon.

D <sup>23</sup>[The borrower's attention is invited to provisions of sub-section (8) of Section 13 of the Act, in respect of time available, to redeem the secured assets.]

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Description of the Immovable Property

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E All that part and parcel of the property consisting of Flat No. .... /Plot No. .... In Survey No. .... /City or Town Survey No. .... /Khasara No. .... within the registration sub-district ..... and District .....

F Bounded:  
On the North by  
On the South by  
On the East by  
On the West by

G sd/-  
Authorised Officer

(Name of Institution)

Date:

Place:”

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<sup>22</sup> Subs. by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016).

H <sup>23</sup> Ins. by G.S.R. 1046(E), dt. 3-11-2016 (w.e.f. 4-11-2016).

8. This Court in **Mardia Chemicals** (supra) after referring in detail to the provisions of the Act held: A

“48. The next safeguard available to a secured borrower within the framework of the Act is to approach the Debts Recovery Tribunal under Section 17 of the Act. Such a right accrues only after measures are taken under sub-section (4) of Section 13 of the Act. B

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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 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 in *Ganga Bai v. Vijay Kumar*[(1974) 2 SCC 393] where in respect of original and appellate proceedings a distinction has been drawn as follows: (SCC p. 397, para 15) C D

“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 the suit is barred by statute one may, at one’s peril, bring a suit of 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.” E F G

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62. As indicated earlier, the position of the appeal under Section 17 of the Act is like that of a suit in the court of the first instance under the Code of Civil Procedure. No doubt, in suits also it is permissible, in given facts and circumstances and under the H

A provisions of the law to attach the property before a decree is passed or to appoint a receiver and to make a provision by way of interim measure in respect of the property in suit. But for obtaining such orders a case for the same is to be made out in accordance with the relevant provisions under the law. There is no such provision under the Act.

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C **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 Debts Recovery Tribunal. The abovenoted provisions are for the purpose 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:

D *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 Debts Recovery Tribunal under Section 17 of the Act, at that stage.

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G *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 Debts Recovery Tribunal.

H *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 in this behalf, we find that the requirement of deposit of 75% of the 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. A

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.” B

Close on the heels of this judgment, the 2002 Act was amended on 30.12.2004 with effect from 11.11.2004. The Statement of Objects and Reasons for the Amended Act reads as under: C

“**Statement of Objects and Reasons.**—The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 was enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected thereto. The Act enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The 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 and realise the secured assets and take over the management of the business of the borrower. D E F

2. The Hon’ble Supreme Court, in the case of *Mardia Chemicals Ltd. v. Union of India*, A.I.R. 2004 S.C. 2371 : (2004) 4 S.C.C 311, *inter alia*,— G

(a) upheld the validity of the provisions of the said Act except that of sub-section (2) of Section 17 which was declared *ultra vires* Article 14 of the Constitution. The said sub-section provides for deposit of seventy-five per cent. of the amount claimed before entertaining an appeal (petition) by the Debts Recovery Tribunal (DRT) under Section 17; H

- A (b) observed that in cases where a secured creditor has taken action under sub-section (4) of Section 13 of the said Act, it would be open to borrowers to file appeals under Section 17 of the Act within the limitation as prescribed therefor. It also observed that if the borrower, after service of notice under sub-section (2) of Section 13 of the said Act, 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 that may be, must be communicated to the borrower. 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 Debts Recovery Tribunal under Section 17 of the Act, at that stage.
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3. In view of the above judgment of the Hon'ble Supreme Court and also to discourage the borrowers to postpone the repayment of their dues and also enable the secured creditor to speedily recover their debts, if required, by enforcement of security or other measures specified in sub-section (4) of Section 13 of the said Act, it had become necessary to amend the provisions of the said Act.
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- E 4. Since the Parliament was not in session and it was necessary to take immediate action to amend the said Act for the above reasons, the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Ordinance, 2004 was promulgated on the 11<sup>th</sup> November, 2004.
- F 5. The said Ordinance amends the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Companies Act, 1956. Chapter II of the Ordinance which amends the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,—
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- H (a) require the secured creditor to consider, in response to the notice issued by the secured creditor under sub-section (2) of Section 13 of the said Act, any representation made or objection raised by the borrower and cast an obligation upon the secured creditor to communicate within one week of receipt of such

representation or objection the reasons for non-acceptance of the representation or objection to the borrower and take possession of the secured asset only after reasons for not accepting the objections of the borrower have been communicated to him in writing; A

(b) enable the borrower to make an application before the Debts Recovery Tribunal without making any deposit (instead of filing an appeal before the Debts Recovery Tribunal after depositing seventy-five per cent. of the amount claimed with the notice by the secured creditor); B

(c) provides that the Debts Recovery Tribunal shall dispose of the application as expeditiously as possible and dispose of such application within sixty days from the date of such applications so that the total period of pendency of the application with such Tribunal shall not exceed four months; C

(d) make provision for transfer of pending applications to any one of the Debts Recovery Tribunal in certain cases; D

(e) enables any person aggrieved by any order made by the Debts Recovery Tribunal to file an appeal to the Debts Recovery Appellate Tribunal after depositing with the Appellate Tribunal fifty per cent. of amount of debt due from him, as claimed by the secured creditor or determined by the Debts Recovery Tribunal, whichever is less; E

(f) enables the borrower residing in the State of Jammu and Kashmir to make an application to the Court of District Judge in that State having jurisdiction over the borrower and make provision for filing an appeal to the High Court from the order of the Court of District Judge; F

(g) makes provision for validation of the fees levied under the said Act before the commencement of this Ordinance.

xxx xxx xxx” G

The Act was accordingly amended in accordance with the aforesaid judgment.

9. The judgment in **Mardia Chemicals** (supra) had made it clear in paragraph 80 that all measures having been taken under section 13(4),

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A and before the date of sale auction, it would be open for the borrower to file a petition under section 17 of the Act. This paragraph appears to have been missed by the Full Bench in the impugned judgment.

10. A reading of section 13 would make it clear that where a default in repayment of a secured debt or any instalment thereof is made by a borrower, the secured creditor may require the borrower, by notice in writing, to discharge in full his liabilities to the secured creditor within 60 days from the date of notice. It is only when the borrower fails to do so that the secured creditor may have recourse to the provisions contained in section 13(4) of the Act. Section 13(3-A) was inserted by the 2004 Amendment Act, pursuant to **Mardia Chemicals** (supra), making it clear that if on receipt of the notice under section 13(2), the borrower makes a representation or raises an objection, the secured creditor is to consider such representation or objection and give reasons for non-acceptance. The proviso to section 13(3-A) makes it clear that this would not confer upon the borrower any right to prefer an application to the Debts Recovery Tribunal under section 17 as at this stage no action has yet been taken under section 13(4).

11. When we come to section 13(4)(a), what is clear is that the mode of taking possession of the secured assets of the borrower is specified by rule 8. Under section 38 of the Act, the Central Government may make rules to carry out the provisions of the Act. One such rule is rule 8. Rule 8(1) makes it clear that “the authorised officer shall take or cause to be taken possession”. The expression “cause to be taken” only means that the authorised officer need not himself take possession, but may, for example, appoint an agent to do so. What is important is that such taking of possession is effected under sub-rule (1) of rule 8 by delivering a possession notice prepared in accordance with Appendix IV of the 2002 Rules, and by affixing such notice on the outer door or other conspicuous place of the property concerned. Under sub-rule (2), such notice shall also be published within 7 days from the date of such taking of possession in two leading newspapers, one in the vernacular language having sufficient circulation in the locality. This is for the reason that when we come to Appendix IV, the borrower in particular, and the public in general is cautioned by the said possession notice not to deal with the property as possession of the said property has been taken. This is for the reason that, from this stage on, the secured asset is liable to be sold to realise the debt owed, and title in the asset divested from

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the borrower and complete title given to the purchaser, as is mentioned in section 13(6) of the Act. There is, thus, a radical change in the borrower dealing with the secured asset from this stage. At the stage of a section 13(2) notice, section 13(13) interdicts the borrower from transferring the secured asset (otherwise than in the ordinary course of his business) without prior written consent of the secured creditor. But once a possession notice is given under rule 8(1) and 8(2) by the secured creditor to the borrower, the borrower cannot deal with the secured asset at all as all further steps to realise the same are to be taken by the secured creditor under the 2002 Rules.

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12. Section 19, which is strongly relied upon by Shri Ranjit Kumar, also makes it clear that compensation is receivable under section 19 only when possession of secured assets is not in accordance with the provision of this Act and rules made thereunder.<sup>24</sup> The scheme of section 13(4) read with rule 8(1) therefore makes it clear that the delivery of a possession notice together with affixation on the property and publication is one mode of taking “possession” under section 13(4). This being the case, it is clear that section 13(6) kicks in as soon as this is done as the expression used in section 13(6) is “after taking possession”. Also, it is clear that rule 8(5) to 8(8) also kick in as soon as “possession” is taken under rule 8(1) and 8(2). The statutory scheme, therefore, in the present case is that once possession is taken under rule 8(1) and 8(2) read with section 13(4)(a), section 17 gets attracted, as this is one of the measures referred to in section 13(4) that has been taken by the secured creditor under Chapter III.

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13. Rule 8(3) begins with the expression “in the event of”. These words make it clear that possession may be taken alternatively under sub-rule (3). The further expression used in sub-rule (3) is “actually taken” making it clear that physical possession is referred to by rule 8(3). Thus, whether possession is taken under either rule 8(1) and 8(2), or under rule 8(3), measures are taken by the secured creditor under section 13(4) for the purpose of attracting section 17(1).

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14. The argument made by the learned counsel for the respondents that section 13(4)(a) has to be read in the light of sub-

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<sup>24</sup> That this is the general scheme of the Act is also clear from section 17(2) which states that the Debts Recovery Tribunal, when an application is filed before it, shall consider whether any of the measures referred to in section 13(4) taken by the secured creditor are in accordance with the provisions of the Act and rules made thereunder.

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A clauses (b) and (c) is therefore incorrect and must be rejected. Under sub-clause (c), a person is appointed as manager to manage the secured assets the possession of which has been taken over by the secured creditor only under rule 8(3). Further, the rule of *noscitur a sociis* cannot apply. Sub-clause (b) speaks of taking over management of the business of the borrower which is completely different from taking over possession of a secured asset of the borrower. Equally, sub-clause (d) does not speak of taking over either management or possession, but only speaks of paying the secured creditor so much of the money as is sufficient to pay off the secured debt. These arguments must therefore be rejected.

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C 15. Equally fallacious is the argument that section 13(4) must be read in the light of sections 14 and 15. There is no doubt whatsoever that under section 14(1), the Magistrate takes possession of the asset and “forwards” such asset to the secured creditor. Equally, under section 15 there is no doubt that the management of the business of a borrower must actually be taken over. These are separate and distinct modes of exercise of powers by a secured creditor under the Act. Whereas sections 14 and 15 have to be read by themselves, section 13(4)(a), as has been held by us, has to be read with rule 8, and this being the case, this argument must also be rejected.

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E 16. Yet another argument was made by the learned counsel for the respondents that section 17(3) would require restoration of possession of secured assets to the borrower, which can only happen if actual physical possession is taken over. Section 17(3) is a provision which arms the Debts Recovery Tribunal to give certain reliefs when applications are made before it by the borrower. One of the reliefs that can be given is restoration of possession. Other reliefs can also be given under the omnibus section 17(3)(c). Merely because one of the reliefs given is that of restoration of possession does not lead to the sequitur that only actual physical possession is therefore contemplated by section 13(4), since other directions that may be considered appropriate and necessary may also be given for wrongful recourse taken by the secured creditor to section 13(4). This argument again has no legs to stand on.

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H 17. Another argument made by learned senior counsel for the respondents is that if we were to accept the construction of section 13(4) argued by the appellants, the object of the Act would be defeated. As has been pointed out hereinabove in the Statement of Objects and Reasons of the original enactment, paragraphs 2(i) and 2(j) make it clear

that the rights of the secured creditor are to be exercised by officers authorised in this behalf in accordance with the rules made by the Central Government. Further, an appeal against the action of any bank or financial institution is provided to the concerned Debts Recovery Tribunal. It can thus be seen that though the rights of a secured creditor may be exercised by such creditor outside the court process, yet such rights must be in conformity with the Act. If not in conformity with the Act, such action is liable to be interfered with by the Debts Recovery Tribunal in an application made by the debtor/borrower. Thus, it can be seen that the object of the original enactment also includes secured creditors acting in conformity with the provisions of the Act to realise the secured debt which, if not done, gives recourse to the borrower to get relief from the Debts Recovery Tribunal. Equally, as has been seen hereinabove, the Statement of Objects and Reasons of the Amendment Act of 2004 also make it clear that not only do reasons have to be given for not accepting objections of the borrower under section 13(3-A), but that applications may be made before the Debts Recovery Tribunal without making the onerous pre-deposit of 75% which was struck down by this Court in **Mardia Chemicals** (supra). The object of the Act, therefore, is also to enable the borrower to approach a quasi-judicial forum in case the secured creditor, while taking any of the measures under section 13(4), does not follow the provisions of the Act in so doing. Take for example a case in which a secured creditor takes possession under rule 8(1) and 8(2) before the 60 days' period prescribed under section 13(2) is over. The borrower does not have to wait until actual physical possession is taken (this may never happen as after possession is taken under rule 8(1) and 8(2), the secured creditor may go ahead and sell the asset). The object of providing a remedy against the wrongful action of a secured creditor to a borrower will be stultified if the borrower has to wait until a sale notice is issued, or worse still, until a sale actually takes place. It is clear, therefore, that one of the objects of the Act, as carried out by rule 8(1) and 8(2) must also be subserved, namely, to provide the borrower with instant recourse to a quasi-judicial body in case of wrongful action taken by the secured creditor.

18. Another argument that was raised by learned senior counsel for the respondents is that the taking of possession under section 13(4)(a) must mean actual physical possession or otherwise, no transfer by way of lease can be made as possession of the secured asset would continue to be with the borrower when only symbolic possession is taken. This

- A argument also must be rejected for the reason that what is referred to in section 13(4)(a) is the right to transfer by way of lease for realising the secured asset. One way of realising the secured asset is when physical possession is taken over and a lease of the same is made to a third party. When possession is taken under rule 8(1) and 8(2), the asset can be realised by way of assignment or sale, as has been held by us hereinabove.
- B This being the case, it is clear that the right to transfer could be by way of lease, assignment or sale, depending upon which mode of transfer the secured creditor chooses for realising the secured asset. Also, the right to transfer by way of assignment or sale can only be exercised in accordance with rules 8 and 9 of the 2002 Rules which require various pre-conditions to be met before sale or assignment can be effected.
- C Equally, transfer by way of lease can be done in future in cases where actual physical possession is taken of the secured asset after possession is taken under rule 8(1) and 8(2) at a future point in time. If no such actual physical possession is taken, the right to transfer by way of assignment or sale for realising the secured asset continues. This argument must also, therefore, be rejected.
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19. Shri Ashish Dholakia, learned Advocate, appearing for the intervenor, State Bank of India, argued that if we were to upset the Full Bench judgment, there would be little difference between the Recovery of Debts Act and the SARFAESI Act as banks would not be able to recover their debts by selling properties outside the court process without constant interference by the Debts Recovery Tribunal. We are of the view that this argument has no legs to stand on for the reason that banks and financial institutions can recover their debts by selling properties outside the court process under the SARFAESI Act by adhering to the statutory conditions laid down by the said Act. It is only when such statutory conditions are not adhered to that the Debts Recovery Tribunal comes in at the behest of the borrower. It is needless to add that under the Recovery of Debts Act, banks/financial institutions could not recover their debts without intervention of the Debts Recovery Tribunal, which the SARFAESI Act has greatly improved upon, the only caveat being that this must be done by the secured creditor following the drill of the SARFAESI Act and rules made thereunder. Shri Dholakia then referred to and relied upon section 3 of the Transfer of Property Act, 1882. Under the said section, “a person is said to have notice” of a fact when he actually knows that fact, or when, but for willful abstention from an inquiry or search which he ought to have made, or gross negligence, he
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would have known it. Shri Dholakia referred to and relied upon Explanation II to this definition, which reads as under: A

“*Explanation II.*—Any person acquiring any immoveable property or any share or interest in any such property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof.” B

We fail to understand what relevance Explanation II could possibly have for a completely different statutory setting, namely, that of the SARFAESI Act and the 2002 Rules thereunder. For the purpose of the Transfer of Property Act, a person acquiring immovable property shall be deemed to have notice of the title, if any, of any person who is for the time being in actual possession thereof. For the purpose of the SARFAESI Act read with the 2002 Rules, the taking of possession by a secured creditor of the secured asset of the borrower would include taking of possession in any of the modes prescribed under rule 8, as has been held by us hereinabove. This argument must also, therefore, be rejected. C

20. We now come to some of the decisions of this Court. In **Transcore v. Union of India & Anr.**, (2008) 1 SCC 125, this Court formulated the question which arose before it as follows: D

“**1.** A short question of public importance arises for determination, namely, whether withdrawal of OA in terms of the first proviso to Section 19(1) of the DRT Act, 1993 (inserted by amending Act 30 of 2004) is a condition precedent to taking recourse to the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (“the NPA Act”, for short).” E

To this, the answer given is in paragraph 69, which is as follows: F

“**69.** For the above reasons, we hold that withdrawal of the OA pending before DRT under the DRT Act is not a precondition for taking recourse to the NPA Act. It is for the bank/FI to exercise its discretion as to cases in which it may apply for leave and in cases where they may not apply for leave to withdraw. We do not wish to spell out those circumstances because the said first proviso to Section 19(1) is an enabling provision, which provision may deal with myriad circumstances which we do not wish to spell out herein.” G

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A Thereafter, the Court went on to discuss whether recourse to take possession of secured assets of the borrower in terms of section 13(4) of the Act would comprehend the power to take actual possession of immovable property. In the discussion on this point in paragraph 71 of the judgment, learned counsel on behalf of the borrowers made an extreme submission which was that the borrower who is in possession of immovable property cannot be physically dispossessed at the time of issuing the notice under section 13(4) of the Act so as to defeat adjudication of his claim by the Debts Recovery Tribunal under section 17 of the Act and that therefore, physical possession can only be taken after the sale is confirmed in terms of rule 9(9) of the 2002 Rules. This submission was rejected by stating that the word “possession” is a relative concept and that the dichotomy between symbolic and physical possession does not find place under the Act. Having said this, the Court went on to examine the 2002 Rules and held:

D “74. .... Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a Court Receiver under Order 40 Rule 1 CPC. The Court Receiver can take symbolic possession and in appropriate cases where the Court Receiver finds that a third-party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorised officer under Rule 8 has greater powers than even a Court Receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third-party interests are created overnight and in very many cases those third parties take up the defence of being a *bona fide* purchaser for value without notice. It is these types of 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.”

H If the whole of paragraph 74 is read together with the extracted passage, it becomes clear that what is referred to in the extracted passage is the

procedure provided by rule 8(3). It is clear that the authorised officer's powers, once possession is taken under rule 8(3), include taking of steps for preservation and protection of the secured assets which is referred to in the extracted portion. Thus, the final conclusion by the Bench, though general in nature, is really referable to possession that is taken under rule 8(3) of the 2002 Rules. Whether possession taken under rule 8(1) and 8(2) is called symbolic possession or statutory possession, the fact remains that rule 8(1) and rule 8(2) specifically provide for a particular mode of possession taken under section 13(4)(a) of the Act. This cannot be wished away by an observation made by this Court in a completely different context in order to repel an extreme argument. This Court was only of the opinion that the extreme argument made, as reflected in paragraph 71 of the judgment, would have to be rejected. This judgment therefore does not deal with the problem before us: namely, whether a section 17(1) application is maintainable once possession has been taken in the manner specified under rule 8(1) of the 2002 Rules.

21. Another case strongly relied upon by learned counsel for the respondents is **Noble Kumar** (supra). This judgment decided that it is not necessary to first resort to the procedure under section 13(4) and, on facing resistance, then approach the Magistrate under section 14. The secured creditor need not avail of any of the remedies under section 13(4), and can approach the Magistrate straightaway after the 60-day period of the notice under section 13(2) is over, under section 14 of the Act. This Court therefore held:

“35. Therefore, there is no justification for the conclusion that the Receiver appointed by the Magistrate is also required to follow Rule 8 of the Security Interest (Enforcement) Rules, 2002. The procedure to be followed by the Receiver is otherwise regulated by law. Rule 8 provides for the procedure to be followed by a secured creditor taking possession of the secured asset without the intervention of the court. Such a process was unknown prior to the SARFAESI Act. So, specific provision is made under Rule 8 to ensure transparency in taking such possession. We do not see any conflict between different procedures prescribed by law for taking possession of the secured asset. The finding of the High Court in our view is unsustainable.

36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:

- A **36.1. (i)** The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.
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- C **36.2. (ii)** The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinise the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1-A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.
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- E **36.3. (iii)** The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinise the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forward them to the secured creditor as under clause 36.2.(ii) above.
- F **36.4.** In any of the three situations above, after the possession is handed over to the secured creditor, the subsequent specified provisions of Rule 8 concerning the preservation, valuation and sale of the secured assets, and other subsequent rules from the Security Interest (Enforcement) Rules, 2002, shall apply.”

- G When this Court referred to the first method of taking possession of secured assets in paragraph 36.1.(i), this Court spoke of a case in which, once possession notice is given under rule 8(1), no resistance is met with. That is why, this Court states that steps as stipulated under rule 8(2) onwards to take possession, and thereafter, for sale of the secured assets to realise the amounts that are claimed by the secured creditor would have to be taken, meaning thereby that advertisement must necessarily be given in the newspaper as mentioned in rule 8(2), after
- H which steps for sale may take place. This case again does not deal with

the precise problem that is before the Court in this case. The observation made in paragraph 36.1.(i), which is strongly relied upon by the Full Bench of the High Court, to arrive at the conclusion that actual physical possession must first be taken before the remedy under section 17(1) can be availed of by the borrower, does not flow from this decision at all. A

22. In **Canara Bank v. M. Amarender Reddy & Anr.**, (2017) 4 SCC 735, this Court after referring to **Mathew Varghese v. M. Amritha Kumar and Ors.**, (2014) 5 SCC 610, which held that the 30-day period mentioned under rule 8(6) is mandatory, then held: B

“14. The secured creditor, after it decides to proceed with the sale of secured asset consequent to taking over possession (symbolic or physical as the case may be), is no doubt required to give a notice of 30 days for sale of the immovable asset as per sub-rule (6) of Rule 8. However, there is nothing in the Rules, either express or implied, to take the view that a public notice under sub-rule (6) of Rule 8 must be issued only after the expiry of 30 days from issuance of individual notice by the authorised officer to the borrower about the intention to sell the immovable secured asset. In other words, it is permissible to simultaneously issue notice to the borrower about the intention to sell the secured assets and also to issue a public notice for sale of such secured asset by inviting tenders from the public or by holding public auction. The only restriction is to give thirty days’ time gap between such notice and the date of sale of the immovable secured asset.” C  
D  
E

Though there was no focused argument on the controversy before us, this Court did recognise that possession may be taken over under rule 8 either symbolically or physically, making it clear that two separate modes for taking possession are provided for under rule 8. F

23. Similarly, in **ITC Limited v. Blue Coast Hotels Ltd. and Ors.**, AIR 2018 SC 3063, this Court held:

“45. As noticed earlier, the creditor took over symbolic possession of the property on 20.06.2013. Thereupon, it transferred the property to the sole bidder ITC and issued a sale certificate for Rs. 515,44,01,000/- on 25.02.2015. On the same day, i.e., 25.02.2015, the creditor applied for taking physical possession of the secured assets under Section 14 of the Act. G  
H

A           **46.** According to the debtor, since Section 14 provides that an  
application for taking possession may be made by a secured  
creditor, and the creditor having ceased to be a secured creditor  
after the confirmation of sale in favour of the auction purchaser,  
was not entitled to maintain the application. Consequently,  
B           therefore, the order of the District Magistrate directing delivery  
of possession is a void order. This submission found favour with  
the High Court that held that the creditor having transferred the  
secured assets to the auction purchaser ceased to be a secured  
creditor and could not apply for possession. The High Court held  
C           that the Act does not contemplate taking over of symbolic  
possession and therefore the creditor could not have transferred  
the secured assets to the auction purchaser. In any case, since  
ITC Ltd. was the purchaser of such property, it could only take  
recourse to the ordinary law for recovering physical possession.

D           **47.** We find nothing in the provisions of the Act that renders  
taking over of symbolic possession illegal. This is a well-known  
device in law. In fact, this court has, although in a different context,  
held in *M.V.S. Manikayala Rao v. M. Narasimhaswami* [AIR  
1966 SC 470] that the delivery of symbolic possession amounted  
to an interruption of adverse possession of a party and the period  
of limitation for the application of Article 144 of the Limitation  
E           Act would start from such date of the delivery.”

24. This judgment also speaks of the taking over of symbolic  
possession under the SARFAESI Act. The judgment then goes on to  
discuss whether a creditor could maintain an application for possession  
under section 14 of the Act once it takes over symbolic possession before  
F           the sale of the property to the auction purchaser. The Court referred to  
various authorities and arrived at the conclusion that a secured creditor  
remains a secured creditor when only constructive or symbolic possession  
is given, as the entire interest in the property not having been passed on  
to the secured creditor in the first place, the secured creditor in turn  
could not pass on the entire interest in the property to the auction  
G           purchaser. In this behalf, it is important to refer to section 8 of the Transfer  
of Property Act, 1882 which states as follows:

H           **“8. Operation of transfer.—** Unless a different intention is  
expressed or necessarily implied, a transfer of property passes  
forthwith to the transferee all the interest which the transferor is

then capable of passing in the property and in the legal incidents thereof. A

xxx xxx xxx”

Section 13(6) of the SARFAESI Act makes it clear that a different intention is so expressed by the Act, as any transfer of a secured asset after taking possession thereof, shall vest in the transferee all rights in the secured asset so transferred as if the transfer had been made by the owner of such secured asset. It is clear, therefore, that statutorily, under section 13(6), though only the lesser right of taking possession, constructive or physical, has taken place, yet the secured creditor may, by lease, sale or assignment, vest in the lessee or purchaser all rights in the secured asset as if the transfer had been made by the original owner of such secured asset. This aspect of the matter does not appear to have been noticed in the aforesaid judgment. The ultimate conclusion in the said judgment is, however, correct as a secured creditor remains a secured creditor even after possession is taken over as the fiction contained in section 13(6) does not convert the secured creditor into the owner of the asset, but merely vests complete title in the transferee of the asset once transfer takes place in accordance with rules 8 and 9 of the 2002 Rules. B C D

25. We may also add that by a notification dated 17.10.2018, rule 8 has since been amended adding two sub-rules as follows: E

“3. In the said rules, in rule 8—

(i) in sub-rule (6), for the proviso, the following proviso shall be substituted, namely:-

“Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in the Form given in Appendix IV-A to be published in two leading newspapers including one in vernacular language having wide circulation in the locality.”; F

(ii) for sub-rule (7), the following sub-rule shall be substituted, namely:- G

“(7) every notice of sale shall be affixed on the conspicuous part of the immovable property and the authorised officer shall upload the detailed terms and conditions of the sale, on the web- site of the secured creditor, which shall include; H

- A (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
- (b) the secured debt for recovery of which the property is to be sold;
- B (c) reserve price of the immovable secured assets below which the property may not be sold;
- (d) time and place of public auction or the time after which sale by any other mode shall be completed;
- C (e) deposit of earnest money as may be stipulated by the secured creditor;
- (f) any other terms and conditions, which the authorized officer considers it necessary for a purchaser to know the nature and value of the property.”;
- D Appendix IV-A which is now inserted by the said notification reads as follows:

**“APPENDIX - IV-A**

[See proviso to rule 8 (6)]

**Sale notice for sale of immovable properties**

- E E-Auction Sale Notice for Sale of Immovable Assets under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 read with proviso to Rule 8 (6) of the Security Interest (Enforcement) Rules, 2002
- F Notice is hereby given to the public in general and in particular to the Borrower (s) and Guarantor (s) that the below described immovable property mortgaged/charged to the Secured Creditor, the constructive/physical \_\_\_\_\_ (whichever is applicable) possession of which has been taken by the Authorised Officer of \_\_\_\_\_ Secured Creditor, will be sold on “As is where is”, “As is what is”, and “Whatever there is” on \_\_\_\_\_ (mention date of the sale), for recovery of Rs. due to the \_\_\_\_\_ Secured Creditor from (mention name of the Borrower (s)) and \_\_\_\_\_ (mention name of the Guarantor (s)). The reserve price will be Rs. \_\_\_\_\_ and the earnest money deposit will be Rs. \_\_\_\_\_
- H

(Give short description of the immovable property with known encumbrances, if any) A

For detailed terms and conditions of the sale, please refer to the link provided in \_\_\_\_\_ Secured Creditor's website i.e. www. (give details of website)

Date: B

Authorised Officer

Place:?"

This appendix makes it clear that statutorily, constructive or physical possession may have been taken, pursuant to which a sale notice may then be issued under rule 8(6) of the 2002 Rules. Appendix IV-A, therefore, throws considerable light on the controversy before us and recognises the fact that rule 8(1) and 8(2) refer to constructive possession whereas rule 8(3) refers to physical possession. We are therefore of the view that the Full Bench judgment is erroneous and is set aside. The appeals are accordingly allowed, and it is hereby declared that the borrower/debtor can approach the Debts Recovery Tribunal under section 17 of the Act at the stage of the possession notice referred to in rule 8(1) and 8(2) of the 2002 Rules. The appeals are to be sent back to the Court/Tribunal dealing with the facts of each case to apply this judgment and thereafter decide each case in accordance with the law laid down by this judgment. C  
D  
E

Devika Gujral

Appeals allowed.