Reserved on 26.9.2022
Delivered on 25.11.2022

AFR

Court No. - 39
Case :- WRIT - C No. - 22594 of 2022
Petitioner :- Shipra Hotels Limited And Anther
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Komal Mehrotra,Aditya Sharma,Mohammad Khalid
Counsel for Respondent :- C.S.C.,Raghav Dwivedi,Veerendra Kumar Shukla

Connected along with

(1) Case :- WRIT - C No. - 19555 of 2022
Petitioner :- Yatindra Singh
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Indever Pandey
Counsel for Respondent :- CSC

(2) Case :- WRIT - C No. - 25346 of 2022
Petitioner :- Santosh Kumar And Another
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Rishikesh Tripathi
Counsel for Respondent :- C.S.C.

(3) Case :- WRIT - C No. - 27814 of 2022
Petitioner :- Prem Chand Bharti And 2 Others
Respondent :- State Of U.P. And 2 Others
Counsel for Petitioner :- Utkarsh Singh,Praneet Kumar Srivastava
Counsel for Respondent :- C.S.C.

(4) Case :- WRIT - C No. - 28176 of 2022
Petitioner :- M/S Shree Agencies
Respondent :- State Of U.P. And 3 Others
Counsel for Petitioner :- Shambhavi Nandan,Nikhil Kumar Mishra
Counsel for Respondent :- CSC,Sanjay Kumar Gupta

Hon'ble Mrs. Sunita Agarwal,J.
Hon'ble Vipin Chandra Dixit,J.

1. Heard Sri Amit Saxena learned Senior Counsel assisted by Sri Komal Mehrotra learned counsel for the petitioners, Sri Manish Goyal learned Additional Advocate General assisted by Sri Apoorva Hajela learned Standing Counsel for the State-respondents, Sri Anurag Khanna learned Senior Counsel assisted by Sri Veerendra Kumar Shukla learned counsel for the respondent No.3 and Sri Navin Sinha learned

Senior Counsel assisted by Sri Raghav Dwivedi learned counsel for respondent No. 4. Ms. Rekha Singh learned Advocate holding brief of Sri Sanjay Kumar Gupta appeared for the respondent bank. Sri Utkarsh Singh learned counsel for the petitioner in Writ-C No. 27814 of 2022 has adopted the arguments of Sri Amit Saxena learned Senior Counsel on the issue of providing opportunity of hearing at the stage of the decision by CMM/DM under Section 14 of the SARFAESI Act' 2002. Learned counsels for the petitioners in other connected writ petitions have also adopted the arguments of the learned Senior Counsels for the petitioners.

2. The common dispute raised in all the connected writ petitions is about the validity of the order passed under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (hereinafter referred to as "SARFAESI Act, 2002") by the authorized officer namely the Additional District Magistrate (Finance & Revenue), Ghaziabad, Meerut Commissionerate and the Additional District Magistrate (Finance & Revenue), Varanasi, on the ground that no notice or opportunity of hearing has been granted to the petitioners herein who are the borrowers and, thus, the orders impugned suffer from violation of principles of natural justice. Hence, they have been heard together and are being decided by this common judgment.

3. In Writ-C No. 22594 of 2022 (Shipra Hotels Limited and another vs. State of U.P. and 3 others), an issue with regard to the jurisdiction of the Additional District Magistrate (F.&R.), Ghaziabad has also been raised to pass such order beyond the period of 60 days prescribed in the 3rd proviso to sub-section (1) of Section 14 of the SARFAESI Act, 2002.

4. The main prayer of the petitioners, thus, is that a declaration that natural justice as implied mandatory requirement, should be read into Section 14 of the SARFAESI Act, be made by this Court.

5. It is argued by Sri Amit Saxena learned Senior Advocate assisted by Sri Komal Mehrotra learned counsel for the petitioners in the leading writ petition that it is well known principle of law that if a statute does not exclude compliance with the principles of natural justice either expressly or by necessarily implication, compliance with natural justice has to be read into the statute. The fundamental principles of natural justice, including *audi altrum paltrum* have been insisted by the Courts to bring procedural fairness into a decision and infraction thereof has lead to quashing of such decisions.

It is argued that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not.

Reliance is placed on the decision of the Apex Court in **Dharampal Satyapal Limited Vs. Deputy Commissioner of Central Excise, Gauhati and others**[1] to assert that where a statute authorises interference with properties or other rights and is silent on the question of hearing, the Courts would apply rule of universal application founded on plainest principles of natural justice. [Reference **De Smith {Judicial Review of Administrative Action (1980), at page 161}**]

It is argued that the fundamental principle of administrative law in **Wade [Administrative Law (1977), at page 395]** emphasizes that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

In **A. K. Kraipak and others vs. Union of India and others**[2], it was held that the rules of natural justice operate in areas not covered by any law. They do not supplant the law of the land but supplement it. They are not embodied rules and their aim is to secure justice or to prevent miscarriage of justice.

1 (2015) 8 SCC 519
2 1969 (2) SCC 262

It was held in **Managing Director, ECIL, Hyderabad v. B. Karunakar**[3] that the subject of natural justice is to be made applicable to administrative proceedings also especially when it is not easy to draw the line that demarcates administrative enquiry from quasi-judicial ones. An unjust decision in an administrative inquiry may have a more far reaching effect than a decision in a quasi-judicial inquiry.

6. Based on the said principles, it was vehemently argued by the learned Senior Counsels for the petitioners that by virtue of sub-section (3) of Section 14, finality has been attached to the order of the Chief Metropolitan Magistrate (CMM)/District Magistrate (DM)/Autorised Officer. No other forum has been provided under the SARFAESI Act, 2002 to challenge the order under Section 14 and the only remedy is to approach the Writ Court.

7. It is contended that since an order of CMM/DM under Section 14 for taking possession would visit a borrower with civil consequences, no such order can be made without complying with natural justice. It is further argued that as per the first proviso to sub-section (1) of Section 14, the application under sub-section (1) moved by the secured creditor is to accompany by an affidavit duly affirmed by the authorized officer of the secured creditor which require declaration as per clauses (i) to (ix) of the said proviso. Meaning thereby, for maintaining an application under Section 14(1) of the Act, 2002, the secured creditor/bank is required to make out a case for initiation of action under Section 14. The factual disclosure made by the secured creditor in the affidavit accompanying the application would be the basis for application of mind by the Authorized Officer namely CMM/DM to record a satisfaction as to whether the proceedings under Section 14 of the Act, 2002 is to be drawn or not. The factual statements made in the affidavit of the secured creditor can be rebutted by the borrower, only when notice and opportunity is provided to him. It is argued that in

3 1993 (4) SCC 727 (para 20)

order to verify the correctness of the statement made by the authorized officer of the secured creditor, it is necessary to grant opportunity of hearing to the borrower. The satisfaction to be recorded by the CMM/DM to the contents of the affidavit though is subjective but the information provided to the said Authority must be correct so as to initiate coercive measure of dispossession of the borrower from the secured asset.

It is argued that wherever coercive measures are taken under any statute by administrative/quasi-judicial authorities, principles of natural justice have to be followed.

Reliance is placed on the decision of the Division Bench of this Court in **Kumkum Tentiwal vs. State of U.P. & Others**[4] to submit that no exparte satisfaction can be recorded by the CMM/DM on the affidavit of the secured creditor when he files an application for taking possession by use of force. The Division Bench therein has held that it is essential that principles of natural justice are followed even while exercising the powers under Section 14 which include the right to be heard. It has taken note of the fact that sub-section (2) of Section 14 authorises the District Magistrate to "take or caused to be taken such steps and use or caused to be used such force as matter, in his opinion, be necessary". It is held therein that the import of the said power is that the District Magistrate can use coercive measures for taking the possession, the right of the occupier to resist or object to the use of force or to point out any deficiency in the affidavit that has been filed by the secured creditor, can be exercised only when a notice is given and an opportunity of hearing is afforded to such person, who may be in occupation. The objection with regard to the maintainability of the writ petition on the plea of remedy of filing application under Section 17 of the SARFAESI Act, 2002 has been turned down therein holding that it cannot be said that an appeal lies against an order passed under

4 (2019) 2 All LJ 332

Section 14 of the SARFAESI Act or that the necessity of hearing can be dispensed with under Section 14 by the District Magistrate. It was held therein that from the scheme of the Act, it is implicit that the procedure of Sections 13(2) and 13(4) is mandatorily to be followed before initiating action under Section 14 of the Act. The borrower on initiation of action under Section 14 of the Act, may at times plead that he was not provided any opportunity of hearing as envisaged under Section 13(2) of the Act entitling him to pay the dues within 60 days and, therefore, the action under Section 14 is illegal and misconceived. From this point of view as well, notice or opportunity of hearing is necessary to the borrower or guarantor although it may be as a formality at times, before initiating action under Section 14 of the Act.

8. It is argued that the said principle was laid down by the Division Bench in **Kumkum Tentiwal** (supra) taking note of the law laid down by the Apex Court in **Harsh Govardhan Sondagar v. International Assets Reconstruction Company Ltd.**[5]. In the said case, in paragraph '28', while analyzing the scope of Section 14, it was clearly observed that when an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and opportunity of hearing to the persons claiming to be the lessee as well as to the secured creditor, consistent with the principles of natural justice, and then take a decision. If the CMM/DM is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65A of the Transfer of Property Act and that the lease has not been determined in accordance with the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor.

It was further noted by the Division Bench that the Apex Court therein while dealing with the remedies available to the aggrieved party

5 (2014) 6 SCC 1

against any action/order passed under Section 14 of the SARFAESI Act has held that the SARFAESI Act, 2002 attaches finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any court or any authority and, as such, the remedy lies to the aggrieved party to challenge the said decision before the High Court under Articles 226 and 227 of the Constitution of India where the High Court can examine the decision of the CMM/DM, as the case may be, in accordance with the settled principles of law.

9. It was argued that relying upon the said decision, various Division Benches of this Court from time to time have disposed of the writ petitions filed by the borrowers relegating them to approach the Chief Metropolitan Magistrate/District Magistrate with the direction to grant opportunity of hearing. The decisions in **M/s Kaushambi Paper Mills Pvt. Ltd. And 2 others vs. Additional District Magistrate and 2 others**[6] dated 31.8.2020 and **Smt Shakeela Begum vs. State of U.P. and 4 others**[7] dated 9.8.2021 have been placed before us. A judgment and order dated 4.11.2020 passed by a Division Bench of this Court in **Zainul Abdin vs. Bank of Baroda and 3 others**[8] has further been placed before us to point out that doubting the correctness of the Division Bench judgment in **Kumkum Tentiwal** (supra) to provide notice and opportunity of hearing to the borrower, the question has been referred for reconsideration by a Full Bench.

It is, thus, argued that as on date, the judgment in **Kumkum Tentiwal** (supra) is holding the field and is to be applied in the facts and circumstances of the present case.

10. In rebuttal, Sri Manish Goyal learned Additional Advocate General for the State respondents, Sri Naveen Sinha and Sri Anurag Khanna learned Senior Counsels appearing for the private respondents,

6 Writ-C No. 12699 of 2020
7 Writ-C No. 16399 of 2021
8 Writ-C No. 12624 of 2020

at the outset, submitted that the judgment and order dated 31.8.2020 in Writ-C No. 12699 of 2022 passed by this Court has been subjected to challenge before the Apex Court in Special Leave to Appeal (C) No. 3687 of 2021 wherein the operation of the said judgment has been stayed vide an interim order dated 19.7.2021 passed therein.

As regards the law laid down by the Division Bench in **Kumkum Tentiwal** (supra), it is argued by the learned Senior Counsels appearing for the respondents that the said judgment proceeds on wrong appreciation of the legal provisions pertaining to the proceeding under Section 14 of the SARFAESI Act, 2002.

The contention is that the scheme of the Act and the decision of the Apex Court in **Harsh Govardhan Sondagar** (supra) has been misappreciated in arriving at the conclusion drawn by the Division Bench of this Court. Various decisions of the Supreme Court pertaining to the field and the statutory provisions of SARFAESI Act, 2002 have been ignored while arriving at the conclusion therein and hence the said decision may not be followed, being *per incuriam*.

11. Learned Senior Counsels for the respondents have insisted that the matter be heard on merits to deal with the arguments of the learned Senior Counsel for the petitioners instead of keeping it pending in view of the reference made by another Division Bench doubting correctness of the decision in **Kumkum Tentiwal** (supra). As the pendency of the reference does not restrain this Court in dealing with the question of law.

12. To support his arguments, Sri Manish Goyal learned Additional Advocate General has taken us to the scheme of the SARFAESI Act, 2002, the Enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions (Amendment) Bill, 2016 whereby amendment in the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 have been brought to place the statement of objects and reasons for bringing the said

enactment. It is placed before us that the statement of objects and reasons of the aforesaid Bill No. 144 of 2016 records that the SARFAESI Act, 2002 and the Recovery of Debts due to Banks and Financial Institutions Act, 1993 were enacted for expeditious recovery of loans of banks and financial institutions. Though the Recovery of Debts due to Banks and Financial Institutions Act, 1993 provided for a period 180 days for disposal of recovery applications, the cases were pending for many years due to various adjournments and prolonged hearing. In order to facilitate expeditious disposal of recovery applications, it had been decided to amend the said Acts. The amendments in the SARFAESI Act, 2002 were proposed to suit changing credit landscape and to augment ease of doing business which *inter alia* include "specific timeline for taking possession of secured assets". The time period of 30 days within which the CMM/DM is required to dispose of the applications filed by the secured creditor has been inserted by Act No. 44 of 2016 w.e.f. 1.9.2016. Third proviso to sub-section (1) of Section 14 of the SARFAESI Act has also been added to make it incumbent upon the CMM/DM to give reasoning in writing for delay in disposal of the application of the secured creditor within the period of 30 days prescribed in the Second proviso to pass orders under Section 14.

It is then argued that the entire scheme of the SARFAESI Act, 2002 is to be seen to examine as to how and where Section 14 has been placed by the legislature and to see whether any Grievance Redressal Scheme is in place to challenge the coercive action taken to secure possession. It is submitted that Chapter III under the scheme of SARFAESI Act, 2002 is for "Enforcement of Security Interest" which includes Section 17, the remedy, for the application before DRT by an aggrieved person including borrower. Section 18, in the same chapter, provides for appeal to the appellate tribunal by a person aggrieved by the order of the Tribunal under Section 17. Section 19 of the Act, 2002

contained in Chapter III further safeguards the borrower against dispossession from the secured asset by the secured creditor, except in accordance with the provisions of the Act, 2002 and Rules made thereunder. It provides for the right of the borrower or any other aggrieved person to receive such compensation and cost as may be determined, in the proceedings before the Tribunal under Sections 17 or appeal under Section 18, if the possession of secured assets by the secured creditor is not in accordance with the provisions of the Act and rules made thereunder and also seek direction to the secured creditors to return such secured assets.

13. It is argued by Sri Manish Goyal learned Additional Advocate General that Section 13(2) provides for 60 days time to the borrower to discharge his full liabilities and, in case, he is aggrieved by the notice or the details given in the notice under sub-section (2) of Section 13, he may make representation or raise objection by invoking provisions of sub-section (3A) of Section 13. In case such objection/representation is filed by the borrower, it becomes incumbent upon the secured creditor to consider the same and communicate its decision, the reasons for non-acceptance of the representation/objection. The decision on the said representation/objection has not been made justiciable, i.e. it cannot be challenged by taking recourse to Section 17 of the Act, 2002 for the reason that the borrower has right to challenge the notice issued at the next step, i.e. under sub-section (4) of Section 13, whereunder the secured creditor may take recourse to the measures provided therein to recover his secured debts, in case, the borrowers fails to discharge his liability within the period specified in sub-section (2) of Section 13. It is placed before us that the application under 17 under Chapter III before the Tribunal is maintainable at this stage that means if the representation/objection(s) of the borrower under sub-section (3A) of Section 13 is/are not accepted and the secured creditor proceeds to take any of the measures to secure his/its debt by issuing notice under sub-

section (4) of Section 13, the borrower has a right to challenge the action of the secured creditor. The contention is that the Grievance Redressal Forum is provided at every stage of the proceeding, when a notice under sub-section (2) of Section 13 is issued to the borrower calling upon him to make payment of outstanding dues and further when the secured creditor decides to take coercive measure to recover its secured debt by issuing notice under sub-section (4) of Section 13.

One of the measures provided in sub-section (4) of Section 13 to recover the secured debts is to take possession of the secured asset of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset. The stage of Section 14 reaches only where the possession of any secured asset 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 the Act, for the purpose of taking possession or control of any such secured asset, i.e. for taking physical possession or control of the secured asset. The contention is that Section 14 is extension of the measures provided in sub-section (4) of Section 13 to the secured creditor to recover his secured debt. The CMM/DM/Authorized Officer under Section 14 is only an extended hand of the secured creditor to help the secured creditor in taking physical possession of the secured asset being administrative authorities. Clauses (a) and (b) of sub-section (1) of Section 14 make it clear that the Authorized Officer/CMM/DM while invoking its jurisdiction is required to take possession of such asset and forward it to the secured creditor. The measure taken under Section 14 of the Act, 2002 though adversarial in nature, but there is no occasion for a contest by the borrower to the application moved by the secured creditor to take possession of the secured asset as no adjudicatory proceeding is to be conducted by the Authorized Officer/CMM/DM.

14. As regards the declaration by the Authorized Officer of the

secured creditor in the affidavit accompanying application under Section 14, it is argued that the information provided in the affidavit are required to facilitate the Authorized Officer/CMM/DM to record its satisfaction that the stage of recovery of physical possession of the secured asset has reached and the secured creditor is entitled to take possession by taking recourse under Section 14. The "satisfaction" to be recorded by the Authorized Officer/CMM/DM "to the contents of the affidavit" before passing a suitable order to take possession of the secured asset as per the second proviso to sub-section (1) of Section 14 of the Act, 2002 is a subjective satisfaction. The act of the Authorized Officer/CMM/DM in passing the order under Section 14 is only a ministerial act and as no adjudicatory process is involved in the said act, the principles of administrative law of natural justice for providing opportunity of hearing cannot be read into as implied mandatory requirement.

15. Reliance is placed on the decision of the Bombay High Court in **CA. Manisha Mehta and others vs. Board of Directors and others**[9] to assert that Section 14 cannot stand independent of Section 13(4) as explained by the Apex Court in **Standard Chartered Bank vs. V. Noble Kumar and others**[10].

It was held in **V. Noble Kumar** (supra) that since the borrower has no right of hearing when the secured creditor takes possession under Section 13(4), no hearing can be demanded by a borrower when by his action in resisting possession being gained over by the authorized officer of the secured creditor or refusing to deliver possession on his own, he compels such officer to seek assistance of the Authorized Officers under Section 14. The right to approach the tribunal is conferred on a borrower in terms of Section 17, post possession, whether it is symbolic possession under Section 13(4) or

9 AIR 2022 Bombay 178
10 (2013) 9 SCC 620

physical possession under Section 14 of the Act, 2002. The scheme of SARFAESI Act' 2002, thus, does not admit of any requirement of complying with natural justice by putting the borrower on notice while an application under Section 14 is under consideration. In view of the efficacious mechanism under the Act being in place, the borrower cannot seek a right of hearing at an intermediary stage.

Reliance is further placed on the decision of the Bombay High Court in **M/s Trade Well, a Proprietorship Firm, Mumbai & another vs. Indian Bank & another**[11], the judgment of the Division Bench of this Court in **Anuradha Singh and another vs. Chief Metropolitan Magistrate Kanpur Nagar and others**[12], a decision of the learned Single Judge of this Court in **Shakuntala Devi Jan Kalyan Samiti through Secretary and others vs. State of U.P. and others**[13], the judgments of the Apex Court in **Mardia Chemicals Ltd. etc. etc. vs. U.O.I. and others etc. etc.**[14]; **Kanhaiyalal Lalchand Sachdev and others vs. State of Maharashtra and others**[15]; **NKGSB Cooperative Bank Limited vs. Subir Chakravarty and others**[16] and the judgment and order dated 27th July, 2022 in **M/s R.D. Jain and Co. vs. Capital First Ltd. & others**[17] as also the decision of the Bombay High Court in **Phoenix ARC Private Limited and others vs. the State of Maharashtra and others**[18] to buttress the above submissions.

16. The meaning of "Ministerial Act" in "Advanced Law Lexicon" has been placed before us to assert that while doing a ministerial act, a government official is dictated by law and has no power to form his own judgment or exercise discretion.

17. In essence, it is argued by Sri Manish Goyal learned Additional

11 2007 SCC OnLine Bom 1232
12 2018 (5) ADJ 712 (DB)
13 2020 (139) ALR 466
14 (2004) 4 SCC 311
15 (2011) 2 SCC 782
16 2022 SCC Online SC 239
17 Civil Appeal No. 175 of 2022
18 Writ Petition No. 9794 of 2021

Advocate General that at the stage of the proceedings under Section 14 of the SARFAESI Act, 2002, as there is no independent consideration and the Authorized Officer/CMM/DM has to act without application of its own independent mind, merely on the information provided by the secured creditor/bank, the requirement of following principles of natural justice, cannot be read into the said provision. Moreover, effective remedy is available to the borrower to challenge the action initiated by the secured creditor even prior to the stage of Section 14, the borrower cannot be granted another opportunity under the scheme of the Act in view of the object and purpose of the enactment, i.e. the SARFAESI Act, 2002.

18. Sri Naveen Sinha learned Senior Advocate for the respondent no. 4 has adopted the arguments of Sri Manish Goyal learned Additional Advocate General.

In addition to the above contentions, it was argued by the learned Senior Counsel that the order passed under Section 14 of the SARFAESI Act, 2002 is only a ministerial act. No adjudicatory process qua points or issue is involved and, as such, there is no question of independent application of mind by the Authorized Officer/CMM/DM. There is no dichotomy between symbolic and physical possession taken under Section 13(4) and Section 14 of the Act, 2002. Rule 8 of the Security Interest (Enforcement) Rules, 2002 (In short as “the Rules, 2002”) provides for affixation of possession notice on the outer door or at such conspicuous place of the property, whereby the Authorized Officer take or cause to take possession. With the affixation of the possession notice as per sub-rule (1) of Rule 8 and publication thereof in accordance with sub-rule (2) in two daily newspapers and the service through electronic mode as per sub-rule (2A), the possession of the secured asset stood transferred in favour of the secured creditor. The question remains, thus, of taking actual physical possession of the

secured asset, in case, the borrower does not part with his possession despite receipt of the notice.

19. Further contention of the learned Senior Counsel for the petitioners is about the delay in passing the order under Section 14, beyond the time limit of 60 days provided under the Act.

It is argued that the Authorized Officer/CMM/DM has no jurisdiction to pass order beyond the period of 60 days, as mandated in the third proviso to Section 14. The proviso states that the officer concerned has to record reasons in writing, in case, it fails to pass order within the period of 30 days from the date of application prescribed in the Second proviso. The order passed, in the instant case, is beyond the period of 60 days and hence suffers from the vice of jurisdiction.

20. In rebuttal, the reliance is placed on the decision of the Apex Court in **C. Bright vs. District Collector and others**[19] by the learned Senior Counsel for the respondent to assert that the District Magistrate does not become *functus officio*, if it is unable to take possession within the time limit, which is prescribed to instill a confidence in creditors that the District Magistrate will make an attempt to deliver possession as well as to impose a duty on the District Magistrate to make an earnest effort to comply with the mandate of the statute to deliver the possession within 30 days and for reasons to be recorded within 60 days.

It was argued that it was held by the Apex Court that the remedy under Section 14 of the Act is not rendered redundant if the District Magistrate is unable to handover the possession. The District Magistrate will still be enjoined upon the duty to facilitate delivery of possession at the earliest.

21. Sri Anurag Khanna learned Senior Advocate appearing for the respondent no. 3 in Writ-C No. 22594 of 2022 while adopting the

19 (2021) 2 SCC 392

arguments of Sri Manish Goyal learned Additional Advocate General on the scheme of the Act raises an objection with regard to the maintainability on the ground that a writ petition against a private financial institution against the proposed action/actions under the SARFAESI Act, 2002 cannot be maintained.

Reliance is placed on the decision of the Apex Court in **Phoenix ARC Private Limited vs. Vishwa Bharati Vidya Mandir and others**[20].

22. Having heard learned counsel for the parties and perused the record, in light of the arguments made by the learned counsels for the parties, the main issue which arises for our examination is as to "whether a borrower is entitled to notice and opportunity of hearing in the proceeding under Section 14 of the SARFAESI Act, 2022".

23. This Court is also required to answer the contentions of the learned Senior Counsel for the petitioners based on the decision of the Division Bench in **Kumkum Tentiwal** (supra) which has answered the issued in favour of the borrower and that the issue has been referred to the Full Bench by another Division Bench doubting the correctness of **Kumkum Tentiwal** (supra)**.**

24. To answer the above issues, we are required to go through the legislative scheme of the SARFAESI Act, 2002. The SARFAESI Act' 2002 has been enacted to enable banks and financial institution to secure recovery by exercising powers to take possession of the securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction, without the intervention of the Court. Section 34 bars the jurisdiction of the Civil Court to entertain any suit or proceeding in respect to any matter which the Tribunal constituted under the Act is empowered to determine.

25. The validity of the SARFAESI Act, 2002 has been upheld by the

20 (2022) 5 SCC 345

Apex Court in **Mardia Chemicals Ltd.** (supra). A question was framed by the Apex Court therein as to whether the provisions as contained in Sections 13 and 17 of the Act provide adequate and efficacious mechanism to consider and decide the objection/dispute raised by a borrower against the recovery, particularly in view of bar to approach the Civil Court under Section 34 of the Act.

While answering the said question, the forums or remedies available to the borrower to ventilate his grievances under the Act have been considered and it was noted therein:-

(i) The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 is that a reply may be submitted by the borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) and Section 13 in case of non-compliance of notice within 60 days.

(ii) The creditor must apply his mind to the objection raised in reply to such notice and an internal mechanism is to be evolved to consider such objections raised in reply to the notice.

(iii) Meaningful consideration of the objection raised by the borrower is mandated before proceeding to take drastic measures under sub-section (4) of Section 13.

(iv) The bank and financial institution are required to communicate to the borrower of the reasons for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take measures under sub-section (4) of Section 13.

(v) The communication of reasons is for the purpose of knowledge of the borrower as he has right to know as to why his objections have not been accepted by the secured creditor who intends to start hard steps of taking over possession/management/business of secured asset without intervention of the Court under Section 13(4) of

the Act.

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

The arguments that the borrower is entitled to be heard before a notice under sub-section (2) of Section 13 is issued failing which there is denial of the principles of natural justice, was turned down, stating therein that the issuance of a notice to the debtor by the creditor does not attract the application of the principles of natural justice. It is always open to tell the debtor what he supposed to repay. No hearing can be demanded from the creditor at this stage. But the secured creditor must bear in mind that the reply of the borrower to the notice under Section 13(2) of the Act has been considered applying mind to it, before stringent measures, a process of recovery is initiated. The reasons, however, brief they may be, for not accepting the objection, if raised in the reply, must be communicated to the borrower. The requirement of pre-deposit of 75% of the demand at the initial proceeding as per sub-section (2) of Section 17 has been held *ultra vires of* Article 14 of the Constitution of India with the observation that the said requirement at the initial proceeding sounds unreasonable and oppressive and cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute.

26. In **Transcore vs. Union of India and another**[21], the question was considered whether recourse to take possession of the secured assets of the borrower in terms of Section 13(4) of the SARFAESI Act (referred as the NPA Act therein) comprehends the power to take actual possession of the immovable property?

While answering the same, it was held that there is no dichotomy

21 (2008) 1 SCC 125

under the Act between symbolic and physical possession. Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one or more of the measures namely taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realising the secured asset. The mechanism for taking possession has been provided under Rule 8 of the 2002 Rules framed under the NPA Act. Section 14 of the NPA Act provides for taking possession of the secured asset through the District Magistrate. Section 17(3) states that if the DRT after examining the facts and circumstances of the case 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 the Act and the Rules thereunder, it may by order declare that the recourse taken to anyone or more measures is invalid and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled *to put the clock back by restoring the status quo ante*.

It was observed therein that for the fact that the NPA Act provides for recovery of possession by non-adjudicatory process, it would be erroneous to say that the rights of borrower shall be defeated without adjudication.

27. In **Standard Chartered Bank** (supra), the challenge was to the legality of the order passed by the Chief Judicial Magistrate in the proceedings under Section 14 of the SARFAESI Act to take possession of the secured asset and to hand over the same to the secured creditor.

It was argued that a secured creditor before invoking the

authority of the Magistrate under Section 14 must necessarily make an attempt to take possession of the secured asset. Only when the creditor faces resistance to such an attempt the creditor could resort to the procedure under Section 14 of the Act. It was further urged that Section 17 of the Act provides remedy only against the measure taken by the creditor under Section 13(4) of the Act and the said remedy is not available against an action taken by the Magistrate under Section 14 of the Act. Therefore, permitting the secured creditor to invoke Section 14 without first resorting to the procedure under Section 13(4) would deprive the owner of the secured asset an opportunity of filing application under Section 17 to have his grievances adjudicated. It was also argued that even a Magistrate exercising power under Section 14 of the Act is required to follow the procedure contemplated under Rule 8 of the Security Interest (Enforcement) Rules' 2002 though the rule does not expressly say so. Failure to comply with the requirement of Rule 8, in that case, would vitiate the order of the Magistrate.

Turning down the above contentions, the decision of the Bombay High Court in **M/s Trade Well, a Proprietorship Firm, Mumbai & another vs. Indian Bank** (supra) was noted therein in Para '22' as under:-

*"**22.** However, the Bombay High Court in **Trade Well v. Indian Bank** opined:*

> *"2.....CMM/DM acting under Section 14 of the NPA Act is not required to give notice either to the borrower or to the third party.*
>
> *3. He has to only verify from the bank or financial institution whether notice under Section 13(2) of the NPA Act is given or not and whether the secured assets fall within his jurisdiction. There is no adjudication of any kind at this stage.*
>
> *4. It is only if the above conditions are not fulfilled that the CMM/DM can refuse to pass an order under Section 14 of the NPA Act by recording that the above conditions are not fulfilled. If these two conditions are fulfilled, he cannot refuse to pass an order under Section 14."*

In Para '24', the Apex Court has taken note of the amendment brought in Section 14 by Act No. 1 of 2013 w.e.f. 15.1.2013, to insert the first proviso to sub-section (1) of that Section, the requirement of affidavit of the authorised officer of the secured creditor, Para '24' to Para '24.7' are to be extracted hereinunder:-

> *"**24.** An analysis of the nine sub-clauses of the proviso which deal with the information that is required to be furnished in the affidavit filed by the secured creditor indicates in substance that:*
>
> ***24.1.** (i) there was a loan transaction under which a borrower is liable to repay the loan amount with interest,*
>
> ***24.2.** (ii) there is a security interest created in a secured asset belonging to the borrower,*
>
> ***24.3**. (iii) that the borrower committed default in the repayment,*
>
> ***24.4.** (iv) that a notice contemplated under Section 13(2) was in fact issued,*
>
> ***24.5.** (v) in spite of such a notice, the borrower did not make the repayment.*
>
> ***24.6.** (vi) the objections of the borrower had in fact been considered and rejected,*
>
> ***24.7.** (vii) the reasons for such rejection had been communicated to the borrower, etc."*

It was concluded in paras '25', '27' as under:-

> *"**25.** The satisfaction of the Magistrate contemplated under the second proviso to Section 14 (1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset.*
>
> ***27.** The "appeal" under Section 17 is available to the borrower against any measure taken under section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under section 13(4). Alienating the asset either by lease or*

sale etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (sic the secured creditor). Therefore, the borrower is always entitled to prefer an "appeal" under section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under section 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under section 17 is available."

It was noted therein that there will be three methods for the secured creditor to take possession of the secured asset. (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 asset to realise the amounts that are claimed by the secured creditor. (ii) The second situation will arise where the secured creditor met 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 scrutinize the application and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1)(A) to take possession of the asset and documents. (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, scrutinize 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. [Reference paragraphs '36.1' to '36.3' of the decision].

In Para '37', the law laid down in **Mardia Chemicals Ltd.** (supra) has been noted to state therein as under:-

> *"**37.** In this connection, it is material to refer to the judgment in Mardia Chemicals (supra) wherein the Court was concerned with the legality and validity of the SARFAESI Act. The Court held the Act to be valid except Section 17(2) thereof as it then stood. In paragraphs 59, 62 and 76 of the judgment the Court in terms held that in remedy under Section 17 of the Act was essentially like filing a suit in a Civil Court though it was called an Appeal. It is also relevant to note that in the ultimate conclusions in paragraph 80 of the judgment this Court held in sub-para (2) thereof as follows:-*
>
> > *"80.(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."*
>
> *The grievance of the respondent that it will be left with no remedy is, therefore, misplaced. As held by a bench of three Judges in Mardia Chemicals (supra), it would be open to the borrower to file an appeal under Section 17 any time after the measures are taken under Section 13 (4) and before the date of sale/auction of the property. The same would apply if the secured creditor resorts to Section 14 and takes possession of the property with the help of the officer appointed by the Magistrate"*

28. It was, thus, held that the borrower is not remediless, inasmuch as, it would be open to the borrower to file an 'application' under Section 17 any time after the measures are taken under Section 13(4) and even before the sale/auction of the property. <u>The same would apply as well if the secured creditor resorts to Section 14 and takes possession</u>

of the property with the help of the officer appointed by the Magistrate.

29. Coming to the legislative scheme, Chapter III under the heading "Enforcement of Security Interest" contains the provisions under Sections 13 to 19 of the Act, 2002. The Act provides for steps to be taken for Enforcement of Security Interest created in favour of any secured creditor, without the intervention of the Court or Tribunal. Before taken stringent measures, the secured creditor is obliged to give notice to the borrower, consider his objection and given reasons not to accept the same, if raised in the reply. Sub-section (4) of Section 13 and Section 14 provide as to how stringent measure of taking possession of the secured asset would be taken to ensure recovery of secured debt. Sections 17 & 18 provide remedy to the borrower against the action of the secured creditor at both stages, sub-section (4) of Section 13 and Section 14 at the post possession stage. However, at the time of challenge to the action taken under Section 14, the challenge to the notice under sub-section (4) of Section 13 is necessary. And further the challenge to the action under Section 14, i.e. the act of taking over physical possession of the secured asset can be sustained by the tribunal only after the borrower is dispossessed. Section 19, however, safeguards the interest of the borrower in case of any illegal act of dispossession from his property/secured asset by empowering the tribunal, both the Debt Recovery Tribunal or the Appellate Tribunal, to restore the possession of such secured asset if it has held that the possession of the secured creditor is not in accordance with the Act and the rules made thereunder. The borrower or any other aggrieved persons is also entitled to the payment of such compensation and cost for such illegal action of the secured creditor, as determined by the Tribunal.

30. Having regard to the scheme of the SARFAESI Act' 2002, as explained by the Apex Court in **Mardia Chemicals Ltd.** (supra),

Transcore (supra) and **Standard Chartered Bank vs. V. Noble Kumar** (supra), it is to be noted that the object of the SARFAESI Act is to facilitate quick recovery of secured debts without the intervention of the Court. The statement of objects and reasons of the bill bringing amendment in Section 14 by Act No. 14 of 2016 providing specific time line for taking possession of the secured asset is further in aid of the principle laid down by the Apex Court that the measures taken by the secured creditor at the stage of Sections 13(4) and 14 is without judicial/quasi judicial intervention, till such time, the possession of the secured asset is taken by the secured creditor after serving requisite notice and responding to the objections/representations, if any, prayed by the borrower under Section 13(3A) of the Act. Explanation to sub-section (1) further clarify that any decision on the representation of the borrower shall not entitle him to file application under Section 17 of the Act. The secured creditor is not required to give any notice or opportunity to the borrower at the stage of Section 13(4) when it proceeds to take recourse to one or more of the measures provided in sub-section (4) to recover its secured debts. Section 14 of the SARFAESI Act is an extension of the measures taken by the secured creditor to take possession of the secured asset of the borrower, on the resistance of the borrower. It would be legal fallacy, if it is said that though the secured creditor is not liable to give hearing to the borrower at the stage of Section 13(4) of the Act but if on resistance put forth by the borrower in getting physical possession of the secured asset, the secured creditor if approach the Magistrate to seek help/assistance, the borrower who is resisting possession being taken by the Authorized Officer of the secured creditor or does not on his own surrender possession, would be entitled to the opportunity of hearing. The borrower has right to approach the Tribunal in terms of Section 17 to challenge any of the measures taken by the secured creditor referred to in sub-section (4) of Section 13, which include the measure taken under

Section 14 of the Act by seeking assistance of the District Magistrate/Chief Metropolitan Magistrate. The right to approach the Tribunal is conferred upon the borrower only post possession.

As held by the Apex Court in **Transcore's case** (supra), there is no dichotomy between symbolic possession taken under sub-section (4) of Section 13 and physical possession by force taken with the assistance of the District Magistrate/Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act.

31. Insofar as the right of the borrower to challenge the steps/measures taken by the secured creditor, the Apex Court in **M/s R.D. Jain and Co.** (supra) while dealing with the provisions of Section 14 of the SARFAESI Act has observed that the powers of the Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act is purely executionary in nature and has no element of quasi-judicial function or application of mind and he cannot brook delay. Time is of the essence. The statutory obligation enjoined upon the CMM/DM is to immediately move into action after receipt of a written application under Section 14(1) of the SARFAESI Act from the secured creditor. The CMM/DM is expected to pass an order after verification of compliance of all formalities by the secured creditor referred to in the proviso in Section 14(1) of the SARFAESI Act, and after being satisfied in that regard, to take possession of the secured asset and documents relating thereto and to forward the same to the secured creditor at the earliest opportunity.

32. Same view has been taken by the Apex Court in **NKGSB Cooperative Bank Limited** (supra), which has been relied in the decision of **M/s R.D. Jain and Co.** (supra).

Relevant paragraph '39' of the said decision is noted as under:-

*"**39.** As regards the procedure for taking possession of the secured assets, it can be discerned from Section 13 read with Section*

14 of the 2002 Act. Section 13(4) permits the secured creditor to take recourse to one or more of the specified measures; and to enable the secured creditor to do so even at the stage of pre-confirmation of sale; in terms of Section 14, the CMM/DM has power in that regard albeit after passing order on a written application given by the secured creditor for that purpose. Once the order is passed, the statutory obligation cast upon the CMM/DM stands discharged to that extent. The next follow-up step is of taking possession of the secured assets and documents relating thereto. The same is ministerial step. ...xxxxxxxxxxxxxx....."

33. In **Kanhaiyalal Lalchand Sachdev** (supra), the Apex Court while answering the question as to whether the DRT would have jurisdiction to consider and adjudicate post Secction 13(4) events or whether its scope in terms of Section 17 of the Act will be confined to the stage contemplated under Section 13(4) of the Act, has held that:-

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

34. The Bombay High Court in **M/s Trade Well, a Proprietorship Firm, Mumbai** (supra) has faced with the issue as to whether the Chief Judicial Magistrate or the District Magistrate, as the case may be, is required to give notice to the borrower or any person who may be in possession of secured asset and give him a hearing.

Taking note of the decision of the Apex Court in **Transcore's case** (supra), it was held therein that adjudication of rival claims is absent at that stage, there is no question of dealing with rival claims and giving a reasoned judgment as regards the merits of the case. In any event, if a party has any grievance as regards the contents of that

order, his remedy would be to voice them in the application under section 17 before the DRT after measures under section 13(4) are taken. At the time of passing order under Section 14 of the NPA Act, CMM/DM will have to consider only two aspects. (i) He must find out whether the secured asset falls within his territorial jurisdiction and; (ii) whether notice under Section 13(2) of SARFAESI Act is given or not. No adjudication of any kind is contemplated at that stage.

35. Same view has been taken by the Bombay High Court in **CA. Manisha Mehta** (supra), wherein it was noted that:-

> *"**8.** Pertinently, Section 14 of the SARFAESI Act was amended twice, once in 2013 and then again in 2016. If it were the intention of the legislature to extend opportunity of hearing to a borrower before the District Magistrate/Chief Metropolitan Magistrate, as the case may be, it was free to do so. Advisedly, the legislature did not do so, for, it would have militated against the scheme of the SARFAESI Act and more particularly Section 13 thereof. It is implicit in the scheme of the SARFAESI Act that natural justice, only to a limited extent, is available and not beyond what is expressly provided. There seems to be little merit in the argument advanced by Mr. Nedumpara and we hold that the language of Section 14 is too clear and unambiguous, and does not admit of any requirement of complying with natural justice by putting the borrower on notice while an application thereunder is under consideration."*

36. A Division Bench of this Court in **Anuradha Singh** (supra) has dealt with the issue in the following manner:-

> *"**9.** .....xxxxxxxxx.....We do not find any statutory provisions for providing an opportunity to the borrower at the stage of passing of an order under Section 14 of the Act nor any decision either of this Court or the Apex Court has been pointed out that may enable us to read such principles of administrative law in to the statutory provisions of Section 14 of the Act. Consequently the said argument does not hold water."*

37. Learned Single Judge of this Court in **Shakuntala Devi Jan**

Kalyan Samiti through Secretary (supra) has noted the Division Bench judgments in **Anuradha Singh** (supra) as also **Kumkum Tentiwal** (supra) and taking note of the decisions of the Apex Court in **Mardia Chemicals Ltd.** (supra) and **Standard Chartered Bank vs. V. Noble Kumar** (supra), it has observed that:-

> *"**34.** This Court taking into account the judgments rendered by three Division Benches of this Court, as referred to hereinabove, and the observations of the Supreme Court in the case of Mardia Chemicals Ltd. (supra), is of the opinion that nothing can be read into the language of Section 14 of the Act, which has not been provided specifically therein by the Parliament.*
>
> *After the judgment was rendered in Mardia Chemicals Ltd. (supra), the Act was amended and the provisions for pre-deposit of 75% was done away with for approaching the Tribunal.*
>
> ***35.** Since in the statute itself there is no provision for giving opportunity of hearing in an action under Section 14 of the Act, this Court cannot provide such opportunity of hearing to the writ petitioner. It is settled position in law that the Court ought to decide matters on the basis of law as it exists and declare the same instead on the basis of what law should be.*"

38. In light of the above discussion, in the legislative scheme of the Act' 2002, Section 14 is placed in Chapter III in such a manner that the proceedings undertaken by the CMM/DM for the purpose of taking possession or control of any secured asset, is in the nature of execution proceeding, in furtherance of the measures taken by the secured creditor to recover his secured debt under Section 13(4) of the Act. The enabling provision is Section 13(4) whereunder the secured creditor has been conferred power to take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realizing the secured asset. In case, the actual physical possession of an immovable property, which is secured asset, is not handed over by the borrower to the secured creditor on his own on initiation of measures under Section 13(4), or the Authorised Officer of

the secured creditor met with resistance from the borrower when he proceed to take steps as stipulated under Rule 8(2) onwards to take possession after the notice, the bank (who is secured creditor) may make a request in writing to the CMM/DM, within whose jurisdiction the secured asset is situated, to take possession thereof and forward such asset to the secured creditor. The borrower has a remedy to challenge the measures taken by the secured creditor including the order passed under Section 14 of the SARFAESI Act, 2002 before the Debt Recovery Tribunal post-possession. As no enquiry either in the nature of judicial or quasi-judicial proceeding is to be conducted at this stage, and as held by the Apex Court the proceedings before the CMM/ DM under Section 14 of the Act is ministerial in nature, we hold that no opportunity of hearing is required to be given to the borrower at this stage.

39. We are now required to go through the Division Bench judgment of this Court in **Kumkum Tentiwal** (supra) relied by the learned counsels for the petitioners, wherein a contrary view has been taken.

40. While dealing with the question as to whether a borrower is entitled to right of hearing prior to any order having been passed by the District Magistrate while exercising power under Section 14, the Bench has observed that the secured creditor is bound to file an affidavit giving declaration as required in Section 14. On the said affidavit being filed by the secured creditor, the CMM/DM is to satisfy itself about the contents of the affidavit to pass a suitable order for the purpose of taking possession of the secured asset. It was, thus, observed that from the plain reading of the said provision, it is inconceivable as to how the District Magistrate can record a satisfaction ex-parte with regard to the averments to be made in the affidavit filed by the secured creditor along with the application making request for taking possession by use of force. Taking note of sub-section (2) of Section 14, it was observed that the said provision authorises the District Magistrate to take such

steps or use such force as in his opinion be necessary. The import of the said power is that the District Magistrate can use coercive measure for taking the possession. The right of the occupier whether it is the borrower or otherwise to resist or object to use of force or to point out any deficiencies in the affidavit that has been filed by the secured creditor, can be exercised only where the notice is given to the person who is sought to be dispossessed and an opportunity of hearing is afforded to such person, who may be in occupation.

41. With the above reasonings, it was held that it is essential that principle of natural justice are followed, even while exercising the powers under Section 14 which include the right to be heard. Before initiation of proceeding under Section 14, it is essential that the procedure of Sections 13(2) and 13(4) is followed and the borrower may at times plead that he was not given opportunity of hearing as envisaged under Section 13(2) to payment of the dues within 60 days and, therefore, the action under Section 14 is illegal. The notice or opportunity of hearing, thus, is also necessary to the borrower or guarantor, as the case may be.

The Division Bench in **Kumkum Tentiwal** (supra) has further referred to the decision of the Apex Court in **Harsh Govardhan Sondagar** (supra) which was related to the right of the lessee of the secured asset to be heard in the proceeding under Section 14 of the SARFAESI Act and taken note of the observations therein that the statutory provisions attaching finality to the decision of an Authority excluding the power of any other Authority or Court, to examine such a decision will not be a bar for the High Court or the Supreme Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. It was, thus, observed in **Kumkum Tentiwal** (supra) that the Apex Court while analyzing the provisions of Section 14 has held therein that only recourse available against an order passed under Section 14 of the

SARFAESI Act is under Articles 226 and 227 of the Constitution of India.

42. As regards the observance of principles of natural justice, it was observed that the Apex Court in a catena of decisions have held that principles of natural justice are engrained and have to be read into every statute even if not specifically provided for. The statute may not contain a provision for prior hearing. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any statutory provision or not.

43. Taking note of the various decisions of the Apex Court, it was observed therein that it is well settled that principles of natural justice are integral part of Article 14. No decision prejudicial to a party should be taken without affording an opportunity or supplying the material which is the basis for the decision. It was, thus, concluded that Section 14 on bare perusal does not provide for any opportunity of hearing. However, the order passed under Section 14 being a coercive measure for taking possession, the officer is bound to observe the principles of natural justice while passing the order under Section 14 of the SARFAESI Act.

It was further noted in **Kumkum Tentiwal** (supra) that the Apex Court in the case of **Dharampal Satyapal Limited** (supra) has held that the Authority exercising power cannot even take a ground to the effect that no useful purpose would be served in hearing the affected parties prior to passing of the order.

44. With due regards to the Hon'ble Judges holding the Bench, we find that the decision in **Kumkum Tentiwal** (supra) is in ignorance of the scheme of the SARFAESI Act, 2002, the construction of Chapter III of the Act which provides for "Enforcement of Security Interest". It has misread the decision of the Apex Court in **Harsh Govardhan**

Sondagar (supra) in holding that only recourse available against the order passed under Section 14 of the SARFAESI Act is under Articles 226 and 227 of the Constitution of India.

45. The availability of the statutory remedy to the borrower under Section 17 of the SARFAESI Act, 2002, contained in Chapter III against the order under Section 14 cannot be disputed. The Division Bench in the case of **Kumkum Tentiwal** (supra) did not consider the law propounded by the Apex Court in **Standard Chartered Bank vs. V. Noble Kumar and others** that Section 14 cannot stand independent of Section 13(4) and if a borrower has no right of hearing when the secured creditor takes possession under Section 13(4), no hearing can be demanded by him when he succeeds in resisting possession being taken over by the Authorized Officer of the secured creditor or does not on his own surrender possession and thus, compels the secured creditor to seek assistance of the CMM/DM under Section 14. The right of a borrower to approach the Tribunal in terms of Section 17, as a post possession right, recognised in **Standard Chartered Bank vs. V. Noble Kumar and others** (supra) as per the legislative scheme has been completely ignored.

46. As noted above, under the scheme of the Act, it is implicit that the observance of principles of natural justice is at the stage of Section 13(3A), i.e. before the secured creditor proceeds to initiate coercive measure against the borrower under Section 13(4) of the Act. Once the borrower is granted opportunity at the stage prior to initiation of the coercive measures after calling upon him to pay the dues of the secured creditor, no further opportunity is to be given either at the stage of Section 13(4) or Section 14.

As regards the opportunity to be granted to the borrower to object the assertion in the affidavit accompanying application moved by the secured creditor in view of the proviso to sub-section (1) of Section 14, we may consider that the information as required under the

said provision is needed for transmission to the officer passing order under Section 14 of the Act, 2002, to enable him to record his satisfaction that the secured creditor has taken necessary steps before making request to seek physical possession by force and there was a refusal or inaction on the part of the borrower to handover physical possession. The satisfaction recorded is subjective and not based on any objective criteria. No enquiry in the nature of judicial or quasi-judicial proceeding is required to be conducted by the CMM/DM who is authorized to take possession of the secured asset and forward such asset to the secured creditor, in terms of sub-section (1)(a)&(b) of Section 14.

At this stage, the observations of the Apex Court in **V. Noble Kumar** (supra) about the scope of enquiry by the Magistrate as per the second proviso to sub-section (1) of Section 14 of the Act, in Para '25' noted above are reiterated.

47. The finality attached to the order of CMM/DM in using force to take physical possession of the secured asset under sub-section (2) of Section 14 has no bearing on the right of the borrower to challenge the measures taken by the secured creditor by initiation of the proceedings under Section 13(4) of the SARFAESI Act, 2002, to take possession of the secured asset in order to recover his secured debt.

The object and purpose of SARFAESI Act, 2002 to enable the secured creditor to secure recovery by exercising powers to take possession of the securities, sell them and reduce Non-performing assets by adopting measures for recovery or reconstruction, without the intervention of the Court, has not been considered by the Division Bench in **Kumkum Tentiwal** (supra). Further Amendments brought in Section 14 by Act No. 16 of 2016 providing specific timeline for taking possession of the secured asset have not been taken note of.

The decision in **Mardia Chemicals Ltd.** (supra) about the safeguards available to borrower within the framework of SARFAESI

Act to approach the Debt Recovery Tribunal under Section 17 of the Act has been ignored. The observations of the Division Bench in **Kumkum Tentiwal** (supra) that no other remedy is available against the order under Section 14 of the SARFAESI Act within the scheme of the Act is in ignorance of the statutory scheme under Chapter III for "Enforcement of Security Interest". It is implicit under the said chapter that if a party has any grievance as regards the contents of the order under Section 14, his remedy would be to voice them in the application under Section 17 before the Debt Recovery Tribunal.

48. Having noted the above, we are required to consider as to whether the Division Bench judgment in the **Kumkum Tentiwal** (supra) would operate as a binding precedent and has to be followed to maintain uniformity and consistency, which is the core of judicial discipline and in case of the contrary opinion, reference to the Larger Bench has to be made.

It is held in **State of U.P. and another vs. Synthetics and Chemicals Ltd. and another**[22] that a decision is binding not because of its conclusion but in regard to its ratio and the principles, laid down therein. Any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be a declaration of law or authority of a general nature binding as a precedent. Restraint in dissenting or overruling is for sake of stability and uniformity but rigidity beyond reasonable limits is inimical to the growth of law.

It was held in **Hyder Consulting (UK) Limited vs. Governor, State of Orissa through Chief Engineer**[23] that a prior decision of a Court on identical facts and law binds the Court on the same points of law in a later case. However, in exceptional circumstances, where owing to obvious inadvertence or oversight, a judgment fails to notice a

22 (1991) 4 SCC 139
23 (2015) 2 SCC 189

plain statutory provision or obligatory authority running counter to the reasoning and result reached, the principle of per incuriam may apply. [Reference was also made to the decision in **Fuerst Day Lawson Ltd. vs. Jindal Exports Ltd.**[24] therein].

49. The latin expression "per incuriam" literally means 'through inadvertence'. A decision can be said to be given per incuriam when the Court of record has acted in ignorance of the relevant law declared on a given subject matter.

As observed in **State of U.P. and another vs. Synthetics and Chemicals Ltd.** (supra) that:-

> *"**40.** Incuria' literally means 'carelessness'. In practice per incurium appears to mean per ignoratium.' English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignoratium of a statute or other binding authority'."*

Reference may also be made to the observation in paragraph '42' in **A. R. Antulay vs. R. S. Nayak and another**[25] as under:-

> *"**42.** .....xxxxxxx... "Per incuriam" are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong. See Morelle v. Wakeling, [1955] 1 All E.R. 708, 718F. .....xxxxxxx....."*

50. For the above discussion, the Division Bench judgment in **Kumkum Tentiwal** (supra) is held *per incuriam*.

The reference made to the Larger Bench by another Division Bench doubting the correctness of the said judgment in **Zainul Abdin** (supra), therefore, does not detain us in any manner.

51. At the cost of repetition, it may be noted at this juncture, that in a recent decision dated 27th July, 2022 in **M/s R.D. Jain and Co.** (supra),

24 2001 (6) SCC 356
25 (1988) 2 SCC 602

the Apex Court has considered that the powers of the Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act is purely executionary in nature having no element of quasi-judicial functions and the power exercised by CMM/DM is a Ministerial Act. As per the dictionary meaning of "Ministerial Act", an authority performing "Ministerial Act" has no liberty to exercise of his own judgment. The enquiry under Section 14 by the CMM/DM is restricted to only two aspects; (i) whether the secured asset falls within his territorial jurisdiction, and (ii) whether notice under Section 13(2) of the Act, 2002 is given or not. No adjudication of any kind is contemplated at that stage. The legal niceties of the transaction is not to be examined by the Magistrate to examine the factual correctness of the assertions made in the affidavit, filed in accordance with the first proviso to sub-section (1) of Section 14 to record his satisfaction to pass appropriate order for taking of possession of the secured asset.

52. In view of the above discussion, it is held that the CMM/DM acting under Section 14 of the SARFAESI Act, 2002 is not required to give notice to the borrower at the stage of the decision or passing order as no hearing can be demanded by the borrower at this stage. However, it is clarified that the order passed by such Magistrate has to be duly served upon the borrower before taking any steps for his forcible dispossession by such steps or use of force, as may be necessary in the opinion of the Magistrate, and the date fixed for such forcible action shall be duly intimated to such borrower in advance giving him sufficient time to remove his belongings, or to make alternative arrangement.

53. Lastly, for the ancillary issue raised by the learned Senior Counsel for the petitioners about the delay in passing the order under Section 14 beyond 60 days being fatal, suffice is to note the decision of the Apex Court in **C. Bright vs. District Collector and others** (supra) wherein it is held that the District Magistrate does not become *functus*

officio, if he is unable to take possession within the time limit. The remedy under Section 14 of the Act is not redundant if the District Magistrate could not adhere to the timeline provided therein.

The challenge to the orders impugned by the competent Authorities passed under Section 14 of the SARFAESI Act, 2002, on the plea of violation of principles of natural justice, therefore, is liable to be turned down.

Accordingly, all the connected writ petitions are **dismissed** being devoid of merits.

(Vipin Chandra Dixit,J.) (Sunita Agarwal,J.)

Order Date :- 25.11.2022
Brijesh