
Velocity Ltd. Indore Vs State Bank of India

Writ Appeal No. 296 of 2010

Court: Madhya Pradesh High Court (Indore Bench)

Date of Decision: Sept. 21, 2010

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) " Section 13(2), 13(3A), 13(4), 17, 17#Transfer of Property Act, 1882 " Section 69, 69A#Constitution of India, 1950 " Article 226, 227#Debts Recovery Tribunal Act, 1993 " Section 17, 17(1), 17(2), 17A, 18#Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 " Section 2(1)#Recovery of Debts Due to Banks and Financial Institutions Act, 1993 " Section 20

Citation: (2011) ILR (MP) 839 : (2011) 1 MPHT 314 : (2011) 2 MPLJ 224

Hon'ble Judges: S.S. Kemkar, J; Prakash Shrivastava, J

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

Shantanu Kemkar, J.

This intra Court appeal u/s 2(1) of Madhya Pradesh Uchcha Nyayalaya (Khand Nyaypeeth Ko Appeal) Adhiniyam, 2005 has been filed by the

Appellant challenging the order dated 10-8-2010 passed by the Single Bench of this Court in Writ Petition No. 2099/2010.

Brief facts necessary for disposal of this writ appeal are that the Appellant Company was extended the loan/credit facilities by the Respondent

Bank. Due to defaults in the repayment, considering the difficulties stated by the Appellant, the Respondent Bank accepted the Appellant's prayer

for re-schedulement of the financial assistance extended by it. However, even after re-schedulement the Appellant failed to adhere to the

conditions of re-schedulement, in the circumstances the Respondent Bank in exercise of its powers u/s 13(2) of the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "Act of 2002") issued a notice dated 14-12-2009

requiring the Appellant to discharge in full its liabilities. It was also informed to the Appellant that failing to discharge its liabilities the Bank shall be

entitled to exercise all or any of the rights under Sub-section (4) of the Section 13 of the Act of 2002.

On receipt of the said notice u/s 13(2) of the Act of 2002 the Appellant submitted a representation/objection before the Respondent/ Bank. The

Respondent Bank considered the said representation/objection and informed the Appellant that his representation/objection is not acceptable/

tenable vide letter dated 9-2-2010. Aggrieved by the notice dated 14-12-2009 issued u/s 13(2) of the Act of 2002 and the reply dated 9-2-2010

sent by the Respondent/Bank, the Appellant filed a Writ Petition No. 2099/2010 before this Court under Article 226 of the Constitution of India

praying therein that the entire proceedings initiated by the Respondent/ Bank under the provisions of Act of 2002 including the notice u/s 13(2) of

the Act of 2002 as well as the reply dated 9-2-2010 be quashed. The said writ petition has been dismissed by the learned Single Judge vide

impugned order dated 10-8-2010 by observing that the Appellant can avail the alternative remedy available to it in case the Respondent Bank

wishes to proceed further u/s 13(4) of the Act of 2002. The learned Single Judge placed reliance on the judgment passed by the Supreme Court in

the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., , on a Division Bench judgment of Madras High Court in the

case of Digvision Electronics Ltd. v. Indian Bank represented by its General Manager 2005 CLC 978, a Single Bench judgment of Madras High

Court in the case of Archana Spinners Ltd. v. Board for Industrial and Financial Reconstruction (2007) 76 SCL 280 and on a judgment delivered

by the Supreme Court on 14-5-2009 in the case of Punjab National Bank and Anr. v. Imperial Gift House and Ors. 2009 INSC 1074.

Feeling aggrieved by the order passed by the learned Single Judge dismissing its writ petition the Appellant/Petitioner has filed this writ appeal.

Heard Shri A.K. Sethi, learned Senior Counsel for the Appellant and Shri G.M. Chaphekar, learned Senior Counsel for the Respondent/Bank.

It has been argued by learned Senior Counsel for the Appellant that the learned Single Judge has committed an error in dismissing the appeal on the

ground of availability of an alternative remedy to the Appellant. He submitted that in view of the Scheme of the Act of 2002 there is no remedy of

appeal against the rejection of the representation or objection submitted by the borrower u/s 13(3-A) of the Act of 2002. According to him the

proviso to Section 13(3-A) prohibits the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or to approach the Court of

District Judge u/s 17A. He pointed out that the explanation of Section 17 also provides that the communication of the reasons to the borrower by

the secured creditor for not accepting 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 the borrower to make an application to the Debts Recovery Tribunal u/s 17(1) of the

Act of 2002. In the circumstances, according to him the only remedy available to the Appellant was to approach the High Court by filing a writ

petition under Article 226 of the Constitution of India. He also argued that against the rejection of the representation/objection submitted by the

borrower the borrower cannot be said to be remedy less and the powers vested in this Court under Article 226 of the Constitution of India cannot

be said to be closed as has been observed by the learned Single Judge. He argued that the judgment of the Supreme Court in the case of Mardia

Chemicals Limited v. Union of India (supra), has no application to the present case in view of the fact that Section 13(3-A) has been inserted by

Act No. 30 of 2004 w.e.f. 11-11-2004 after the decision of the Supreme Court in the case of Mardia Chemicals (supra), delivered on 18-1-

2004. Distinguishing the case of Punjab National Bank and Anr. v. Imperial Gift House and Ors. (supra), decided by the Supreme Court, he

argued that in the said case, the Supreme Court had observed that the High Court was not justified in entertaining the writ petition against the

notice issued u/s 13(2) whereas in the present case apart from challenge to the notice u/s 13(2) of the Act of 2002 the Appellant had also

challenged the reply of the Respondent Bank by which the Appellant's representation/objection has been rejected u/s 13(3-A) of the Act of 2002.

On the other hand, learned Senior Counsel appearing for the Respondent Bank argued that in the writ petition the challenge was essentially to the

notice issued to the Appellant by the Respondent Bank u/s 13(2) of the Act of 2002, in the circumstances, in view of the law laid down by the

Supreme Court in the case of Mardia Chemicals (supra), and also in the case of Punjab National Bank v. Imperial Gift House and Ors. (supra),

the notice u/s 13(2) as also to challenge the reply u/s 13(3-A) of the Act of 2002 sent by the Respondent Bank to the Appellant could not have

been challenged as by the communication of reasons u/s 13(3-A) of the Act of 2002 no harm was effected on the Appellant and as such at that

stage of the proceedings the Appellant was not entitled to invoke the jurisdiction of this Court under Article 226 of the Constitution of India. He

also pointed out that after dismissal of the writ petition the Respondent Bank has already taken action u/s 13(4) of the Act of 2002 and as such the

Appellant is required to file an appeal before the Debts Recovery Tribunal u/s 17 of the Act of 2002. In support of his contention that the

possession of the Appellant's property was taken invoking powers u/s 13(4) of the Act of 2002 on 17-8-2010 document Annexure R-14 has

been filed.

In order to decide the controversy involved in this writ appeal it would be appropriate to extract the relevant provisions of the Act of 2002.

Section 13 provides for enforcement of the security interest.

Enforcement of security interest.-

(1) Notwithstanding, anything contained in Section 69 or Section 69A of the Transfer 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.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt

or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured

creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of

notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

(3) The notice referred to in Sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be

enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

(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 within one week of receipt of such representation or objection the reasons for non-acceptance of the

representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer

any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the Court of District Judge u/s 17A.

Section 17, which is also relevant is quoted as under:

Right to appeal.- (1) Any person, including borrower, aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the

secured creditor or his authorised officer under this Chapter, may 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 measures had been taken:

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

Explanation: For the removal of doubts, it is hereby declared that 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.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured

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

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the

conclusion that any of the measures referred to in Sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the

provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or

restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in

Sub-section (4) of Section 13 taken by the secured assets as invalid and restore the possession of the secured assets to the borrower or restore

the management of the secured assets to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in

relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under Sub-section (4) of Section 13, is in accordance with

the provisions of this Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the

secured creditor shall be entitled to take recourse to one or more of the measures specified under Sub-section (4) of Section 13 to recover his

secured debt.

(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:

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 application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such

application made under Sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in Sub-section (5), any party

to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal

for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make

an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the

provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made there under.

Section 18, which provides for appeal to Appellate Tribunal is also extracted which reads as under:

Appeal to Appellate Tribunal.-

(1) Any person aggrieved, by any order made by the Debts Recovery Tribunal u/s 17, may prefer an appeal along with such fee, as may be

prescribed to an Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

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

Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of

debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

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

debt referred to in the second proviso.

(2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of 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 there under.

In the case of *Mardia Chemicals Limited v. Union of India and Ors.* (supra), the Supreme Court was considering the question about validity of the

Act of 2002. In Paragraphs 77 and 80 the Supreme Court has observed thus:

It is also true that till the stage of making of the demand and notice u/s 13(2) of the Act, no hearing can be claimed for by the borrower. But

looking to the stringent nature of measures to be taken without intervention of Court with a bar to approach the Court or any other forum at that

stage, it becomes only reasonable that the secured creditor must bear in mind the say of the borrower before such a process of recovery is

initiated. So as to demonstrate that the reply of the borrower to the notice u/s 13(2) of the Act has been considered applying mind to it. The

reasons howsoever brief that may be for not accepting the objections, if raised in the reply, must be communicated to the borrower. True,

presumption is in favour of validity of an enactment and a legislation may not be declared unconstitutional lightly more so, in the matters relating to

fiscal and economic policies resorted to in the public interest, but while resorting to such legislation it would be necessary to see that the persons

aggrieved get a fair deal at the hands of those who have been vested with the powers to enforce drastic steps to make recovery.

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 u/s 13(4) of the

Act have been taken, a mechanism has been provided u/s 17 of the Act to approach the Debts Recovery Tribunal. The above noted provisions

are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges

from different provisions of the Act, is as follows:

(1) Under Sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the

measures as provided under Sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts

for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not

accepting the objections, howsoever, brief they may be, must be communicated to the borrower. In connection with this conclusion we have

already held a discussion in the earlier part of the judgment. The reason so communicated shall only be for the purposes of the

information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal u/s 17 of the Act, at that stage.

(2) As already discussed earlier, on measures having been taken under Sub-section (4) of Section 13 and before the date of sale/auction of the

property it would be open for the borrower to file an appeal (petition) u/s 17 of the Act before the Debt Recovery Tribunal.

(3) That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition at it may deem

fit and proper to impose.

(4) In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an

appeal (petition) u/s 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is

invalid and it is liable to be struck down.

(5) As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in Civil Court, within the narrow scope and on the

limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the Court.

On going through the law laid down by the Supreme Court in the case of Mardia Chemicals (supra), it is clear that the amendment in the Act of

2002 by insertion of Section 13(3-A) was made on account of the observation made by the Supreme Court, in the circumstances even though the

amendment has been introduced after the judgment of the Supreme Court in the case of Mardia Chemicals (supra), but in view of the observations

made by the Supreme Court that the reasons communicated to the borrower against any objection to the notice u/s 13(2) shall be only for the

purposes of information/knowledge of the borrower without giving rise to any right to approach the Debts Recovery Tribunal u/s 17 of the Act at

that stage, the challenge to the communication of reasons to reject the objection/representation being only for the purposes of information and

knowledge of the borrower the same cannot be assailed at that stage. In the case of Punjab National Bank and Anr. v. Imperial Gift House and

Ors. (supra), the challenge was not only to the notice u/s 13(2) but was also to the rejection of the representation u/s 13(3-A) of the Act of 2002.

In the said case before any further action could be taken u/s 13(4) by the Bank the writ petition was filed before the High Court. In that situation,

the Supreme Court observed that the High Court was not justified in entertaining the writ petition against the notice issued u/s 13(2) of the Act and

quashing the proceedings initiated by the Bank.

In the case of United Bank of India v. Satyawati Tondon and Ors., decided on 26-7-2010, 2010 INSC 550, in Paragraphs 4, 5, 6, 17, 18, 19,

21, 22, 27 and 28 the Supreme Court has observed thus:

Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured

creditor under Sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on

which action is taken under that Sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been

clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application u/s 17(1).

Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of

security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and

circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not

in consonance with Sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of

the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under Sub-section (4)

of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other

law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its

secured debt. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made u/s 17 is required to be

disposed of. The proviso to this Sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the

Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a

direction to the Tribunal to dispose of the application expeditiously. Section 18 provides for an appeal to the Appellate Tribunal.

Section 34 lays down that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or

Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of

any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section

34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any

other law for the time being in force or any instrument having effect by virtue of any such law.

However, effective implementation of the SARFAESI Act was delayed by more than two years because several writ petitions were filed in the

High Courts and this Court questioning its vires. The matter was finally decided by this Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI)*

and Others Etc. Etc., and the validity of the SARFAESI Act was upheld except the condition of deposit of 75% amount enshrined in Section

17(2). The Court referred to the recommendations of the Narasimham and Andhyarujina Committees on the issue of constitution of Special

Tribunals to deal with cases relating to recovery of the dues of banks etc. and observed:

One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the

assets without intervention of the Court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed

recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the

Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of

early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is

again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr. Andhyarujina for

bringing about the needed steps within the legal framework. We are, therefore, unable to find much substance in the submission made on behalf of

the Petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet

another legislation for the recovery of the mounting dues. Considering the totality of circumstances and the financial climate world over, if it was

thought as a matter of policy to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter

to be gone into by the Courts to test the legitimacy of such a measure relating to financial policy.

Emphasis supplied

This Court then held that the borrower can challenge the action taken u/s 13(4) by filing an application u/s 17 of the SARFAESI Act and a civil suit

can be filed 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. In Paragraph 31 of the judgment, the Court observed as under:

In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers

would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the

provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be

unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NP As and better availability

of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the

public interest.

Emphasis supplied)

There is another reason why the impugned order should be set aside. If Respondent No. 1 had any tangible grievance against the notice issued u/s

13(4) or action taken u/s 14, then she could have availed remedy by filing an application u/s 17(1). The expression "any person" used in Section

17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action

taken u/s 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and

are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the

SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not

entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with

greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions.

In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep

in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not

only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance

of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a

person must exhaust the remedies available under the relevant statute.

While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to

issue to any person or authority, including in appropriate cases, any Government directions, orders or writs including the five prerogative writs for

the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of

that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is

bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a

rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under

Article 226 of the Constitution and pass interim order ignoring the fact that the Petitioner can avail effective alternative remedy by filing application,

appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance. It must be remembered that stay of

an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of

public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of

the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial

health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely

careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the Petitioner is able to show that its case falls within

any of the exceptions carved out in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, ,

Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and

Others, and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate

interim order.

In Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, , the Constitution Bench considered the question whether the High

Court of Assam should have entertained the writ petition filed by the Appellant under Article 226 of the Constitution question the order passed by

the Commissioner of Taxes under the Assam Sales Tax Act, 1947. While dismissing the appeal, the Court observed as under:

The jurisdiction of the High Court under Article 226 of the Constitution is couched in wide terms and the exercise thereof is not subject to any

restrictions except the territorial restrictions which are expressly provided in the Articles. But the exercise of the jurisdiction is discretionary: it is not

exercised merely because it is lawful to do so. The very amplitude of the jurisdiction demands that it will ordinarily be exercised subject to certain

self imposed limitations. Resort that jurisdiction is not intended as an alternative remedy for relief which may be obtained in a suit or other mode

prescribed by statute. Ordinarily the Court will not entertain a petition for a writ under Article 226, where the Petitioner has an alternative remedy,

which without being unduly onerous, provides an equally efficacious remedy. Again the High Courts does not generally enter upon a determination

of questions which demand an elaborate examination of evidence to establish the right to enforce which the writ is claimed. The High Court does

not therefore, act as a Court of appeal against the decision of a Court or Tribunal, to correct errors of fact, and does not by assuming jurisdiction

under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved Petitioner to move

another Tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not

permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the

party applying to it to seek resort to the machinery so set up.

The views expressed in *Titaghur Paper Mills Co. Ltd. v. State of Orissa* (supra), were echoed in *Assistant Collector of Central Excise, Chandan*

Nagar, West Bengal Vs. Dunlop India Ltd. and Others, in the following words:

Article 226 is not meant to short-circuit or circumvent statutory procedures. It is only where statutory remedies are entirely ill suited to meet the

demands of extra-ordinary situations, as for instance where the very vires of the statute is in question or where private or public wrongs are so

inextricably mixed up and the prevention of public injury and the vindication of public justice require it that recourse may be had to Article 226 of

the Constitution. But then the Court must have good and sufficient reason to bypass the alternative remedy provided by statute. Surely matters

involving the revenue where statutory remedies are available are not such matters. We can also take judicial notice of the fact that the vast majority

of the petitions under Article 226 of the Constitution are filed solely for the purpose of obtaining interim orders and thereafter prolong the

proceedings by one device or the other. The practice certainly needs to be strongly discouraged.

In *Punjab National Bank Vs. O.C. Krishnan and Others*, this Court considered the question whether a petition under Article 227 of the

Constitution was maintainable against an order passed by the Tribunal u/s 19 of the DRT Act and observed:

In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable u/s 20 of the Recovery of Debts

Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article

227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High

Court and whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

The Act has been enacted with a view to provide a special procedure for recovery of debts due to the Banks and the financial institutions. There is

a hierarchy of appeal provided in the Act, namely, filing of an appeal u/s 20 and this fast-track procedure cannot be allowed to be derailed either

by taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a

provision under an Act cannot expressly oust the jurisdiction of the Court under Articles 226 and 227 of the Constitution, nevertheless, when there

is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional

provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have

directed the Respondent to take recourse to the appeal mechanism provided by the Act.

It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory

remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse

impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their

discretion in such matters with greater caution, care and circumspection.

Insofar as this case is concerned, we are convinced that the High Court was not at all justified in directing the Appellant from taking action in

furtherance of notice issued u/s 13(4) of the Act.

On a close scrutiny of the provisions of the Act of 2002 and the law laid down by the Supreme Court in the case of *Mardia Chemicals* (supra), in

the case of *Punjab National Bank* (supra), and in the case of *United Bank of India v. Satyawati Tondon and Ors.* (supra), we find that it is not

justifiable to entertain a writ petition against the notice u/s 13(2) of the Act of 2002 and also against the communication of reason by the secured

creditor to the borrower about non-acceptability or untenability of the representation or objection. Such communication is not an order/action

causing harm to the borrower but is a step before taking recourse to one or more of the measures provided u/s 13(4). It is only when such

measure u/s 13(4) is taken it can be said that the borrower is aggrieved and only on taking of such measure the borrower can take recourse to the

provision of appeal provided u/s 17 of the Act of 2002. Keeping in view the scheme of the Act of 2002 the object behind making amendment by

way of introducing Section 13(3-A) and the observations made by the Supreme Court in the case of *Mardia Chemicals Limited* (supra), in our

considered view the communication of reasons is only for the purpose of information/knowledge of the borrower, and the same being not an action

to cause harm to the borrower, at that stage it cannot be assailed. Having regard to the scope of provisions of Section 17 of the Act of 2002, the

reasons so communicated can be well assailed in case measures referred to in Sub-section (4) of Section 13 are taken by the secured creditor.

This being the Scheme of the Act of 2002, any interference by this Court in a writ petition under Article 226 of the Constitution of India at the

stage of notice u/s 13(2) and at the stage of communication of rejection of representation/ objection u/s 13(3-A) of the Act of 2002 would hamper

the process of recovery, defeating the very purpose of enactment of the Act of 2002 and the purpose of introducing Section 13(3-A) in the Act of

2002.

It is also pertinent to mention that after dismissal of the writ petition the Respondent Bank on 17-8-2010 has taken the recourse u/s 13(4) of the

Act of 2002, in the circumstances if the Appellant feels aggrieved by taking of such measure it is open for it to approach the Debts Recovery

Tribunal u/s 17 of the Act.

Accordingly, no case for interference in the order passed by learned Single Judge is made out. The appeal fails and is hereby dismissed. No order

as to the costs.