(2018) 03 SC CK 0035

SUPREME COURT OF INDIA

Case No: CIVIL APPEAL Nos. 2928-2930 OF 2018 [Arising out of SLP (C) Nos. 10215-10217/2016] WITH CIVIL APPEAL Nos. 2931-2933 OF 2018 [Arising out of SLP (C) Nos. 10196-10198/2016]

Itc Limited	APPELLANT
Vs	
Blue Coast Hotels Ltd. & Ors	RESPONDENT

Date of Decision: March 19, 2018

Acts Referred:

- Security Interest (Enforcement) Rules, 2002 - Rule 3A
- Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 - Section 2(d), 2(zf), 13(2), 13(3A), 13(4), 13(6), 14, 17, 17A, 18B, 31, 31(i)
- Wealth Tax Act, 1957 - Section 2(e)
- Banking Regulation Act, 1949 - Section 5(c)
- Transfer Of Property Act, 1882 - Section 8, 55(4)(b)

Citation: (2018) 3 JT 634 : (2018) 4 Scale 628 : (2018) 4 BCR111 : (2018) 2 CTC 569 : (2018) (248) DLT 1 : (2018) 1 JKJ 1 : (2018) 2 RCR(Civil) 646 : (2018) 2 Supreme 664

Hon'ble Judges: S.A. Bobde, J; L. Nageswara Rao, J

Bench: Division Bench

Advocate: Dua Associates

Final Decision: Allowed

Judgement

S. A. Bobde, J.

[1] Leave granted.

[2] The auction purchaser ITC Ltd. is before us in the appeals arising out of SLP (C) Nos.10215-10217/2016. The sale of a five star luxury hotel

property purchased in a public auction was set aside by an order Dated 23.03.2016 of the Bombay High Court in favour of the debtor Blue Coast

Hotels Ltd.

[3] The circumstances under which the auction purchaser purchased the hotel property are as follows:- Industrial Financial Corporation of India

(IFCI), [filed appeals arising out of SLP (C) Nos.10196-10198/2016 in this Court], the secured creditor (hereinafter referred to as 'the creditor'), in the

capacity of a financial institution entered into a corporate loan agreement Dated 26.02.2010 with Blue Coast Hotels (hereinafter referred to as 'the

debtor') for a sum of Rs.150 crores. The agreement included a creation of a special mortgage to secure the corporate loan. The mortgaged property

comprised of the whole of the debtor's hotel property- including the agricultural land on which the debtor was to develop villas. The debtor defaulted in

repayment of the loan and the debtor's account became a Non- Performing Asset (NPA) w.e.f. 30.09.2012.

[4] Several notices intimating default in payment of the total outstanding amount of Rs.133.18 crores were sent by the creditor to the debtor. Upon

failure to remit the overdue amount despite the notices, a notice Dated 26.03.2013 under Section 13(2) of the Securitisation and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as ""the Act"") was sent by the creditor calling upon the debtor

to pay the amount overdue within a period of 60 days.

[5] In reply to the said notice, the debtor sent the creditor a proposal Dated 27.05.2013 for extension of time for the payment of the outstanding dues.

The High Court held that the creditor's failure to deal with this representation constituted a violation of Section 13 (3A) of the Act. Further, the High

Court held that the notice issued under Section 13 (2) by the creditor comprising of agricultural property despite the bar under Section 31 (i) of the Act

is contrary to the law since the land was not converted into non-agricultural land. The High Court also held that the auction/sale of the property based

upon symbolic possession of the property is contrary to the scheme of the Act and the Rules.

[6] On 18.06.2013, a notice was issued under Section 13 (4) whereby symbolic possession of the hotel property was taken over by the creditor. The

debtor filed a securitization application Dated 31.07.2013 before the Debts Recovery Tribunal (hereinafter referred to as 'the DRT') against the taking

over of the symbolic possession by the creditor. In the meanwhile, the creditor published the first auction sale notice On 04.09.2013 with a reserve

price of Rs. 403 crores which came to be postponed in view of the negotiations between the parties for the repayment of the dues. Upon default in the

repayment of the outstanding amount, a second sale notice was published on 09.01.2014 with the same reserve price.

The DRT passed an interim order, Vide order dated 6.02.2014 directing the creditor to defer the acceptance of bids and not to take any further steps

for sale of the property for the next 60 days. Subsequently, no bids were received and the auction failed.

[7] The creditor challenged the interim order passed by the DRT order before Debts Recovery Appellate Tribunal (hereinafter referred to as 'the

DRAT'). In the challenge, the Appellate Tribunal directed for the second appeal to be disposed off within a month by the DRT.

[8] The DRT disposed off the second appeal and set aside the notice under Section 13(2) Vide order dated 26. 03.2013 on the ground of non

compliance with Section 13(3A) and for issuance of the demand notice jointly for the mortgaged land comprising of agricultural land to which the

provisions of the Act did not apply as per Section 31(i) of the Act.

[9] The creditor filed an appeal to the order of the DRT Vide order dated 31.03.2014 in the DRAT which came to be allowed Vide order dated

10.09.2014 and the validity of the notice issued under Section 13(2) was upheld. Against the order of the DRAT setting aside the order of the DRT,

the debtor filed the Writ Petitions leading up to the present SLP, in the High Court.

The Auction Sale

[10] On 04.09.2013, the creditor published a Notice of Sale by Public Auction in the newspaper fixing the date of auction as 09.10.2013 at a reserve

price of Rs 403 crores. In view of this, the debtor sent a letter Dated 19.09.2013 to the creditor undertaking that it will pay all outstanding installments

by 31.12.2013 and that the sale of assets be deferred upto the aforesaid date. The debtor further stated that they shall not proceed in respect of their

Securitization Application Dated 31.07.2013 before the DRT.

In pursuance of it, the creditor deferred the sale by issuing a public notice on 08.10.2013 and granted the debtor an opportunity to clear the loan,

however, the creditor extended repayment only by 15-20 days.

[11] Thereafter, on 25.11.2013, the debtor gave a letter of undertaking accepting the schedule given by the creditor and also acknowledging the right

of the creditor to sell the assets in case of default as per the schedule.

[12] On 30.12.2013, the debtor sought further time to repay the loan to which the creditor issued a notice taking over symbolic possession.

[13] On 09.01.2014, the creditor published a second notice of sale at the same reserved price of Rs. 403 crores. The DRT Vide order dated

06.02.2014 passed an interim order directing the creditor to defer the acceptance of the bids and not take any further steps with regard to the sale of

the property for 60 days.

[14] On 08.10.2014 the creditor issued a third Notice of Sale by public auction fixing the auction on 12.11.2014 at a reserve price of Rs. 542.57

crores. Pursuant to the writ petitions filed by the debtor, the High Court Vide order dated 11.11.2014 allowed the bids to be received for the sale of

the Goa Hotel to be held in a sealed cover till the next date of hearing which was fixed to be on 19.11.2014. However, no bids were received pursuant

to the 3rd Public Auction Notice.

[15] In the meanwhile, the debtor wrote to the creditor stating that the corporate loan will be taken over by Hyatt who were the operating service

provider for the hotel. Hyatt in turn wrote to the creditor stating that they will not be responsible for the repayment of the loan. On 31.12.2014, a

fourth and fresh notice for conducting the auction sale of the Goa Hotel was issued by the creditor setting the reserve price at Rs. 515.44 crores. This

notice led to the sale of the Goa Hotel to ITC Ltd. (hereinafter referred to as 'the auction purchaser'). Findings of the High Court

[16] The parties eventually moved the High Court by way of writ petitions in its jurisdiction under Article 226 of the Constitution of India. Three writ

petitions were filed:-

(i) Writ Petition No. 2698 of 2014 (renumbered as 222 of 2015) was filed on 04.10.2014 by the debtor challenging the order of the DRAT. Order

dated 10.09.2014

(ii) Writ Petition No. 1150 of 2015 was filed on 02.03.2015 by the debtor against the order of handing over possession passed by the District

Magistrate. Order dated 26.02.2015

(iii) Writ Petition No. 2486 of 2015 was filed on 19.03.2015 by the debtor challenging the sale of the secured assets in an auction on 25.02.2015.

The writ petitions were filed before the Panaji Bench of the High Court at Goa, though eventually they were heard by the Bombay High Court. The

High Court set aside the judgment of the DRT and held the entire proceedings for recovery and sale of the Goa Hotel to be illegal being in violation of

the Act.

[17] In brief the High Court held that:-

(i) The recovery proceedings were a breach of Section 13 (3A) for failure of the creditor to reply to the representation of the debtor and reject the

same by a reasoned order.

(ii) That a portion of the land mortgaged by the debtor as security interest consisted of agricultural land to which the provisions of the Act do not

apply. The land, therefore, could not have been recovered.

(iii) The proceedings under Section 14 were initiated by the creditor who was not a secured creditor after having sold the property in auction to the

auction purchaser.

(iv) It was incumbent of the creditor to take physical possession of the property before putting it to sale in an auction.

(v) Lastly, having regard to the manner in which the proceedings of the auction sale were conducted, it was held that they were vitiated by fraud and

collusion.

Section 13 (3A) and its True Construction

[18] One of the main contentions on behalf of the debtor which found favour with the High Court was that after the creditor issued the notice under

Section 13(2), the debtor made a representation asking for a reschedulement of the loan which the creditor neither considered (constituting a breach of

sub-section (3A) which is mandatory), nor communicated the reasons for non-acceptance thereof. Thus, the subsequent action of the creditor in

resorting to a measure under Section 13(4) is liable to be annulled.

[19] The statutory scheme in this regard has been enumerated under Section 13 of the Act [1].

[20] The Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as 'the Rules') framed under the Act[2] elaborate on the manner in

which the representation of the borrower is required to be dealt with. Section 13 (4) enables any creditor to enforce any security interest without the

intervention of a court or tribunal. The procedure prescribed is that after classifying the debt as a non-performing asset, the creditor may, by a notice

in writing require the debtor/borrower to discharge his liabilities within 60 days. On receipt of a notice, the borrower may make a representation or

raise any objection. The creditor is then bound to consider the representation or objection. If the creditor comes to the conclusion that the

representation is not acceptable or tenable, the creditor is required to communicate the reasons for the non-acceptance of the representation/ objection

within fifteen days. Where the borrower fails to discharge his liability in full, the creditor may take any of the actions under sub- section (4) which

include the taking over of possession of the secured assets et cetera.

[21] Rule 3A of the Rules requires the authorized officer who is an officer specified by the Board of Directors of the secured creditor to consider the

representation and modify the notice of demand if satisfied of the need to do so in that regard. If the authorized officer comes to the conclusion that

such representation or objection is not tenable or acceptable, he must communicate the reasons for non-acceptance of the representation or objection

within fifteen days.

[22] The Act and the Rules thus provide for a locus poenitentiae. The borrower may raise an objection or make a representation of any nature that the

creditor must consider, and if found not acceptable, may reject the same before proceeding to resort to any of the measures provided by Section 13(4)

of the Act. The borrower may thus raise an objection against the proposed measures or make a representation explaining the circumstances in which

he cannot discharge his liabilities and propose reschedulement. This may result in reconsideration by the creditor of whether or not it would be prudent

to carry out the proposed measures and may even result in a renovation of the contract.

[23] Sub-Section (3A) of Section 13 was introduced in the Act by the Parliament in pursuance of the following observations of this Court in Mardia,

2004 4 SCC 311 Chemicals:

45. The purpose of serving a notice upon the borrower under sub-section (2) of Section 13 of the Act is, that a reply may be submitted by the

borrower explaining the reasons as to why measures may or may not be taken under sub-section (4) of Section 13 in case of non-compliance with

notice within 60 days. The creditor must apply its mind to the objections raised in reply to such notice and an internal mechanism must be particularly

evolved to consider such objections raised in the reply to the notice. There may be some meaningful consideration of the objections raised rather than

to ritually reject them and proceed to take drastic measures under sub-section (4) of Section 13 of the Act. Once such a duty is envisaged on the part

of the creditor it would only be conducive to the principles of fairness on the part of the banks and financial institutions in dealing with their borrowers

to apprise them of the reason for not accepting the objections or points raised in reply to the notice served upon them before proceeding to take

measures under sub-section (4) of Section 13. Such reasons, overruling the objections of the borrower, must also be communicated to the borrower by

the secured creditor. It will only be in fulfillment of a requirement of reasonableness and fairness in the dealings of institutional financing which is so

important from the point of view of the economy of the country and would serve the purpose in the growth of a healthy economy. It would certainly

provide guidance to the secured debtors in general in conducting the affairs in a manner that they may not be found defaulting and being made liable

for the unsavoury steps contained under sub-section (4) of Section 13. At the same time, more importantly, we must make it clear unequivocally that

communication of the reasons for not accepting the objections taken by the secured borrower may not be taken to give occasion to resort to such

proceedings which are not permissible under the provisions of the Act. But communication of reasons not to accept the objections of the borrower,

would certainly be for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been

accepted by the secured creditor who intends to resort to harsh steps of taking over the management/business of viz. secured assets without

intervention of the court. Such a person in respect of whom steps under Section 13(4) of the Act are likely to be taken cannot be denied the right to

know the reason of non-acceptance and of his objections. It is true, as per the provisions under the Act, he may not be entitled to challenge the

reasons communicated or the likely action of the secured creditor at that point of time unless his right to approach the Debts Recovery Tribunal as

provided under Section 17 of the Act matures on any measure having been taken under sub-section (4) of Section 13 of the Act.

[24] The Parliament transformed the observations of this Court into a provision in the Act with a plain intention to introduce a pause for the creditor to

rethink and reconsider the action proposed by the debtor. It is a departure from the usual steps that an ordinary creditor is bound to take for recovering

the loan i.e. through the intervention of the Court.

[25] The question that arises for consideration before us is whether the Parliament intended for a total invalidity to result from the failure to reply and

give reasons for the non-acceptance of the borrower's representation. In other words, whether sub-section (3A) of Section 13 is mandatory or

directory in nature.

[26] There is no doubt that if a reply with reasons is an integral and indispensable part of the statutory scheme, the Courts would not excuse a

departure from it. But, on the other hand, if the reply is merely a direction and not of substance to the scheme, the non-compliance may be excused.

[27] This question must be answered upon a construction of the statute according to its true intent by taking into account the language in which the

intent is clothed. In a passage from Crawford's Statutory Construction, it is stated -

The question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the

intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the

provision, but also by considering its nature, its design, and the consequences which would follow from construing it the one way or the other.""[3]

This has been followed in several decisions of the Supreme Court. State of U. P.v. Manbodhan Lal Shrivastava, 1957 AIR(SC) 912 ; State of U. P. v.

Baburam, Upadhya, 1961 AIR(SC) 751 ; Article 143 of the Constitution of India, In the matter of, supra, p. 769; State of Mysore v. V. K. Kangan,

1975 AIR(SC) 2190 ; Govindlal Chhagan-lal Patel v. Agriculture Produce Market Committee, 1976 AIR(SC) 263; Ganesh Prasad Sah Kesari v.

Lakshmi Narayan, 1985 3 SCC 53 ; B. P. Khemka Pvt. Ltd. v. Birendra Kumar Bhowmik, 1987 2 SCC 407; Owners and Parties interested in M.V.

Vali Pero"" v. Fernandes Lopez, 1989 AIR(SC) 2206; State of M. P. v. Pradeep Kumar, 2000 7 SCC 372 ; Sarla Goel v. Krishanchand, 2009 7 SCC

658. Subbarao, J. in State of U. P. v. Babu Ram Upadhya, 1961 AIR(SC) 751, points out, ""For ascertaining the real intention of the Legislature, the

court may consider inter alia, the nature and design of the statute, and the consequences which would follow from construing it the one way or the

other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the circumstances, namely, that the

statute provides for a contingency of the noncompliance with the provisions; the fact that the non-compliance with the provisions is or is not visited by

some penalty; the serious or the trivial consequences, that flow therefrom; and above all, whether the object of the legislation will be defeated or

furthered"".

[28] We find the language of sub-section (3A) to be clearly impulsive. It states that the secured creditor ""shall consider such representation or

objection and further, if such representation or objection is not acceptable or tenable, he shall communicate the reasons for non-acceptance"" thereof.

We see no reason to marginalize or dilute the impact of the use of the imperative 'shall' by reading it as 'may'. The word 'shall' invariably raises a

presumption that the particular provision is imperative, State of U. P. v. Manbodhan Lal Shrivastava, 1957 AIR(SC) 912.

[29] There is nothing in the legislative scheme of Section 13 (3A) which requires the Court to consider whether or not, the word 'shall' is to be treated

as directory in the provision. As the Section stood originally, there was no provision for the above mentioned requirement of a debtor to make a

representation or raise any objection to the notice issued by the creditor under Section 13(2). As it was introduced via sub-section (3A), it could not be

the intention of the Parliament for the provision to be futile and for the discretion to ignore the objection/representation and proceed to take measures,

be left with the creditor. There is a clear intendment to provide for a locus poenitentiae which requires an active consideration by the creditor and a

reasoned order as to why the debtor's representation has not been accepted.

[30] Moreover, this provision provides for communication of the reasons for not accepting the representation/objection and the requirement to furnish

reasons for the same. A provision which requires reasons to be furnished must be considered as mandatory. Such a provision is an integral part of the

duty to act fairly and reasonably and not fancifully. We are not prepared in such circumstances to interpret the silence of the Parliament in not

providing for any consequence for non-compliance with a duty to furnish reasons. The provision must nonetheless be treated as 'mandatory'.

We agree with the view of this Court in this regard in Mardia Chemicals Ltd. v. Union of India, 2004 4 SCC 311 (para 45, 47, 77 and 80) Transcore v.

Union of India, 2008 1 SCC 125 (para 24 and 25) and Keshavlal Khemchand & Sons (P) Ltd. v. Union of India, 2015 4 SCC 770 (para 19 and 61).

We also approve of the view of several High Courts in this regard, Kiran Devi Bansal v. DGM SIDBI, 2009 AIR(Guj) 100 (DB)(para 9 and 10);

Clarity Gold Pvt. Ltd. v. State Bank of India, 2011 AIR(Bom) 42 (DB)(para 11, 12 and 13); Vinay Container Services Pvt. Ltd. v. Axis Bank, 2011 1

MhLJ 882 (para 6); Krushna Chandra Sahoo v. Bank of India, 2009 AIR(Ori) 35 (para 6 and 7); Tensile Steel Ltd. & Anr. v. Punjab and Sind Bank

& Ors., 2007 AIR(Guj) 126 (para 21); M/s Jayant Agencies v. Canara Bank & Ors., Jharkhand HC in WP (C) No. 4048 of 2010 (para 27, 28, 29, 32

and 33); M/s Tetulia Coke Plant Pvt. Ltd. v. Bank of India, 2013 AIR(Jhar) 12 (para 5, 9, 20, 22, 23 and 24); Mrs. Sunanda Kumari v. Standard

Chartered Bank, 2007 135 CompCas 604 (Kar) (para 5); Palash Mukherjee v. U.O.I, W.P. 9876 (W) of 2014 Calcutta High Court (para 1, 2 and 67);

Jaideep Singh and Ors. v. Union of India and Anr., 2008 2 GauLT 91 (para 25 and 28); Malabar Sand and Stones (Pvt.) Ltd. v. Catholic Syrian Bank

Ltd. & Ors., 2013 AIR(Ker) 25 (para 7, 8, 9 and 10).

[31] It was submitted on behalf of the creditor that the conduct of the debtor does not warrant an interference in this case. However, we are of the

view that the construction of the Act should not be affected by the facts of a particular case. For, indeed, where the remedy invoked is a discretionary

remedy, the Court may deny relief if the circumstances so warrant.

[32] In the present case, it is a fact that the creditor has not replied to the debtor's representation[Dated 27.05.2013], and thus appears to be in breach

of Section 13 (3A), but the following attendant circumstances are important:

(i) On 26.03.2013, the creditor issued a notice under Section 13(2) to the debtor to discharge his liabilities within 60 days. On 27.05.2013 the debtor

made a representation to the creditor containing a proposal for reschedulement (which was the same as the one made as far back as on 22.08.2012)

and reserving the right to file a reply.

(ii) On 07.06.2013, the debtor again sent a proposal for extension of time for repayment, repeating its proposal dated 27.05.2013.

(iii) On 20.06.2013, the creditor issued the notice of possession under Section 13(4). The taking over of possession was purely symbolic. We are

informed that the debtor is in possession of the hotel till date and is running its business without any noteworthy repayment.

(iv) On the next day 21.06.2013, the debtor wrote a letter to the creditor seeking extension of time and enclosed six cheques for upfront payment of

Rs.33.16 crores without making any reference to the notice of taking over of possession. The cheques were dishonoured.

(v) On 04.09.2013, the creditor published a Notice of Sale by Public Auction in the newspaper fixing the date of auction as 09.10.2013 at a reserve

price of Rs. 403 crores.

(vi) Following this the debtor sent a letter to the creditor on 19.09.2013 undertaking that it will repay all outstanding installments by 31.12.2013 and that

the sale of assets be deferred up to the said date. The debtor further stated that it shall not proceed further in respect of their Securitization

Application before the DRT.

(vii) On 08.10.2013, the creditor deferred the sale by issuing a public notice while considering the debtor's proposal.

(viii) On 29.10.2013, the creditor granted an opportunity to the debtor to clear the debt as stated in the debtor's letter dated 03.10.2013 wherein it sent

forth another proposal for extension of time for repayment stating that it will repay a principal installment of the corporate loan of a total of Rs. 89

crores by 31.12.2013. However, the creditor only extended the time for repayment by 15-20 days.

(ix) On 25.11.2013, ""A Letter of Undertaking"" was given by the debtor accepting the schedule given by the creditor on 29.10.2013 and also

acknowledging the right of the creditor to sell the assets in case of default as per the above mentioned schedule.

(x) The creditor wrote to the debtor on 08.01.2014 informing the debtor that due to the default in repayment, the creditor is proceeding with steps to

recover the dues and accordingly rejected the debtor's request letter dated 30.12.2013 seeking further time to repay the outstanding dues.

[33] From the above, it is clear that the creditor was induced by the debtor not to take action against them through assurances and promises. The

creditor appeared to have entered into negotiations for the settlement of the dues and even accepted cheques in repayment much after the

notice[Dated 26.03.2013] under Section 13(2) and after the debtor's letter of representation[Dated 27.05.2013]. Many opportunities were granted by

the creditor to the debtor to repay the debt which were all met by proposals for extension of time. Eventually, the debtor even executed ""A Letter of

Undertaking[On 25.11.2013]"" acknowledging the right of IFCI to sell the assets in the case of default.

[34] In these circumstances, we have no doubt that the failure to furnish a reply to the representation is not of much significance since we are

satisfied that the creditor has undoubtedly considered the representation and the proposal for repayment made therein and has in fact granted

sufficient opportunity and time to the debtor to repay the debt without any avail. Therefore, in the fact and circumstances of this case, we are of the

view that the debtor is not entitled to the discretionary relief under Article 226 of the Constitution which is indeed an equitable relief.

Letter of Undertaking ""Without Prejudice

[35] Much was sought to be made of the words ""without prejudice"" in the letter[Dated 25.11.2013] containing the undertaking that if the debt was not

paid, the creditor could take over the secured assets. The submission on behalf of the debtor that the letter of undertaking was given in the course of

negotiations and cannot be held to be an evidence of the acknowledgement of liability of the debtor, apart from being untenable in law, reiterates the

attempt to evade liability and must be rejected. The submission that the letter was written without prejudice to the legal rights and remedies available

under any law and therefore the acknowledgement or the undertaking has no legal effect must likewise be rejected. This letter is reminiscent of a

letter that fell for consideration in Spencer,[Spencer v. Hemmerde, 1922 2 AC 507, HL at 526] as pointed out by Mr. Harish Salve, ""as a rule the

debtor who writes such letters has no intention to bind himself further than is bound already, no intention of paying so long as he can avoid payment,

and nothing before his mind but a desire, somehow or other, to gain time and avert pressure.

It was argued in a subsequent case[Bradford and Bingley vs. Rashid [2006]] that an acknowledgment made ""without prejudice"" in the case of

negotiations cannot be used as evidence of anything expressly or impliedly admitted. The House of Lords observed as follows:

But when a statement is used as acknowledgement for the purpose of s. 29 (5), it is not being used as evidence of anything. The statement is not an

evidence of an acknowledgement. It is the acknowledgement.

Therefore, the without prejudice rule could have no application.

It said:

Here, the respondent, Mr. Rashid was not offering any concession. On the contrary, he was seeking one in respect of an undisputed debt. Neither an

offer of payment nor actual payment.

We, thus, find that the mere introduction of the words ""without prejudice"" have no significance and the debtor clearly acknowledged the debt even

after action was initiated under the Act and even after payment of a smaller sum, the debtor has consistently refused to pay up.

[36] All in all, as the matter stands, the debtor did not repay the loan. The debtor managed to submit a letter purporting to be a representation,

containing a proposal for reschedulement made much earlier to the creditor's notice and reserved a right to file a reply. Apparently, the debtor induced

the creditor to enter into negotiations to ward off the reply and avoid the taking over of possession. The debtor ignored the symbolic possession taken

over by the creditor and continued to negotiate and even gave six cheques which were dishonoured. The debtor then gave a final letter of undertaking

agreeing that the creditor could take over possession of the assets if the debt was not repaid. All along, the debtor's response has been that of seeking

extension of time to pay, with the usual unfulfilled promise of repayment. We see no reason why the debtor should not be stopped from questioning the

taking over of possession, particularly since, neither the debt nor the liability is in dispute. The debt has not been repaid in fact, and the objection raised

is merely on the ground that the taking of assets is illegal because the creditor failed to reply to the representation.

Inclusion of Agricultural Land as Security Interest in the Notice of Recovery

[37] One of the contentions raised on behalf of the debtor questioned the correctness of the finding of the High Court on the ground that the inclusion

of agricultural land as security interest could not have been validly included in the notice for recovery of the secured loan. The correctness of the

finding of the High Court depends on the effect of Section 31 (i) of the Act, which reads as follows:-

31. Provisions of this Act not to apply in certain cases-The provision of this Act shall not apply to-

(a) .

(b) .

(c) .

(e) .

(f) .

(g) .

(h) .

(i) any security interest created in agricultural land;

(j) .

[38] The purpose of enacting Section 31(i) and the meaning of the term ""agricultural land"" assume significance. This provision, like many others is

intended to protect agricultural land held for agricultural purposes by agriculturists from the extraordinary provisions of this Act, which provides for

enforcement of security interest without intervention of the Court. The plain intention of the provision is to exempt agricultural land from the provisions

of the Act. In other words, the creditor cannot enforce any security interest created in his favour without intervention of the Court or Tribunal, if such

security interest is in respect of agricultural land. The exemption thus protects agriculturists from losing their source of livelihood and income i.e. the

agricultural land, under the drastic provision of the Act. It is also intended to deter the creation of security interest over agricultural land as defined in

Section 2 (zf)[4]. Thus, security interest cannot be created in respect of property specified in Section 31.

[39] In the present case, security interest was created in respect of several parcels of land, which were meant to be a part of single unit i.e. the five

star hotel in Goa. Some parcels of land now claimed as agricultural land were apparently purchased by the debtor from agriculturists and are entered

as agricultural lands in the revenue records. The debtor applied to the revenue authorities for the conversion of these lands to non-agricultural lands

which is pending till date due to policy decision.

[40] It is undisputed that these lands were mortgaged in favour of the creditor under a deed dated 26.02.2010. Obviously, since no security interest

can be created in respect of agricultural lands and yet it was so created, goes to show that the parties did not treat the land as agricultural land and

that the debtor offered the land as security on this basis. The undisputed position is that the total land on which the Goa Hotel was located admeasures

182225 sq. mtrs. Of these, 2335 sq. mtrs. are used for growing vegetables, fruits, shrubs and trees for captive consumption of the hotel. There is no

substantial evidence about the growing of vegetables but what seems to be on the land are some trees bearing curry leaves and coconut. This amounts

to about 12.8 % of the total area.

[41] The Corporate Loan Agreement[Dated 26.02.2010] that deals with the mortgage in question in the relevant clause[Clause 2.1, part b] reads as

follows:-

The Borrower shall create mortgage on Exclusive basis on the 'Park Hyatt Goa Resort and Spa"" Hotel Property admeasuring 1, 82, 225 Sq Mtrs with

a built up area of 25182 Sq. Mtrs situated at 263 C, Arossim, Canasaulim Goa.

The mortgage is thus intended to cover the entire property of the Goa Hotel. Prima facie, apart from the fact that the parties themselves understood

that the lands in question are not agricultural, it also appears that having regard to the use to which they are put and the purpose of such use, they are

indeed not agricultural.

[42] At the outset, it was argued on behalf of the debtor that Section 31(i) is beyond the legislative competence of the Parliament since it is only the

State Legislature which is competent to legislate on land under Entry 18 of List II. This contention appears to be completely untenable. Though

Section 31(i) exempts agricultural land from the operation of the Act it is not possible to construe such a provision as a legislation on agricultural land.

In fact, it is quite the contrary. Moreover, Section 31 (i) is one of the provisions in the Act which has been held by this Court as referable to Entry 45

of List I, in Union of India and Another v. Delhi High Court Bar Association and Ors., 2002 4 SCC 275 . The Court held that:-

14 . Entry 45 of List I relates to ""banking"". Banking operations would inter alia, include accepting of loans and deposits, granting of loans and

recovery of the debts due to the bank. There can be little doubt that under Entry 45 of List I, it is Parliament alone which can enact a law with regard

to the conduct of business by the banks. Recovery of dues is an essential function of any banking institution. In exercise of its legislative power

relating to banking, Parliament can provide the mechanism by which monies due to the banks and financial institutions can be recovered.

In State Bank of India v. Santosh Gupta and Ors., 2017 AIR(SC) 25 this Court concluded that the Act is referable to Entries 45 and 95 of List I. It

observed that:-

43 . the entire Act, including Sections 17-A and 18-B, would in pith and substance be referable to Entries 45 and 95 of List I, .

[43] The validity of Section 31(i) which in any case deals with security interest created over agricultural land and not agricultural land itself, is an

integral part of the Act and cannot be questioned on the ground of legislative competence.

In A. S. Krishna and Ors. v. State of Madras, 1957 AIR(SC) 297 this Court observed as follows:-

It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then

disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof

are intra vires, and what are not.

Thus, this contention on behalf of the debtor must be rejected.

[44] In 'Commissioner of Wealth Tax, Andhra Pradesh v. Officer-in-Charge (Court of Wards) Paigah, 1976 3 SCC 864, this Court interpreted the

definition of the term 'Agricultural Land' with respect to Section 2(e) of the Wealth Tax Act, 1957 that excluded the said term from the definition of

assets. This Court observed:-

We agree that the determination of the character of land, according to the purpose for which it is meant or set apart and can be used, is a matter

which ought to be determined on the facts of each particular case. What is really required to be shown is the connection with an agricultural purpose

and user and not the mere possibility of user of land, by some possible future owner or possessor, for an agricultural purpose. It is not the mere

potentiality, which will only affect its valuation as part of ""assets"", but its actual condition and intended user which has to be seen for purposes of

exemption from wealth-tax. One of the objects of the exemption seemed to be to encourage cultivation or actual utilisation of land for agricultural

purposes. If there is neither anything in its condition, nor anything in evidence to indicate the intention of its owners or possessors, so as to connect it

with an agricultural purpose, the land could not be ""agricultural land"" for the purposes of earning an exemption under the Act. Entries in revenue

records are, however, good prima facie evidence.

Similarly, in the case of Kunjukutty Saheb v. State of Kerala, 1972 2 SCC 364 this Court held as follows:

We suppose that something or other can be, and often is, grown on any vacant land, but that would not necessarily make it agricultural land for our

purposes. To give an example the possibility of cultivating, or even the actual cultivation of, what is essentially a building site in the heart of a town

would not make it agricultural land. It is the purpose for which it is held that determines its character and the existence of a few coconut trees or a

vegetable patch on the land cannot alter the fact that it is held for purposes of building and not for purposes of agriculture.

In any event, having regard to the character of the land and the purpose for which it is set apart, we are of the view that the land in question is not an

agricultural land. The High Court mis-directed itself in holding that the land was an agricultural land merely because it stood as such in the revenue

entries, even though the application made for such conversation lies pending till date.

Transfer of Security Interest by IFCI to ITC

[45] As noticed earlier, the creditor took over symbolic possession of the property on 20.06.2013. Thereupon, it transferred the property to the sole

bidder ITC and issued a sale certificate for Rs.515,44,01,000/- on 25.02.2015. On the same day, i.e., 25.02.2015, the creditor applied for taking

physical possession of the secured assets under Section 14 of the Act.

[46] According to the debtor, since Section 14 provides that an application for taking possession may be made by a secured creditor, and the creditor

having ceased to be a secured creditor after the confirmation of sale in favour of the auction purchaser, was not entitled to maintain the application.

Consequently, therefore, the order of the District Magistrate directing delivery of possession is a void order. This submission found favour with the

High Court that held that the creditor having transferred the secured assets to the auction purchaser ceased to be a secured creditor and could not

apply for possession. The High Court held that the Act does not contemplate taking over of symbolic possession and therefore the creditor could not

have transferred the secured assets to the auction purchaser. In any case, since ITC Ltd. was the purchaser of such property, it could only take

recourse to the ordinary law for recovering physical possession.

[47] We find nothing in the provisions of the Act that renders taking over of symbolic possession illegal. This is a well- known device in law. In fact,

this court has, although in a different context, held in M.V.S.Manikayala Rao v. M.Narasimhaswami, 1966 AIR(SC) 470 that the delivery of symbolic

possession amounted to an interruption of adverse possession of a party and the period of limitation for the application of Article 144 of the Limitation

Act would start from such date of the delivery.

[48] The question, however, whether the creditor could maintain an application of possession under Section 14 of the Act; even though it had taken

over only symbolic possession before the sale of the property to the auction purchaser, depends on whether it remained a secured creditor after having

done so.

Section 2(d) of the Act defines 'secured creditor' to mean a ""banking company"" having the meaning assigned to it in clause (c) of section 5 of the

Banking Regulation Act, 1949;

Clause 2(L)[2(L) SARFAESI Act] includes debts or receivables and any right or interest in the security whether full or part underlying such debt or

receivables or any beneficial interest in property vide (L)(i)(iv) & (v)[5].

Sub-section (6) of Section 13[6] posits that the transfer of the secured asset by the secured creditor shall vest in the transferee all the rights as if the

transfer had been made by the owner of the secured asset.

[49] In Mulla's the Transfer of Property Act[Page 104, 105]:-

The section (s.8) does not apply to court sales, for such sales effect a transfer by the operation of law. The principle of the section was, however,

applied in a case decided by Madras High Court where a debt for unpaid purchase money on a sale of land was attached and sold, and the auction

purchaser was held entitled to the charge which the vendor had under s 55(4) (b) on the property in the hands of the buyer. The court, after observing

that the present section did not apply to court sales, said: The effect of applying s 8 is to strengthen the sale certificate by transferring the lien along

with it.

This Court observed in Abdul Aziz[Abdul Aziz v. Appayasami, 1903 31 IndApp 1] that a sale through court is different from a sale inter parties:-

What is sold at a court sale is the right, title and interest of the judgment debtor, and the extent of that interest is a mixed question of fact and law to

be decided according to the circumstances of each particular case, and depends upon what the court intended to sell, and the purchaser intended to

buy.

We note that even though the entire right, title and interest were purported to have been transferred, all the rights, transfer and interest could not be

said to have been transferred since the possession of the property was not transferred to creditor. The possession was retained by the debtor who

continued to do business and receive rent from the rooms on the property and has in fact continued to do so till date. There is no doubt that after

taking over the property from debtor, the creditor also acquired the right to receive the usufruct of the property i.e. the rent in this case. However, this

was an interest in the property which was not at any point of time transferred to the auction purchaser.

[50] In this case, the creditor did not have actual possession of the secured asset but only a constructive or symbolic possession. The transfer of the

secured asset by the creditor therefore cannot be construed to be a complete transfer as contemplated by Section 8 of the Transfer of Property Act.

The creditor nevertheless had a right to take actual possession of the secured assets and must therefore be held to be a secured creditor even after

the limited transfer to the auction purchaser under the agreement[Dated 25.02.2015]. Thus, the entire interest in the property not having been passed

on to the creditor in the first place, the creditor in turn could not pass on the entire interest to the auction purchaser and thus remained a secured

creditor in the Act.

Findings of Fraud and Collusion by the High Court

[51] Finally, the High Court in its judgment renders a finding that there was in fact fraud and collusion between the creditor and the auction purchaser.

According to the High Court, since the measures were taken in breach of all laws, the inference of manipulation and collusion cannot be ruled out.

[52] We fail to see how such a finding of manipulation and collusion is sustainable on account of breach of law in the present case. A risk of this kind

taken up by an intending purchaser cannot lead to an inference of collusion. Mainly, the finding is based on the fact that the sale is a collusion because

the auction purchaser was aware that a dispute between the parties was pending and still went ahead and made a bid for the property. It is not

unusual in the sale of immovable properties to come across difficulties in finding suitable buyers for the property. We find that the property was

eventually sold on the fourth auction, and all the auctions were duly advertised.

[53] Another fact on the basis of which the High Court has observed an inference of collusion is that the property was sold and the sale was

confirmed in favour of ITC Ltd. though a statement was made in the morning of 23.02.2015 before the DRT that the sale would not be confirmed till

the order is passed. This seems to be recorded in the order of the DRT. However, what is overlooked is the fact that in the statement on behalf of the

creditor, the creditor only agreed to not confirm the sale till 3 pm. In the absence of any finding as to what actually transpired, it is not possible for us

to infer manipulation and collusion on this account. There is no dispute that the property was actually purchased by ITC Ltd. in pursuance of a public

auction and that the entire amount of sale consideration has been deposited by it.

[54] We have anxiously considered the entire matter and find that the undisputed facts of the case are that a loan was taken by the debtor which was

not paid, the debtor did not respond to a notice of demand and made a representation which was not replied to in writing by the creditor. The creditor,

however, considered the proposals for repayment of the loan as contained in the representation in the course of negotiations which continued for a

considerable amount of time. Several opportunities were in fact availed of by the debtor for the repayment of the loan after the proceedings were

initiated by the secured creditor. The debtor failed to discharge its liabilities and eventually undertook that if the debtor fails to discharge the debt, the

creditor would be entitled to take realize the secured assets.

[55] As held, we are of the view that non-compliance of sub-section (3A) of Section 13 cannot be of any avail to the debtor whose conduct has been

merely to seek time and not repay the loan as promised on several occasions.

[56] This Court in the case of State of Maharashtra v. Digambar, 1995 4 SCC 683 observed as follows:-

19. Power of the High Court to be exercised under Article 226 of the Constitution, if is discretionary, its exercise must be judicious and reasonable,

admits of no controversy. It is for that reason, a person's entitlement for relief from a High Court under Article 226 of the Constitution, be it against

the State or anybody else, even if is founded on the allegation of infringement of his legal right, has to necessarily depend upon unblameworthy

conduct of the person seeking relief, and the court refuses to grant the discretionary relief to such person in exercise of such power, when he

approaches it with unclean hands or blameworthy conduct.

It relied on the judgment of the Privy Council in Lindsay Petroleum Co. v. Hurd,1874 5 PC 221 where the Privy Council observed:-

.Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might

affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as it relates to the remedy.

[57] Therefore, the debtor is not entitled for the discretionary equitable relief under Articles 226 and 136 of the Constitution of India in the present

case.

[58] We accordingly, set aside the impugned judgment of the High Court and direct the debtor and its agents to handover possession of the mortgaged

properties to the auction purchaser within a period of six months from the date of this judgment along with the relevant accounts.

[59] Appeals are allowed accordingly.

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1 13. 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 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).....

(3A) 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 fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation

or objection to the borrower:

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

any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section

17A.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to

one or more of the following measures to recover his secured debt, namely:--

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

asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the

secured asset: PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the

business of the borrower is held as security for the debt:

PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take

over the management of such business of the borrower which is relatable to the security for the debt.

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

secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is

due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5).....

(6).....

(7).....

(8).....

(9).....

(10).....

(11).....

(12).....

(13).....

2 3-A. Reply to Representation of the borrower.-

(a) After issue of demand notice under sub-section (2) of section 13, if the borrower makes any representation or raises any objection to the notice,

the Authorised Officer shall consider such representation or objection and examine whether the same is acceptable or tenable.

(b) If on examining the representation made or objection raised by the borrower, the secured creditor is satisfied that there is a need to make any

changes or modifications in the demand notice, he shall modify the notice accordingly and serve a revised notice or pass such other suitable orders as

deemed necessary, within fifteen days from the date of receipt of the representation or objection.

(c) If on examining the representation made or objection raised, the Authorized Officer comes to the conclusion that such representation or objection

is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection, the reasons for non-acceptance of

the representation or objection, to the borrower.

3 Passage from CRAWFORD: Statutory Construction, p. 516

4 (zf) ""security interest"" means right, title or interest of any kind, other than those specified in section 31, upon property created in favour of any

secured creditor and includes-

(i) any mortgage, charge, hypothecation, assignment or any right, title or interest of any kind, on tangible asset, retained by the secured creditor as an

owner of the property, given on hire or financial lease or conditional sale or under any other contract which secures the obligation to pay any unpaid

portion of the purchase price of the asset or an obligation incurred or credit provided to enable the borrower to acquire the tangible asset; or

(ii) such right, title or interest in any intangible asset or assignment or licence of such intangible asset which secures the obligation to pay any unpaid

portion of the purchase price of the intangible asset or the obligation incurred or any credit provided to enable the borrower to acquire the intangible

asset or licence of intangible asset;

5 2 (l) ""financial asset"" means debt or receivables and includes-

(i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or

(iv) any right or interest in the security, whether fall or part underlying such debt or receivables; or

(v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing,

conditional or contingent;

or

(vi)x x x

6 13(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by

the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer

had been made by the owner of such secured asset.