

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 14th OCTOBER, 2022

IN THE MATTER OF:

+ **W.P.(C) 1122/2021& CM APPL. 3147/2021, CM APPL. 36355/2021CM APPL. 46482/2021**

M/S M. SONS GEMS N JEWELLERY PRIVATE LIMITED &
ORS Appellants

Through: Mr. Anuj Jain, Mr. S.S. Jain,
Advocates with the Petitioner in
person.

versus

RESERVE BANK OF INDIA & ORS Respondents

Through: Mr. Ramesh Babu, Ms. Manisha
Singh, Ms. Jagriti Bharti, Ms. Tanya
Chowdhary, Advocates for RBI

Mr. Anil Soni, CGSC for Union of
India

Ms. Usha Singh, Advocate for R-
3&R-4

Mr. Tushar Sannu, Standing Counsel
for MCD

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD

JUDGMENT

SUBRAMONIUM PRASAD, J

1. The Petitioners have filed the instant writ petition praying for the following reliefs:

"1. Issue an appropriate Writ striking down Chapter II of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for not providing an avenue of judicial redress against ARCs who have defaulted in their statutory obligations including for borrowers, the petitioners herein;

Alternatively, issue a Writ of Mandamus to the Reserve Bank of India to exercise its powers under Section 12 of the SARFAESI Act (mandating RBI to work in. the public interest and to regulate the financial system of the country) to provide legal remedies to the borrowers for the purposes of enforcement of provisions of Chapter II of the Act in its letter and spirit;

Further alternatively, issue a Writ of Mandamus to the Union of India to exercise its powers under Section 38(1) of the SARFAESI Act (mandating central government to make rules for carrying .out the provisions of the Act) to provide legal remedies to the borrowers for the purposes of enforcement of provisions of Chapter II of the Act in its letter and spirit;

2. Issue a Writ of Mandamus directing the Reserve Bank of India to amend Securitization Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 to make provisions in it to the effect that defaulting ARC companies including RARC respondent herein, shall not be entitled to proceed as per provisions of SARFAESI Act and shall lose their rights to enforce security under provisions of SARFAESI Act;

3. Issue appropriate writ of mandamus directing Reserve

Bank of India to take appropriate decision as per law on the representation dated 9.10.2020 for recalling the certificate of registration of respondent RARC to carry on business of Securitization and Asset Reconstruction within the meaning of SARFAESI Act;

4. Issue an appropriate Writ restraining/prohibiting the RARC/respondent from proceeding any further under the provisions of SARFAESI Act against the Petitioners and/or their only aforesaid residential house bearing H. No. 84, Bharat Nagar, New Friends Colony, New Delhi."

2. Shorn of details, the facts leading to the instant writ petition are as under:

- i. The State Bank of Bikaner and Jaipur (*hereinafter referred to as 'SBBJ'*) granted cash credit (hypothecation) to the Petitioners with a limit to the sum of Rs. 10 crores and a sub-limit of Rs.4 crores on 24.11.2009. The Petitioners were also granted Bank Guarantee loan of Rs.5crores.
- ii. The Petitioners in order to secure the cash credit (hypothecation) and the Bank Guarantee granted by SBBJ gave an equity mortgage of two properties which are as under:
 - a) Ground Floor, first floor, second floor, third floor of No. 84, Bharat Nagar, Opposite D-Block, New Friends Colony, New Delhi (Bharat Nagar Property). It is stated by the Petitioners that the mortgage of the second floor of the said property was subject to the tenancy rights of the tenant since the year 2000.
 - b) K-47A, Lajpat Nagar-II, New Delhi (Lajpat Nagar Property)

- iii. It is stated that Laxmi Vilas Bank (*hereinafter referred to as 'LVB'*) i.e., Respondent No.5 herein, gave cash credit (hypothecation) to the Petitioners with a limit for the sum of Rs.5 crores and sub-limit of Rs.2 crores. The Bank Guarantee for the sum of Rs.10 crore was also given to the Petitioners and the abovementioned two properties i.e. Bharat Nagar and Lajpat Nagar property were made by the Petitioners by way of *pari passu* to secure the said amount.
- iv. The cash credit (hypothecation) was enhanced by SBBJ to Rs.10 crores with sub-limit of Rs.4 crores and Bank Guarantee was enhanced to Rs.10 crore.
- v. On account of a survey conducted by the Income Tax Department, the bank accounts of the Petitioners were frozen. The loan accounts of the Petitioners were also frozen by the Income Tax Department. The Bank Guarantees issued by LVB were removed by MMTC Ltd. and the accounts of the Petitioners were categorised as Non-Performing Assets (NPA) by SBBJ.
- vi. Notices under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*hereinafter referred to as 'SARFAESI Act'*) were issued by SBBJ and the LVB demanding outstanding amount of Rs.19.90 crores and Rs.14.94 crores respectively. It is stated that LVB also declared the accounts of the Petitioners as NPA.
- vii. It is stated that the Lajpat Nagar property of the Petitioners was sold for the sum of Rs.11 crore and on 31.07.2014, a one-time settlement (OTS) for the sum of Rs.10.60 crores was approved by

LVB. It is stated that out of Rs.10.60 crores the Petitioners paid Rs. 6.35crores by 31.10.2014 and outstanding amount of remained at Rs.4.25 crores.

- viii. It is stated that LVB filed an original application bearing O.A. No. 236/2015 before the Debt Recovery Tribunal (*hereinafter referred to as 'DRT'*) for recovery of Rs.13.41 crores.
 - ix. On 31.07.2015, LVB assigned the loan granted to the Petitioners to Reliance Asset Reconstruction Company (*hereinafter referred to as 'RARC'*) i.e., Respondent No.3 herein.
 - x. It is stated that the Petitioners approached the RARC for an OTS Scheme on 30.06.2016 and another OTS Scheme was proposed to RARC by the Petitioners on 03.07.2020.
 - xi. The OTS proposal of the Petitioners was rejected by RARC and the RARC issued a notice under Section 13(2) of the SARFAESI Act demanding of sum of Rs.39 crores.
 - xii. It is stated that the Petitioners sent a letter dated 12.10.2020 to the Reserve Bank of India i.e., Respondent No.1 herein, for cancellation of certificate of registration of RARC under Section 4 of the SARFAESI Act alleging that the provisions of the SARFAESI Act read with Securitisation Companies and Reconstruction Companies (Reserve Bank) Guidelines and Directions, 2003 (*hereinafter referred to as 'RBI Guidelines, 2003'*) have been violated. Stating that no action has been taken by the Reserve Bank of India, the Petitioners approached this Court by filing the instant writ petition.
3. It is the contention of the Petitioners that Chapter II of the SARFAESI Act and the RBI Guidelines, 2003 does not provide for any judicial remedy,

unlike the one provided under Chapter III of the SARFAESI Act, and in the absence of a judicial remedy, Chapter II of the SARFAESI Act deserves to be struck down.

4. Mr. Anuj Jain, learned counsel for the Petitioners, submits that Chapter II of the SARFAESI Act contained provisions for regulation of securitisation and reconstruction of financial assets of banks and financial institutions and there are no guidelines which have been formulated in order to ensure proper regulation by the Asset Reconstruction Companies (*hereinafter referred to as 'ARCs'*). He states that Section 9 of the SARFAESI Act read with Guideline 7 of the RBI Guidelines, 2003 provides for a strict timeline for realisation of the assets and this timeframe has been provided to ensure that the Asset Reconstruction Companies do not manipulate the process for realisation of assets in order to satisfy the outstanding loans. He states that majority of the Asset Reconstruction Companies do not follow the guidelines framed for this purpose and the RBI does practically nothing to ensure that the maximum value of assets is obtained.

5. Learned counsel for the Petitioners states that in the absence of a judicial remedy by the borrower complaining about the malpractices committed by the Asset Reconstruction Companies, Chapter II as a whole would become manifestly arbitrary for the reason that each Asset Reconstruction Company follows its own procedure which varies on a case-to-case basis and thereby puts borrowers at a distinct disadvantage. He states that Chapter II of the SARFAESI Act, therefore, falls foul of the principles enshrined under Articles 14, 19 and 21 of the Constitution of India inasmuch as the procedure adopted by the Asset Reconstruction Companies is not just, reasonable or fair and Chapter II of the SARFAESI Act is thus liable to be struck down.

6. It is further submitted by Mr. Jain that the appeal under Section 4(2) of the SARFAESI Act lies with the Central Government. He submits that the Central Government has a deep and penetrative influence over the working of the RBI by virtue of the Reserve Bank of India Act, 1934. The Central Government thus exercises great influence on the working of the RBI and the appeal under Section 4(2) of the SARFAESI Act should not be heard by the Central Government. He submits that this procedure is not fair as there is a factor of biasness and the same is in violation of Article 14 of the Constitution. He further submits that the term “Central Government” has not been defined in the entire Act or its Rules and the same is thus vague.

7. It is submitted by Mr. Jain that a lender’s liability has to be adjudicated by an independent agency for determining the rights of the parties, particularly so when the consequences of an Act defeat the civil rights of the parties. He relies upon the decision of the Hon’ble Supreme Court in L. Chandra Kumar v. Union of India, (1997) 3 SCC 261, in furtherance of this submission.

8. Learned counsel for the Petitioners submits that the only remedy available to the borrowers, is to approach the Debt Recovery Tribunal (*hereinafter referred to as ‘DRT’*) under Section 17 and 18 of the SARFAESI Act which only deals with the circumstances enumerated under Chapter III of the SARFAESI Act. He further states that Section 34 of the SARFAESI Act expressly ousts the jurisdiction of the Civil Court, and, therefore, there is a complete absence of any right to approach Courts in case of a flagrant violation of the procedure under Chapter 2 of the SARFAESI Act by the Asset Reconstruction Companies.

9. Mr. Ramesh Babu, learned Counsel for the RBI, submits that a borrower can raise objections under Section 17 of the SARFAESI Act

against a creditor or ARC before the DRT. The remedy under Section 17 of the SARFAESI Act is the appropriate and proper remedy to agitate any disputes with respect to proceedings initiated by a creditor or ARC and therefore the Petitioners have an alternative effective remedy available to them under the SARFAESI Act and the present writ petition is not maintainable.

10. Mr. Babu further submits that the Petitioners cannot call upon the High Court to direct the RBI to frame guidelines as the same is done in exercise of the Banking Regulation Act, 1949 and is a matter of policy.

11. It is further submitted by Mr. Babu that the RBI is a statutory authority constituted under Section 3 of the Reserve Bank of India Act, 1934 and has been made a statutory regulator of the ARCs under the SARFAESI Act and is commended with the responsibility of superintendence and control of the banking business in the country under the Banking Regulation Act, 1949. The RBI is empowered to determine policy and issue guidelines and directions to all or individual ARCs under Sections 3, 9, 10 and 12 of the SARFAESI Act and in exercise of these powers, the RBI issued the updated RBI Guidelines, 2003 *vide* notification dated 01.07.2015.

12. Mr. Babu further submits that in order to ensure transparency and fairness in the operation of businesses of an ARC, the RBI has devised and put in place the Fair Practice Code for Asset Reconstruction Companies (Fair Practice Code) by way of circular dated 16.07.2020. The Fair Practice Code must be mandatorily and strictly adhered to by ARCs and as per the same, all ARCs are required to constitute a Grievance Redressal Machinery within the organisation to ensure all genuine grievances are redressed promptly.

13. It is submitted by Mr. Babu that the representation dated 09.10.2020 submitted by the Petitioner was closed by the RBI taking into consideration the proceedings under SARFEASI Act and the Recovery of Debts Due to Bank and Financial Institution Act, 1993 (RDDBFI Act) that are pending adjudication between the parties and to prevent derailing of the proceedings before the DRT, New Delhi.

14. Mr. Babu submits that the constitutional validity of the provisions of the SARFAESI Act has been upheld by the Apex Court in Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311, wherein it was held that borrowers get a reasonably fair deal and opportunity to get their disputes adjudicated before the DRT. The instant petition which seeks to challenge the provisions of the SARFAESI is thus devoid of any merits.

15. Ms. Usha Singh, the learned Counsel for Respondent No. 3 submits that the RARC has proceeded against the Petitioners in accordance with the law laid down under the SARFAESI Act and the RBI 2003 Guidelines and it has not violated any provisions of law. Further, the RARC has complied with the Fair Practice Code by providing a Grievance Redressal Mechanism for borrowers, the details of which are displayed on the website of RARC and an aggrieved borrower can use this mechanism to lodge a complaint.

16. Heard learned counsels for the parties and perused the material on record.

17. The principal contention of the Petitioners is that absence of any judicial remedy by a borrower in case of a flagrant violation of the guidelines/provisions under Chapter II of the SARFAESI Act by an Asset Reconstruction Company renders the entire Chapter ultra vires the Constitution of India. He states that the right to a judicial remedy is a part of the basic structure and any enactment which provides for a duty to be

performed by the instrumentalities of the State must also prescribe the remedies in case of a violation/non-performance of such duty. The absence of a judicial remedy under any enactment makes the enactment liable to be struck down. The said contention lacks merit. Any action by an instrumentality of State is subject to judicial scrutiny under Article 226 of the Constitution of India. It is always open for any borrower to approach the High Court under Article 226 of the Constitution of India contending that the Reserve Bank of India is not exercising due and adequate control over any Asset Reconstruction Company and that the provisions of Chapter II of the SARFAESI Act is being violated.

18. Before proceeding to discuss the contention of the Petitioners regarding the absence of a judicial remedy, we find it pertinent to discuss the powers and the role of the Reserve Bank of India under the SARFAESI Act. Section 12 of the SARFAESI Act gives power to the Reserve Bank of India to determine policy and issue directions. Section 12 of the SARFAESI Act reads as under:

"12.Power of Reserve Bank to determine policy and issue directions.

(1) If the Reserve Bank is satisfied that in the public interest or to regulate financial system of the country to its advantage or to prevent the affairs of any [asset reconstruction company] from being conducted in a manner detrimental to the interest of investors or in any manner prejudicial to the interest of such [asset reconstruction company], it is necessary or expedient so to do, it may determine the policy and give directions to all or any [asset reconstruction company] in matters relating to income recognition, accounting standards, making provisions for bad and doubtful debts, capital adequacy based on risk weights for assets and also relating to deployment of funds by the [asset

reconstruction company], as the case may be, and such company shall be bound to follow the policy so determined and the directions so issued.

(2) Without prejudice to the generality of the power vested under sub-section (1), the Reserve Bank may give directions to any [asset reconstruction company] generally or to a class of [asset reconstruction companies] or to any [asset reconstruction company] in particular as to—

(a) the type of financial asset of a bank or financial institution which can be acquired and procedure for acquisition of such assets and valuation thereof;

(b) the aggregate value of financial assets which may be acquired by any [asset reconstruction company].

(c) the fee and other charges which may be charged or incurred for management of financial assets acquired by any asset reconstruction company;

(d) transfer of security receipts issued to qualified buyers.”

19. A reading of the aforesaid highlights that under the SARFAESI Act, powers have been given to the Reserve Bank of India to determine policy and issue directions to the Asset Reconstruction Companies to regulate their affairs. In fact, if the Asset Reconstruction Companies do not follow the guidelines, the Reserve Bank of India has been given power to revoke the certificate of registration granted to them under Section 4 of the SARFAESI Act.

20. For the purpose of Asset Reconstruction, which includes recovery of debts, the Reserve Bank of India has issued guidelines and directions in the form of RBI Guidelines, 2003 according to which the ARC must formulate a

plan for realisation of assets within the planning period i.e., within a period not exceeding 6 months from the date of acquisition of debt. The said formulation includes one or more of asset reconstruction measures i.e., rescheduling of payment of settlement of dues or enforcement of security interest or charge or take-over of management etc. The ARCs are required to formulate the policy for realization of financial assets, under which the period for realization shall not exceed 5 years from the date of acquisition. The Guidelines also provide that the policy shall be duly approved by the Board of Directors laying down the parameters for settlement of the debt acquired. The Board of Directors also have the power to extend the period of 5 years upto a maximum period of 8 years and shall specify the steps to be taken within 5 years and/or extended period of 8 years.

21. The RBI has also issued a “Fair Practices Code for Asset Reconstruction Companies” under Section 9 of the SARFAESI Act to increase fairness and transparency in the manner ARCs conduct their businesses. The Fair Practice Code calls for measures to enhance transparency in the process of sale of secured assets by publicly soliciting the invitation for participation in auction to enable maximum participation. It also states that the spirit of Section 29A of the Insolvency and Bankruptcy Code be followed in dealing with prospective buyers. The Code also calls for ARCs to put in place a Board approved outsourcing policy if they wish to outsource any of their activities, and the ARCs shall ensure that these outsourcing arrangements do not diminish the ARCs ability to fulfil its obligations to customers and the RBI and does not impede upon effective supervision by the RBI. It is also provided that in the matter of recovery of loans, ARCs do not resort to harassment of the debtor and their staff is adequately trained to deal with customers in an appropriate manner.

22. The contention of the Petitioners that that the scope of the remedy available under Section 17 of the SARFAESI Act is restricted only to disputes pertaining to Chapter III of the SARFAESI Act and it does not cover Chapter II of the SARFAESI Act cannot be accepted. The borrower is entitled to file an application under Section 17 of the SARFAESI Act challenging the actions of the Asset Reconstruction Company/Bank on the ground that it is not in accordance with the SARFAESI Act. At this juncture, it becomes expedient for this Court to discuss the scope of the remedy provided for under Section 17 of the SARFAESI Act. Section 17 of the SARFAESI Act is reproduced as under:

"17. 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, 1[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:—(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, 1[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\."
2[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.] 3[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.]³[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.]" 4[(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 subsection (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 subsection (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 subsection (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 thereunder.]"

23. The Hon'ble Supreme Court in the case of Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311, while dealing with a constitutional challenge to the validity of Section 17 of the SARFAESI Act recognised that the borrowers cannot be left remediless in case they have been wronged by a secured creditor, bank or financial institutions and that borrowers have a right to approach the DRT after measures are taken against the borrower under Section 13(4) of the SARFAESI Act and the same provides reasonable protection to the borrower. The relevant extracts from the decision are reproduced as under:

“80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debts Recovery Tribunal. The abovenoted provisions are for the purpose of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days' notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach

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

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debts Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

81. 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 NPAs 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)

24. The Apex Court in its decision in Indian Overseas Bank v. Ashok Saw Mill, (2009) 8 SCC 366, discussed the jurisdiction of DRT under Section 17 of the SARFAESI Act. The Court noted that certain checks and balances have been introduced through Section 17 of the SARFAESI Act in order to prevent misuse of the wide powers conferred upon banks and financial institutions under the SARFAESI Act. The Apex Court held that Section 17 of the SARFAESI Act permits the borrower, who is aggrieved by

measures taken against him under Section 13(4) to approach the DRT and the DRT has been vested with the power to declare any such action as invalid. It notes that Section 17(3) of the SARFAESI Act vests with the DRT, the authority to question the action taken by a secured creditor. The relevant paragraphs of the judgment delineating the same are reproduced as under:

“35. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof. 36. The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee. 37. The consequences of the authority vested in the DRT under sub-section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. The legislature by including sub-section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr Gopalan

and Mr Altaf Ahmed that the DRT has no jurisdiction to deal with a post-Section 13(4) situation, cannot be accepted.

39. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT. ” (emphasis supplied)

25. In United Bank of India v. Satyawati Tondon, (2010) 8 SCC 110, the Apex Court noted that the SARFAESI Act is a code in itself and the remedy provided under Section 17 is an expeditious and effective remedy available to an aggrieved person. In this regard, the Court stated as follows:

“42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 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 the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. 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 a 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, the 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.”

(emphasis supplied)

26. It is well settled that the remedy u/s 17(1) of the SARFAESI Act allows the borrower to challenge the actions of the secured creditor on all such grounds which would render the action of the secured creditor illegal. The DRT while exercising its powers under Section 17 of the SARFAESI Act is not restricted to the compliance of provisions of the Act alone and can get into violations of other provisions such as mandatory guidelines of RBI and other incidental questions.

27. The aforesaid decisions of the Hon'ble Supreme Court make it clear that a borrower aggrieved by the actions of the secured creditor can approach the DRT under Section 17 of the SARFAESI Act. The SARFAESI Act is a code in itself and the remedy provided for under Section 17 of the

SARFAESI Act is an expeditious and effective remedy available to borrowers and the same provides reasonable protection to the interest of the borrowers. The DRT under Section 17(3) of the SARFAESI Act has the power to examine whether the actions of the secured creditor are in accordance with the provisions of the SARFAESI Act and the rules made thereunder. The remedy under Section 17 of the SARFAESI Act is not restricted to Chapter III of the SARFAESI Act and the DRT has power to look into the compliance of the secured creditor with other provisions of law, and not just provisions of the SARFAESI Act and rules framed thereunder.

28. Chapter II of the SARFAESI Guidelines provides for a mechanism through which the RBI regulates the functioning of securitisation by banks, financial institutions and the securitisation companies. In pursuance of these statutory functions the RBI has framed the RBI Guidelines, 2003 and Fair Practice Code which have been discussed above. These Guidelines and Code regulate the functioning of the banks, financial institutions, securitisation companies and reconstruction companies involved in the process of securitisation of financial assets and the enforcement of security interests. These functions of regulation are within the exclusive domain of the RBI and a borrower cannot claim that his grievance with the actions of a secured creditor be adjudicated by the RBI under Chapter II of the SARFAESI Act. The borrower cannot approach the RBI, in its capacity as a regulatory body to adjudicate whether the actions of an ARC are in compliance with the SARFAESI Act. As stated above, the SARFAESI Act under Section 17 provides for an efficacious and efficient remedy to adjudicate the grievances of a borrower and the DRT has the power to determine whether the actions of an ARC are in compliance with the SARFAESI Act. Permitting a

borrower to approach the RBI to adjudicate such claims under Chapter II would be against the scheme of the SARFAESI Act.

29. The learned Counsel for the Petitioners has argued that Chapter II of the SARFAESI Act is manifestly arbitrary and has relied upon the decision of the Hon'ble Supreme Court in Shayara Bano (supra) to buttress this argument. The Court in the said decision has explained the test of manifest arbitrariness as follows:

“101. It will be noticed that a Constitution Bench of this Court in Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India [Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India, (1985) 1 SCC 641:1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14.”

30. The aforesaid decision defines the test of manifest arbitrariness as something done by the legislature capriciously, irrationally and/or without determining principle or something which is excessive and disproportionate. As has been discussed above, the SARFAESI Act provides for an

efficacious and expeditious remedy to borrowers under Section 17. The powers conferred upon the DRT under Section 17 are not restricted to Chapter II of the SARFAESI Act and the DRT has the power to assess whether the actions of the SARFAESI are in compliance with other provisions of the law as well. Further, the bar on jurisdiction of civil courts under Section 34 has been upheld by the Hon'ble Supreme Court in Mardia Chemicals Ltd. (supra) and the reason for providing "protection of actions taken under good faith" under Section 32 has been explained in Priyanka Srivastava v. State of U.P., (2015) 6 SCC 287 wherein the Hon'ble Supreme Court has discussed the intention of the legislature to provide for the same under the SARFAESI Act. The Court in the aforesaid decision was dealing with a case where the secured creditor had initiated action against the borrowers under Section 13(4) of the SARFAESI Act and in response the borrowers decided to initiate criminal action against the officials. The Court at the outset in the aforesaid decision noted how borrowers abuse the process of the Court to harass statutory authorities and create pressure on officials in order to settle disputes. The Court in its decision noted that the Parliament has made such a provision in its wisdom to protect the secured creditors and its officers so that such situations can be avoided.

31. The purpose of Chapter II of the SARFAESI Guidelines is to establish a mechanism through which the RBI shall regulate securitisation process by Banks, Financial Institutions and Securitisation Companies. It is in the performance of this statutory function that the RBI 2003 Guidelines and the Fair Practice Code have been published by the RBI. Further, as has been discussed hereinabove, the Petitioners cannot claim a remedy under Section 4 of the SARFAESI Act as the borrowers have an appropriate remedy available to them under Section 17 of the Act. The Petitioners have failed to

establish how the legislature has acted in a capricious or irrational manner or how any of these provisions are excessive or disproportionate. The provisions of the SARFAESI Act as a whole have been made to give effect to its purpose and object and the legislature has enacted the legislation on rational and determined principles.

32. In light of the foregoing, it is held that Chapter II of the SARFAESI Act is not manifestly arbitrary and is not in violation of Article 14 of the Constitution of India. Accordingly, the prayer of the Petitioners seeking a writ to strike down Chapter II of the SARFAESI Act is rejected.

33. The Petitioners herein have made an alternative prayer seeking a writ of mandamus to the RBI to exercise its powers under Section 12 of the SARFAESI Act to provide legal remedies to the borrowers for enforcement of provisions of Chapter II. The Petitioners have further alternatively prayed for a writ of mandamus to the Union of India to exercise its powers under Section 38(1) of the SARFEASI Act to provide legal remedies to the borrowers for enforcement of provisions of Chapter II. Additionally, the Petitioners have prayed for a writ of mandamus to the RBI to amend the RBI 2003 Guidelines to make provisions in it to the effect that defaulting ARCs shall not be entitled to proceed as per the provisions of SARFAESI Act and lose their right to enforce security interest under the SARFAESI Act. With regards to these alternate prayers made by the Petitioners, it is suffice to say that this Court does not have any power to direct the Legislature or the Executive to perform a legislative function as such a direction would be in conflict with the doctrine of separation of powers.

34. It has been brought to the notice of this Court that Petitioners have already approached the DRT by raising objections regarding the modus adopted by Respondent No.3/RARC for sale of the property. This Court is not

going into those issues at this juncture. It is left to the Petitioners and Respondent No.3 to raise all the contentions available to them before the DRT. It is also stated by learned counsel for the Petitioners that representations are pending before the RBI. It is always open for the RBI to consider and decide the representation and pass appropriate orders in accordance with law even when the Petitioners have already approached the DRT.

35. The petition is disposed of with the above observations. Pending applications, if any, stand disposed of.

SATISH CHANDRA SHARMA, CJ

SUBRAMONIUM PRASAD, J

OCTOBER 14, 2022

hsk.

