Itc Limited vs Blue Coast Hotels Ltd. . on 19 March, 2018

Equivalent citations: AIR 2018 SUPREME COURT 3063, (2018) 1 ORISSA LR 935, (2018) 141 REVDEC 203, AIR 2018 SC (CIV) 2563, (2018) 2 RECCIVR 646, (2018) 4 MAD LW 492, (2018) 4 MPLJ 104, (2018) 2 PUN LR 583, (2018) 6 MAH LJ 42, (2018) 4 SCALE 628, (2018) 4 BOM CR 111, (2018) 187 ALLINDCAS 70 (SC), (2018) 126 CUT LT 705, (2018) 2 CURCC 46, 2018 (15) SCC 99, 247 (2018) DLT 1 (CN)(DEL), 2018 (4) KCCR SN 453 (SC)

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Bench: L. Nageswara Rao, S.A. Bobde

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL Nos. 2928-2930 OF 2018
[Arising out of SLP (C) Nos. 10215-10217/2016]

ITC LIMITED …. APPELLANT

VERSUS

BLUE COAST HOTELS LTD. & ORS. ….RESPONDENTS

WITH

CIVIL APPEAL Nos. 2931-2933 OF 2018
[Arising out of SLP (C) Nos. 10196-10198/2016]

JUDGMENT

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 1 of the Bombay High Court in favour of the debtor Blue Coast Hotels Ltd.

Dated 23.03.2016

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 agreement2 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) 3.

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 notice4 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.

Dated 26.02.2010 w.e.f. 30.09.2012 Dated 26.03.2013

5. In reply to the said notice, the debtor sent the creditor a proposal5 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 6 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 7 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. Dated 27.05.2013 Dated 31.07.2013 On 04.09.2013 The DRT passed an interim order,8 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)9 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 10 in the DRAT which came to be allowed11 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.

Vide order dated 6.02.2014 Vide order dated 26. 03.2013 Vide order dated 31.03.2014 Vide order dated 10.09.2014 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 letter12 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 13 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 DRT14 passed an Dated 19.09.2013 Dated 31.07.2013 Vide order dated 06.02.2014 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 Court15 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 Vide order dated 11.11.2014

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.16
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> (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. 17
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> (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.
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> (ii) That a portion of the land mortgaged by the debtor as security interest consisted of agricultural land to which the Order dated 10.09.2014 Order dated 26.02.2015 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 Act18.

13. Enforcement of security interest

20. The Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as 'the Rules') framed under the Act19 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, (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;

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.

(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).....

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.

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 Mardia20 Chemicals:

> (2004) 4 SCC 311 "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." (emphasis supplied)

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." 21 This has been followed in several decisions of the Supreme Court22. Subbarao, J. in State of U.P. v. Babu Ram Upadhya23 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 Passage from CRAWFORD: Statutory Construction, p. 516 State of U.P.v. Manbodhan Lal

Shrivastava, AIR 1957 SC 912, p. 918: 1958 SCR 533; State of U.P. v. Baburam, Upadhya, AIR 1961 SC 751, p. 765 : (1961) 2 SCR 679; Article 143 of the Constitution of India, In the matter of, supra, p. 769; State of Mysore v. V.K. Kangan, AIR 1975 SC 2190, p. 2192: (1976) 2 SCC 895; Govindlal Chhagan-lal Patel v. Agriculture Produce Market Committee, AIR 1976 SC 263, p. 267 : (1976) 1 SCC 369; Ganesh Prasad Sah Kesari v. Lakshmi Narayan, (1985) 3 SCC 53, pp. 59, 60 : AIR 1985 SC 964; B.P. Khemka Pvt. Ltd. v. Birendra Kumar Bhowmik, (1987) 2 SCC 407, p. 415 : AIR 1987 SC 1010; Owners and Parties interested in M.V. "Vali Pero" v. Fernandes Lopez, AIR 1989 SC 2206, p. 2213 : (1989) 4 SCC 671; State of M.P. v. Pradeep Kumar, (2000) 7 SCC 372, p. 377 : (2000) 10 JT 349; Sarla Goel v. Krishanchand, (2009) 7 SCC 658 pp. 668, 669 para 30 : (2009) 9 JT 21.

AIR 1961 SC 751 the other; the impact of other provisions whereby the necessity of complying with the provisions in question is avoided; the cir- cumstances, 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 imperative24.

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 State of U.P. v. Manbodhan Lal Shrivastava, AIR 1957 SC 912, p. 917 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 25, Transcore v. Union of India 26 and Keshavlal Khemchand & Sons (P) Ltd. v. Union of India 27.

(2004) 4 SCC 311 (para 45, 47, 77 and 80) (2008) 1 SCC 125 (para 24 and 25) (2015) 4 SCC 770 (para 19 and 61) We also approve of the view of several High Courts in this regard28.

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 29, 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 Kiran Devi Bansal v. DGM SIDBI, AIR 2009 Guj 100 (DB)(para 9 and 10); Clarity Gold Pvt.

Ltd. v. State Bank of India, AIR 2011 Bom. 42 (DB)(para 11, 12 and 13); Vinay Container Services Pvt. Ltd. v. Axis Bank, 2011 (1) Mh. L.J. 882 (para 6); Krushna Chandra Sahoo v. Bank of India, AIR 2009 Orissa 35 (para 6 and 7); Tensile Steel Ltd. & Anr. v. Punjab and Sind Bank & Ors., AIR 2007 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, AIR 2013 Jhar 12 (para 5, 9, 20, 22, 23 and 24); Mrs. Sunanda Kumari v. Standard Chartered Bank, (2007) 135 Comp Cases 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 GLT (91) (para 25 and 28); Malabar Sand and Stones (Pvt.) Ltd. v. Catholic Syrian Bank Ltd. & Ors., AIR 2013 Ker 25 (para 7, 8, 9 and 10).

Dated 27.05.2013 (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 notice30 under Section 13(2) and after the debtor's letter of representation31. 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 32" 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 letter33 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 Dated 26.03.2013 Dated 27.05.2013 On 25.11.2013 Dated 25.11.2013 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's34 case 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 35 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:
>
> Spencer v. Hemmerde [1922] 2 AC 507, HL at 526 Bradford and Bingley vs. Rashid [2006] "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) 36. 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 (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; 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 37 that deals with the mortgage in question in the relevant clause38 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." Dated 26.02.2010 Clause 2.1, part b 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. 39. 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 (2002) 4 SCC 275 monies due to the banks and financial

institutions can be recovered." In State Bank of India v. Santosh Gupta and Ors. 40 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 41 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.

AIR 2017 SC 25 AIR 1957 SC 297

44. In 'Commissioner of Wealth Tax, Andhra Pradesh v.

Officer-in-Charge (Court of Wards) Paigah 42, 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." (emphasis supplied) Similarly, in the case of Kunjukutty Saheb v. State of Kerala 43, 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 (1976) 3 SCC 864 (1972) 2 SCC 364 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.Narasimhaswami44 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 AIR 1966 SC 470 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)45 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) 46.

Sub-section (6) of Section 1347 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 Act48:-

> 2(L) SARFAESI Act 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 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. 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 Aziz49 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 Abdul Aziz v. Appayasami (1904) ILR 27 Mad 131, 31 IA 1.

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 50. 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 Dated 25.02.2015 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. Digambar51 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 (1995) 4 SCC 683 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. Hurd52, 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.

.....J. [S.A. BOBDE] .....J. [L. NAGESWARA RAO]
NEW DELHI MARCH 19, 2018 (1874) 5 PC 221