Sashi Agro Food (P) Ltd. vs Andhra Bank, Ssi Branch And Anr. on 31 December, 2007

Equivalent citations: 2008(2)ALD536

ORDER

P.S. Narayana, J.

1. Heard Sri S. Rajan, learned Counsel representing the writ petitioner, Sri Dr. K. Lakshmi Narasimha, learned Counsel representing the 1st respondent and Sri S. Niranjan Reddy, learned Counsel representing the 2nd respondent.

2. On 31.7.2007, this Court made the following order:

> Heard the learned Counsel for the petitioner. There is no representation for the respondents. Post on 2.8.2007 in the Motion List. Till then, there shall be a direction to the respondents not to take any coercive steps against the petitioner pursuant to the impugned order.
>
> Subsequent thereto, a counter-affidavit was filed on behalf of the respondents and the interim order granted is being extended from time to time.

3. This Court issued Rule Nisi on 25.10.2007.

4. The writ petition is filed for a writ of mandamus or any other appropriate writ declaring the action of the 2nd respondent in resorting to action under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the Act' for the purpose of convenience) and consequential issuance of warrant dated 7.7.2007 in Crl. MP. No. 13963 of 2007 by the Chief Metropolitan Magistrate, Visakhapatnam being violative of law, principles of natural justice and also Article 300-A of the Constitution of India, and consequently direct the 2nd respondent not to interfere with the possession of the petitioner's properties, which were given as security to the 2nd respondent, otherwise than by due process of law.

5. Sri R. Rajan, learned Counsel representing the writ petitioner had taken this Court through Sections 13 and 5 of the Act and would submit that Section 5(4) of the Act cannot be made applicable to this case since the other proceeding referred to in Section 5(4) of the Act and a notice under Section 13(2) of the Act would not fall within the meaning of the proceeding. The learned Counsel also would submit that though the maintainability of the writ petition also had been taken as a ground of attack since the said objection is not being canvassed by the Counsel representing the

respondents elaborate submissions on that aspect need not be made. The learned Counsel also would submit that the very claim is barred by Article 137 of the Limitation Act, 1963 and in the facts and circumstances the writ petitioner cannot invoke the alterative remedy under Section 17 of the Act and hence the writ petition as such is maintainable and the same cannot be thrown out on the ground of availability of the alternative remedy. The learned Counsel had taken this Court through the contents of the affidavit filed in support of the writ petition and would maintain that in the light of the subsequent payments which were made it may have to be taken that there was fresh cause of action and at any rate the further proceedings cannot be continued on the strength of the proceedings initiated by the 1 st respondent that too after a long lapse of time, by the 2nd respondent. Hence viewed from any angle, the writ petitioner is bound to succeed.

6. Sri Dr. Lakshmi Narayana, the Counsel representing the 1st respondent had pointed out to the stand taken by the 2nd respondent and would maintain that in the light of the different provisions of the Act, the 2nd respondent is entitled to continue the proceedings to their logical end and this writ petition as such cannot be maintained in the facts and circumstances of the case.

7. Sri S. Niranjan Reddy, the learned Counsel representing the 2nd respondent had taken this Court through Sections 13(2) and 4 of the Act. The learned Counsel in all fairness would submit that no doubt after the issuance of the notice under Section 13(2) of the Act by the 1st respondent, certain payments were made. The learned Counsel also pointed out that the Memorandum of Understanding had been entered into and the same specifically provides for recovery of amounts and conditions of default, the petitioner having entered into such Memorandum of Understanding (MOU) with the 2nd respondent now cannot contend otherwise that the 2nd respondent has no authority to further proceed with the matter. The issuance of notice on the ground of Non-Performing Asset (NPA) itself being the cause of action and in the light of the specific language of Section 5(4) of the Act read along with Section 5(3) of the Act, there is absolutely no illegality in further proceeding with the matter. With regard to the question of applicability of Article 137 of the Limitation Act, 1963 on the ground of delay, these aspects are not applicable to the facts and circumstances of the present case. The learned Counsel placed a strong reliance in Transcore v. Union of India and Anr. .

8. Heard the learned Counsel representing the parties and perused the records.

9. Sashi Agro Food (P) Limited represented by its Managing Director, the writ petitioner, filed the present writ petition being aggrieved by the issuance of warrant dated 7.7.2007 in Crl. M.P. No. 13963 of 2007 by the Chief Metropolitan Magistrate, Visakhapatnam. The 1st respondent is Andhra Bank, SSI Branch, Galjuwaka and the 2nd respondent is M/s. Asset Reconstruction Company (India) Limited represented by its Special Power of Attorney Holder.

10. The petitioner-company is engaged in food processing business and was set up during 1997 in the Special Economic Zone (SEZ), Visakhapatnam with employees around hundred permanent workmen. The petitioner-company availed loans to a tune of Rs. 1.61 crores from time to time during 1998 to 2002 for various purposes and also had given immovable property securities to the 1st respondent for the repayment of the loans. The petitioner has been prompt in its repayment for a

considerable period, and so far, approximately a sum of Rs. 1.10 crores has been paid to the 1st respondent.

11. However, on account of the market conditions and the drop in the volume of business, the petitioner could not make the balance payment and the 1st respondent declared the assets of the petitioner-company as a Non-Performing Asset (NPA) on 31.3.2003 and conveyed the same to the petitioner during September 2003. Further, it was informed by the I st respondent that a sum of Rs. 1.61 crores was outstanding as on 31.3.2003.

12. The 1st respondent issued a notice under Section 13(2) of the Act calling upon the petitioner to discharge a sum of Rs. 1,45,00,000/- towards the outstanding liability. The petitioner made several representations to the 1st respondent explaining about their difficult financial situation and sought for extension of time to discharge the loan but the same was without any avail. Further, it is stated that during September 2004, the 1st respondent appears to have assigned the debt payable by the petitioner in favour of the 2nd respondent and on the strength of the same, the 2nd respondent approached the petitioner for discharge of the outstanding dues payable to the 1st respondent. Subsequent thereto, discussions were held between the petitioner and the Power of Attorney Holder of the 2nd respondent i.e., M/s. APTICO Limited and a Memorandum of Understanding was reached on 21.4.2005, according to which, the petitioner agreed to pay and the 2nd respondent agreed to receive a sum of eighty seven lakhs in full and final settlement and further agreed to waive all the balance provided that the petitioner paid the said amounts as per the schedule agreed to thereunder. A copy of the said Memorandum of Understanding had been produced before this Court.

13. In pursuance of the aforesaid MOU, the petitioner paid a sum of Rs. 15,00,000/- on 21.4.2005 to the 2nd respondent. Insofar as the balance amount is concerned, the petitioner has been requesting the 2nd respondent to extend the time. Even during the personal discussions, the petitioner was given to understand by the 2nd respondent that they would consider the said request provided, the petitioner came up with a realistic schedule of repayment. While the mutual discussions as above were on and the petitioner has been trying to mobilise the resources for discharge of the debt, the 2nd respondent appears to have approached the Chief Metropolitan Magistrate, Visakhapatam under Section 14(1) of the Act for possession of the property securities and a warrant has also been issued to the bailiff by the said Court on 7.7.2007 in Crl. M.P. No. 13963 of 2007 with a further permission to arrest the obstructers with police aid as well as break open the locks. Coming to know of the same, he had approached the 2nd respondent's-Power of Attorney Holder Company to enquire about the same. Their officials though had agreed to consider the revival of MOU, if the petitioner came up with a realistic and substantial offer, which the petitioner is in the process of considering insofar as the warrant is concerned they expressed their inability since it is in the realm of the Court.

14. Neither the 2nd respondent nor its Special Power of Attorney Holder i.e., M/s. APITCO issued any notice to the petitioner as contemplated under Section 13(2) of the Act before invoking the provisions under Section 14 of the Act. Moreover, even the Magistrate, before issuing the warrant, did not even issue any notice to the petitioner. Specific stand had been taken that the issuance of

notice by the 2nd respondent-Company under Section 13(2) of the Act is sine qua non before invoking Section 14 of the Act. Further, since the warrant contemplated under Section 14 of the Act being a judicial order, the same cannot be issued for mere asking and notice should have been issued to the petitioner and an opportunity given before making such order. More so, in view of the MOU entered into between the parties and also in the light of the subsequent payments made and the discussions, which had taken place between the parities in such circumstances, it is stated that the petitioner left with no other alternative but to invoke the extraordinary jurisdiction of this Court.

15. W.V.M.P. No. 1910 of 2007 had been filed praying for the vacation of the interim order and by making submissions, the Counsel on record made a request for the final disposal of the writ petition and thus with the consent of the parties this writ petition is being disposed of finally.

16. In the counter-affidavit filed by the respondent No. 2, specific stand had been taken that the writ petition is not maintainable. But however, the learned Counsel representing the 2nd respondent made a submission before this Court that the 2nd respondent is not serious relating to the said question, and had not advanced any elaborate submissions in this regard. However, it is averred in Para No. 5 of the counter-affidavit that the 2nd respondent is an Asset Reconstruction Company constituted under the Act. In the course of its business, the 2nd respondent had acquired financial asset of the 1st respondent (Andhra Bank) concerning the petitioner company under a Deed of Assignment Agreement dated 29.9.2004. The said assignment is in terms of Section 5 of the Act. The 2nd respondent has thus become the absolute owner of the said financial asset. The 2nd respondent appointed APITCO (constituted attorney) as its agent for the purpose of making realizations/recoveries from/out of the assets and executed a Power of Attorney in favour of APITCO to facilitate attorney it to carry out and/or execute all powers of 2nd respondent-ARCIL for the purpose of making realizations/recoveries from/out of the assets assigned to it. Further, it is stated that neither the 2nd respondent (ARCIL) nor its agent (APITCO) can be termed as a State within the meaning of Article 12 of the Constitution of India nor any other authority for the purposes of Article 226 of the Constitution of India. The constitution, continuance and the regulations of the answering respondent are not by any statutory instruments. All the actions of the answering respondent occur purely in the private contractual sphere. The writ petition cannot therefore be against the actions of the answering respondent.

17. It is also averred that in pursuance of the provisions of Section 5 of the Act, the answering respondent acquired rights and interest in the financial asset of the 1st respondent pertaining to the petitioner together with underlying securities. Specific stand had been taken that the petitioner is having an effective alternative remedy before the Debts Recovery Tribunal. It is also averred that pursuant to various documents and agreements executed by the petitioner, the 1st respondent had disbursed loans aggregating to a principal sum of Rs. 91.60 lakhs to the petitioner and against that an outstanding of Rs. 2,66,04, 766.00 as on 31.7.2007 is liable to be paid by the petitioner. As the said amounts were not repaid, the 1st respondent was constrained to file OA No. 172 of 2004 before the DRT, Visakhapatnam for recovery of amounts due to it.

18. Subsequent to the filing of the O.A, the 1st respondent issued a notice under Section 13(2) of the Act to the petitioner and the 8th respondent calling upon them to discharge the liabilities due to it.

Thereafter and in pursuance of the provisions of the Act, the 1st respondent entered into an assignment agreement dated 29.9.2004 with the 2nd respondent, a Secuiritization and Reconstruction company registered under the Act and upon the terms and conditions set forth thereat, became the true legal and beneficial owner of all the loan incidents. The 1st respondent unconditionally and irrevocably sold, assigned, transferred and released unto the 2nd respondent the loan with the underlying security interests including the original charge and all the modification thereto and all its rights, title and interests in the loan.

19. Thus, the 2nd respondent became the full and absolute legal owner and the only person legally entitled to the loan and the underlined security and is entitled to recover, and receive all amounts due from the borrower under the loan including the right to file suits or institute such other recovery proceedings or take any other action as may be required for the purpose of recovery of the loan in its own name and right as an assignee and to exercise all other rights of 1st respondent in relation thereto.

20. In view of the provisions of the agreement and the Act referred to supra, the 2nd respondent steps into the shoes of the 1st respondent and is entitled in law to continue the recovery proceedings against the petitioner. The impugned action initiated by the 2nd respondent is only in continuation of the proceedings initiated by the 1st respondent. The 2nd respondent also has taken a specific stand that the 1st respondent invoked the provisions of the Act causing demand notice under Section 13(2) of the Act, dated 4.3.2004 and making a demand of the amount within 60 days from the date of the notice. Since the petitioner failed to adhere to the said notice, the 1st respondent was constrained to issue possession notice under Section 13(4) of the Act. Further, specific stand has been taken that the petitioner approached the 2nd respondent and after several discussions with the 2nd respondent, entered into a Memorandum of Understanding dated 21.4.2005, wherein the petitioner agreed to pay an amount of Rs.87 lakhs towards full and final settlement on or before 31st July, 2005 and in the event of default, the 2nd respondent shall be at liberty to recover the entire outstanding amount.

21. Further, it is averred in Para No. 19 that it is true that the petitioner paid an amount of Rs. 15,00,000/- in terms of the Memorandum of Understanding. Thereafter, the petitioner failed to adhere to the terms of the Memorandum of Understanding and failed to deposit the balance amount as agreed. The petitioner agreed to pay the balance amount on or before 31.7.2005 but the petitioner failed to adhere to the condition, and hence, the 2nd respondent was constrained to invoke the provisions of the Act, by filling an application under Section 14 of the Act and certain particulars in this regard had been furnished in Para No. 19.

22. In Para No. 20 of the counter-affidavit, it is averred that it is true that the petitioner approached this respondent after invoking the provisions under Section 14 of the Act. The petitioner expressed his willingness to pay the balance consideration in terms of the Memorandum of Understanding, and as the same was not acceptable, the answering respondent/agent rejected the plea of the petitioner. It is incorrect to say that the answering respondent/ agent agreed to consider the revival of the Memorandum of Understanding, if the petitioner has been served with a substantial offer. It is further stated that the petitioner has been served with Section 13(2) Notice under the Act by the

1st respondent, and hence, no further notice need be issued under Section 5(4) of the Act provides that where any suit, appeal or other proceedings of whatever nature relating to the said financial asset is pending by or against the bank or financial institution the same shall be continued, prosecuted and enforced by the Securitisation Company.

23. In view of the provisions of the agreement and the Act referred to supra, the 2nd respondent herein steps into the shoes of the 1st respondent and is entitled in law to continue the recovery proceedings. The writ petition is devoid of merits and hence the same is liable to be dismissed. This is a stand taken by the 2nd respondent in the counter-affidavit.

24. As seen from the respective stands taken by the parties, the following essential facts appear to be not in serious controversy between the parties. The fact that the petitioner obtained a loan from the 1 st respondent is not in dispute and the fact that the assets of the petitioner-company were declared as Non-Performing Assets (NPA) during 31.3.2003 also is not in serious controversy. The issuance of notice by the 1st respondent-banking institution under Section 13(2) of the Act also is not in dispute. The fact of assignment of all the assets to the 2nd respondent by the 1st respondent and the petitioner entering into a Memorandum of Understanding with the 2nd respondent and making payment of Rs. 15,00,000/- on 21.4.2005 by the petitioner these aspects also are not in serious controversy.

25. Section 13 of the Act deals with endorsement and security interest and Section 13(2) of the Act reads as hereunder:

> 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 installment 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).

26. Section 13(4) of the Act, which may also be relevant reads as hereunder:

> 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 realizing the secured asset;
>
> (b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

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

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

27. Section 14 of the Act dealing with Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured assets reads hereunder:

Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him-

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor.

(2) For the purposes of securing compliance with the provisions of Sub-section (1) the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any Court or before any authority.

28. Section 5 of the Act deals with acquisition of rights or interest in financial assets. Section 5(3) of the Act reads as hereunder:

Unless otherwise expressly provided by this Act, all contracts, deeds, bonds, agreements, powers-of-attorney, grants of legal representation, permissions, approvals, consents or no objections under any law or otherwise and other instruments of whatever nature which relate to the said financial asset and which are subsisting or having effect immediately before the acquisition of financial asset under Sub-section (1) and to which the concerned bank or financial institution is a party or which are in favour of such bank or financial institution shall, after the acquisition of

> the financial assets, be of as full force and effect against or in favour of the securitisation company or reconstruction company, as the case may be, had been a party thereto or as if they had been issued in favour of securitisation company or reconstruction company, as the case may be.

29. Section 5(4) of the Act reads as hereunder:

> If, on the date of acquisition of financial asset under Sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution, save as provided in the third proviso to Sub-section (1) of Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 (1 of 1986), the same shall not abate, or be discontinued or be, in any way, prejudicially affected by reason of the acquisition of financial asset by the securitisation company or reconstruction company, as the case may be, but the suit, appeal or other proceeding may be continued prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be.

30. The words "if, on the date of acquisition of financial asset under Sub-section (1), any suit, appeal or other proceeding of whatever nature relating to the said financial asset is pending by or against the bank or financial institution" and also the words "but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the securitisation company or reconstruction company, as the case may be" would assume some importance.

31. Submissions at length were made that the word "proceeding" in Sub-section (4) of Section 5 of the Act specified above would include a notice issued under Section 13(2) of the Act and hence no further notice need be issued again in this regard and the 2nd respondent is entitled to continue the proceedings further in pursuance of the proceedings already initiated by the 1st respondent against the petitioner.

32. Strong reliance was placed on Transcore v. Union of India and Anr. (supra), wherein the Apex Court observed at Para Nos. 20, 21, 22, 23 and 24 as hereunder:

> Section 2(b) defines "asset reconstruction" to mean acquisition by any securitisation company or reconstruction company of any right or interest of any bank or financial institution in any financial assistance for the purpose of realization of such financial assistance. Section 2(f) defines the word "borrower" to mean the principal borrower who is granted financial assistance by any bank or FI and includes as guarantor, a mortgagor as well as a pledgor. It is also includes a person who becomes a borrower of an asset reconstruction company consequent upon acquisition by it of the rights or interest of any bank or FI in relation to financial assistance. The word "debt" is also defined under Section 2(ha) to mean the debt as defined under the DRT Act. Section 2(K) defines "financial assistance" to mean any loan or advance or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any bank or FI. Therefore, asset reconstruction means

acquisition by asset reconstruction company or asset management company of any right or interest created in favour of any bank or FI in any loan or advance granted or created in any debentures or bonds subscribed or guarantee given to the bank or FI or rights created in favour of the bank or FI under letters of credit. This shows that the NPA Act basically deals with a crystallized liability. The NPA Act proceeds on the basis that the asset is created in favour of the bank/FI which could be assigned to the asset management company or asset reconstruction company which, in turn, steps into the shoes of the secured creditor, namely the bank/FI. Section 2(1) defines "financial asset" to mean any debt or receivables. It includes a claim to any debt or receivables which may be secured or unsecured. It includes a mortgage, charge, hypothecation or pledge. It includes any right or interest in the security underlying such debt or receivables. It includes any beneficial interest in the property. It also includes any financial assistance. Section 2(n) defines hypothecation to mean a charge created by a borrower in favour of a secured creditor as a security for financial assistance. Section 2(o) defines non-performing asset to mean an asset or account of a borrower which has been classified by a bank or FI as sub-standard, doubtful or loss asset. Section 2(r) defines the word "originator" to mean the owner of a financial asset which is acquired by a reconstruction company or asset management company for the purposes of the NPA Act. Similarly, an obligor is defined under Section 2(q) to mean a person who is liable to the originator. A borrower is an obligor whereas a secured creditor, namely, a bank or FI is the originator who is the owner of a financial asset. This section also indicates that banks/FIs. are the owners of the financial assets. It is only when these assets in the hands of the bank or FI becomes sub-standard, doubtful or loss then the account or the asset becomes classifiable as non-performing asset and it is only then the NPA Act comes into operation. Section 2(z) defines securitisation to mean acquisition of financial assets by any asset reconstruction company from any originator (bank/FI). Section 2(zc) defines secured asset to mean the property on which security interest is created. Section 2(zd) defines secured creditor to mean any bank or FI. Section 2(ze) defines a secured debt to mean a debt which is secured by any security interest. Section (zf) defines security interest to mean right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation and assignment. Section 31 of the NPA Act excludes certain items of security interest from the provisions of the NPA Act.

Section 5 of the NPA Act deals with acquisition or rights or interest in financial assets by securitisation company or reconstruction company. Section 5A was introduced by Act 30 of 2004. It says that, if any financial asset, of a borrower is acquired by a securitisation company or reconstruction company and if such financial asset comprise of secured debts of more than one bank or FI for recovery of which such banks or FIs. has filed applications before two or more DRTs. Then the securitisation company or reconstruction company may file an application to the DRT having jurisdiction for transfer of all pending applications to any one of the several DRTs. as it deems fit. Section 5A gives a clue as to the cases in which leave is required to be

obtained from DRT by banks/FIs. before invoking the NPA Act. Section 5A indicates matters which attract the first proviso to Section 19(1) of DRT Act. Section 6 of the NPA Act inter alia states that the bank or FI may, if it considers appropriate, give a notice of acquisition of financial assets by any securitisation company or reconstruction company to the borrower and to any other concerned person. This is also an enabling provisioa The bank/ FI may or may not give notice to the borrower regarding acquisition of financial assets. The reason is that assets are transferable overnight. In certain cases, the bank/FI may feel that a third party right may be created by the borrower, in which event, the bank/FI may not give notice of acquisition. In other cases, it may give such notice if it is satisfied that the financial asset is not likely to be disposed of or alienated by the borrower. The point to be noted is that the scheme of NPA Act, whose constitutional validity is already upheld, provides for various enabling provisions. It gives discretion to the bank /FI to take steps in order to protect its assets from being alienated, transferred or disposed of in any other manner. Section 9 deals with the various measures which a reconstruction company is required to take for assets reconstruction. Section 10 deals with the functions of securitisation company or reconstruction company. Section 11 deals with the resolution of disputes relating to securitisation, reconstruction or non-payment of any amount due between the bank or IT or securitisation company or reconstruction company. It further states that such disputes shall be resolved by conciliation or arbitration. It is important to note that the dispute contemplated under Section 11 of NPA Act is not with the borrower. Section 12 empowers RBI to give directions from time to time. Classification of an account as non-performing asset has to be done by the bank or FI in terms of the guidelines issued by RBI.

Section 13 falls in Chapter III which deals with the enforcement of security interest. It begins with a non-obstante clause. It states inter alia that notwithstanding anything contained in Section 69 or Section 69A of the TP Act, any security interest created in favour of any secured creditor may be enforced, without the Court's intervention, by such creditor in accordance with the provisions of this Act. When we refer to the word 'Court', it includes DRT. We quote herein- below Sub-section (2) of Section 13 of NPA Act:

13. Enforcement of Security Interest:

(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 installment 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).

On reading Section 13(2), which is the heart of the controversy in the present case, one finds that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing asset then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4). Reading Section 13(2) it is clear that the said sub-section proceeds on the basis that the borrower is already under a liability and further that, his account in the books of the bank or FI is classified as sub-standard, doubtful or loss. The NPA Act comes into force only when both these conditions are satisfied. Section 13(2) proceeds on the basis that the debt has become due. It proceeds on the basis that the account of the borrower in the books of bank/FI, which is an asset of the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual of liability, determination of liability and liquidation of liability. Section 13(2) deals with liquidation of liability. Section 13 deals with enforcement of security interest, therefore, the remedies of enforcement of security interest under the NPA Act and the DRT Act are complementary to each other. There is no inherent or implied inconsistency between these two remedies under the two different Acts. Therefore, the doctrine of election has no application in this case. Section 13(3) inter alia states that the notice under Section 13(2) shall give details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank/FI. In the event of non-payment of secured debts by the borrower, notice under Section 13(2) is given as a notice of demand. It is very similar to notice of demand under Section 156 of the Income-tax Act, 1961. After classification of an account as NPA, a last opportunity is given to the borrower of sixty days to repay the debt. Section 13(3-A) inserted by Amending Act 30 of 2004 after the judgment of this Court in Manila Chemicals's case (supra), whereby the borrower is permitted to make representation/ objection to the secured creditor against classification of his account as NPA. He can also object to the amount due if so advised. Under Section 13(3-A), if the bank/FI comes to the conclusion that such objection is not acceptable, it shall communicate within one week the reasons for non-acceptance of the representation/objection. A proviso is added to Section 13(3-A) which states that the reasons so communicated shall not confer any right upon the borrower to file an application to the DRT under Section 17. The scheme of Sub-sections (2), (3) and (3-A) of Section 13 of NPA Act shows that the notice under Section 13(2) is not merely a show-cause notice, it is a notice of demand. That notice of demand is based on the footing that the debtor is under a liability and that his account in respect of such liability has become sub-standard, doubtful or loss. The identification of debt and the classification of the account as NPA is done in accordance with the guidelines issued by RBI. Such notice of demand, therefore, constitutes an action taken under the provisions of NPA Act and such notice of demand cannot be compared to a show-cause notice. In fact, because it is a notice of demand which constitutes an action, Section 13(3-A) provides for an opportunity to the borrower to make representation to the secured creditor. Section 13(2) is a condition precedent to the invocation of Section 13(4) of NPA Act by the bank/FI. Once the two conditions under Section 13(2) are fulfilled, the next step which the bank or FI is entitled to take is either to take possession of the secured assets of the borrower or to take over management of the business of the borrower or to appoint any manager to manage the secured assets or require any person, who has acquired any of the secured assets from the borrower, to pay the secured creditor towards liquidation of the secured debt.

Reading the scheme of Section 13(2) with the Section 13(4), it is clear that the notice under Section 13(2) is not a mere show-cause notice and it constitutes an action taken by the bank/FI for the purposes of the NPA Act. Section 13(6) inter alia provides that any transfer of secured asset after taking possession or after taking over of management of the business, under Section 13(4), by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured asset. Therefore, Section 13(6) inter alia provides that once the bank/FI takes possession of the secured asset, then the rights, title and interest in that asset can be dealt with by the bank/FI as if it is the owner of such an asset. In other words, the asset will vest in the bank/FI free of all encumbrances and the secured creditor would be entitled to give a clear title to the transferee in respect thereof. Section 13(7) refers to recovery of all costs, charges and expenses incurred by the bank/FI for taking action under Section 13(4). Section 13(7) provides for priority in the matter of recovery of dues from the borrower. It inter alia provides for payment of surplus to the person entitled thereto. Section 13(8) inter alia states that if the dues of the secured creditor together with all costs, charges and expenses incurred are tendered to the secured creditor before the debt fixed for sale/transfer, the secured asset shall not be sold or transferred by the bank/FI to the asset reconstruction company and no further steps shall be taken in that regard. Section 13(9) inter alia states that where a financial asset is funded by more than one bank/FI or in case of joint financing by a consortium, no single secured creditor from that consortium shall be entitled to exercise right under Section 13(4) unless exercise of such right is agreed upon by all the secured creditors. Section 13(9) provides for one more instance when permission of DRT may be required under the first proviso to Section 19(1) of the DRT Act. The agreement between the secured creditors in such cases is required to be placed before the DRT not as a fetter on the rights of the secured creditors but out of abundant caution. Generally, such agreements are complex in measure, particularly because rights of each of the secured creditor in the consortium may be required to be looked into. However, if before the DRT, all the secured creditors in such consortium enter into an agreement under Section 13(9) then no such further inquiry is required to be made by the DRT. In such cases, the DRT has only to see that all the secured creditors in the consortium are represented under the agreement. The point to be noted is that the scheme of the NPA Act does not deal with disputes between the secured creditors and the borrower. On the contrary, the NPA Act deals with the rights of the secured creditors inter se. The reason is that the NPA Act proceeds on the basis that the liability of the borrower has crystallized and that his account is classified as non-performing asset in the hands of the bank/FI. Section 13(9) also deals with pari passu charge of the workers under Section 529-A of the Companies Act, 1956, apart from banks and financial institutions, who are secured creditors. Section 13(10) inter alia states that where the dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application to DRT under Section 17 of the NPA Act for recovery of balance amount from the borrower. Section 13(10), therefore, shows that the bank/FI is not only free to move under NPA Act with or without leave of DRT but having invoked NPA Act, liberty is given statutorily to the secured creditors (banks/ FIs.) to move the DRT under the DRT Act once again for recovery of the balance in cases where the action taken under Section 13(4) of the NPA Act does not result in full liquidation of recovery of the debts due to the secured creditors. Section 13(10) fortifies our view that the remedies for recovery of debts under the DRT Act and the NPA Act are complementary to each other. Further, Section 13(10) shows that the first proviso to Section 19(1) of DRT Act is an enabling provision Land that the said provision cannot be read as a condition precedent to taking recourse to NPA Act.

Section 13(11) of the NPA Act inter alia states that, without prejudice to the rights conferred on the secured creditor under Section 13, the secured creditor shall be entitled to proceed against the guarantor/ pledgor; that the secured creditor shall be entitled to sell the pledged assets without taking recourse under Section 13(4) against the principal borrower in relation to the secured assets under the NPA Act. Section 13(13) states that, no borrower shall, after receipt of notice under Section 13(2) transfer by way of sale, lease or otherwise any of his secured assets referred to in the notice, without prior written consent of the secured creditor. Thus, Section 13(13) further fortifies our view that notice under Section 13(2) is not merely a show-cause notice. In fact, Section 13(13) indicates that the notice under Section 13(2) in effect operates as an attachment/injunction restraining the borrower from disposing of the secured assets and, therefore, such a notice, which in the present case is dated 6.1.2003, is not a mere show-cause notice but it is an action taken under the provision of the NPA Act.

33. On a careful analysis of Section 13(2) of the Act, it is clear that if the borrower, who is under liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non-performing asset, then the secured creditor may require the borrower by notice in writing to discharge his liability within 60 days from the date of the notice failing which the secured creditor shall be entitled to exercise all or any of the rights given in Section 13(4) of the Act.

34. The contentions with regard to the question of bar of limitation or applicability of the Limitation Act 1963, in my considered opinion, are untenable. It is also true that in the light of the language of Section 5(4) of the Act the notice issued by the 1st respondent under Section 13(2) of the Act would fall under the "proceeding" in normal circumstances, and the 2nd respondent is entitled to continue such proceedings further to its logical end. However, in the present case, after a sufficient lapse of time after issuance of the notice under Section 13(2) of the Act, the petitioner again is made liable to make certain payments as per the Memorandum of Understanding entered into with the 2nd respondent but it is stated that subsequent thereto some default had been committed.

35. In the light of the denial of the 2nd respondent relating to the revival of Memorandum of Understanding, this Court is not inclined to express any further opinion on the said aspect. In the facts and circumstances of the case, it cannot be said that the 2nd respondent cannot continue the proceedings in normal circumstances, but however, in the light of the Memorandum of Understanding and the payments made subsequent thereto this Court is of the considered opinion that in the light of the subsequent events, it would be just and proper on the part of the 2nd respondent to narrate these facts by issuing a further notice in accordance with law and further proceed with the matter under the provisions of the Act and till then the interim order made by this Court to be operative.

The writ petition is disposed of with the above directions. No orders as to costs.