Sravan Dall Mill P. Limited v. Central Bank Of India, 2009 PLRonline 0012

Andhra Pradesh High Court,

Vllas V. Afzulpurkar, J

Sravan Dall Mill P. Limited v. Central Bank Of India,

WP 18089 of 2006

11.09.2009

NPA – Incorrect to presume that once an NPA is always an NPA – Prudential Norms and Master Circular issued by RBI – It also cannot be disputed that even assuming that particular had become NPA, the subsequent payments by the borrower entitled a borrower to upgrade the said account and may come out of the said classification of his account as NPA – Therefore, it is incorrect to presume that once an NPA is always an NPA and it is precisely for the said reason that the clause 4.2.4 of the prudential norms specifically states that if interest and principal are paid by the borrower in case of loans classified as NPA, the said account should no longer be treated as NPA and may be classified as sub-standard account – (*4.2.4 Upgradation of loan accounts classified as NPAs : If arrears of interest and principal are paid by the borrower in the case of loan accounts classified as NPAs, the account should no longer be treated as non-performing and may be classified as standard accounts)* – After declaration of account as an NPA, substantial subsequent payments made which establishes that the petitioners account is not an NPA – Classification of an account as NPA must be in accordance with the directions or guidelines relating to asset classification issued by the RBI – The said aspect of classification of the account as NPA, therefore, assumes any amount of importance and is the first step that is necessary to be satisfied by the creditor bank for invoking the provisions of the SARFAESI Act – It would, therefore, be open for the borrower to invoke the jurisdiction of this Court seeking judicial review of such decision of a creditor declaring his account as NPA, in view of the fact that such classification by itself leads to serious consequences of invocation of the SARFAESI Act against the borrower – Grievance of a borrower regarding asset classification and consequential invocation of the SARFAESI Act by issuing notice under Section 13(2) of the SARFAESI Act, cannot be redressed under section 17 of the sarfaesi act in the absence of invocation of Section 13(4) of the SARFAESI Act and judicial review under Article 226 is the only remedy – Consequently, therefore, the action under the SARFAESI Act with regard to the said account would not be tenable, as jurisdictional fact under Section 13(2) of the SARFAESI Act would remain unsatisfied – Banking. [Para 15, 17, 23]

SARFAESI Act Section 13(2) – The right of the borrower to have a due

consideration of objections is, therefore, an important right of the borrower where the bank is bound to apply its mind and inform the borrower of its reasons as to why and how the account is classified as NPA, particularly, when the borrower raises specific objections in that regard – The reply of the bank must indicate application of mind by the bank that the decision of the bank in classifying the account as NPA was fully in conformity with the prudential norms of RBI – Non-consideration of the said objection by mere statements in the reply that the bank has considered the same cannot be said to be the fulfilment of the obligation of the bank under sections 13(2) and 13(3)(a) of the sarfaesi act. [Para 23]

Judgement

VILAS V. AFZULPURKAR, J. :- This writ petition is filed questioning the action of the first respondent bank in issuing notice dated 14.06.2006 under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, (Act 54 of 2002), hereinafter called the SARFAESI Act.

2. In normal course we would not have entertained this writ petition inasmuch as no measures under Section 13(4) of the SARFAESI Act have been taken by the first respondent bank but we have heard the writ petition at length after permitting the respondent to file a counter affidavit in view of the fact that the petitioner questions the classification of its account, by the first respondent bank, as a Non-Performing Asset (NPA). The foundation of the writ petition and the basic contention of the petition therefore, is that the declaration of the petitioners account as NPA is not justifiable and consequently the jurisdictional fact necessary for invocation of section 13 of the sarfaesi act is non-existent in this case. The sole question that falls for consideration in this case is whether the first respondent bank is justified in classifying the petitioners account as NPA.

3. The facts, in brief, are as follows :

(a) The petitioner is a company incorporated in the year 2002 under the Companies Act, 1956 and is engaged in the business of finishing work of Dal products, which has been enjoying the credit facilities, such as Cash Credit (Hypothecation) to the extent of Rs.96,60,000/- and a term loan of Rs.41,12,000/-, from the first respondent bank from 2002 onwards. The term loan is against mortgage of immovable properties and thus, the overall exposure of the petitioner is to the tune of Rs. 1,37,72,000/- and the said loans are said to have been granted by the first respondent bank after satisfactorily fulfilling the due documentation and securities required therefor.

(b) The petitioner submits that the original limit sanctioned by the bank was revised from Rs.85 lakhs to Rs. 137.72 lakhs vide their letter dated 12.10.2004 that the petitioner company is regular in repayment of the said loans. The petitioner, however, submits that on account of various cash constraints and business exigencies, it could not pay interest for a period of two months whereupon the bank has treated the petitioners account as NPA and issued the impugned notice dated 14.06.2006 under Section 13(2) of the SARFAESI Act and

demanded an amount of Rs.1,31,57,549.05 as outstanding amount as on 31.05.2006. The petitioner has thereupon filed objections to the said notice through its counsel under their reply dated 14.08.2006, primarily, on the ground that though the petitioner is regular in repayment of amount, the present default has occurred due to delay in receivables from sundry depositors and the company has not lost its viability and as such, the classification of the petitioners account as NPA is unjustified. It was also alleged that while in classifying the said account as NPA, the directions and guidelines regarding asset classification issued/by the Reserve Bank of India are not followed and therefore, the bank has no jurisdiction to issue notice under Section 13(2) of the SARFAESI Act.

4. The respondent bank alleges that its reply to the said notice under their reply dated 01.09.2006 informing the petitioner that ill operations of the account and weak management resulted in non-consideration of the petitioners proposal for enhancement of the cash credit limits. To the extent of classification of the account as NPA, the bank has replied that it has every right to take legal action under the SARFAESI Act, as the account is classified as NPA on 31.05.2006 and as such, the action under the SARFAESI Act is justified.

5. Petitioner, however, alleges in the affidavit that the bank has not communicated any reasons with regard to their objections dated 14.08.2006 and in any case, no reasons are communicated as to why the account has been classified as NPA. The present writ petition is accordingly filed on the ground that the classification of the petitioners account is against the norms relating to asset classification under the Prudential Norms on Income Recognition, Asset Classification and Provisioning Pertaining to Advances.

6. As mentioned above, the respondent filed a counter affidavit stating that the operation of the petitioners account was not satisfactory and not in accordance with the terms of sanction and due to non-service and defaults, the same was classified as NPA on 31.05.2006 and that no requests for One Time Settlement (OTS) was made by the petitioner and that the management of the petitioner had addressed a letter dated 27.02.2007 admitting the liability and requesting time till 03.03.2007 for liquidating the outstanding debt along with a proposal. It also mentions that the petitioner has made part payment of Rs.66,50,000/- on various dates and on the date of filing of the counter affidavit, after giving credit to the said payments, outstanding amount payable is Rs.83,31,258/- with interest thereon. It is also contended that the writ petition is not maintainable since adequate relief can be obtained from the appellate authority under the SARFAESI Act and consequently, the petitioner be relegated to the said appellate remedy.

7. We have heard Smt. Ch. Veda Vani, learned counsel for the petitioner and Sri Siva Reddy, learned counsel for the first respondent bank.

8. Apart from substantiating the averments in the affidavit as mentioned above, the learned counsel for the petitioner has placed before us, the Prudential Norms and Master Circular issued by RBI and has placed reliance upon the following clauses of the said circular, which are as follows :

2.1 Non-performing assets

2.1.1 An asset, including a leased asset, become non-performing when it ceases to generate income for the bank. A non-performing asset (NPA) was defined as a credit facility in respect of which the interest and/or instalment of principal has remained past due for a specified period of time. The specified period was reduced in a phased manner as under :

Year ending March 31 Specified Period

1993 four quarters

1994 three quarters

1995 on wards two quarters

2.1.2...

2.1.3. With a view to moving towards international best practices and to ensure greater transparency, the 90 days overdue norm for identification of NPAs has been adopted from the year ending March 31, 2004. Accordingly, with effect from March 31, 2004, a non-performing asset (NPA) shall be a loan or an advance where :

(i) interest and/or instalment of principal remain overdue for a period of more than 90 days in respect of a term loan,

(ii) the account remains out of order as indicated at paragraph 2.2 below, in respect of an Overdraft/Cash Credit (OD/CC),

(iii) the bill remains overdue for a period of more than 90 days in the case of bills purchased and discounted,

(iv) interest and/or instalment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes, and

(v) any amount to be received remains overdue for a period of more than 90 days in respect of other accounts.

* * *

4. Asset Classification

4.1 Categories of NPAs

Banks are required to classify non-performing assets further into the following three categories based on the period for which the asset has remained non-performing and the realisibility of the dues :

(a) Sub-standard Assets

(b) Doubtful Assets

(c) Loss Assets

4.1.1 Sub-standard Assets

A sub-standard assets was one, which was classified as NPA for a period not exceeding two years. With effect from 31 March 2001, a sub-standard asset is one, which has remained NPA for a period less than or equal to 18 months. In such cases, the current net worth of the borrower/guarantor or the current market value of the security charged is not enough to ensure recovery of the dues to the banks in full. In other words, such an asset will have well defined credit weaknesses that jeopardise the liquidation of the debt and are characterized by the distinct possibility that the banks will sustain some loss, if deficiencies are not corrected.

With effect from 31 March 2005, a substandard asset would be one which has remained NPA for a period less than or equal to 12 months.

4.1.2 Doubtful Assets

A doubtful asset was one, which remained NPA for a period exceeding two years. With effect from 31 March 2001, an asset is to be classified as doubtful, if it has remained NPA for a period exceeding 18 months. A loan classified as doubtful has all the weaknesses inherent in assets that were classified as substandard, with the added characteristic that the weaknesses make collection or liquidation in full, – on the basis of currently known facts, conditions and values – highly questionable and improbable.

With effect from March 31, 2005, an asset would be classified as doubtful if it remained in the sub-standard category for 12 months.

4.1.3 Loss assets

A loss asset is one where loss has been identified by the bank or internal or external auditors or the RBI inspection but the amount has not been written off wholly. In other words, such an asset is considered uncollectible and of such little value that its continuance as a bankable asset is not warranted although there may be some salvage or recovery value.

4.2 Guidelines for classification of assets

4.2.1 Broadly speaking, classification of assets into above categories should be done taking into account the degree of well-defined credit weaknesses and the extent of dependence on collateral security for realization of dues.

4.2.2 Banks should establish appropriate internal systems to eliminate the tendency to delay or postpone the identification of NPAs, especially in respect of high value accounts. The banks may fix a minimum cut off point to decide what would constitute a high value

account depending upon their respective business levels. The cut off point should be valid for the entire accounting year. Responsibility and validation levels for ensuring proper asset classification may be fixed by the banks. The system should ensure that doubts in asset classification due to any reason are settled through specified internal channels within one month from the date on which the account would have been classified as NPA as per extant guidelines.

4.2.3...

4.2.4 Upgradation of loan accounts classified as NPAs

If arrears of interest and principal are paid by the borrower in the case of loan accounts classified as NPAs, the account should no longer be treated as non-performing and may be classified as standard accounts. With regard to upgradation of a restructured/rescheduled account which is classified as NPA contents of paragraphs 4.2.14 and 4.2.15 will be applicable.

9. Learned counsel for the petitioner contended that the first respondent bank is bound to follow the said prudential norms and only when the classification made in conformity with the said norms, would entitle the bank or financial institution to resort to the SARFAESI Act if the conditions thereunder are satisfied. She placed strong reliance on clause 2.1.3 which requires 90 days overdue norm is essential for identification of NPA, which in other words, means that the interest and or instalment of principal remains overdue for a period of more than 90 days in respect of a term loan. She, further, contends that the policy of income recognition and asset classification has to be objective and based on record of recovery. The account, therefore, cannot be classified as NPA unless it satisfies the prudential norms. Further, the said NPAs may be of various categories where the account remains NPA for less than or equal to 18/12 months, it is broadly classified as sub-standard asset, if in such cases, the current net worth of the borrower or the guarantor or the current market value of the security is not enough to ensure recovery of dues to the bank in full. Further, such assets, which remain NPA for a period exceeding 18 months to 12 months of the loan is already classified as doubtful and the recovery is highly questionable and improbable, it is classified as doubtful asset. Further, such NPA account is identified by the bank, as uncollectible and of such little value that its continuance as a bankable asset is not warranted is classified as a loss asset. Learned counsel, therefore, asserts that there was never a default where the interest or instalment remained overdue for 90 days and in any case, as admitted in the counter of the first respondent, substantial subsequent payments made by the petitioner has already brought down the original liability of Rs.1,31,57,549.05 to Rs.83,31,258/-, which establishes that the petitioners account is not an NPA. She, therefore, contends that the first respondent bank ought to have upgraded the said account and should no longer be treated as NPA as provided under clause 4.2.4 of the norms.

10. Learned counsel has relied upon a decision of the Karnataka High Court in Raja Associates V. Union of India1, AIR 2009 Karnataka 136 particularly para 14, which supports her contentions, which is extracted hereunder :

"14. What was expected by this court was not as to whether the officers of the respondent-bank are aware of the circulars and the judgments, but what had been directed is to consider as to whether the account of the petitioner falls within the said category as defined in the circulars and such consideration should have come out in the form of a speaking consideration i.e., by assigning reasons as observed by the Honble Supreme Court. Even the contents of para 5 does not disclose this aspect of the matter where it only says that the value of the security being more has no bearing towards classification without indicating what else was the method followed for classification. Thought the learned counsel for the respondents attempted to point out the circular of R.B.I., the same does not serve any purpose at this stage since neither the reply dated 25th May, 2005 nor the objection statement filed in this petition would refer to the details in this regard and what is required is not to notice the R.B.I. guidelines alone but to indicate from the materials on record that the account in question falls within the guidelines. Only when that is done the respondents would be at liberty to proceed in accordance with law. Hence it requires reconsideration at the hands of the respondents themselves."

11. She has also placed reliance upon the decision of the Supreme Court in Mardia Chemicals Ltd. v. Union of India, (2004) 4 SCC 311 : AIR 2004 SC 2371 particularly paragraphs 37 and 44 thereof, which are extracted hereunder :

"37. Next we come to the question as to whether it is on whims and fancies of the financial institutions to classify the assets as non-performing assets, as canvassed before us. We find it not to be so. As a matter of fact a policy has been laid down by the Reserve Bank of India providing guidelines in the matter for declaring an asset to be a non-performing asset known as "RBIs prudential norms on income recognition, asset classification and provisioning – pertaining to advances" through a Circular dated August 30, 2001. It is mentioned in the said Circular as follows :

"1.1 In line with the international practices and as per the recommendations made by the Committee on the Financial System (Chairman Shri M. Narasimham), the Reserve Bank of India has introduced, in a phased manner, prudential norms for income recognition, asset classification and provisioning for the advances portfolio of the banks so as to move towards greater consistency and transparency in the published accounts."

2.1 Non-performing Assets :

2.1.1 An asset, including a leased asset, becomes non-performing when it ceases to generate income for the bank. A non-performing asset (NPA) was defined as a credit facility in respect of which the interest and/or instalment of principal has remained past due for a specified period of time. The specified period was reduced in a phased manner as under :

Year ending March 31 Specified Period

1993 four quarters

1994 three quarters

1995 on wards two quarters

2.1.2 An amount due under any credit facility is treated as "past due" when it has not been paid within 30 days from the due date. Due to the improvements in the payment and settlement systems, recovery climate, upgradation of technology in the banking system, etc., it was decided to dispense with past due concept, with effect from March 31, 2001. Accordingly, as from that date, a non-performing Asset (NPA) shall be an advance where

(i) interest and/or installment of principal remain overdue for a period of more than 180 days in respect of a Term Loan,

(ii) the account remains out of order for a period of more than 180 days, in respect of an Overdraft/Cash Credit (OD/CC),

(iii) the bill remains overdue for a period of more than 180 days in the case of bills purchased and discounted,

(iv) interest and/or installment of principal remains overdue for two harvest seasons but for a period not exceeding two half years in the case of an advance granted for agricultural purposes, and

(v) any amount to be received remains overdue for a period of more than 180 days in respect of other accounts.

4.2.2 Banks should establish appropriate internal systems to eliminate the tendency to delay or postpone the identification of NPAs, especially in respect of high-value accounts. The banks may fix a minimum cut off point to decide what would constitute a high value account depending upon their respective business levels. The cut-off point should be valid for the entire accounting year. Responsibility and validation levels for ensuring proper asset classification may be fixed by the banks. The system should ensure that doubts in asset classification due to any reason are settled through specified internal channels within one month from the date on which the account would have been classified as NPA as per extant guidelines."

From what is quoted above, it is quite evident that guidelines as laid down by the Reserve Bank of India which are in more details but not necessary to be reproduced here, laying down the terms and conditions and circumstances in which the debt is to be classified as non-performing asset as early as possible. Therefore, we find no substance in the submission made on behalf of the petitioners that there are no guidelines for treating the debt as a non-performing asset."

"44. As a matter of fact, the Narasimham Committee also advocates for a legal framework which may clearly define the rights and liabilities of the parties to the contract and provisions for speedy resolution of disputes, which is a sine qua non for efficient trade and commerce, especially for financial intermediation. Even the guidelines of the Reserve Bank of India in relation to classifying the NPAs while stressing the need of expeditious steps in taking a decision for classifying and I dentification of NPAs says, a system be evolved

which should ensure that the doubts in asset classification are settled through specified internal channels within the time specified in the guidelines. It is thus clear that while recommending speedier steps for recovery of the debts it is envisaged by all concerned that within the legal framework, such provisions may be contained which may curtail the delays. Nonetheless dues or disputes regarding classification of NPAs should be considered and resolved by some internal mechanism. In our view, the above position suggests the safeguards for a borrower, before a secured asset is classified as NPA. If there is any difficulty or any objection pointed out by the borrower by means of some appropriate internal mechanism it must be expeditiously resolved."

12. According to the learned counsel, therefore, the manner in which the first respondent bank has classified the petitioners account as NPA is wholly unwarranted and consequently the very reason for invocation of Section 13(2) of the SARFAESI Act is liable to be set aside under the judicial review jurisdiction of this court.

13. Learned counsel for the respondent has justified the actions of the first respondent bank by stating that the counter affidavit already records that the performance of the petitioners account is not satisfactory and on account of the defaults committed by it, their account was classified as NPA as early as on 31.05.2006 and mere subsequent payments by the petitioner will not mitigate against the said status of the said account as NPA. He submits that the said payments are made after the notice by the bank under Section 13(2) of the SARFAESI Act dated 14.06.2006 and thereby it cannot be said that the initial classification of the account as NPA itself is not justified based on the subsequent payments in the year 2007. He also placed reliance upon the reply given by the bank dated 01.09.2006 and submits that all the questions raised by the petitioner being relating to factual aspects it would be more appropriate that they be adjudged in the appeal provided under section 17 of the sarfaesi act. Learned counsel has relied upon a decision of the Calcutta High Court in Core Ceramics Ltd. v. Union of India, AIR 2008 Calcutta 88 where a similar question was considered and he relies upon para 8 thereof, which holds that the Debts Recovery Tribunal has been conferred with wide powers to examine the facts and circumstances of the case and evidence produced and whether measures taken under Section 13(4) conform to and in accordance with the provisions of the SARFAESI Act, which includes consideration whether classification of a debt as NPA is in accordance with the RBI guidelines. He relies upon para 12 of the aforesaid judgment, which is extracted hereunder :

"12. In the instant case I find that the authorities of the bank had issued notice dated 3rd November, 2003 classifying the account as non-performing asset as per RBI guidelines. Whether there is any doubt or question that under the guidelines of the RBI the accounts are non-performing assets or not, is a matter to be settled through the internal specified channels of the bank. Once bank authorities under Section 13(2) classifies the account as non-performing asset and issues notice, as has been done in the instant case, the writ Courts have little or no role to play in deciding such issue. Therefore, since it is clear from a reading of the judgments in Mardia Chemicals (supra) and Transcore (supra) that Apex Court had approved the concept of greater or complete autonomy of the banks and financial institutions in setting doubts in asset classification and in recovery of their dues

without the intervention of the Court or Tribunal and had stressed on the appropriate internal mechanism for speedy resolution of disputes, the law laid down in the judgments in Whirlpool (AIR 1999 SC 22) (supra). Appropriate Authority and another v. Sudha Patil (AIR 1999 SC 181) (supra), Chaube Jagdish Prasad (AIR 1959 SC 492) (supra). ABL International Limited (supra), Binapani Dei (AIR 1967 SC 1269) (supra) and Srikant Kashinath Jituri (AIR 1995 SC 288) (supra) relied on by the petitioner are not applicable. The argument on behalf of the petitioner that the notice dated 3rd November, 2003 is vague as it does not make a mention of the Section, that is Section 13(2), is not tenable, as it has been stated in the notice impugned that the account has been classified as non-performing asset as per RBI guidelines. That the petitioner had understood the purport of the notice dated 3rd November, 2003 is evident from reply, dated 31st December, 2003 and, therefore, challenge to the impugned notice fails. The principles of law laid down in the judgment of the Allahabad High Court relied on, on behalf of the bank in Paramjit Lal Badhwar 1983 Tax LR 2506 (supra) are applicable to the facts of the case. The judgments of the Apex Court relied on by the petitioner in Board of Technical Education, U.P. and Ors. v. Dhanwantri Kumar and others (AIR 1991 SC 271) (supra). Food Corporation of India v. State of Punjab and others (AIR 2001 SC 250) (supra) and Commissioner of Central Excise, Bangalore v. Brindavan Beverage (P) Ltd. and Ors. (2007 AIR SCW 7747) (supra) in this regard are not applicable to the facts of the case."

14. Based on the above, the following questions are framed for consideration :

(i) Whether the remedy under Article 226 is available to the petitioner challenging the notice under Section 13(2) of the SARFAESI Act?

(ii) Whether the respondent bank has satisfied the requirement of asset classification under the Prudential Norms as framed under Master Circular of the RBI?

15. We have considered the aforesaid submission at length. So far as the maintainability of the writ petition is concerned, we are of the view that invocation of jurisdiction under the SARFAESI Act is pre-conditioned by the account in question being classified as NPA. Section 13(2) of the SARFAESI Act specifically states as follows :

13. Enforcement of security interest.-

(1) ...

(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).

It is categorically mentioned in the aforesaid provision that jurisdiction to issue notice under Section 13(2) would arise when an account of a borrower is classified as NPA.

16. The classification of asset as NPA is defined under Section 2(1)(o), which is as follows :

2(1)(o) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, [doubtful or loss asset,-

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank;]

Thus, from the above, it is clear that the classification of an account as NPA must be in accordance with the directions or guidelines relating to asset classification issued by the RBI. The said aspect of classification of the account as NPA, therefore, assumes any amount of importance and is the first step that is necessary to be satisfied by the creditor bank for invoking the provisions of the SARFAESI Act. It would, therefore, be open for the borrower to invoke the jurisdiction of this Court seeking judicial review of such decision of a creditor declaring his account as NPA, in view of the fact that such classification by itself leads to serious consequences of invocation of the SARFAESI Act against the borrower.
Further, Section 13(3)(A) of the SARFAESI Act inserted by amendment consequent upon a decision of the Supreme Court in Mardia Chemicalss case, AIR 2004 SC 2371 (supra) makes the position further clear that mere rejection of objections of the borrower to the notice of the creditor under Section 13(2) of the SARFAESI Act, would not give rise to cause of action to invoke jurisdiction of DRT under section 17 of the sarfaesi act, unless measures as envisaged under sub-clause (4) of Section 13 of the SARFAESI Act are taken by the creditor. For the sake of convenience Section 13(3)(A) of the SARFAESI Act is extracted hereunder :

13. Enforcement of security interest.-

(1) ...

(2) ...

(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 is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of

District Judge under section 17A.

17. Thus, when measures are not taken by the creditor under Section 13(4) of the SARFAESI Act, the borrower would be disabled from invoking the jurisdiction of DRT under section 17 of the sarfaesi act. Thus, the grievance of a borrower regarding asset classification and consequential invocation of the SARFAESI Act by issuing notice under Section 13(2) of the SARFAESI Act, cannot be redressed under section 17 of the sarfaesi act in the absence of invocation of Section 13(4) of the SARFAESI Act and judicial review under Article 226 is the only remedy.

18. Learned counsel for the respondents has placed reliance on para 37, extracted as above, of the judgment in Mardia Chemicalss case (supra) and he contends that the classification is an internal matter of the bank. He, therefore, submits that as per para 44 of the said judgment the disputes regarding classification of NPAs should be considered and resolved by some internal mechanism, which will provide enough safeguards to the borrower. He also submits that essential questions of fact may have to be considered and according to him, the expeditious remedy in such situation is only under section 17 of the sarfaesi act.

19. We are, however, not persuaded to accept the said submission of the learned counsel for the respondents for the reason that a serious civil consequence will flow against the borrower, the moment his account is classified as NPA and thereafter, the proceedings are taken demanding entire outstanding amount by issuing a notice under Section 13(2) of the SARFAESI Act. The appropriate adjudicatory internal mechanism as envisaged by the Supreme Court is not evolved as is evident from the present case. In fact, the only reply which the bank gave to the objections of the petitioner was that we would like to bring to your attention that the said account was classified as NPA on 31.05.2006 and bank has every right to take legal steps under the SARFAESI Act to recover its outstanding overdues from the said NPA account (see reply of the bank dated 01.09.2006). There is no reference in the said reply as to when and how the account was classified as NPA, particularly, when the petitioner has asserted to the contrary and has sent detailed objections to the very classification of the said account based upon the prudential norms referred to above. The judicial review before this Court is, therefore, certainly available to the borrower in such circumstances. The first question is accordingly answered.

20. So far as the second question is concerned, the facts and circumstances of the present case are quite closer to the facts and circumstances in the decision of the Karnataka High Court in Raja Associatess case (supra).

21. The Supreme Court in Mardia Chemicalss case (supra) in relevant paragraphs 45 and 46 has laid down as follows :

“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 of 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 fulfilment 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 me 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 not accepting the objections taken by the secured borrower may not be taken to give an 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..."

"46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to notice under Section 13(2) of the Act more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13(1) of the Act the creditor is empowered to enforce the security himself without intervention of the Court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets, etc.

22. Similarly, the position was reiterated in the decision of the Supreme Court in M/s. Tanscore v. Union of India, 2006 (12) Scale 585 : AIR 2007 SC 712 and the relevant portion of para 23 thereof is extracted hereunder :

"23... 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..."

23. The right of the borrower to have a due consideration of objections is, therefore, an important right of the borrower where the bank is bound to apply its mind and inform the borrower of its reasons as to why and how the account is classified as NPA, particularly, when the borrower raises specific objections in that regard. The reply of the bank must indicate application of mind by the bank that the decision of the bank in classifying the account as NPA was fully in conformity with the prudential norms of RBI. Non-consideration of the said objection by mere statements in the reply that the bank has considered the same cannot be said to be the fulfilment of the obligation of the bank under sections 13(2) and 13(3)(a) of the sarfaesi act. It also cannot be disputed that even assuming that particular had become NPA, the subsequent payments by the borrower entitled a borrower to upgrade the said account and may come out of the said classification of his account as NPA. Therefore, it is incorrect to presume that once an NPA is always an NPA and it is precisely for the said reason that the clause 4.2.4 of the prudential norms specifically states that if interest and principal are paid by the borrower in case of loans classified as NPA, the said account should no longer be treated as NPA and may be classified as sub-standard account. Consequently, therefore, the action under the SARFAESI Act with regard to the said account would not be tenable, as jurisdictional fact under Section 13(2) of the SARFAESI Act would remain unsatisfied.

24. For the above reasons, therefore, we are of the view that the petitioners objections have not been considered by the bank by due application of mind keeping in view the aforesaid guidelines and norms of the RBI and the decision of the Supreme Court in Mardia Chemicalss case (supra) and other decisions referred to hereinabove. We may mention that a similar question was also considered by the Jharkhand High Court in Stan Commodities Pvt. Ltd. v. Punjab and Sind Bank, AIR 2009 Jharkhand 14.

25. In the circumstances, we deem it appropriate to issue the following directions :

The first respondent bank shall consider afresh the objections dated 14.08.2006 and by a reasoned order communicate such reasons to the petitioner. It is open to the petitioner to supplement the said objections by further supplementary objections, if any, in view of the fact that the said objections were filed as early as on 14.08.2006 and several subsequent events may have become relevant. If the petitioner chooses to file the said supplementary objections, if any, he shall do so within a period of two (2) weeks from today. The first respondent is directed to consider the objections filed earlier together with supplementary objections, if any, within a period of six (6) (sic) from today and communicate its reasoned decision to the petitioner. The petitioner shall be at liberty to take such appropriate steps as permissible under law thereafter. As no measures under Section 13(4) of the SARFAESI Act are taken by the first respondent bank, no directions in that regard are necessary to be issued till the bank passes appropriate orders on the objections of the petitioner

under Section 13(2) of the SARFAESI Act.

The writ petition is accordingly disposed of. There shall be no order as to costs.

Order accordingly.