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**(2008) 12 KL CK 0038**  
**In the High Court Of Kerala**  
**Case No : F.A.O. No. 292 of 2008**

Fakrudheen Haji, V.P.

APPELLANT

Vs

State Bank of India and Another

RESPONDENT

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**Date of Decision :** 19-12-2008

**Acts Referred:**

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 13(1), 13(4), 17, 17(1), 17(3)  
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 14, 17, 17(2)  
Transfer of Property Act, 1882 — Section 3, 8

**Citation :** (2009) 1 KLJ 301

**Hon'ble Judges :** Kurian Joseph, J; K.T. Sankaran, J

**Bench :** Division Bench

**Advocate :** C. Varghese Kuriakose, for the Appellant; K.K. Chandran Pillai and A.S. Sajush Paul, for the Respondent

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## Judgement

K.T. Sankaran, J.—The question involved in this appeal is whether a relief can be granted u/s 17(3) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in favour of a person other than the borrower. The application filed by the Appellant/Plaintiff for temporary injunction was dismissed by the court below, which is under challenge in this appeal.

2. The suit was filed by the Appellant against one V.P. Sharaf and three Ors. . The Respondents, State Bank of India and its Chief Manager, are Defendants 2 and 3. One P.A. Nazeer is the fourth Defendant. The Plaintiff prayed for a declaration that he is the absolute owner in possession of the plaint schedule properties and that Document No. 1967/2006, Sub Registrar's Office, Kuthiathodu, is only a "nominal sale deed operating as a security". There is an alternative prayer, to declare that the aforesaid document is only a sham document and that Defendants 2 and 3 had not obtained any right over the plaint schedule properties and they are not entitled to proceed against the same. There is a

prayer for permanent prohibitory injunction against Defendants 2 and 3 from "disrupting the ownership, possession and enjoyment of the plaint schedule properties by the Plaintiff". The Plaintiff contended that after purchase of the properties, he constructed a house and he is residing with his family in that house. The Plaintiff was engaged in seafoods exports business. He was a partner of a registered firm. A loan was availed by the firm from the State Bank of Travancore and title deeds in respect of plaint schedule properties were deposited with the bank. Since the loan was not discharged, the Bank filed O.A. No. 1141 of 1999 before the Debts Recovery Tribunal, Ernakulam. As per the order in the O.A., the Bank initiated recovery proceedings. There was a settlement with the Bank and as part of the settlement, some of the items of properties were sold as per the proceedings before the Debt Recovery Tribunal. The Plaintiff needed a further sum of Rs. 10 lakhs for discharging the loan. He approached his brother, the first Defendant, who agreed to advance money on condition of the Plaintiff offering the plaint schedule properties as security. A document, styling it as a sale deed, but which was in substance a security document, was executed in the name of the first Defendant. The Plaintiff was allowed to reside in the residential house. An agreement for re-conveyance was also executed between the Plaintiff and the first Defendant. Utilising the amount borrowed from the first Defendant, the loan amount due to the State Bank of Travancore was closed. As per the agreement of re-conveyance, the Plaintiff has time till 18-7-2009 to repay the loan amount to the first Defendant. The prior title deeds were not handed over to the first Defendant. It is stated in the plaint that on 29-9-2008 one advocate along with officers of the second Defendant Bank and the officer designated by the third Defendant came to the residence of the Plaintiff and served a notice to him. It was revealed that the fourth Defendant had taken a loan from the second Defendant Bank, for which, the first Defendant stood as surety and the plaint schedule properties were mortgaged in favour of the Bank. The Plaintiff contended that the first Defendant had no right to mortgage or alienate the plaint schedule properties. It is stated that the fourth Defendant cheated the first Defendant and due to the false promise made by the fourth Defendant, the first Defendant happened to deposit the title deeds in respect of the plaint schedule properties with the second Defendant for the loan contracted by the fourth Defendant. The suit was filed with the aforesaid reliefs in these circumstances.

3. Along with the suit, an application for temporary injunction for restraining Defendants 2 and 3 from evicting the Plaintiff and his family from the plaint schedule properties was filed.

4. The Respondents (Defendants 2 and 3) contended that the second Defendant is a secured creditor as defined u/s 2(1)(zd) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act"), as Defendants 1 and 4 had availed financial assistance from the Bank creating security interest over the plaint schedule properties. On default of repayment, the Bank decided to enforce the security deposit. The Bank initiated recovery steps under Sections 13(4) and 14

of the Act. As per Order dated 3-10-2008 in W.P. (C) No. 20774 of 2008 (Ext B-2), the High Court rejected the contentions of the first Defendant challenging the proceedings initiated under the Act. The present suit and the application for injunction were filed to avoid the recovery steps. The plaintiff schedule properties were mortgaged to the Bank. The Plaintiff has no right to question the recovery steps initiated by the second Defendant Bank. The Plaintiff having alienated the property by a registered sale deed, he is estopped from contending that the document is not a sale deed. It was also contended that the Plaintiff is an impostor of Defendants 1 and 4. The jurisdiction of the Civil Court to entertain the suit or to grant an injunction is ousted by Section 34 of the Act. The Plaintiff has an alternative remedy under the Act itself. The agreement for re-conveyance was also denied by the second Defendant. It was contended that the alleged agreement for re-conveyance dated 18-7-2006 (Ext. A-5) is a concocted and fraudulent document. The equitable mortgage by deposit of title deeds created by the first Defendant is valid. There was no subsisting encumbrance at the time of creating the equitable mortgage. As per the order passed by the Chief Judicial Magistrate u/s 14 of the Act, an Advocate Commissioner was appointed for the purpose of taking actual possession of the property. The Commissioner visited the property and affixed a notice. The injunction granted by the Court originally has affected the valuable rights of the second Defendant Bank in lawfully recovering the amounts due to it by invoking the provisions of the Act.

5. The court below had granted ad interim injunction. After hearing the parties, the ad interim injunction was vacated by the order impugned in the Appeal. The court below held that the Plaintiff cannot complain that the Bank has committed fraud or illegality by accepting Ext. B-3 title deed to create an equitable mortgage. The issue whether Ext. B-3 title deed is a sham document is a matter to be decided in the suit. The proceedings initiated against the second Defendant under the Act cannot be interfered with. A contention was raised by the Plaintiff that while executing Ext B-3 assignment deed by him in favour of the first Defendant, the house was not included and, therefore, the Bank was not justified in taking possession of the house. The court below held that there was no exclusion of the house and whatever title the Plaintiff has got as per Exts. A-2 and A-3 was conveyed by him in favour of the first Defendant under Ext B-3. It was noticed that the recitals in Ext. B-3 would clearly indicate the same and that the house is also included in Ext. B-3 assignment deed executed in favour of the first Defendant. The Plaintiff has not pleaded in the plaint that the house was excluded from the purview of Ext. B-3. The court below also held that the jurisdiction of the Civil Court is ousted u/s 34 of the Act.

6. While disposing of W.P. (C) No. 20774 of 2008 filed by the first Defendant, an opportunity was granted to the first Defendant to continue to occupy of the house for a period of one month on condition of payment of a sum of Rs. 2 lakhs within a week. All the contentions raised by the first Defendant in respect of the steps taken by the second Defendant Bank under the Act were repelled by this Court.

7. Learned Counsel for the Petitioner relied on the decision in Ramlal and Another Vs. Phagua and Others, and contended that an agreement for re-conveyance having been executed on the date of Ext. B-3 sale deed, the mortgage created by the first Defendant is unenforceable. The counsel also contended that there is no effective alternative remedy to the Petitioner under the Act since no relief can be granted u/s 17(3) of the Act in favour of a person other than the borrower. The counsel also submits that the view taken by the court below is unsustainable.

8. Section 34 of the Act ousts the jurisdiction of the Civil Court. Section 34 reads as follows:

34. Civil Court not to have jurisdiction.-No Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

It is not disputed that proceedings were initiated under the Act. Section 13 of the Act provides for enforcement of security interest, without the intervention of the Court or Tribunal, by the creditor in accordance with the provisions of the Act, under the circumstances mentioned therein. Sub-section (4) of Section 13 provides that 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 measures mentioned therein to recover the secured debt. The measures provided under Sub-section (4) are: (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 for realising the secured asset; (c) appoint any person to manage the secured assets, the possession of which has been taken over by the secured creditor; and (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. Section 17 provides that any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor may make an application to the Debts Recovery Tribunal having jurisdiction within forty-five days from the date on which such measures had been taken. Sub-section (2) of Section 17 states that the Debts Recovery Tribunal shall consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of the Act and the Rules made thereunder. Sub-section (3) of Section 17 reads as follows:

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that

any of the measures referred to in Sub-section (4) of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in Sub-section (4) of Section 13 taken by the creditors assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

Section 18 provides that any person aggrieved, by any order made by the Debts Recovery Tribunal u/s 17, may prefer an appeal to the Appellate Tribunal within thirty days from the date of receipt of the order of the Debts Recovery Tribunal.

9. The heading of Section 17 is "Right to appeal". Sub-section (1) empowers "any person (including borrower)" to make an application to the Debts Recovery Tribunal. The application referred to in Section 17(1) is the appeal itself as stated in the heading of the section. The contention of the Petitioner is that though Section 17 empowers any person (including borrower) to make an application to the Debts Recovery Tribunal, restoration of possession of the secured assets could be made only in favour of the borrower. Therefore, it is contended that the remedy provided u/s 17 is illusory. We are not inclined to accept this contention. There cannot be any doubt that any person (including the borrower) can challenge the measures taken u/s 13(4) by making an application to the Debts Recovery Tribunal as provided in Sub-section (1). If the Debts Recovery Tribunal comes to the conclusion that any of the measures taken by the secured creditor u/s 13(4) are not in accordance with the provisions of the Act and the Rules made thereunder, it may declare the measures taken u/s 13(4) as invalid. Section 17(3) also empowers the Debts Recovery Tribunal to restore the secured assets to the borrower. Section 17(3) also states that the Debts Recovery Tribunal may pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13. If the Tribunal finds that the recourse taken by the creditor u/s 13(4) is invalid, nothing prevents the Tribunal from passing appropriate orders protecting the interests of the Appellant, whether the Appellant is the borrower or any other person. The fact that specific mention is made for restoration of possession in favour of the borrower does not mean that restoration of possession in favour of a person other than the borrower is impossible while passing an order u/s 17(3). If the Tribunal finds that the recourse taken u/s 13(4) is invalid, and if it is found that the Appellant who is not a borrower was dispossessed by such recourse u/s 13(4), it would only be proper for the Tribunal to pass an order putting the Appellant in possession of the property or to pass any other appropriate order in the facts and circumstances of the case. The expressions "after examining the facts and circumstances of the case and

evidence produced by the parties" and "pass such order as it may consider appropriate and necessary" in Sub-section (3) of Section 17 clearly indicate that the Debts Recovery Tribunal has ample powers to deal with any situation where a recourse was taken by the secured creditor u/s 13(4) and when the Tribunal finds that such recourse was not in accordance with the provisions of the Act and the Rules. Section 17(3) does not prevent restoration of possession in favour of a person other than the borrower. It cannot be said that when a right is conferred on any person aggrieved, to file an appeal to the Debts Recovery Tribunal, the Tribunal would have no power to redress his grievance. Restoration of possession to the borrower mentioned in Sub-section (3) of Section 17 would not in any way fetter the jurisdiction of the Tribunal to pass any order including restoration of possession in favour of any person aggrieved, whether he is a borrower or not, if the facts and circumstances of the case warrant such restoration. We are of the view that the expression "evidence produced by the parties" occurring in Section 17(3) would include evidence produced by the Appellant, though he is a person other than the borrower.

10. We find support for the aforesaid view in the light of the decision in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, wherein it was held:

We may like to observe that proceedings u/s 17 of the Act, in fact, are not appellate proceedings. It seems to be a misnomer. In fact it is the initial action which is brought before a forum as prescribed under the Act, raising grievance against the action or measures taken by one of the parties to the contract. It is the stage of initial proceeding like filing a suit in civil court. As a matter of fact proceedings u/s 17 of the Act are in lieu of a civil suit which remedy is ordinarily available but for the bar u/s 34 of the Act in the present case....

\* \* \* \* \* 62. As indicated earlier, the position of the appeal u/s 17 of the Act is like that of a suit in the court of the first instance under the Code of Civil Procedure. No doubt, in suits also it is permissible, in given facts and circumstances and under the provisions of the law to attach the property before a decree is passed or to appoint a receiver and to make a provision by way of interim measure in respect of the property in suit. But for obtaining such orders a case for the same is to be made out in accordance with the relevant provisions under the law. There is no such provision under the Act.

11. The decision in *Ramlal and Another Vs. Phagua and Others*, does not apply to the facts of the case. In that case, there was a sale deed and an agreement for re-conveyance. The court found that the sale deed was not in fact a real sale deed, but it was by way of security and thus, the right, title and interest did not pass in favour of the vendee. The admission of vendee was also taken note of. In that case, it was admitted that there was an agreement for re-conveyance. In that context, the Supreme Court held that by the sale deed, no right, title or interest passed in favour of the assignee and, therefore, the assignee was not competent to execute the sale deed in favour of strangers. In the present case, it is not an admitted fact that there is an agreement for re-conveyance. The case of

the contesting Defendants is that there was no such agreement for re-conveyance and that the agreement produced by the Plaintiff is a concocted document. A decision on the question whether the sale deed is a real one or it is only a security for the loan transaction is a matter to be decided after taking evidence and after considering the facts and circumstances of the case. It is also necessary to decide the question whether there was an agreement for re-conveyance or whether it is a concocted document. All these are matters to be decided at the time of final disposal of the suit. At this stage, it cannot be said that the Plaintiff has made out a prima facie case.

12. We are of the view that the court below was right in rejecting the case of the Plaintiff that the house was not included in the sale deed executed by him in favour of the first Defendant. In *Kodiyan v. Karambi* 2007 (2) KLT 361, one of us (K.T. Sankaran, J.) held thus:

Counsel for the Appellants contended that Ext. A-1 does not disclose that the house was available at the time when the transfer was made in favour of the Plaintiff and Ayyer and that would lead to the inference that the house was constructed by the first Defendant. If immovable property is transferred, all improvements attached to the earth would also stand transferred to the assignee. It is not necessary to mention each and every item of improvements in the schedule of the assignment deed. Even if the existence of a house is not mentioned in Ext. A-1, it cannot be said that the Plaintiff has no title to the house in the plaint schedule property. As per Section 3 of the Transfer of Property Act, the expression "attached to the earth" means rooted in the earth, as in the case of trees and shrubs; imbedded in the earth as in the case of walls or buildings; or attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. Section 8 of the Transfer of Property Act provides that:

Unless a different intention is expressed or necessarily implied, a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidents thereof.

Such incidents include, when the property is land, the easements annexed thereto, the rents and profits thereof accruing after the transfer, and all things attached to the earth.

In view of the definition of the term "attached to earth" in Section 3 read with Section 8 of the Transfer of Property Act, even if the title deed or the schedule of property attached thereto does not mention that the house in the property which is the subject of transfer is also transferred, the transferee would get title to the house situated in the property, unless the house is specifically excluded from the transfer.

13. The balance of convenience is also not in favour of the Plaintiff. Proceedings were initiated under the Act by the second Defendant Bank. The Plaintiff/Appellant has adequate alternative and efficacious remedy under the

Securitisation Act itself. Therefore, we are of the view that the court below was right in holding that the Plaintiff is not entitled to get an order of temporary injunction in his favour.

14. The order passed by the court below would indicate that a finding was arrived at that the suit is barred u/s 34 of the Securitisation Act. It is not necessary, for the purpose of the disposal of the application for temporary injunction, to arrive at such a finding, in the facts and circumstances of the case. We think it proper to relegate the question of maintainability of the suit to the trial stage of the suit, particularly in view of the decision in Mardia Chemicals" case. The order passed by the court below is sustained on the other findings in the order and in view of what we have held in this judgment.

The FAO is disposed of as above. The interlocutory application for injunction, I.A. No. 4946 of 2008, is dismissed.