

(2015) 09 CAL CK 0044
In the Calcutta High Court
Case No : C.O. 1884 of 2015

Housing Development Finance Corporation Limited (HDFC Ltd.) and Others

APPELLANT

Vs

Dorjee Dolma Bhutia and Others

RESPONDENT

Date of Decision : 21-09-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11
Constitution of India, 1950 — Article 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 14, 14(1)
Transfer of Property Act, 1882 — Section 65-A, 69, 69-A

Citation : (2016) 1 BC 581 : (2015) 4 CALLT 108

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Probal Kumar Mukherjee, Samit Dutta, Bhaskar Mukherjee and Avigyan Roy, for the Appellant; Satyajit Talukdar, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Harish Tandon, J—The point emerged for consideration in this revisional application is to whether the jurisdiction of the Civil Court is barred under Section 34 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (In short SARFAESI). The challenge is made to an order No. 9 dated February 9, 2015 passed by Civil Judge (Junior Division), Siliguri in Title Suit No. 103 of 2014 rejecting an application under Order 7 Rule 11 of the Code.

2. The aforesaid suit is filed by the plaintiff/opposite party for declaration of their ownership in respect of the suit property, with further declaration that the defendant No. 3 & 4, the petitioner herein, have no right to take possession thereof by ousting her and have no right to sale the suit property to a third party for realization the loan amount and permanent injunction restraining the

petitioners from entering into the suit property and also from disturbing the peaceful possession of the plaintiff/opposite party No. 1.

3. The facts emanate from the plaint are that one Mr. Mani Kumar Gurung inherited the suit property from his father late Dhan Bahadur Gurung who purchased the same through a registered deed bearing No. 2881 for the year 1983. The said owner showed his intention to sale the said property and expressed such desire to the plaintiff/opposite party No. 1. It was conveyed to her that the property is neither mortgaged nor under charge and hypothecation but could not hand over the original title deed as the same had been misplaced. Subsequently, it was disclosed that the said property was mortgaged with the Central Bank of India, Bagdogra Branch but after the payment of the entire loan, it is free from any encumbrances. The said owner further handed over the photocopy of the no encumbrances certificate issued by the learned Advocate and in good faith, she agreed to purchase the suit property for a consideration of Rs. 4,50,000/-. Subsequently a deed of sale was executed by the said owner and the clearance certificate issued by the Central Bank of India, Bagdogra Branch was also handed over to her. It is further averred that simultaneously with the execution of the deed, the possession of the suit premises was also handed over by the erstwhile owner. Later on, it transpired that the said property was also mortgaged with the State Bank of India, Mangaldeep Branch, Siliguri when a notice under Section 13(2) of the SARFAESI Act was issued. The said fact was brought to the notice of the erstwhile owner who cleared the entire loan amount and handed over the original deed which was kept with the said bank to her. The plaintiff/opposite party No. 1 further received a notice under Section 13(2) of the SARFAESI Act issued by the United Bank of India, Darjeeling Branch and was surprised to know that the said property was also mortgaged with the said bank for the loan obtained by the erstwhile owner. The erstwhile owner again repaid the loan of the United Bank of India, who, thereafter, did not pursue any further. In the last week of March, 2014, a further notice under Section 13(2) of the SARFAESI Act issued by the petitioners addressed to the erstwhile owner and one Sanjoy Gurung brings the notice of the plaintiff/opposite party No. 1 that the said property was further mortgaged for securing a loan. Despite several attempts, the erstwhile owner could not be traced so that the demand of the petitioners could be met by them. Since the erstwhile owner suppressed those facts and misrepresentative that the property is free from any encumbrances have practiced fraud upon the plaintiff/opposite party No. 1 and being a bonafide purchaser for value without notice his property cannot be sold by the petitioners taking measures under the SARFAESI Act.

4. The petitioners, who are arraigned as defendant No. 3 & 4 in the suit, took out an application under Order 7 Rule 11 of the Code for rejection of the plaint on the ground that the suit is barred by the provision of Section 34 of the SARFAESI Act.

5. The Trial Court dismissed the said application on two fold grounds firstly; the

Court should confine its perusal to the averments made in the plaint and cannot travel beyond it secondly; unless the measures under Section 13(4) of the SARFAESI Act is taken, the right to file an appeal under Section 17 of the Act is not available and therefore, Section 34 of the said Act cannot be a bar in entertaining the civil suit.

6. Admittedly, on the date of the institution of suit, the petitioners did not issue any notice under Section 13(4) of the Act which came to be issued on 07.07.2014.

7. The learned Advocate for the petitioner vehemently submits that the right to apply under Section 17 of the SARFAESI Act accrues only after any measures taken under Section 13(4) and not prior thereto. It is further submitted that the cause of action pleaded in the plaint is based on fraud committed by the defendant No. 1 and, therefore, the Debt Recovery Tribunal is not competent to decide such issue.

8. The host of the judgments delivered by the Supreme Court and the different High Courts are relied on the proposition that if the right to apply under Section 17 of the SARFAESI Act is not available, the bar under Section 34 of the said Act cannot be applied to a civil proceeding instituted before the Civil Court. It is pertinent to record, before proceeding to deal with each of the judgment cited by the petitioners, that subsequently the petitioner approached the Debt Recovery Tribunal by filing an appeal under Section 17 of the Act challenging the action of the petitioners under Section 13(4) of the SARFAESI Act which is pending.

9. The petitioner heavily placed reliance upon on the constitution bench decision of the Supreme Court delivered in case of *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, AIR 2004 SC 2371 : (2004) 2 BC 397 : (2004) 120 CompCas 373 : (2004) 2 CompLJ 209 : (2004) 2 CTC 759 : (2004) 4 JT 308 : (2004) 138 PLR 271 : (2004) 4 SCALE 338 : (2004) 4 SCC 311 : (2004) 51 SCL 513 : (2004) 3 SCR 982 : (2004) 2 UJ 980 : (2004) AIRSCW 2541 : (2004) 3 Supreme 243 , on the proposition that by virtue of Section 34 of the SARFAESI Act, the jurisdiction of the Civil Court is barred in respect of the matter which the Debt Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken or to be taken in pursuance of any power conferred under the said Act. The reliance is placed on an observation made in Paragraph 50 of the said report and it would be apt to quote the same as under:

"50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr. Salve, one of the counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find

that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken "or to be taken in pursuance of any power conferred under this Act". That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under Sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under Sub-section (4) of Section 13."

10. Before the Constitution Bench, the challenge was made to the validity of the SARFAESI Act, more particularly, the provisions contained under Section 13, 15, 17 & 34 thereof.

11. The sheet anchor of the argument was restricted to the exercise of arbitrary powers conferred upon the bank and the financial institution without any guidelines and without providing any appropriate or adequate mechanism to decide the disputes relating to correctness of the demand, its validity and actual amount of dues sought to be recovered from the borrowers. While analyzing the different sections, more particularly, Section 17 of the Act, it is observed:

"It is thus clear that an appeal under sub-section (1) of Section 17 would lie only after some measure has been taken under sub-section (4) of Section 13 and not before the stage of taking of any such measure. According to sub-section (2), the borrower has to deposit 75% of the amount claimed by the secured creditor before his appeal can be entertained."

12. In Paragraph 42 of the said report, the Constitution Bench posed a question as to whether there is an absolute bar in a remedy to a borrower before an action is taken under Sub-section 4 of Section 13 of the Act in view of non-obstante clause under Subsection 1 of Section 13 and the bar of jurisdiction of the Civil Court under Section 34 of the Act. Upholding the jurisdiction of the Civil Court in a limited compass, the observations made in Paragraph 51 should be noticed which runs thus:

"51. However, to a very limited extent jurisdiction of the civil court can also be invoked, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil court in the cases of English mortgages. We find such a scope having been recognized in the two decisions of the Madras High Court which have been relied upon heavily by the learned Attorney General as

well appearing for the Union of India, namely, V. Narasimhachariar, AIR at pp. 141 and 144, a judgment of the learned Single Judge where it is observed as follows in para 22: (AIR p. 143)

"22. The remedies of a mortgagor against the mortgagee who is acting in violation of the rights, duties and obligations are twofold in character. The mortgagor can come to the court before sale with an injunction for staying the sale if there are materials to show that the power of sale is being exercised in a fraudulent or improper manner contrary to the terms of the mortgage. But the pleadings in an action for restraining a sale by mortgagee must clearly disclose a fraud or irregularity on the basis of which relief is sought: *Adams v. Scott*. I need not point out that this restraint on the exercise of the power of sale will be exercised by courts only under the limited circumstances mentioned above because otherwise to grant such an injunction would be to cancel one of the clauses of the deed to which both the parties had agreed and annul one of the chief securities on which persons advancing moneys on mortgages rely. (See *Ghose, Rashbehary: Law of Mortgages, Vol. II, 4th Edn., p. 784.*)"

13. The Karnataka High Court in case of *Vysya Co-operative Bank Ltd. Vs. Ms. G. Keerthana and Others*, AIR 2008 Kar 25 : (2008) 2 KarLJ 380 : (2008) 1 KCCR 423 upheld the jurisdiction of the Civil Court to entertain a partition suit negating the objection of the bank that the suit is barred under Section 34 of the SARFAESI Act. The fact emerges from the said report are that the mother as a natural guardian filed a partition suit for and on behalf of the two minors against the father and the bank. The father appeared to have taken loan from the bank after mortgaging the said property. The bank took a preliminary objection as to the maintainability of the suit because of the embargo created under Section 34 of the Act. Without noticing the judgment rendered by the Constitution Bench in case of *Mardia Chemicals Ltd.*; (*supra*), the Karnataka High Court held that the petitioner-bank being only a mortgagee shall have the right to get a share in the properties and, therefore, such right shall not be defeated if a decree is passed in the said suit.

14. In case of *United Bank of India Vs. Satyawati Tondon and Others*, AIR 2010 SC 3413 : (2010) 3 BC 495 : (2010) 3 CompLJ 585 : (2010) 7 SCALE 696 : (2010) 8 SCC 110 : (2010) 9 SCR 1 : (2010) 9 UJ 4395 : (2010) AIRSCW 7049 : (2010) AIRSCW 5267 , one of the point which came up for consideration as to whether the remedy under Section 17 can be invoked only by a borrower and the guarantor and not by a third party. The Apex Court interpreted the expression "any person" used in Section 17(1) of the Act to be of wide import which not only brings within its fold the borrower or the guarantor but any person effected by an action taken under Section 13(4) or Section 14 of the Act.

15. The judgment rendered by the Supreme Court in case of *Jagdish Singh Vs. Heeralal and Others*, (2014) 1 ABR 124 : (2014) 2 AD 647 : (2013) 11 AD 624 : AIR 2014 SC 371 : (2013) 4 BC 744 : (2013) 117 CLA 173 : (2014) 1 CompLJ 307 : (2014) 1 CTC 652 : (2013) 14 JT 173 : (2013) 13 SCALE 359 : (2014) 1

SCC 479 : (2014) 2 SCJ 460 has somewhat factual parity with the present case. The Appellant before the Supreme Court purchased the property in auction and was also put in possession by the bank after exhausting the provision of SARFAESI Act. Later on, it was brought to the notice of the appellant therein that the respondent Nos. 1 to 5 filed the civil suit in the Court of District Judge for declaration of title, partition and permanent injunction against the respondent Nos. 7 to 9 and others including the appellant and the bank. The bank took a preliminary objection before the Civil Court challenging the jurisdiction to entertain the suit in view of Section 13 & Section 34 of the SARFAESI Act. The Civil Court upheld the preliminary objection observing that the suit is not maintainable in view of embargo created under Section 34 of SARFAESI Act which was reversed by the High Court of Madhya Pradesh. The matter was further carried to the Apex Court.

16. A point was urged that once the question of title on the basis of the Joint Hindu Property acquired from the nucleus thereof is involved, it cannot be suggested that on the basis of the perusal of the averments made in the plaint, the suit is barred under the aforesaid provisions. The Apex Court noticed the judgment rendered in case of Satyawati Tondon (supra) interpreting the expression "any person" to be of wide import and amplitude and imbibed within its folds not only the borrower or guarantor but any person effected by any action taken under Section 13(4) of the SARFAESI Act held:

"24. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously.

25. Section 18 provides for an appeal to the Appellate Tribunal.

26. Section 34 lays down that no civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."

17. Before proceeding further to deal with the other judgments cited at the bar, this Court feels that the judgment of the Supreme Court in case of Standard Chartered Bank Vs. V. Noble Kumar and Others, (2013) 117 CLA 18 : (2013) 180 CompCas 137 : (2013) 4 ComplJ 417 : (2013) 6 CTC 683 : (2013) 10 SCALE

540 : (2013) 9 SCC 620 which was not cited in Jagdish Singh's Case should be taken note of. In Noble Kumar case, the point, which arose, was whether recourse to Section 14 of the SARFAESI Act can be taken by the secured creditor after issuing a notice under Section 13(2) of the said Act and what should be the remedy of an aggrieved person.

18. In the said report, a notice under Section 13(2) of the SARFAESI Act was issued on 15.11.2007 demanding the repayment of loan with interest within sixty days. Since the respondent therein did not comply with the demand in making the payment nor raised any objection, the appellant-bank made an application under Section 14 of the SARFAESI Act in the Court of Chief Judicial Magistrate, Chengalpattu requesting him to take possession of the secured assets. The Chief Judicial Magistrate appointed an Advocate Commissioner to take possession and to hand over the same to the appellant-bank. The legality of the proceeding was challenged by the respondent therein. The writ petition was allowed by the Division Bench by setting aside the order by which the Commissioner/Receiver was appointed holding that the bank cannot bypass the provision of Section 13(4) of the SARFAESI Act before invoking Section 14 thereof. The Apex Court held:

"It is in the abovementioned background of the legal frame of Sections 13 and 14, we are required to examine the correctness of the conclusions recorded by the High Court. Having regard to the scheme of Sections 13 and 14 and the object of the enactment, we do not see any warrant to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under Section 13(4) and on facing resistance, he may still approach the Magistrate under Section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under Section 14."

19. The other question which, the Supreme Court felt necessary to consider, was the availability of the remedy under Section 17 to the borrower against any measure taken either under Section 13(4) or Section 14 of the SARFAESI Act. In Paragraph 27 of the said report, it is held:

"We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available."

20. The Apex Court further took note of the expression "aggrieved by".....taken by the secured creditor appearing in Section 17(1) of the Act and held that either the reasons indicated for rejection of the objection of the borrower or the likely action of the secured creditor shall not confer any right under Section 17. It is ultimately held that the remedy by way of an appeal under Section 17 of the Act is open to the borrower after the measures are taken under Section 13(4) and

before the date of sale/auction of the property and also available when any recourse to Section 14 of the Act for taking possession of the property with the help of the Officer appointed by the Magistrate.

21. In a recent decision, the Supreme Court in case of Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Ltd. and Others, (2014) 5 JT 75 : (2014) 3 RCR(Civil) 501 : (2014) 4 SCALE 484 : (2014) 6 SCC 1 was considering a point as to whether the provision of the SARFAESI Act in any way affected the right of the lessee to remain in possession of the secured assets during the period of a lease. In the said case, the tenants of the several premises mortgaged with the different bank as security for the loan advanced to the borrower who defaulted in repayment of their debts, challenged the order of the Chief Metropolitan Magistrate under Section 14(1) of the SARFAESI Act. It was contended by the appellant therein that being a lessees in respect of the property and being protected under Transfer of Property Act or the Rent Restriction Act they cannot be evicted without recourse having taken under the aforesaid Act by invoking the provision of the SARFAESI Act. Since those tenants did not avail the remedy under Section 17 of the SARFAESI Act, the point arose whether they should be relegated to the Debt Recovery Tribunal under the aforesaid provision and not to any other forum. While holding that the words "any person" includes the person affected by any action taken under the SARFAESI Act and the lessee may file an application before the Debt Recovery Tribunal for restoration of possession in case he is dispossessed from a secured assets, the Bench noticed the provision contained under Sub-section 3 of Section 17 of the said Act and held that the power to restore possession of the secured assets is confined to the borrower only and not to any person including the lessee. It is ultimately held that in such situation, such person has no remedy under Section 17 of the said Act to protect his lawful possession under valid lease. It would be apt to quote Paragraph 32 & 34 of the said report which runs thus:

"32. When we read sub-section (1) of Section 17 of the SARFAESI Act, we find that under the said sub-section "any person (including borrower)", aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under the chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with Mr. Vikas Singh that the words "any person" are wide enough to include a lessee also. It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset. But when we read sub-section (3) of Section 17 of the SARFAESI Act, we find that the Debts Recovery Tribunal has powers to restore possession of the secured asset to the borrower only and not to any person such as a lessee. Hence, even

if the Debts Recovery Tribunal 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 the Act, it cannot restore possession of the secured asset to the lessee. Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is in accordance with the requirements of Section 65-A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under Section 17 of the SARFAESI Act to the lessee to protect his lawful possession under a valid lease.

34. We have perused the aforesaid decision of this Court in Transcore and we find that in that case, the question whether the secured creditor, in exercise of its rights under Section 13 of the SARFAESI Act, can take over possession of the secured asset in possession of a lessee under a valid lease was not considered nor was the question whether there is anything in the SARFAESI Act inconsistent with the right of a lessee to remain in possession of the secured asset under the Transfer of Property Act considered. In our view, therefore, the High Court has not properly appreciated the judgment of this Court in Transcore and has lost sight of the opening words of sub-section (1) of Section 13 of the SARFAESI Act which state that notwithstanding anything contained in Section 69 or Section 69-A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of the Act. The High Court has failed to appreciate that the provisions of Section 13 of the SARFAESI Act thus override the provisions of Section 69 or Section 69-A of the Transfer of Property Act, but does not override the provisions of the Transfer of Property Act relating to the rights of a lessee under a lease created before receipt of a notice under Sub-section (2) of Section 13 of the SARFAESI Act by a borrower. Hence, the view taken by the Bombay High Court in the impugned judgment as well as in Trade Well so far as the rights of the lessee in possession of the secured asset under a valid lease made by the mortgagor prior to the creation of mortgage or after the creation of mortgage in accordance with Section 65-A of the Transfer of Property Act is not correct and the impugned judgment of the High Court, insofar it takes this view, is set aside."

22. What could be culled out from the ratio laid down in the above noted reports are that the expression "any person" is a wide import and amplitude and includes within its ambit a person other than the borrower or the guarantor who may be effected by any action taken under the SARFAESI Act. A person who is neither a borrower or the guarantor has a right of an appeal under Section 17 of the said Act before the Debt Recovery Tribunal assailing any measures taken under Section 13(4) of the Act. The right of appeal is not restricted only to the

measures taken under Section 13(4) but is further available if recourse is made to Section 14 of the said Act and even on mere apprehension of threat of dispossession from the secured assets. Section 34 of the Act in explicit terms does not take away the jurisdiction of the Civil Court. The Civil Court can exercise the jurisdiction within the limited extend, more particularly, when the ingredients under Section 17(1) of the Act is not satisfied. It cannot be said in absolute terms that the Civil Court's jurisdiction is taken away merely on an action taken under the SARFAESI Act.

23. In the present case, not only the plea of fraud has been set out in the plaint but there was no measures taken under Section 13(4) or under Section 14 of the SARFAESI Act as on the date of the institution of a suit. Admittedly the notice under Section 13(4) was issued after the institution of a suit. The Court should confine its scrutiny under Order 7 Rule 11 of the Code to the averments made in the plaint when the rejection is sought under Clause "d" thereof. The Court should not look into the documents produced by the defendants at the stage of Order 7 Rule 11 and than to say that the suit is barred.

24. This Court, therefore, does not find that the Trial Court committed any error or the impugned order suffers from illegality and/or infirmity warranting interference under Article 227 of the Constitution of India.

25. The revisional application is thus dismissed.

26. However, there shall be no order as to costs.