

(2017) 06 KL CK 0027
In the High Court Of Kerala
Case No : 73 of 2017 (O)

ROSHAN NARAYANAN.C.S

APPELLANT

Vs

THE AUTHORIZED OFFICER & Anr

RESPONDENT

Date of Decision : 23-06-2017

Acts Referred:

Constitution of India, Article 21, Article 300A - Amendment of the Schedule - Persons not to be deprived of property save by authority of law
Securitisation and Reconstruct

Citation : (2017) 06 KL CK 0027

Hon'ble Judges : A.K.Jayasankaran Nambiar

Bench : SINGLE BENCH

Advocate : S.EASWARAN, N.SASI, K.M.ANEESH, N.NAGARESH

Judgement

1. The petitioner herein, was an applicant before the Debts Recovery Tribunal, Ernakulam (hereinafter referred to as "DRT"), in S.A. No.11/2016 that was preferred impugning a notice received from an Advocate Commissioner, informing the petitioner that physical possession of his property would be taken on a date that was specified in the notice. The S.A. was considered by the DRT, along with a number of similar S.A's that were filed challenging the action of the secured creditor in approaching the Magistrate under Section 14 of the Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter referred to as the "SARFAESI Act"), and the consequential orders passed by the Magistrate, and notices issued by Advocate Commissioners. By Ext.P6 common order dated 25.05.2017, the DRT found that the S.A's were not maintainable under Section 17 of the SARFAESI Act, since, according to the DRT, a notice of dispossession, issued by an officer of the court executing the order of a Magistrate, cannot be construed as a "measure" under Section 13(4) of the SARFAESI Act. It is the correctness of this view that is questioned in this O.P (DRT).

2. It might be noticed, in this connection that the DRT had, on an earlier

occasion issued a circular, on more or less similar lines, clarifying that in cases where symbolic possession had already been taken, and the period of 45 days had elapsed since then, a subsequent order under Section 14 of the SARFAESI Act contemplating physical possession could not be challenged through a securitization application filed under Section 17. The legality of the said circular was considered by this Court in *Sami v. Bank of India* - [2011 (3) KLT 554], wherein, after referring to the decisions of the Supreme Court in *Authorised Officer, Indian Overseas Bank & Anr v. Ashok Saw Mill* - [(2009) 8 SCC 366], *United Bank of India v. Satyawati Tandon & Ors* - [(2010) 8 SCC 110] and *Kanaiyalal Lalchand Sachdev & Ors v. State of Maharashtra & Ors* - [(2011) 2 SCC 782], this court found as follows: 6. At the outset, I would note that although the Supreme Court had upheld the constitutional validity of the Act, it cannot be gainsaid that the Act is a very harsh legislation, which results in very disastrous consequences to the owner of the property against which a measure under S.13(4) of the Act has been taken. That being so, the provisions regarding the remedies provided for persons aggrieved by such action should be construed liberally. No doubt, the Supreme Court has categorically held that no application/appeal would lie against any action taken by the financial institution proper to taking a measure under S.13(4). Therefore, the right to resort to remedies under S.17 would arise only when any one of the measures contemplated under S.13(4) or thereafter is initiated, is his contention. I am of opinion that it is not necessary for an aggrieved person to wait till actual or symbolic possession is taken by the financial institution before resorting to the remedy as provided under S.17. Take for example, a case where a person against whom proceedings under the securitization proceedings have been initiated, has a case that he was not a party to the loan transaction at all, but by fraud or forgery, he has been made a borrower or a surety. In such cases, it would be nothing but sheer injustice to say that he has to wait till the financial institution takes possession and throws him out into the street before he can resort to the only remedy available to him under law, which is filing of an application/appeal under S.17 of the Act. I am of opinion that the rigour of the provisions of the Act should not be taken to that extreme extent to deny even the right of appeal under S.17, which is the only remedy provided to an aggrieved person against a measure under S.13(4). This is all the more so since the Supreme court has time and again held that High Courts should not ordinarily entertain Writ Petitions challenging proceedings under the Securitisation and Reconstructions of Financial Assets and Enforcement of Security Interest Act, 2002 and should relegate the parties to the remedy by way of appeal under S.17 of the Act before the Debt Recovery Tribunal. I am of opinion that despite the vehement protestations of counsel for the banks, particularly by the Union Bank of India, going by the decisions of the Supreme Court, the very fact of the financial institution approaching the Magistrate under S.14 itself would constitute a measure under S.13(4) of the Act, against which an appeal can be filed by the aggrieved person before the Tribunal under S.17. Counsel for the banks point out that in the decisions of *Mardia Chemicals case* & *Transcore case* (supra), the Supreme Court has held

that only when a measure under S.13(4) is actually taken, an appeal would lie. No doubt, that is the legal position. But the question is when exactly a measure under S.13(4) can be stated to be actually taken. I am not inclined to accept the contention of the counsel for the banks that that would only be when possession is actually taken by the financial institution. Any measure under S.13(4) would constitute a cause of action for filing an appeal under S.17. The mere decision of the financial institution to approach the Magistrate under S.14 would also constitute a measure under S.13(4). Reliance by the learned counsel for the Union Bank of India on the Division Bench decision of this Court in Muhammed Ashraf's case (supra) is misplaced, according to me. That decision only says that no appeal would lie against an order of the Magistrate under S.14 or the action of the Commissioner appointed by the Magistrate to take possession. That decision does not say that the action of the bank in approaching the Magistrate under S.14 would not constitute a measure under S.13(4).

3. In Ext.P6 common order of the DRT, while the aforesaid decision of this Court is taken note of, the Tribunal appears to have taken a contrary view solely on account of a subsequent judgment of the Supreme Court in *Standard Chartered Bank v. V. Noble Kumar & Ors* - [(2013) 9 SCC 620], which was taken note of by this Court in *Jaffar v. Dhanalakshmi Bank* - [2014 (1) KHC 705]. In *Noble Kumar* (Supra) the Supreme Court, while considering the issue of whether it was obligatory for a secured creditor to first issue a notice in terms of Rule 8(2) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the "Enforcement Rules"), and attempt to take possession of the secured asset directly, before taking recourse to the provisions of Section 14 of the SARFAESI Act for getting possession of the said asset, answered the question in the negative, and found that the secured creditor could directly approach the Magistrate under Section 14 for getting possession of the secured asset. While dealing with an incidental issue regarding the stage at which the borrower could approach the DRT through an application under Section 17 of the DRT, the court observed that the remedy under Section 17 is available to the borrower only after losing possession of the property. The relevant observations are at paragraphs 27 to 29 of the judgment and read as follows: 27. The "appeal" under Section 17 is available to the borrower against any measure taken under Section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under Section 13(4). Alienating the asset either by lease or sale, etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (sic the secured creditor). Therefore, the borrower is always entitled to prefer an "appeal" under Section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares

that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section 14. 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.

28. It can be noticed from the language of the proviso to Section 13(3-A) and the language of Section 17 that an "appeal" under Section 17 is available to the borrower only after losing possession of the secured asset. The employment of the words "aggrieved by taken by the secured creditor" (emphasis supplied) in Section 17(1) clearly indicates the appeal under Section 17 is available to the borrower only after losing possession of the property. To set at naught any doubt regarding the interpretation of Section 17, the proviso to sub-section (3-A) of Section 13 makes it explicitly clear that either the reasons indicated for rejection of the objections of the borrower or the likely action of the secured creditor shall not confer any right under Section 17.

29. The same principle is re-emphasised with the newly added Explanation in Section 17(1) which came to be inserted by Act 30 of 2004:

"Explanation:-For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including the borrower) to make an application to the Debts Recovery Tribunal under this subsection."

4. It is significant to note that the decision in Noble Kumar (Supra) does not refer to the earlier decisions of concurrent benches of the Supreme Court in Satyawati Tandon (Supra) and Kanaiyalal Lalchand Sachdev (Supra), both of which suggest that a borrower can approach the DRT, through an application under Section 17 of the SARFAESI Act, against any step taken by the secured creditor, including the stage covered by Section 14 of the Act. This court has, therefore, to examine whether the Supreme Court in Noble Kumar (Supra) struck a discordant note, to the earlier view taken by it, and if so, decide as to which of the decisions is to be followed for the purposes of resolving the issues in the instant case.

5. I have heard the learned counsel Sri. S. Easwaran appearing on behalf of the petitioner and Sri. Aneesh K.M., the learned Standing counsel for the respondent Bank.

6. It will be apposite, at the outset, to notice the relevant statutory provisions: Sections 13(4)(a), 14 and 17 of the Act read as follows:

13. Enforcement of security interest:-

(1) xxxxxxxxxxxxxxx

(2) xxxxxxxxxxxxxxxx

(3) xxxxxxxxxxxxxxxx

(4) In case the borrower fails to discharge his liability in full within the period specified in subsection (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset:- (1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him-

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

(b) forward such assets and documents to the secured creditor:

[Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that-

(i) the aggregate amount of financial assistance granted and the total claim of the bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial institution is holding a valid and subsisting security interest over such properties and the claim of the bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets within a period of thirty days from the date of application:

Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,-

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor]

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

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any court or before any authority.

17. Application against measures to recover secured debts:- (1) 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 this Chapter, may make an application along with such fee, as may be

prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

[Explanation:- For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under subsection (1) of section 17.

(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction-

- (a) the cause of action, wholly or in part, arises;
- (b) where the secured asset is located; or
- (c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

(2) 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 this Act and the rules made thereunder.

(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 subsection (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 or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,-

- (a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and
- (b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and
- (c) pass such other directions as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under subsection of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under subsection (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall

be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recovery his secured debt.

(4A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of secured interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

7. Rule 8 of the Security Interest (Enforcement) Rules, 2002 reads as follows: 8.

Sale of immovable secured assets:-(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession, by delivering a possession notice prepared as nearly as possible in Appendix IV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in subrule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers], one in vernacular language having sufficient circulation in that locality, by the authorised officer.

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) The authorised officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

(5) Before effecting sale of the immovable property referred to in sub-rule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:-

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public.

(c) by holding public auction; or

(d) by private treaty.

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under sub-rule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers on in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,-

(a) The description of the immovable property to be sold, including the details of the encumbrances known t the secured creditor;

(b) the secured debt for recovery of which the property is to be sold;

(c) reserve price, below which the property may not be sold;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.

(7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet.

(8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.

8. On an analysis of the provisions of Sections 13, 14 and 17 of the SARFAESI Act, with particular focus on the rights available to a borrower to take legal recourse against any action of the secured creditor against the secured asset, it is my view that, when a secured creditor initiates a measure under Section 13(4) (a) of the SARFAESI Act, he initiates a series of "steps", the cumulative effect of which secures to him the actual physical possession of the secured asset, together with the right to transfer by way of lease, assignment or sale for realizing the secured asset. It may well be that, at the time of affixing a notice in terms of Rule 8(2) of the Enforcement Rules, he does not have actual physical possession of the secured asset, but only the allied rights such as the right to transfer by way of lease, assignment or sale for realizing the secured asset. Rule 8 (3) of the Enforcement Rules indicates that the legislature was aware of such a possibility since, the said provision deals with the procedure to be followed by the secured creditor "in the event of" the possession of immovable property being "actually taken". It is when a secured creditor wants to effectuate his right to alienate the property that he looks to getting the actual physical possession of the secured asset. At that stage, if there is no resistance from any quarter, he secures physical possession effortlessly. When there is such resistance, however, he moves the jurisdictional Chief Metropolitan Magistrate/District Magistrate in terms of Section 14 of the SARFAESI Act, to get possession using the machinery of the State.

9. The role of the Magistrate, at this stage is merely to facilitate the taking of physical possession, based on the application preferred by the secured creditor. The procedural requirements, with regard to the contents of the affidavit filed by the secured creditor before the Magistrate, which were introduced w.e.f 15.01.2013 through the Amendment Act of 2013, are designed to ensure that any action by the Magistrate concerned is based on the affidavit filed by the secured creditor, the contents of which are duly affirmed by the authorised officer of the secured creditor. This procedure, in my view, is intended to make the secured creditor accountable for the steps taken for getting physical possession. In the event of it being subsequently demonstrated, that the contents of the affidavit were not factually correct, then, in proceedings under Section 17 of the

SARFAESI Act, the said measure taken by the secured creditor can be set aside by the DRT, as not in accordance with the provisions of the Act or Rules. In that event, the DRT also has the power to prevent further proceedings, as also to order a restoration of possession, if already taken.

10. Since the Magistrate, acting under Section 14 of the SARFAESI Act, does not exercise any discretion while issuing orders directing physical possession of the secured asset to be taken, there is no judicial function discharged by the Magistrate and it is therefore that the Act protects such orders of the Magistrate, by rendering them immune to legal action (See: Section 14(3) of the SARFAESI Act). The absence of any independent judicial function by the Magistrate, while passing orders under Section 14, also suggests that the orders passed by the Magistrate are only such as to effectuate the step taken by the secured creditor, and when an Advocate Commissioner, authorised by the Magistrate to take physical possession of the secured asset, does so, either with or without police assistance, the measure taken by the secured creditor under Section 13(4)(a) fructifies. The recourse to the Magistrate under Section 14 is thus only a "step" in the "measure" taken by the secured creditor for obtaining physical possession of the secured asset.

11. Section 17 of the Act renders the measures taken by a secured creditor under Section 13 (4), including one under Section 13 (4)(a) of the Act, actionable at the instance of any person (including the borrower). Here, the reference to a "measure" must be taken as including a reference to any step in the effectuation of that measure, commencing with the issuance of any notice under Rule 8(2), and including the stages of approaching the Magistrate, obtaining an order from him, issuance of a notice by the Advocate Commissioner, and culminating with the taking of actual physical possession of the secured asset. Each of the above steps, in the measure adopted, would, in my opinion, give rise to a cause of action to approach the DRT through an application under Section 17 of the Act. The above position becomes more clear when we notice some of the other provisions of the Act. It is trite that a notice under Rule 8(2) is actionable under Section 17 of the Act. Assume, for argument sake, that, on account of resistance, the notice does not secure to the secured creditor actual physical possession of the secured asset, but only secures to him the allied rights such as the right to transfer by way of lease, assignment or sale for realizing the secured asset. The secured creditor would then approach the Magistrate under Section 14 of the SARFAESI Act and, in the absence of any legal provision that obliges the Magistrate to issue a notice to the borrower before passing an order directing the taking of physical possession, the notice received from an Advocate Commissioner could well be the first stage where a person in possession of the property becomes aware of an imminent dispossession. In such a situation, a tenant of the property is granted a right to approach the DRT through Section 17 (4A) that was introduced through the Amendment Act 44 of 2016, w.e.f 01.09.2016. Surely, it could not have been the intention of the legislature to grant such a right of legal access to a tenant of the property while, at the same

time, denying such access to the owner of the property. Further, to deny the borrower access to the DRT at that stage, questioning the step taken by the secured creditor to get physical possession, would tantamount to ignoring the constitutional right available to him under Art. 300A of the Constitution of India. Deferring legal access to a stage after he has been dispossessed would render meaningless his right under Art. 300A, a right that is now seen as an integral facet of one's right to life under Art. 21 of the Constitution.

12. If one re-visits the decision of the Supreme Court in *Noble Kumar* (Supra) in the backdrop of the above interpretation of the term "measures" in Section 13(4) of the SARFAESI Act, then it is easy to reconcile the observations therein with those in the earlier precedents such as *Satyawati Tandon* (Supra) and *Kanaiyalal* (Supra). The reference by the Supreme Court in *Noble Kumar* (Supra) to the right under Section 17 being available to a borrower "only after dispossession" must be seen as a reference to the right being available to a borrower after losing any right that constitutes an integral part of the right to possession. As already noted, the measure envisaged in Section 13(4)(a) of the SARFAESI Act is one of taking possession "including the right to transfer by way of lease, assignment or sale for realizing the secured asset". The possessory right envisaged under Section 13 (4)(a) takes within its ambit the incidental right to transfer the property also. Thus, even going by the decision in *Noble Kumar* (Supra), I would think that, an application preferred by any person (including the borrower) against any step taken by the secured creditor that is designed to deprive the said person of any constituent of the proprietary right envisaged in Section 13(4)(a), would be maintainable before the DRT under Section 17 of the SARFAESI Act.

13. I might add, at this juncture, that this court is mindful of the plethora of judicial precedents which state that, when confronted with two or more mutually irreconcilable decisions of the Supreme Court, that are cited at the bar, the inviolable recourse is to apply the earliest view, as the succeeding ones would fall in the category of *per incuriam* (See: *Sandeep Kumar Bafna v State of Maharashtra & Anr* - 2014 (16) SCC 623). In the instant case, it would have been easy for this court to brush aside the decision in *Noble Kumar* (supra) as *per incuriam*, as the said decision does not refer to the earlier decisions of concurrent benches in *Satyawati Tandon* (Supra) and *Kanaiyalal* (Supra). My attempt in this judgment, however, has been to reconcile the said decisions in the light of the statutory provisions.

14. In the result, I set aside Ext.P6 common order dated 25.05.2017 of the DRT, to the extent it holds that the action of the secured creditor in approaching the Magistrate under Section 14 and obtaining an order appointing an Advocate Commissioner do not constitute measures under Section 13(4) of the SARFAESI Act for the purposes of maintaining an application under Section 17 of the SARFAESI Act. It is declared that the reference to a "measure" in Section 13 (4), in its application to clause (a) thereof, must be taken as including a reference to

any step in the effectuation of that measure, commencing with the issuance of any notice under Rule 8 (2), and including the stages of approaching the Magistrate, obtaining an order from him, issuance of a notice by the Advocate Commissioner, and culminating with the taking of actual physical possession of the secured asset. Each of the above steps, in the measure adopted, would give rise to a cause of action to approach the DRT through an application under Section 17 of the SARFAESI Act. The DRT shall forthwith restore to file all applications that have been rejected on the basis of Ext.P6 common order, and proceed to deal with those applications on merits and in accordance with law. The original petition is disposed as above.