
(2017) 03 MP CK 0137
In the Madhya Pradesh High Court
Case No : 3743 of 2016

Smt. Sherbano wd./o Ata Mohammad, & Ors.

APPELLANT

Vs

Sarfaraj Mohd., & Ors.

RESPONDENT

Date of Decision : 06-03-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Transfer of Prope

Citation : (2017) 03 MP CK 0137

Hon'ble Judges : S.K.Seth

Bench : Single Bench

Advocate : Sanjay Agarwal, Santosh Thakur, V.P.Shrivastava

Judgement

1. This order shall also govern the disposal of W.P. No. 7400 of 2016, as the material and relevant facts and issues involved in both cases are common.

2. Petitioner is the auction purchaser of immovable property situated in Patwari Halka 57, R.I. Circle Khamariya, Village Ghana, District Jabalpur.

3. Dinesh Kumar Thakur(respondent. 2 herein) took a housing loan from Cent Bank Home Finance Ltd (respondent No. 3 and 4 herein) against collateral security of said

immovable property. These facts are no longer in dispute.

4. Respondent No. 2 defaulted in repayment of loan therefore the loan account was classified as NPA and respondent 3 and 4 took action under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act,2002 (herein after referred to as the SARFAESI Act for short) for recovery of outstanding dues amounting to Rs. 4,42,192 with interest and costs within sixty days from the date of the notice. Respondent No.2 did not make the default good, therefore secured creditor i.e. respondent No. 3 and 4

moved to the District Magistrate/Collector Jabalpur under Section 13 of the Act of 2002. On 16.3.2011 the District Magistrate ordered delivery of possession of the secured asset. (Subject matter of W.P.No. 7400/16).

5. After the said order was passed by the District Magistrate, respondent No. 1 swung into action by filing an objection before the D.M. that the actual physical possession cannot be given without evicting him (res.No.1) in accordance with the law in view of the temporary injunction granted in his favour by the Civil Court. District Magistrate overruled the objection as per order dated 13.7.2011 and thereafter the property was put to public auction. Petitioner was a successful bidder and property was sold to her and after documentation secured creditor handed over the property to the petitioner. Thus, she became absolute owner thereof.

6. Respondent No. 1 who is also an advocate, instead of challenging the orders of the District Magistrate under Section 17 of the SARFAESI Act by way of an appeal before the Debt Recovery Tribunal Jabalpur, amended the plaint to seek a mandatory injunction for delivery of possession of the property. He also sought a temporary mandatory injunction claiming to be put back in possession of property.

7. Trial Court rejected the prayer for a temporary injunction holding that respondent No.1 could not establish that he was in lawful possession. In the appeal, however, the IIInd Additional Judge Jabalpur vide order dated 17.11.2015 allowed the appeal and directed delivery of possession to respondent No. 1. It is significant to note that respondent no.1 in chasing teasing illusion succeeded in creating smoke screen that the IIInd Additional Judge Jabalpur completely shut its eyes not only to the fact that petitioner was not party to the suit but also that respondent No. 1 had not resorted to efficacious alternative statutory remedy and ignoring the Bar created under section 34 of the SARFAESI Act passed the order dated 17.11.2015 in execution whereof trial Court issued warrant of possession and on 8.2.2015 ordered Superintendent of Police to provide police aid to obtain possession from the petitioner, a bonafide purchaser of secured asset in public auction for valuable consideration. This led to the filing of the present petition.

8. Not satisfied with above, respondent No. 1 filed another suit (CS No. 280A/15) seeking a declaration that the order passed

by District Magistrate on 16.3.2011 was null and void. Once again, behind the back of petitioner, learned VIIth Civil Judge Class without considering the relevant law that such a suit was not maintainable, decreed the suit. Hence the second petition (W.P.No. 7400/16).

9. Learned Counsel for the petitioner submitted that the respondent No. 1 obtained orders behind her without affording an opportunity to put forward her case that she is a bonafide purchaser for valuable consideration and after documentation property stood transferred to her. Petitioner denied the status of

respondent No. 1 in the property as atenant and if the respondent No.1 had any grievance, his remedy was under Section 17 of the SARFAESI Act and a suit for dectration and permanent injunction barred under Section 34 of the Act.It is submitted that Court below passed orders and impugned decree without any jurisdiction which can be challengeged in a writ jurisdiction so as the jurisdictional error committed by Courts below could be corrected by keeping the Courts below within the bounds of their jurisdiction. It was further contended that when a judgment and decree is anullity, it could be challenged in any proceeding.

10. Per contra, Respondent No. 1 appearing in person submitted that the respondent No. 3 and 4 did not come with clean hand and obtained an order of the District Magistrarte by playing a fraud and fraud vitiates every thing. His further contention was that against the impugned judgment of decree for a mandatory injunction could not be challenged in a petition under Article

226/227, therefore, authorities were obliged to put him back in possession. He further submitted once the decision of the trial court attained finality it not be challenged on the ground of res judicata.

11. After having heard rival submissions at length and going through the voluminous material placed on record, we are of the opinion that both petitions deserve to be allowed.

12. Section 13 of the SARFAESI Act contains a detailed mechanism for enforcement of security interest. Sub-section (1) thereof lays down that notwithstanding anything contained in Sections 69 or 69-A of the Transfer of Property Act, 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 this Act. Sub-section (2) of Section 13 enumerates first of many steps needed to be taken by the secured creditor for enforcement of security interest. This sub-section provides that if a borrower, who is under a liability to a secured creditor, makes any default in re-payment 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 with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of Section 13(4). Subsection (3) of Section 13 lays down that notice issued under Section 13(2) shall contain details of the amount payable by the

borrower as also the details of the secured assets intended to be enforced by the bank or financial institution. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as a non-performing asset as also the quantum of the amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for nonacceptance are required to

be communicated. Sub-section (4) of Section 13 specifies various modes which can be adopted by the secured creditor for recovery of secured debt. The secured creditor can take possession of the secured assets of the borrower and transfer the same by way of lease, assignment or sale for realising the secured assets. This is subject to the condition that the right to transfer by way of lease, etc. shall be exercised only where a substantial part of the business of the borrower is held as secured debt. If the management of whole or part of the business is severable, then the secured creditor can take over management only of such business of the borrower which is relatable to security. The secured creditor can appoint any person to manage the secured asset, the possession of which has been taken over. The secured creditor can also, by notice in writing, call upon a person who has acquired any of the secured assets from the borrower to pay the money, which may be sufficient to discharge the liability of the borrower. Sub-section (7) of Section 13 lays down that where any action has been taken against a borrower under sub-section (4), all costs,

charges and expenses properly incurred by the secured creditor or any expenses incidental thereto can be recovered from the borrower. The money which is received by the secured creditor is required to be held by him in trust and applied, in the first instance, for such costs, charges and expenses and then in the discharge of dues of the secured creditor. The residue of the money is payable to the person entitled thereto according to his rights and interest. Sub-section (8) of Section 13 imposes a restriction on the sale or transfer of the secured asset if the amount due to the secured creditor together with costs, charges and expenses incurred by him are tendered at any time before the time fixed for such sale or transfer. Sub-section (9) of Section 13 deals with the situation in which more than one secured creditor has stakes in the secured assets and lays down that in the case of financing a financial asset by more than one secured creditor or joint financing of a financial asset by secured creditors, no individual secured creditor shall be entitled to exercise any or all of the rights under sub-section (4) unless all of them agree on such a course. There are five unnumbered provisos to Section 13(9) which deal with *pari passu* charge of the workers of a company in liquidation. The first of these provisos lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. The second proviso deals with the case of a company being wound up on or after the commencement of this Act. If the secured creditor of such company opts to realise its security instead

of relinquishing the same and proving its debt under Section 529(1) of the Companies Act, then it can retain sale proceeds after depositing the workmen's dues with the liquidator in accordance with Section 529-A. The third proviso requires the liquidator to inform the secured creditor about the dues payable to the workmen in terms of Section 529-A. If the amount payable to the workmen is not certain, then the liquidator has to intimate the estimated amount to the secured creditor. The fourth proviso lays down that in case the secured creditor

deposits the estimated amount of the workmen's dues, then such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited with the liquidator. In terms of the fifth proviso, the secured creditor is required to give an undertaking to the liquidator to pay the balance of the workmen's dues, if any. Sub-section (10) of Section 13 lays down that where dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application before the Tribunal under Section 17 for recovery of balance amount from the borrower. Sub-section (11) states that without prejudice to the rights conferred on the secured creditor under or by this section, it shall be entitled to proceed against the guarantors or sell the pledged assets without resorting to the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets. Sub-section (12) of Section 13 lays down that right available to the secured creditor under the Act may be exercised by one or more of its officers authorised in this behalf. Sub-section (13) lays down that after receipt of notice under sub-section

(2), the borrower shall not transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice without prior written consent of the secured creditor. In terms of Section 14, the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor.

13. Section 17 speaks of the remedies available to any person including borrower who may have a grievance against the action taken by the secured creditor under subsection (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that subsection. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1). Subsection (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the

conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse

taken by the secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt. Subsection (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 subsection envisages the 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 the issue of a direction to the Tribunal to dispose of the application expeditiously. Section 18 provides for an appeal to the Appellate Tribunal.

14. 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 overriding 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. Thus, it is clear that Section 13, 14, 17 and 34 SARFAESI Act provide a complete code for recovery of outstanding dues to the Bank, remedy to borrower or any person to appeal against an order passed under Section 13(4) before the Debt Recovery Tribunal and the jurisdiction of civil Court is total barred or ousted to entertain any civil suit in respect of any matter arising under the i.e. SARFAESI Act or Debt Recovery Act of 1993. This position of law is no longer *res integra* and stand concluded by the decision of Supreme Court in the case of *United Bank of India Vs. Satyawati Tandon* (2010) 8 SCC 110 and the latest pronouncement in the case of *State Bank of India vs. Mukesh Jain* (2017) 1 SCC 53. The reliance placed by respondent No. 1 in matter of *Vishal Kansaria vs. Bank of India* reported in AIR 2016 SC 530 is clearly distinguishable on facts in hand for the simple reason that the respondent No. 1, except for making a bald assertion, did not adduce any relevant material to show that he was actually occupying the premises as bonafide tenant thereof. As has been stated above, he even failed to establish any *prima facie* case in this regard when he sought a temporary injunction. In absence of cogent and relevant material, in the opinion of this Court, nothing prevented him to take recourse to provisions contained in Section 17 by filing an appeal when action was taken pursuant Section 14 of the SARFAESI Act and having failed to do so, now he cannot be permitted to turn around to contend that civil suits filed by him were maintainable. In this connection, it is reproduce what their Lordships said para 16 and 17 of the judgment in *Patiala v. Mukesh Jain*, (2017) 1 SCC 53, page 57 : "16. Upon perusal of Section 34 of the Act, it is very clear that no civil court is having jurisdiction to entertain any suit or respect

of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under the Act to determine the dispute. Further, the civil court has no right to issue any injunction in pursuance of any action taken under the provisions of the DRT Act.

17. In view of a specific bar, no civil court can entertain any suit wherein the proceedings initiated under Section 13 of the Act are challenged. The Act had been enacted in 2002, whereas the DRT Act had been enacted in 1993. legislature is presumed to be aware of the fact that the Tribunal constituted under the DRT Act would not have any jurisdiction to entertain any matter, wherein the subject is less than Rs 10 lakhs.

18. In the aforesaid circumstances, one will have to make an effort to harmonise both the statutory provisions. According to Section 17 of the Act, any person who is aggrieved by any of the actions taken under Section 13 of the Act can approach the Tribunal under the provisions of the DRT Act.

19. In normal circumstances, there cannot be any action of any authority which cannot be challenged before a civil court unless there is a statutory bar with regard to challenging such an action. Section 34 specifically provides the bar of jurisdiction and therefore, the order passed under Section 13 of the Act could not have been challenged by Respondent 1 debtor before any civil court."

15. It was vehemently argued by respondent No.1 that on the anvil of the doctrine of res judicata, the impugned judgment and decree and orders have attained finality and is therefore, not open to challenge. The doctrine of res-judicata is a principle of law evolved to ensure that a party to litigation is not vexed twice over in the Court in respect of the same subject matter. In the present case, it is not the case. Firstly because the petitioner is not a party to the suits filed by the respondent borrower; and secondly Court lacked inherent jurisdiction over the subject matter in view of Bar contained in SARFAESI Act or Debt Recovery Act of 1993.

16. The next question for consideration is what is the efficacy of a decree passed without jurisdiction; when and where it could be questioned.

17. As back as 1954, their Lordships of the Supreme Court in case of Kiran Singh vs. Chaman Paswan AIR 1954 340 held "It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial or whether, it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree, and such a defect cannot be cured even by consent of parties."

18. In view of foregoing discussion, we have no hesitation to hold that respondent No.1 could not establish by any relevant and cogent material that he

was in occupation of the property as tenant thereof; further he could not establish that the secured creditor while exercising right under Section 13(4) played any fraud upon respondent No. 1 rendering purchase of property by the petitioner null and void. The contention that the writ jurisdiction is not available to petitioner does not appeal to us. We, therefore, dismiss both civil suits filed by the respondent No. 1 and set aside impugned judgment and orders with costs of Rs, 5000/- in each writ petition recoverable from the respondent No.1.

19. Ordered accordingly.

20. Let a copy of this order be placed in the record of the connected Writ Petition No.7400/2016.