

**In The High Court At Calcutta
Constitutional Civil Jurisdiction
Appellate Side**

Present :

The Hon'ble Justice Harish Tandon.

C.O. 1046 of 2015

**Chhanda Hazra
-Vs-
Mani Prasad Hazra & Anr.**

For the Petitioners : Mrs. Sohini Chakraborty.

For the Opposite Party No.2 : Mr. Bhaskar Mukherjee.

Judgment on : 19.02.2016

Harish Tandon, J. :

This revisional application is directed against an order no. 1 dated March 18, 2015 passed by the learned District Judge, Alipore in Miscellaneous Appeal No. 93 of 2015 refusing to pass an ad interim order of injunction.

The plaintiff/petitioner filed Title Suit No. 18910 of 2013 before the learned Civil Judge (Junior Division), 6th Court, Alipore praying for declaration of his title as joint owner in respect of the suit premises with

further declaration that she has exclusive right, title and interest in respect of a ground floor. It would be apt to quote the reliefs claimed in the plaint which run thus:

- A)** A decree for declaration that the plaintiff is the joint owner/co-sharer in respect of the suit land.
- B)** A decree for declaration that the plaintiff is the sole and absolute owner in respect of the ground floor of the suit property;
- C)** A decree for declaration that the suit property has been charged against the maintenance of the plaintiff which includes right to residence of the plaintiff in the suit property;
- D)** A decree for declaration that plaintiff has got right of residence in respect of the suit property;
- E)** A decree for permanent injunction restraining the defendants each of them and/or their men and agents, recovery agents and/or their transferees from selling, transferring, alienating, encumbering and/or from disturbing the peaceful possession and/or ousting the plaintiff from the suit property and/or from changing the nature and character of the suit property and/or from causing any physical violence upon the plaintiff in any manner whatsoever.
- F)** Costs;
- G)** Any other relief or reliefs to which the plaintiff is entitled to get in law and in equity.”

It is stated in the plaint that the piece and parcel of land comprising in Municipality Holding No. P-23, Block- A, Sarada Park, Police Station- Maheshtala, Kolkata-700 141, was owned by the husband of the plaintiff/petitioner, the defendant no.1 in the suit, who was a government employee and constructed a building up to first floor. It is further averred that the said defendant no.1 did not have the sufficient funds to construct the ground floor and utilised the money which was

her Stridhan for construction of the first floor. In Paragraph 9 of the plaint, it is stated that the plaintiff/petitioner was subjected to physical and mental tortures by the defendant no. 1 and several complaints were lodged before the authorities and a proceeding for maintenance and right of residence in the matrimonial home is also prayed for. It subsequently transpired that the said defendant no.1 took loan from the defendant no.2, the HDFC Bank Limited and failed to pay the loan amount with accrued interest which led the initiation of an action under SARFAESI Act. There is a clear averment in the plaint that the defendant no.2, the bank, is contemplating to take physical possession of the said property with an intend to dispossess the plaintiff/petitioner despite having exclusive right in the ground floor as well as an undivided share in the entire land.

An application for injunction was filed in the said suit restraining the defendants each of them from selling, transferring, alienating, encumbering and/or disturbing peaceful possession of the plaintiff/petitioner in respect of the suit premises. The defendant no.2 took a plea of demurer as the plaint is liable to be rejected under Order 7 Rule 11 of the Code being barred by law. It is alleged by the defendant no.2 that Section 34 of the SARFAESI Act, 2002 excludes the jurisdiction of the Civil Court to entertain any proceeding or to pass any order of injunction against any action taken or ought to be taken in pursuance of

the power conferred by or under the said Act. The Trial Court allowed the said application as a consequence whereof the plaint was rejected. The plaintiff/petitioner challenged the said order before the District Judge, Alipore in Miscellaneous Appeal No. 93 of 2015 and filed an independent application for a temporary injunction and moved the same for passing an ad interim order which is refused by the impugned order.

The revisional application was admitted after noticing the judgment rendered by the Supreme Court in case of **Standard Chartered Bank –v- V. Noble Kumar & Ors; (2013) 9 SCC 620** wherein it is held that the suit is otherwise maintainable if no step under Section 13 (4) of the SARFAESI Act, 2002 has not been taken by the bank. The learned Advocate for the petitioner submits that the Apex Court, in above noted reports, categorically held that the appeal under Section 17 of the Act is available to the borrower against any measure taken under Section 13 (4) of the said Act and can only be maintained if the possession is handed over to the secured creditor.

The learned Advocate for the Bank, on the other hand, submits that an action under Section 13 (4) of the Act has been taken and, therefore, the remedy available to any person aggrieved by such action is to file an appeal under Section 17 of the Act. It is, therefore, submitted that the jurisdiction of the Civil Court is excluded by Section 34 of the

Act and if the Civil Court has no jurisdiction to entertain the suit, it cannot pass an order of injunction.

The questions, which arise in this revisional application, are firstly; whether the jurisdiction of the Civil Court is barred if any action is taken or contemplated under Section 13 (4) of the Act secondly; whether the remedy of the person is to file an appeal under Section 17 of the Act, even if, he is not a borrower or a guarantor to the loan. It would be apposite to quote under Section 17 and Section 34 of the Act which are reproduced as under:

“17. Right to appeal.- (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.

(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 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 secured assets 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 secured assets as invalid and restore the

possession of the secured assets to the borrower or restore the management of the secured assets 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.

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.”

It is, therefore, beyond cavil that any person including borrower feels aggrieved by any of the measures referred in sub-section 4 of section 13 taken by the secured creditor or the authorized officer has a right to prefer an appeal before the Debt Recovery Tribunal having jurisdiction within 45 days from the date of which such measures have been taken. Section 34 of the Act took away the jurisdiction of the Civil Court to entertain any suit or proceeding in respect of any matter which a Debt Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine. The emphasis is made on the judgment of the Supreme Court in case of **V. Noble Kr. (supra)** and it is sought to be interpreted that if the secured creditor has not taken any step under Section 13 (4) or Section 14 of the Act, the embargo created under Section 34 of the Act shall not operate and, therefore, the suit is maintainable.

It would be apt to examine the facts involved in the above report to deduce the ratio laid down therein. In the said case, the first respondent stood as a guarantor of the borrower to a loan transaction and a notice under Section 13 (2) of the Act was issued by the secured creditor. On failure to pay the loan amount, an application under Section 14 was taken out before the Chief Judicial Magistrate requesting him to take possession of the secured asset and handed over the same to the secured creditor. The challenge is made to a legality of the proceeding and the first respondent approached the High Court by filing a writ petition. The Division Bench allowed the writ petition on the premise that the Bank cannot bypass the provision contained under Section 13 (4) of the Act and straight away invoked under Section 14 thereof. An argument was advanced before the High Court that before invoking the authority under Section 14, there should be an attempt to take possession of the secured assets and its only when the secured creditor faces resistance to such an attempt, the recourse under Section 14 of the Act can be resorted to.

Before the Apex Court, it was argued that there are two alternative procedures for taking possession one, under Section 13 (4) and other Section 14 thereof. It was argued that if two courses are opened, the election of one procedure can not be impinged. After noticing the scheme and the legislative intend underlining the promulgation of the said Act, it is held: “we do not see any warrant to record for conclusion that it is only

after making an unsuccessful attempt to take possession of secured assets, a secured creditor can approach the Magistrate.” It is further held that if any measures are taken for taking the possession of the secured assets either under Section 13 (4) or Section 14 thereof, the remedy of an aggrieved person is under Section 17 thereof. The Supreme Court succinctly prescribed three methods for secured creditor to take possession of the secured assets in Paragraph 36 of the report which are as follows:

“36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:

36.1. (i) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

36.2. (ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinise the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1-A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

36.3. (iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinise the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents

and forward them to the secured creditor as under clause 36.2.(ii) above.

36.4. In any of the three situations above, after the possession is handed over to the secured creditor, the subsequent specified provisions of Rule 8 concerning the preservation, valuation and sale of the secured assets, and other subsequent rules from the Security Interest (Enforcement) Rules, 2002, shall apply.”

In case of **Jagdish Singh -v- Heeralal** reported in **(2014) 1 SCC 479**, the Supreme Court interpreted the expression “any person” used in Section 17 of the Act to be of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken under Section 13 (4) of the Act. On the scope of Section 13 (4) of the Act, it is held:

“25. We are of the view that the civil court jurisdiction is completely barred, so far as the “measures” taken by a secured creditor under sub-section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal, to determine as to whether there has been any illegality in the “measures” taken. The Bank, in the instant case, has proceeded only against secured assets of the borrowers on which no rights of Respondents 6 to 8 (*sic* Respondents 1 to 5) have been crystallised, before creating security interest in respect of the secured assets.”

In a subsequent decision rendered in case of **Harshad Govardhan Sondagar -v- International Assets Reconstruction Co. Ltd; & Ors;** reported in **(2014) 6 SCC 1**, the tenant sought to resist the action for

recovery of possession as such tenants is protected by a Rent Restriction Act. The Apex Court after noticing Section 34 of the Act held that where any action is taken or sought to be taken by the secured creditor under Section 13 or Section 14 of the Act, the Court or the authority cannot grant injunction to prevent such action in following words:

“35. A further question of law raised in these appeals is whether the tenants have remedies under the tenancy law concerned. In the State of Maharashtra, the Maharashtra Rent Control Act, 1999 is in force and this Act applies to premises let for the purposes of residence, education, business, trade or storage specified in Schedule I and Schedule II to the Act as well as houses let out in areas to which the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 applied before the commencement of the Act. Section 33 of the Maharashtra Rent Control Act is titled “jurisdiction of courts” and it provides that the courts named therein “shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises and to decide any application made under the Act and the applications which are to be decided by the State Government or an officer authorised by it or the competent authority”. The question of law that we have to consider is whether the appellants as tenants of premises in the State of Maharashtra including Mumbai will have any remedy to move these courts having jurisdiction under Section 33 of the Maharashtra Rent Control Act and obtain the relief of injunction against the secured creditor taking possession of the secured asset from the appellants. The answer to this question is in Section 34 of the SARFAESI Act, which is extracted hereinbelow:

“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).”

A reading of the second limb of Section 34 of the SARFAESI Act would show that 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 the Act. Thus, when action is sought to be taken by the secured creditor under Section 13 of the SARFAESI Act or by the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act, the court or the authority mentioned in Section 33 of the Maharashtra Rent Control Act cannot grant the injunction to prevent such action by the secured creditor or by the Chief Metropolitan Magistrate or the District Magistrate. Even otherwise, Section 33 of the Maharashtra Rent Control Act vests jurisdiction in the courts named therein to decide disputes between the landlord and the tenant and not disputes between the secured creditor and the tenant under landlord who is a borrower of the secured assets.”

It is, therefore, clear from the language given in Section 34 of the Act that the Civil Court shall not grant injunction in respect of any action taken or to be taken in pursuance of any order conferred by or under the said Act or under the recovery of money due to Banks and Financial Institutions Act, 1993. Without entering into the area of dispute whether the Civil Court is competent to entertain a suit of such nature, it is manifest from the aforesaid provision that the Civil Court shall not pass any injunction restraining the secured creditor from taking any action under the said Act. It is apparent from the documents annexed to the revisional application, a notice under Section 13 (2) of the SARFAESI Act was issued on February 12, 2013 and further noticed to take possession of the secured assets was issued by the Banks on August 23, 2013.

It is, therefore, apparent that the Court should not pass any injunction restraining the secured creditors to take recourse to take any

of the measures contemplated under the said Act and, therefore, the Court of appeal below, in my opinion, has not erred in refusing to pass an interim order. Solely on such ground, this Court does not find any ground warranting interference with the impugned order.

However, for abundant precaution, it is hereby made clear that none of the observations made herein above shall have persuasive effect or value on maintainability of the suit filed by the petitioner.

The appellate court is requested to make efforts to dispose of the appeal as expeditiously as possible in accordance with law.

With these observations, the revisional application is disposed of.

No order as to costs.

(Harish Tandon, J.)