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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) 2118/2013**

% ***Judgment dated 25.08.2014***

GOPI RAM Plaintiff
Through: Mr.R.L. Kohli, Advocate

versus

RAKESH KUMAR AGGARWAL & ANR..... Defendant
Through: Ms.Shikha Goyal, Adv. for D=1
Mr.S.V. Tyagi and Ms.Reena Jain Malhotra,
Advocates for defendant no.2

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

G.S.SISTANI, J (ORAL)

I.A. 9627/2014 (u/O.7 R.11 CPC)

1. Plaintiff has filed the present suit for declaration and perpetual injunction. Plaintiff is the father of defendant no.1. Defendant no.2 is a bank, who has advanced loan to defendant no.1.
2. Admittedly, defendant no.1 has mortgaged the property bearing No.919/1-B, Ward No.7, Mehrauli, New Delhi to the defendant no.2-Bank. As the defendant no.1 did not clear the outstanding loan amount, the bank has declared the account of the defendant no.1 as a NPA and proceedings under Section 13(2) of the SARFAESI Act have been initiated. In the meanwhile, father of defendant no.1 has filed the present suit for declaration. The plaintiff was a tenant prior to the property being purchased by defendant no.1 and the tenancy continues till date after the purchase.

3. As expected in the written statement, defendant no.1 has supported the plea of the plaintiff, who is none-else but his father.
4. Counsel appearing for the bank has filed the present application under Order 7 Rule 11 CPC for dismissal of the suit *primarily* on the ground that the jurisdiction of the Civil Court is expressly barred and even otherwise, it is contended that the plaintiff is not a tenant of the defendant no.1 nor plaintiff was a tenant prior to the purchase of the property by defendant no.1, nor he continues to remain as a tenant thereafter.
5. Mr.Kohli, counsel for the plaintiff has relied upon various documents filed along with the plaint in support of his plea of a prior tenancy. Counsel for the defendant bank submits that the remedy available to the plaintiff is under Section 17 of the SARFAESI Act and the present suit is not maintainable. Reliance is placed on *Jagdish Singh Vs. Heeralal & Ors.* 2014 (2) Rajdhani Law Reporter 11; and *Radnik Exports Vs. Standard Chartered Bank*, 211 (2014) DLT 436 in support of her contention.
6. I have heard learned counsel for the parties. Before considering the rival contentions of counsel for the parties, it would be useful to refer to Section 17 of the SERFASE Act:

“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 alongwith 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 measure 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 this sub-section.]

(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 business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (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 recover his secured debt.

(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 part 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 the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.”

7. It will also be useful to refer to Section 34 of the Act, which reads as under:

“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).”

8. Although the plaintiff may not be a party to the proceedings pending before the DRT, but a reading of section 17 of SERFASE Act as extracted hereinabove, makes it clear that the section is wide enough to include any person. Reading of Section 34 also makes it abundantly clear that the jurisdiction of the civil court is expressly barred.

9. In my view, the judgment rendered in the case of Jagdish Singh Vs. Heera Lal & Ors reported in 2014(2) Rajdhani Law Reporter 11, is fully applicable to the facts of this case. The relevant portion of the judgment reads as under:-

“16. Any person aggrieved by any order made by the DRT under Section 17 may also prefer an appeal to the Appellate Tribunal under Section 18 of the Act.

17. The expression ‘any person’ used in Section 17 is 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 Securitisation Act. Reference may be made to the judgment of this Court in Satyawati Tondon’s case, (2010) 8SCC 110(supra).

18. Therefore, the expression ‘any person’ referred to in Section 17 would be taken in the plaintiffs in the suit as well. Therefore, irrespective of the question whether the civil suit is maintainable or not, under the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of Section 17 of the Securitisation Act, in case the bank (secured creditor) adopts any measure including the sale of the secured assets, on which the plaintiffs claim interest.

23. We are of the view that the civil court jurisdiction is completely barred, so far as the “measure” 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 “measure” taken. The bank, in the instant case, has proceeded only against secured assets of the borrowers on which no rights of Respondent Nos. 6 to 8 have been crystallised, before creating security interest in respect of the secured assets. In such circumstances, we are of the view that the High Court was in error in holding that only civil court has jurisdiction to examine as to whether the “measure” taken by the secured creditor under sub-section (4) of Section 13 of the Securitisation Act were legal or not. In such circumstances, the appeal is allowed and the judgment of the High Court is set aside. There shall be no order as to costs.”

10. Further in the case of In **Radnik Exports vs. Standard Chartered Bank:**
211(2014) Delhi Law Times 436, this court has held as under:-

“32. Applying the aforesaid principles, the jurisdiction of this Court to entertain this suit has to be necessarily held to be barred. It matters not whether on the date of institution of this suit the bank had initiated any proceedings before the DRT or not and whether not any proceedings are pending or not. As long as the declaration claimed in the suit is the same as the defence which could be raised by the plaintiff to a claim by the defendant Bank before the DRT, the jurisdiction of the Civil Court would be barred. The consequential relief of permanent injunction against recovery would also be thus barred.

33. Notice in this regard may also be taken of Section 34 of the SARFAESI Act which prohibits a Civil Court from granting any injunction in respect of any action “taken or to be taken” in pursuance of any power conferred by or under, not only the SARFAESI Act, but also the DRT Act. Thus the grant by this Court, of the relief claimed in suit of permanent injunction restraining the defendant Bank from acting upon or seeking to enforce any transaction under the agreement qua which the relief of declaration as void is claimed, is prohibited. The defendant Bank, before the DRT is enforcing its claim against the plaintiff under the said agreements/transactions. The claim of the defendant Bank against the plaintiff, before the DRT, is "an action taken in pursuance of a power under the DRT Act". Section 34 supra, prohibits this Court from injunctioning the defendant Bank from agitating its claim against the plaintiff before the DRT.

34. I have wondered that if the jurisdiction of this Court to grant the consequential relief of injunction is barred, can this Court have jurisdiction to grant the relief of declaration and/or should this Court grant the relief of declaration, which, without the consequential relief of injunction, would be a toothless declaration, incapable of saving the plaintiff

from the claim of the defendant Bank if the DRT was to conclude otherwise and thus, but a mere scrap of paper. I am, (without foraying into the aspect of whether the jurisdiction to grant declaration would also be barred) of the view that in these circumstances this Court ought to refuse to grant the relief of declaration also, which is but a discretionary relief. It cannot be forgotten that grant of every injunction entails declaration of rights and no injunction can be granted without adjudicating conflicting rights of the parties. Thus, where grant of injunction is prohibited, such prohibition cannot be circumvented by instead granting declaration. This follows from Section 34 of the Specific Relief Act also which bars making of such a declaration where the plaintiff, able to seek further relief, omits to do so. The only difference here is that though the plaintiff has claimed further relief, such further relief is barred by Section 34 of the SARFAESI Act.

35. I would be failing in my duty if do not record that I have in *Sunayana Malhotra supra* taken a view that a Civil Court will have jurisdiction, if no proceeding before DRT is initiated. However, the same cannot be said to be good law in view of the subsequent dicta of the Supreme Court in *Jagdish Singh supra*. In the same vein, reference may also be made to *Richa Industries Ltd. Vs. ICICI Bank Ltd.* : 190 (2012) DLT 500 where another single Judge, though held the suit for declaration, injunction and damages to be maintainable, refused interim relief. However I do not consider myself bound thereby because the suit was so held maintainable on a prima facie view of the matter and also because FAO(OS) No. 577/2011 preferred there against was disposed off as compromised on 28th February, 2013.

36. The suit is thus found to be not maintainable. The amendment claimed to the plaint does not affect its maintainability. Thus, the suit is dismissed and resultantly the pending applications are infructuous. The plaintiff is also burdened with costs of the suit. Counsel's fee assessed at Rs. 20,000/-.”

11. Mr.Kohli, counsel for the plaintiff submits that an almost identical

situation has arisen in the case of *Harshad Govardhan Sondagar Vs. International Assets Reconstruction Co. Ltd & Ors.* 2014 LawSuit (SC) 236, where the Supreme Court had the occasion to lay down the guidelines where a lessee in the premises resists the attempt of the secured creditor to take possession. The Supreme Court has held that the lessee cannot be evicted by force, but on an application filed before the Chief Metropolitan Magistrate or District Magistrate and a notice would be required to be given to the lessee. Paragraph 21 of the judgment reads as under:

“21. When, therefore, a lessee becomes aware of the possession being taken by the secured creditor, in respect of the secured asset in respect of which he is the lessee, from the possession notice which is delivered, affixed or published in sub-rule (1) and sub-rule (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, he may either surrender possession or resist the attempt of the secured creditor to take the possession of the secured asset by producing before the authorised officer proof that he was inducted as a lessee prior to the creation of the mortgage or that he was a lessee under the mortgagor in accordance with the provisions of Section 65A of the Transfer of Property Act and that the lease does not stand determined in accordance with Section 111 of the Transfer of Property Act. If the lessee surrenders possession, the lease even if valid gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act and state in the affidavit accompanying the application, the name and address of the person claiming to be the lessee. When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor, consistent with the principles of

natural justice, and then take a decision. If the Chief Metropolitan Magistrate or District Magistrate is satisfied that there is a valid lease created before the mortgage or there is a valid lease created after the mortgage in accordance with the requirements of Section 65A of the Transfer of Property Act and that the lease has not been determined in accordance with the provisions of Section 111 of the Transfer of Property Act, he cannot pass an order for delivering possession of the secured asset to the secured creditor. But in case he comes to the conclusion that there is in fact no valid lease made either before creation of the mortgage or after creation of the mortgage satisfying the requirements of Section 65A of the Transfer of Property Act or that even though there was a valid lease, the lease stands determined in accordance with Section 111 of the Transfer of Property Act, he can pass an order for delivering possession of the secured asset to the secured creditor.”

12. At this stage, Mr.Kohli, learned counsel for the plaintiff, submits that in case the Bank is willing to give an undertaking that they would follow the procedure as laid down in the case of **Harshad Govardhan(Supra)** and also follow the due process of law, he would not press his suit.
13. Counsel for the bank submits that without admitting the plaintiff to be a tenant of the mortgaged property, in case any resistance is offered, the bank will follow the due process of law, including by making an application to the Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act and take action as available in accordance with law and as per the dictate of the judgment of **Harshad Govardhan (Supra)**. Mr.Kohli, submits that the defendant should be bound by the statement made and rights of all the parties should be kept open to be agitated in the appropriate court of jurisdiction.
14. In view of the stand taken by the parties, present suit [CS(OS) 2118/2013] is disposed of. The Bank will remain bound by the statement made by the counsel in Court and as agreed the rights of both the parties are kept open,

to be agitated in the appropriate court of jurisdiction.

15. It is expected that the bank and the Metropolitan Magistrate will follow the principles of natural justice, as laid down in para 21 of **Harshad Govardhan (Supra)**.
16. The application is allowed, in above terms.
17. Let the original documents be returned to the plaintiff in accordance with law.

IA.No.17620/2013

18. Interim order dated 1.11.2013 stands vacated.
19. Application stands disposed of.

IA.No.9626/2014 (u/O.39 R= 4 CPC)

20. In view of the order passed in the application IA.No.17620/2013 today, the present application also stands dismissed.

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21. In view of the order passed in the application IA.No.9627/2014 today, the present suit stands disposed of.

G.S.SISTANI, J

AUGUST 25, 2014
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