

**IN THE HIGH COURT OF KERALA AT ERNAKULAM**

**PRESENT:**

**THE HONOURABLE MR. JUSTICE B.KEMAL PASHA**

**THURSDAY, THE 30TH DAY OF JULY 2015/8TH SRAVANA, 1937**

**OP(C).No. 889 of 2015 (O)**  
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**I.A.NO.890/2011 IN O.S.NO.116/2011 OF MUNSIFF COURT, THALASSERY**

**C.M.A.NO.51/2011 OF SUB COURT, THALASSERY**  
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**PETITIONER(S) :**  
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- 1. KHDFC BANK LIMITED,  
REGISTERED OFFICE AT HDFC HOUSE, SENAPATH BAPAT MARG,  
LOWER PAREL, MUMBAI, PIN- 400 013,  
REP. BY ITS ASST. VICE PRESIDENT SREEKALA SHENOY.**
- 2. P.S.NANDAKUMAR MENON, AGED 63 YEARS,  
S/O.SREEDHARAN, "BRINDA " VARA -596, ANANTHA NAGAR,  
ARAPPURA, VATTIYOORKAVU, TRIVANDRUM- 695 013.**
- 3. HDFC BANK LIMITED,  
KASARAGODE BRANCH, REP. BY SENIOR BRANCH MANAGER,  
KASARGODE THALUK, KASARGOD DISTRICT.**

**BY ADV. SRI.S.R.DAYANANDA PRABHU**

**RESPONDENT(S) :**  
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**PRESTIGE EDUCATIONAL TRUST,  
REGISTERED OFFICE AT MP.VI/863,  
MILL ROAD, P.O.PAYANGADI, PIN- 670 358,  
REP. BY ITS POWER OF ATTORNEY HOLDER,  
DR.M.A.HASHIM, AGED 33 YEARS, S/O.DR. MOHAMMED ASHRAF,  
DOCTOR, RESIDING AT QUARTERS NO.1,  
KANNUR MEDICAL COLLEGE CAMPUS, P.O.ANJARAKKANDY,  
KANNUR TALUK, KANNUR DISTRICT, PIN- 670 612.**

**BY ADV. SRI.GEORGE POONTHOTTAM**

**THIS OP (CIVIL) HAVING BEEN FINALLY HEARD ON 30-07-2015,  
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

Msd.

**APPENDIX**

**PETITIONER(S)' EXHIBITS :**

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- EXHIBIT P1:** COPY OF JUDGMENT DATED 25.09.2013 IN W.P.(C).NO.35954/2010 OF HONOURABLE HIGH COURT OF KERALA.
- EXHIBIT P2:** FINAL REPORT DATED 26.03.2011 FILED BY SUB INSPECTOR OF POLICE, KASARGODE BEFORE CHIEF JUDICIAL MAGISTRATE COURT, KASARGODE.
- EXHIBIT P3:** A TRUE COPY OF THE ORDER DATED 28.10.2014 IN CRL.MA.NO.7165/14 IN CRL.MC.NO.4295/2014 OF HONOURABLE HIGH COURT OF KERALA.
- EXHIBIT P4:** A TRUE COPY OF PLAINT DATED 18.03.2011 IN O.S.NO.116/2011 PENDING BEFORE THE MUNSIF COURT THALASSERY.
- EXHIBIT P5:** A TRUE COPY AFFIDAVIT FILED BY THE PLAINTIFF DATED 18.03.2011 IN SUPPORT OF I.A.NO.890/2011 IN O.S.NO.116/2011 BEFORE THE MUNSIF COURT, THALASSERY.
- EXHIBIT P6:** COUNTER AFFIDAVIT DATED 28.03.2011 FILED BY THE DEFENDANTS IN I.A.NO.890/2011 IN O.S.NO.116/2011 BEFORE THE MUNSIF COURT, THALASSERY.
- EXHIBIT P7:** WRITTEN STATEMENT DATED 28.03.2011 FILED BY THE DEFENDANTS IN O.S.NO.116/2011 BEFORE THE MUNSIF COURT, THALASSERY.
- EXHIBIT P8:** REJOINDER STATEMENT DATED 31.07.2012 FILED BY THE PLAINTIFF IN O.S.NO.116/2011 BEFORE THE MUNSIF COURT, THALASSERY.
- EXHIBIT P9:** ORDER DATED 31.05.2011 IN I.A.NO.890/2011 IN O.S.NO.116/2011 BEFORE THE MUNSIF COURT, THALASSERY.
- EXHIBIT P10:** COPY OF JUDGMENT DATED 22.01.2014 IN CMA.NO.51/2011 OF SUB COURT, THALASSERY.
- EXHIBIT P11:** TRUE COPY OF THE TRUST DEED DATED 05.09.2001 OF PRESTIGE EDUCATIONAL TRUST REGISTERED AT ANJARAKANDY SUB REGISTRAR OFFICE.

**RESPONDENT(S)' EXHIBITS :**

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- EXHIBIT R1(A):** TRUE COPY OF THE APPLICATION (WITHOUT DOCUMENTS) PREFERRED BY THE PETITIONER BANK BEFORE THE DRT.

**//TRUE COPY//**

**P.S.TO JUDGE.**

[CR]

**B. KEMAL PASHA, J.**

.....  
O.P.(C) No. 889 of 2015  
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Dated this the 30<sup>th</sup> day of July, 2015

**J U D G M E N T**

(i) Whether, in a case wherein proceedings under Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(*hereinafter referred to as the 'SARFAESI Act'*) are initiated by a secured creditor against any property, which is not a secured asset, the only remedy available to such a person is to have recourse to Section 17 of the said Act?

(ii) In such a case, whether the jurisdiction of the civil court to grant an injunction is barred under Section 34 of the *SARFAESI Act*?

2. The plaintiff in O.S.No.116/2011 of the Munsiff's Court, Thalassery, has sought for a decree of perpetual injunction against the defendants or any person claiming through or under the defendants, from trying to take possession or taking possession of A schedule property or the buildings thereon, etc. Along with the suit, IA No.890 of 2011 seeking an order of temporary injunction under Order XXXIX Rule 1 of the Code of Civil Procedure, was also filed. The learned Munsiff allowed the said IA through Ext.P9 order, and restrained the respondents therein from taking possession of A schedule property and the buildings thereon for the alleged dues payable by the petitioner therein to the respondents therein by way of recovery of the loan.

3. The petitioners herein have taken up the matter in appeal through CMA No.51 of 2011, before the Subordinate Judge's Court, Thalassery. The learned Subordinate Judge has also concurred with the findings entered by the learned

Munsiff, through Ext.P10 judgment. The said judgment is under challenge.

4. It seems that a notice was issued at the instance of the petitioners to the respondent herein, purportedly one under Section 13(2) of the *SARFAESI Act*. It is the case of the respondent that the respondent had obtained financial nursing from the erstwhile Lord Krishna Bank. It seems that the said Bank subsequently amalgamated with the Centurian Bank of Punjab Ltd., which later amalgamated with the HDFC Bank. Consequently, the assets and liabilities of the Lord Krishna Bank as well as of the Centurian Bank of Punjab Ltd. were taken over by the HDFC Bank.

5. Assuming the status of a 'secured creditor', the HDFC Bank has attempted to proceed against the properties of the respondent by styling it as 'secured assets'. Even though the respondent had obtained financial nursing for the construction of buildings for establishing a Medical

College and a Dental College in the plaint B schedule property, according to the respondent, those buildings were put up in plaint A schedule property with the consent of the Bank. According to the respondent, there was reasonable apprehension in the mind of the respondent that under the colour of actions under the *SARFAESI Act*, the Bank was about to take possession of the plaint A schedule property, which was not one included in the 'secured asset'. In order to protect plaint A schedule property from such proceedings, the above suit has been filed.

6. Plaint A schedule property is described as 25 acres of property out of a total extent of 90 acres and 31 cents, in old Sy.Nos.17, 21, 41 and 42 and Re.Sy.No.2/1 of Anjarakkandy Amsom. It is also described that plaint A schedule property includes the Medical College, the Dental College, Para-medical College institutions, and all other buildings thereon. The plaint B schedule property is

described as 5 acres of property in old Sy.Nos.37 and 39/6-8 and Re.Sy.No.28 of Anjarakkandy Amsom.

7. Admittedly, plaint B schedule is a 'secured asset' as it was the subject matter of mortgage by deposit of title deeds for availing the loan. According to the respondents, plaint A schedule property having an extent of 25 acres with all the buildings and institutions thereon were not subject matter of any mortgage in respect of the loan transaction and therefore, it cannot be treated as a 'secured asset'. It was on the apprehension that the Bank would proceed against plaint A schedule property also through the proceedings under the SARFAESI Act, the suit has been filed.

8. In the counter in respect of the IA as well as in the written statement filed by the petitioners, it has been specifically admitted that the plaint A schedule property is not the subject matter of mortgage, and the Bank has no

intention to proceed against plaint A schedule property. According to the Bank, the Bank could not trace out document No.2332/2003 in respect of the 5 acres of property out of the total extent of 90 acres and 30 cents in old Sy.Nos.17, 21, 41, 42 and Re.Sy.No.2/1 of Anjarakkandy Amsom, which was also furnished as a security for mortgage by way of deposit of title deeds at the first instance when the written statement was filed, and therefore, the Bank could not show that property also as a 'secured asset', in the written statement. Subsequently, through an amendment to the written statement, the Bank has incorporated the plea that the Bank has got every right to proceed against the said five acres of property covered by document No.2332/2003 also, through the *SARFAESI* proceedings.

9. Heard the learned counsel for the petitioners Sri. S.R. Dayananda Prabhu and the learned counsel for the

respondents Sri. George Poonthottam.

10. The main challenge forwarded by the learned counsel for the petitioners against the impugned judgment is that the suit as such is hit by Section 34 of the *SARFAESI Act*. It is argued that if at all the respondent is entitled to any relief, it can only be by having recourse to Section 17 of the SARFAESI Act, by an appeal before the Appellate Authority. The next challenge is that under the cover of the order of temporary injunction passed in favour of the respondent, the respondent will obstruct the proceedings that will be initiated by the Bank towards the 5 acres of property covered by document No.2332/2003 also. The argument is that the said 5 acres of property is also a part of the larger extent of 90 acres and 30 cents of property.

11. Even though, the said argument is forwarded, still the learned counsel for the petitioners has fairly conceded that plaint A schedule property is not the subject matter of

mortgage and therefore, the plaint A schedule property is not a 'secured asset'. At the same time, the argument is that the 5 acres of property covered by document No.2332/2003 is also a part of the larger extent of 90 acres and 30 cents which has been described as the total extent of property in plaint A schedule. At the same time, plaint A schedule reveals that plaint A schedule is 25 acres of property out of the total extent of 90 acres and 31 cents.

12. Regarding the first point, concerned provisions of the *SARFAESI Act* have also to be considered. Section 2(1)(zc) of the *SARFAESI Act* defines 'secured asset':

*"secured asset" means the property on which security interest is created"*

Section 2(1)(zd) of the *SARFAESI Act* deals with secured creditor:

*"secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and*

*includes—*

*(i) debenture trustee appointed by any bank or financial institution; or .....”*

Section 2(1)(ze) deals with secured debt:

*“Secured debt” means a debt which is secured by any security interest”*

Section 2(1)(zf) deals with security interest:

*“security interest” means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31;*

Therefore, a 'secured asset' is the property on which a 'security interest' has been created.

13. Section 13(2) says:

*“Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in*

*repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).”*

Therefore, in order to attract Section 13(2), the creditor should be a 'secured creditor' within the meaning of the *SARFAESI Act* and the action should be one for recovery of a 'secured debt'.

14. Section 13(4) (a) says:

*“In case the borrower fails to discharge his liability in full within the period specified in sub-section (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;*

15. Therefore, from a reading of Section 13(4)(a), it is evident that a 'secured creditor', through the provisions of the *SARFAESI Act*, can take possession of the 'secured assets' of the borrower. It is evident that Section 13(4) of the *SARFAESI Act* does not confer any power or right on the 'secured creditor' to take possession of any assets other than the 'secured assets'. If there is any attempt to take possession of any asset other than the 'secured assets', it is *ultra vires* to the provisions of the *SARFAESI Act*.

16. Section 17 of the *SARFAESI Act* deals with right to appeal. According to the petitioners, if at all the respondent has any complaints against the notice issued under Section 13(2) of the *SARFAESI Act*, the only course

open to the respondent is to file an appeal, since any person, including the borrower, aggrieved by any of the measures referred to in Section 13(4), can file an appeal.

Section 17(1) says:

*“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 measure had been taken:*

17. Section 17 also clearly says that any person aggrieved by any of the measures referred to in Section 13 (4) of the *SARFAESI Act* taken by the secured creditor or his authorised officer under that Chapter, can file an appeal. Therefore, it is evident that if it is not a legal measure that has been adopted by the secured creditor or his authorised

officer under that Chapter, the party need not wait for an appeal; whereas he can take all possible measures to check such an illegal or unauthorised act.

18. The learned counsel for the petitioners has invited the attention of this Court to the decision in ***United Bank of India v. Satyawati Tondon and Ors.*[(2010) 8 SCC 110]** wherein it was held:

*“The Government of India accepted the recommendations of the two Committees and that led to enactment of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the SARFAESI Act'), which can be termed as one of the most radical legislative measures taken by the Parliament for ensuring that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstruction. For the first time, the secured creditors have been*

*empowered to take steps for recovery of their dues without intervention of the Courts or Tribunals.”*

19. It was further held in paragraph 42:

*“Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.”*

20. The learned counsel for the petitioner relies on the decision reported in ***Laxmibai v. Jalgaon Merchant Co-operative Bank Ltd. & Ors.***[III(2011) BC 583(DB)] where the case of a guarantor was considered. The plea taken up by the guarantor was that by exercising fraud, a continuing guarantee was recorded by the Bank and she was attempted to be proceeded against. In that case, it was

held that the course open to the guarantor is to file an appeal. In that particular case, the guarantor had already filed an appeal also. She was directed to pursue her remedies through that appeal.

21. Section 34 of the Act says:

*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).*  
”(Emphasis supplied)

22. With respect, I differ with the argument of the learned counsel for the petitioners that Section 34 creates a

blanket ban against the jurisdiction of the civil court to grant an injunction. As per Section 34, no injunction shall be granted by any court in respect of “*any action taken or to be taken in pursuance of any power conferred by or under this Act.....*” Therefore, the bar is there only when an order of injunction is attempted to be granted in respect of any action taken or to be taken in pursuance of any power conferred by or under that Act. It cannot be said that a secured creditor or his authorised officer can initiate proceedings under Section 13(2) or 13(4) of the Act as against any asset other than the 'secured asset'. If a creditor is initiating action against an asset, which is not a 'secured asset', he cannot be termed as a 'secured creditor'. Over and above it, such an attempt will not be an exercise of any power conferred by or under the said Act. In such case, it cannot be said that the civil court has no power to grant an injunction.

23. By exercising powers which are not conferred on a secured creditor or his authorised officer under the Act, the creditor cannot point out the Appellate Authority to the person aggrieved, as the only authority, which can redress the grievance of such a person. In such cases, it cannot be said that the civil court's jurisdiction is barred under Section 34 of the Act.

24. From all the above, it is clear that the jurisdiction of the civil court in entertaining the present suit is not barred. Exts.P9 and P10 do not suffer from any illegality, infirmity or jurisdictional error. The bar under Section 34 of the *SARFAESI Act* has no application as far as the present suit is concerned. Further, the enabling provision contemplated under Section 17 of the *SARFAESI Act* does not debar the respondent in having recourse to a suit of this nature. Matters being so, this Original Petition lacks merits, and is only to be dismissed, and I do so.

In the result, this Original Petition stands dismissed.

ul/-

**Sd/- B.KEMAL PASHA, JUDGE**

[True copy]

P.S. to Judge