**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

Civil Revision No. 1777 of 2014 (O&M)

Date of decision : 14.5.2015

Bank of Baroda ... Petitioner

vs

Vinod Kumar ... Respondent

Coram: Hon'ble Mr. Justice Rajesh Bindal

Present: Mr. G. S. Anand, Advocate, for the petitioner.

Mr. Atul Gaur, Advocate for
Mr. Sumeet Goel, Advocate, for the respondent.

Rajesh Bindal, J.

1. The defendant-petitioner is before this Court impugning the order dated 10.6.2013 passed by the learned Court below whereby the application filed by it under Order VII Rule 11 CPC for rejection of the plaint, was dismissed.

2. The pleaded case of the petitioner-bank is that it granted over draft limit of ₹ 1 lac to Pawan Kumar in the name of M/s Singla Kiryana Store in the year 2002. The over draft limit was increased from ₹ 1 lac to ₹ 2 lac in the year 2003. Immovable property situated within the municipal limit of Kaithal was mortgaged as security for the loan. As the amount was not repaid, the petitioner-bank proceeded to take action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, 'the Act') for taking over and sale of the mortgaged property. Notice for possession under Section 13 of the Act was issued on 9.5.2013. It was thereafter that the respondent filed the suit for prohibitory injunction restraining the petitioner-bank from interfering in possession of the respondent-plaintiff in the suit property, which was admittedly mortgaged with the petitioner-bank. It was on the plea that the respondent-plaintiff is in possession of the property as a tenant for the last 40-50 years.

3. After notice in the suit, the petitioner filed application under Order VII Rule 11 CPC seeking rejection of the plaint, which was dismissed by the learned Court below. The order has been impugned in the present petition.

4. Learned counsel for the petitioner submitted that it is not in dispute that the property in question has been mortgaged by Pawan Kumar of M/s Singla Kiryana Store for securing the loan raised. Once the petitioner bank has proceeded to initiate action under Section 13 of the Act, the only remedy available with the person aggrieved is under Section 17 of the Act to file an appeal before the Debts Recovery Tribunal. Jurisdiction of the civil court is clearly barred under Section 34 of the Act. The respondent-plaintiff smartly filed the suit without even impleading the owner of the property as party. There is no privity of the contract between the petitioner and the respondent-plaintiff. Whatever grievance he has against the action of the bank, civil suit is not the remedy. In support of his arguments, reliance was placed upon judgments of Hon'ble the Supreme Court in *Mardia Chemicals Limited and others vs Union of India and others* 2004 (2) RCR (Civil) 665, *United Bank of India vs Satyawati Tondon and others* AIR 2010 SC 3413 (1) and *Jagdish Singh vs Heeralal and others* (2014) 1 SCC 479.

5. On the other hand, learned counsel for the respondent submitted that the property is under tenancy of the respondent and his predecessor-in-interest for the last 40-50 years. The landlord had failed in all efforts to evict the respondent. It is a device designed by him to take possession of the property in connivance with the bank. Under these circumstances, the respondent does not have any other remedy except to approach the civil court. The suit is clearly maintainable. The respondent will not fall within the definition of 'any person'. In support of his plea, reliance was placed upon an order passed by this Court in CR No. 2475 of 2015 *Central Bank of India vs Mr. Ram Rattan alias Rattan Lal and others* on 9.4.2015, whereby the order passed by the learned Court below dismissing the application for rejection of plaint was upheld.

6. Heard learned counsel for the parties and perused the paper book.

7. Section 13(2) of the Act provides that where any borrower makes any default in re-payment of secured debt, then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of notice failing which action under section 13(4) may follow.

8. Section 13(4) of the Act provides that in case of failure to discharge the liabilities within the period specified in sub-section (2), the secured creditor may adopt any of the mode provided in the section which includes taking over possession of the secured assets of the borrower.

9. Section 17 of the Act provides that any person(s) (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor may make an application to the Debts Recovery Tribunal.

10. Any person aggrieved against the order passed by the Debts Recovery Tribunal under Section 17 of the Act has a remedy to file appeal before the Appellate Tribunal under Section 18 of the Act.

11. Section 34 of the Act bars jurisdiction of the civil court to entertain any suit or proceedings in respect of any matter which can be entertained by the Debts Recovery Tribunal or the Appellate Tribunal. No injunction shall be granted by any court in respect of any action taken in pursuance to the powers conferred under the Act. Relevant provisions of Sections 13(1)(2), (4a), 17(1) and 34 of the Act are extracted below:-

> "**13. Enforcement of security interest.-** (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), 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.
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> (2) 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).

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(4) 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;

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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 measures had been taken:

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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).

12. It is pleaded case of the petitioner bank that the property which is in possession of the respondent, has been mortgaged by Pawan Kumar of M/s Singla Kiryana Store to secure the loan. The amount of loan having not been repaid, recourse to provisions of the Act was taken. The claim of the respondent is that he being in possession of the property as a tenant cannot be dispossessed unless in due course of law as he has tenancy rights. He cannot avail of the remedy available under the Act and will not fall within the definition of 'any person'.

13. The issue as to who shall fall within the definition of 'any person' was considered by Hon'ble the Supreme Court in *Satyawati Tondon*'s case (supra), where the status of a guarantor of a loan was considered. It was opined that he would fall within the term 'any person' and can take recourse to the provisions of Section 17 of the Act for redressal of his grievance. Relevant para 17 of the judgment is extracted below:-

> "17. There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression `any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. 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............" (emphasis supplied).

14. The issue was further considered in *Jagdish Singh*'s case (supra). In the aforesaid case, the bank had advanced loan to a firm, which was secured by mortgage of land and houses. Suit was filed alleging that the property mortgaged was purchased from HUF funds. In that case the issue

arose whether the aggrieved party would fall within the definition of 'any person' or not. The opinion expressed by the Court was that the expression, 'any person' would include not only the borrower but also the guarantor or any other person, who may be affected by the action under Section 13 of the Act. It was opined that jurisdiction of the civil court is completely barred. Relevant paras thereof are extracted below:-

> "19. 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 *Satyavati Tondon* case.
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> 20. Therefore, the expression "any person" referred to in Section 17 would take 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) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest.
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> 22. The scope of Section 34 came up for consideration before this Court in Mardia Chemicals Ltd., (2004) 4 SCC 311 and this court held as follows: (SCC P. 349, para 50)
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>> "50. It has also been submitted that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceeding in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus before any action or measure is taken under sub-section (4) of Section 13, it is submitted by Mr Salve, one of the

counsel for the respondents that there would be no bar to approach the civil court. Therefore, it cannot be said that no remedy is available to the borrowers. We, however, find that this contention as advanced by Shri Salve is not correct. A full reading of Section 34 shows that the jurisdiction of the civil court is barred in respect of matters which a Debts Recovery Tribunal or an Appellate Tribunal is empowered to determine in respect of any action taken 'or to be taken in pursuance of any power conferred under this Act'. That is to say, the prohibition covers even matters which can be taken cognizance of by the Debts Recovery Tribunal though no measure in that direction has so far been taken under sub-section (4) of Section 13. It is further to be noted that the bar of jurisdiction is in respect of a proceeding which matter may be taken to the Tribunal. Therefore, any matter in respect of which an action may be taken even later on, the civil court shall have no jurisdiction to entertain any proceeding thereof. The bar of civil court thus applies to all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those matters in which measures have already been taken under sub-section (4) of Section 13."

23. Section 13, as already indicated, deals with the enforcement of the security interest without the intervention of the court or tribunal but in accordance with the provisions of the Securitisation Act.

24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub- section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of

secured assets of the borrowers, including the right to transfer by way of lease, assignment or realising the secured assets. Any person aggrieved by any of the "*measures*" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have the jurisdiction to entertain any suit or proceeding "*in respect of any matter*" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression "in respect of any matter" referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently, if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. The civil court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well.

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 Respondent Nos.6 to 8 (sic Respondents 1 to 5) have been crystalised,

before creating security interest in respect of the secured assets."

15. The only exception carved out in _Mardia Chemicals Limited's_ case (supra) was that jurisdiction of the civil court can be invoked where the action of the secured creditor is alleged to be fraudulent or his claim may be absorb or untenable.

16. The case in hand does not fall in that category. The respondent-plaintiff has not alleged any fraud on the part of the petitioner-bank, which is a secured creditor. The respondent-plaintiff is only seeking to protect his possession of the property as a tenant. The cause of action to file a suit is stated to be a letter dated 9.5.2013 received from the bank threatening to take possession of the property. The right of the petitioner to auction the property is not denied. Further it is claimed that possession can be taken only if there is an order of eviction passed against the respondent-plaintiff. There is no plea of fraud against the secured creditor.

17. The order relied upon by learned counsel for the respondent in _Mr. Ram Rattan alias Rattan Lal'_s case (supra) is distinguishable as the plea set up by the plaintiff therein, who had filed the suit, was that in fact he was the owner of the property and the borrower had fraudulently mortgaged the same having no right or interest thereon. Meaning thereby the ownership of the property of the loanee was in dispute, which is not in the case in hand.

18. In view of aforesaid discussion, in my opinion, the order passed by the learned Court below dismissing the application filed by the petitioner for rejection of the plaint deserves to be set aside. Ordered accordingly. The plaint filed by the respondent-plaintiff is rejected as jurisdiction of the civil court is barred under Section 34 of the Act.

19. However, still considering the fact that the respondent-plaintiff, who immediately approached the court when communication was sent to him by the bank for take possession of the property in dispute and the matter remained pending either before the Court below or before this Court and time to file appeal before the Debts Recovery Tribunal being 45 days from the date on which measure under Section 13 of the Act is taken, in my opinion, the respondent cannot be left remediless. In case he approaches the Debts Recovery Tribunal for redressal of his grievances within a period of two weeks from the date of receipt of copy of the order, the appeal filed by

the respondent shall be considered by the Debts Recovery Tribunal on merits and shall not be dismissed only on the ground of delay, subject to fulfillment of other conditions.

20. The petition stands disposed of.

14.5.2015 (Rajesh Bindal)
vs Judge

(Refer to Reporter)