

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY,
AURANGABAD BENCH, AURANGABAD**

WRIT PETITION NO. 5094 OF 2015

Kamalakar s/o Raghunath Pathak ...Petitioner

VERSUS

Jalna Sahakari Bank Ltd.
and others
...Respondents

.....

Shri A.N.Irpatgire, advocate for the petitioner
Shri S.V.Natu , advocate for respondent nos. 1 to 3
Shri V.M.Mane, advocate for respondent nos. 4 and 5
absent

.....

CORAM : S.V.GANGAPURWALA & K.L.WADANE, JJ.

DATED : 10th FEBRUARY, 2017

O R D E R :

Rule. Rule made returnable forthwith.
Heard finally with the consent of the respective parties.

2. Mr. Irpatgire, learned counsel for the petitioner states that respondent no.1 initiated proceedings under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act,

2002 (for short, 'the Act'). The respondent took the actual possession of the asset which was not secured asset. Learned counsel for the petitioner submits that the petitioner approached the Debts Revenue Tribunal, Aurangabad under Section 17 of the Act. The Securitization application was allowed. Against the said order, the Bank preferred an appeal. The appellate court only on the premise that the Bank states that the possession has not been taken, has allowed the appeal. The facts on record were never considered. It was specifically held by the Tribunal that the asset involved was not a secured asset. The said aspect is not discussed, nor the aspect of taking over of possession has been categorically and specifically discussed.

3. Learned counsel submits that even the finding of the appellate authority that the property is allotted by the Government was also not subject matter of record. The said finding is alien to the facts on record. Even the finding is

given that the respondent is at liberty to have lien over the possession of the property and if the Bank takes possession from the respondent he can file the application.

4. Mr. Natu, learned counsel for the respondent/Bank submits that the respondent/Bank has not taken the possession as is contemplated under Section 13 (4) of the Act. The fact that the Bank has not taken over possession is fortified by the fact that the Bank is required to file application under Section 14 of the Act with the District Magistrate. Learned counsel submits that even on an application filed by the petitioner under Section 17 of the Act, the Bank has taken preliminary objection that possession is not taken. No publication in the news papers was ever made which is requirement under the Rules. In case possession is not voluntarily handed over by the debtor then the secured creditor has to move under Section 14 of the Act.

5. The panchanama on record clearly shows that there was obstruction on behalf of the petitioner and as such possession could not be taken.

6. We have considered the submissions canvassed by the learned counsel for respective parties.

7. The Tribunal had allowed the Securitization application with direction that the action initiated by the Bank was not in respect of secured asset, whereas the appellate court has not dilated on the said aspect and has come to the conclusion that the possession is not being taken by the Bank. The other aspect of the matter is that the land allotted by the Government was not the contention of either of the parties. The appellate authority was required to go into the said aspect about the asset being secured asset, more particularly in view of the fact that there is a finding by the Tribunal that asset is not secured asset, and so also with regard to the aspect of possession being

taken over/not taken over by the Bank. The discussion with regard to other aspects does not appear to have been made.

8. Considering the afore said, it will be proper to relegate the parties before the appellate forum. Considering the above, the impugned judgment passed by the Tribunal is quashed and set aside. The parties are relegated before the appellate authority. The appellate authority shall consider the whole gamut of the case and decide the appeal on all aspects. The parties shall appear before the appellate authority on 7.3.2017.

9. Writ Petition disposed of. No costs.

(K.L.WADANE, J.)

(S.V.GANGAPURWALA, J.)

dbm/wp5094.15