Meena

IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO. 2 OF 2018

State Bank of India,
A Body Corporate Constituted under the Provisions of State Bank of India Act, 1955 Having one of its Local Head Office at Mumbai and amongst others a Branch of Margao namely Margao Main Branch, Goa Through its Asst. General Manager, Mr. Mujahid Bohra, song of Ibrabim Bhai, Aged 58 years, having his office at Margao Main Branch, near Municipal Garden, Margao , Goa 402 601 ... Applicant/ Petitioner

versus

1 Shri Umesh Morto Sinai Kenkro,
Son of late Morto Sinai Kenkro,
Aged 74 years, Businessman,
Residing at H. No.E-95,
Maddicotto, Cuncolim, Salcete, Goa.

2 Shri Ajit Morto Sinai Kenkro,
Son of late Morto Sinai Kenkro,
Aged 67 years, Businessman,
Residing at H.No. E-95,
Maddicotta, Cuncolim, Salcete, Goa.

3 Mr. Mahadev Naguesh Naik,

Major in age,
Resident of Flat No.201-A,
2nd Floor, Eyestar Dwelling,
Near PWD Office,
Fatorda, Salcete, Goa

4 Mrs. Lydia Cardozo Monteiro,
Major in age,
Resident of Monteiro Building,
Cuncolim Bazar, Cuncolim,
Salcete, Goa.

5 Mrs. Maria Odrey Monteiro,
Major of age
Resident of Monteiro Building,
Cuncolim Bazar, Cuncolim, Salcete,
Goa.

6 Mr. Domnic Cleaphas Cardozo,
Major of age
Resident of Monteiro Building,
Cuncolim Bazar, Cuncolim, Salcete,
Goa.

7 Mr. Santano Caetano Smilia D'Souza,
Major of age
Resident of House No.134,
Cobrawaddo, Calangute,
Bardez- Goa.

8 Mrs. Filomena D'Souza,
major of age,

Resident of House No.134,
Cobrawaddo, Calangute,
Bardez- Goa. … Respondents

Shri S. N. Joshi, Advocate for the applicants

Shri A.R. Kantak, Advocate for the respondent Nos.1 and 2.

CORAM : NUTAN D. SARDESSAI, J.

RESERVED ON : 28th March, 2018.

PRONOUNCED ON : 11th April, 2018

ORDER:

1. The applicants seek to challenge the order dated 03/10/2017 passed by the Court of the Adhoc Senior Civil Judge, Margao rejecting the preliminary objections to the maintainability of the suit and under Section 115 C.P.C..

2. It was briefly the case of the applicants that the suit was filed against the applicants and others seeking declaration that they were tenants in possession of the suit shop on the basis of the lease agreement dated 10/12/1967. They prayed for an injunction against them and from dispossessing the respondent from the suit shop. The applicants on service of summons filed a detailed written statement raising preliminary objections to the maintainability of the suit and also on merit on the premise that the suit was not maintainable in view of the action taken by the applicants under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, SARFAESI Act for short. The suit was also not maintainable for want of proper and necessary parties. The learned Senior Civil Judge passed the order dated 03/10/2017 rejecting the preliminary objections holding that the suit was maintainable giving rise to the order under challenge.

3. Heard Shri S. N. Joshi, learned Advocate for the applicants who submitted that in view of the SARFAESI Act, the Civil Court was ousted of the jurisdiction to deal with the issue and in that context referred to Section 34 and Section 17 of the SARFAESI Act. He placed reliance in **Vishal N. Kalsaria v/s. Bank of India and others** [2016(3) SCC 762] and contended that the tenancy agreement had to be decided by the Debt Recovery Tribunal, DRT for short. He adverted to the plaint coupled with the reliefs and the written statement apart from the impugned order and submitted that the amendment to the SARFAESI Act had to be applied retrospectively in procedural matters. He placed further reliance in **Vinod Gurudas Raikar v/s. Natinal Insurance Co. Ltd. and others** [(1991) 4 SCC 333] and **Hitendra Vishnu Thakur and others v/s. State of Maharashtra and others** [(1994) 4 SCC 602] and submitted that the Civil Court had no jurisdiction and the only remedy available to the aggrieved party was to approach the DRT for urgent reliefs.

4. Shri A.R. Kantak, learned Advocate for the respondent Nos.1 and 2 referred to the relevant paragraphs of the impugned order and submitted that the respondents had a license to run the shop since October, 2011. Pursuant to the amendment to SARFAESI Act, it had to be given effect from 01/09/2016 and in case the Parliament intended to apply it retrospectively it would state otherwise. There was no scope for applying the Act retrospectively. On his part he placed reliance in **Purbanchal Cables and Conductors Pvt. Ltd. V/s. Assam State electricity Board and another** [(2012) 7 SCC 462].

5. Shri S.N. Joshi, learned Advocate for the applicants in reply submitted that the judgment in **Jagdish Singh v/s. Heeralal and others** [(2004) 4 SCC 311] was in force pre **Kalsaria** (supra) judgment. However, reliance was placed in **State Bank of India v/s. Smt. Jigishaben B. Sanghavi and others** [2011 (2) LJ Soft 44] and that in **State Bank of India v/s. Mr. Aurelio Jose Da Costa** [Civil Revision Application No. 13/2013] where the subject matter was almost identical to the case of the respondents and pressed for the grant of an order in his favour. Shri A. R. Kantak, learned Advocate for the respondent Nos. 1 and 2 in reply distinguished the judgment in **Jigishaben** (supra) and that in **Aurelio** (supra) and pressed for the dismissed of the revision.

6. Section 34 of the SARFAESI Act provides that 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.

7. Section 35 in particular provides that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

8. Section 17 provides for the remedies and reads that any person (including a 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 circumscribed by the proviso. Sub section 1(a) thereof provides that an application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction - (a) the cause of action, wholly or in part, arises; or (b) where the secured asset is located; or (c) the branch or any other office of a bank or financial institution is maintaining an account in which the debt claimed is outstanding for the time being. In other words, a reading of Section 34 reveals that the jurisdiction of the Civil Court is barred to entertain any suit or proceedings which the DRT or the Appellate Tribunal is empowered under this Act to determine while the remedy is provided in terms of Section 17 before the DRT.

9. In **Vishal Kalsaria** (supra), the Apex Court held at paragraph 37 as below:

"37. It is a settled position of law that once tenancy is created, a tenant can be evicted only after following the due process of law, as prescribed under the provisions of the Rent Control Act. A tenant cannot be arbitrarily evicted by using the provisions of the SARFAESI Act as that would amount to stultifying the statutory rights of protection given to the tenant. A non obstante clause (Section 35 of the SARFAESI Act) cannot be used to bulldoze the statutory rights vested on the tenants under the Rent Control Act.

The expression any other law for the time being in force' as appearing in Section 35 of the SARFAESI Act cannot mean to extend to each and every law enacted by the Central and State legislatures. It can only extend to the laws operating in the same field." while dealing with the batch of appeals, where the broad point which required attention and consideration was whether a 'protected tenant' under The Maharashtra Rent Control Act, 1999 could be treated as a lessee, and whether the provisions of the 'SARFAESI Act' would override the provisions of the Rent Control Act.

10. Section 14 of the Act deals with the powers of the Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of the secured asset. It reads thus "(1) where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession, thereof, and the Chief Metropolitan

Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him (a) take possession of such asset and documents relating thereto; and (b) forward such asset and documents to the secured creditor." It is circumscribed by the proviso that any application by the secured creditor shall be accompanied by the affidavit duly confirmed by the authorised officer of the secured creditor declaring that (i) ….. (ii)...... (iii)....... (iv) the borrower has committed default in repayment of financial assistance granted aggregating the specified amount. In that context, it was the contention of Shri S.N. Joshi, learned Advocate for the applicant that the tenancy claim had to be decided by the DRT.

11. The District Magistrate i.e. the Collector in exercise of the powers under Section 14 and acting on the basis of the request made by the applicant had authorised the Mamaltdar to take or called to be taken over the secured assets and handover the same to the secured creditor by giving prior intimation to the applicants / secured creditor vide the order dated 16/08/2011. The respondent Nos. 1 and 2 had filed a suit for declaration, permanent injunction and consequential reliefs against the applicant herein and five others carving a case that the suit shop in Monteiro building was leased to their late predecessors and to them in 1967, that they were tenants in possession of the suit shop and were not made parties to the proceedings before the District Magistrate, that the applicants herein through the instrumentality of the Mamlatdar were seeking to evict them from the suit building and to take over its possession and on that basis had sought the relief of declaration, permanent injunction and the consequential reliefs.

12. The applicants herein had opposed the suit and raised a plea that it was not maintainable against an order passed under the SARFAESI Act and that the Civil Court had no jurisdiction to deal with the matter. The Civil Court while dealing with the preliminary objection considered the judgment in **Vishal Kalsaria** (supra), the amendment to the SARFAESI Act and held that the provisions of the Act could not be applied and rejected the preliminary objections. Considering the law in **Vishal Kalsaria** (supra) case, no fault could be found with the findings rendered by the learned Trial Judge dismissing the preliminary objections raised on behalf of the applicants herein. i am fortified in this conclusion on a bare reading of The enforcement of Security Interest and Recovery of Debts Laws and Miscellaneous Provisions(Amendment) Act, 2016 which has been enacted further to amend the SARFAESI Act, the Recovery of Debt due to Banks and Financial Institutions Act, 1993, the Indian Stamp Act, 1899, and the Depositories Act, 1996, and for the matters connected therewith or incidental thereto. It clearly reads that this Act shall come into force on such date as the Central Government may, by Notification in the Official Gazette, appoint. Shri Joshi, learned Advocate for the applicants had produced on record the Gazette Notification pursuant to which the Act came into force w.e.f. 01/09/2016. The question therefore which would arise as per the contention is whether this Act would apply prospectively or retrospectively. A bare reading of the Notification would clearly belie the contention of Shri Joshi, learned Advocate for the applicants that the Act would have retrospective operation since the Parliament intended to bring the Act into force on such date as the Central Government may, by Notification in the Official Gazette, appoint and the appointed date was 01/09/2016. It could therefore never be construed that this Act was intended to have retrospective operation.

13. **Vinod Raikar** (supra), was injured in the road accident and his claim petition was dismissed as being barred by limitation. The accident took place on 22/01/1989 while the Motor Vehicles Act, 1939 was repealed by Section 217 (1) of the Motor Vehicles Act, 1988 which came into force on 01/07/1989. The limitation for filing the claim petition both under the old Act and the new Act being 6 months expired on 22/07/1989 while the petition was filed belatedly on 15/03/1990 with a prayer for condonation of delay. The Accident Claims Tribunal held that this delay could not be condoned and dismissed the application which was unsuccessfully challenged before the High Court. It was contended on his behalf since the accident took place when the old Motor Vehicles Act was in force, the proceeding before the Accident Claims Tribunal must be held to be governed by the old Act, and his petition cannot be dismissed on the basis of the provisions in the new Act. The period of limitation for filing a claim petition both under the old Act and the new Act is six months from the date of the accident. The difference in the two Acts, which is relevant in the present case, is in regard to the provisions relating to condonation of delay. In view of the proviso to sub-section (3) of Section 166 of the new Act, the maximum period of delay which can be condoned is six months, which expired on 22/01/1990. If the new Act is held to be applicable, the appellant's petition filed in March had to be dismissed. The case of the appellant was that the accident having taken place before the new Act came into force, the proceeding was governed by the old Act, where there was no such restriction as in the new Act and therefore the question was as to which Act is applicable; the new Act or the old. In that context, it was observed at paragraph 6 that even independent of the General Clauses Act, it is firmly established that unless a new statute expressly or by necessary implication says so, it will not be presumed that it deprives a person of an accrued right. On the other hand, a law which is procedural in nature, and does not affect the rights, has to be held to be retrospectively applicable.

14. In **Hitendra Thakur** (supra), the Apex Court culled out amongst other principles with regard to the ambit and scope of an Amending Act and its retrospective operation of Law relating to forum and limitation is procedural in nature, whereas the law relating to right of action and right of appeal even though remedial is substantive in nature.

15. These judgements with respect do not buttress the case of Shri Joshi, learned Advocate for the applicants that being a procedural matter, the law was applicable retrospectively and therefore his preliminary objection to the maintainability of the suit had to be held in his favour and the proceedings disposed off by the Trial Court.

16. Besides, there is force in the contention of Shri Kantak, learned Advocate for the respondent Nos.1 and 2 that in case the Parliament intended to apply the Act retrospectively, it would have stated so and, therefore, there is no basis and scope in the contention of Shri Joshi, learned Advocate for the applicants that the act is to apply retrospectively.

17. Jagdish Singh (supra), was the auction purchaser, in respect of the land bearing distinct Khasra Numbers of Barwani, M.P., which was brought to sale for recovery of loan amounts under the provisions of the SARFAESI Act. The auction was confirmed by the bank on 08/11/2005 on the appellant's depositing ₹2,90,250/- by 09/11/2005 and the remaining 75% within 15 days. The appellant was however not put in possession of the property in question even though the auction was confirmed. He then came to know that the respondent Nos.1 to 5 had filed a Civil Suit in the Court of the District Judge, Barwani District for a declaration of title, partition and permanent injunction against the respondent Nos.7 to 9 and others in which he and the bank were also made parties and sought relief of declaration of title in respect of the same Khasra numbers, a decree of partition, permanent injunction and other reliefs. The respondent Nos.7 to 9 filed an application before the Debt Recovery Tribunal, Jabalpur under Section 17 of the SARFAESI Act challenging the sale notice dated 08/11/2005 which was opposed by the bank and same was dismissed by the DRT. The respondent Nos.6 and 7 (the Bank) filed a preliminary objection before the Civil Court stating that in view of Section 13 read with Section 34 of the SARFAESI Act, the Civil Court had no jurisdiction to entertain the suit. The civil court upheld the preliminary objection stating that if the plaintiffs had any right, they ought to have filed an appeal under Section 17 of the DRT Act and not a suit in view of the specific bar contained in Section 34 of the SARFAESI Act. The Civil court, therefore, passed an order on 18.01.2008 holding that the suit was not maintainable allowed the application filed by the bank.

18. In **Jagdish Singh** (supra), the respondent Nos.1 to 5 filed an appeal before the High Court of Madhya Pradesh at Indore which allowed the appeal giving rise to the appeal before the Apex Court. It was contended on his behalf that the High Court had not properly appreciated the scope of Section 34 of the SARFAESI Act and over-looked the principle laid down by this Court in various Judgments with regard to the scope of Section 9 CPC vis-à-vis Section 34 of the SARFAESI Act including the Judgment in **Mardia Chemicals Ltd. and other v/s. Union of India and others** [(2004) 4 SCC 311] amongst others. It was further contended that the appellant is a bonafide purchaser for value and the sale was confirmed in his favour as early as on

08/11/2005 and the application preferred by the respondent Nos.7 to 9 before the DRT, challenging the sale notice dated 08/11/2005, was also dismissed by the DRT on 21/07/2006 and, therefore, the High Court was not justified in interfering with the order passed by the District Judge. Quite on the contrary, it was submitted on behalf of the respondents that the High Court had rightly interfered with the order of the District Judge after having found that the Civil Court has got the jurisdiction to deal with the rights of the respondents – plaintiffs, correctly appreciated the scope of Section 34 of the SARFAESI Act and referred to **Mardia Chemicals Ltd.** (supra) in that context. The Apex Court considered Section 17 of the Act, the remedy of appeal under Section 18 of the Act if aggrieved by the order made by the DRT, Section 34 of the SARFAESI Act and its scope which came up for consideration in **Mardia Chemicals Ltd.** (supra) and held that the Civil Court jurisdiction was barred. This judgment would not substantiate the contention of Shri Joshi, learned Advocate for the applicants considering the law laid down in **Vishal Kalsaria** (supra) and the Amendment Act of 2016 having prospective effect.

19. In **Smt. Jigishaben B. Sanghavi** (supra), the appellant having instituted an application before the DRT for recovery and in the recovery proceedings the mortgaged flat was attached and a sale proclamation was issued. The plaintiffs had filed a suit in respect of the validity of the mortgage contending that the HUF was a co-owner /tenant in common of the residential flat. The plaintiffs contended that HUF was not a borrower, guarantor or mortgagor and there was no legal and valid mortgage nor was any security created in favour of the Bank as against the rights of the HUF of which the plaintiffs were members. The appellant-Bank had filed an appeal against the order of the Hon'ble Single Judge who dismissed the Chamber Summons seeking the rejection of the plaint under Order VII Rule 11 (d) of CPC. It was held that Section 17 of the RDDB Act provides a right of appeal to any person, including a borrower. The expression "any person" was broad enough to include not only the borrower, but any person who was aggrieved by a measure which was taken by the secured creditor under sub-section (4) of Section 13. The plaintiff as third parties had sufficient recourse to challenge the lawfulness of the action of the Bank by invoking the remedies u/s.17. None of the grounds which were sought to be urged in the plaint fell outside the province and jurisdiction of the DRT. Recourse to the proceedings in the form of a civil suit was barred by Section 34 of SARFAESI Act and the order of the learned Single Judge was set aside and the plaint was rejected on the ground that the suit, from the statement contained in the plaint was barred under Section 34 of the SARFAESI Act. This Judgment too with respect does not advance the case of the applicants and therefore the departure.

20. In **Aurelio Costa** (supra), the State Bank challenged in Revision Application under Section 115 of CPC the order passed by the Trial Court pursuant to which the application under Order VII Rule 11 CPC filed by the Petitioner - Bank had been dismissed. The first respondent had filed the suit against the petitioner and others seeking a declaration that the Deed of Mortgage dated 29/09/2008 executed by the original defendant Nos.3 to 7 in favour of the petitioner- Bank was null and void and not binding on him and also sought permanent injunction, restraining the petitioner from attaching or taking over possession of the suit property. The petitioner-Bank as the defendant no.1 filed an application under Order VII Rule 11 CPC, claiming that the suit was barred by the provisions of the SARFAESI Act which was opposed by the respondent No.1 and dismissed by the Trial Court on the ground that the validity of the Mortgage Deed could only be decided by a Civil Court and the suit was not barred under the provisions of SARFAESI Act and challenged in the revision application. Apparently, the respondents Nos.1 and 2 are not the parties to the said proceedings which has been the contention of

Shri Joshi, learned Advocate for the applicants that this matter is almost identical to that of the respondents and that parties are also the same. In any event, the learned Single Judge had found that a view taken by the Civil Court was not appropriate and allowed the revision application rejecting the plaint in terms of the order VII Rule 11 CPC. This judgment is of a coordinate Bench and is not binding on this Court.

21. Having considered the judgments earlier relied upon and on a consideration of the contentions of both the learned Advocates, there is no scope to interfere with the order of the learned Trial Court pursuant to which he dismissed the preliminary objections raised by the applicants to the maintainability of the suit filed by the respondent Nos.1 and 2. In view thereof, the revision application is dismissed.

NUTAN D. SARDESSAI, J.