

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

WRIT PETITION NO.27552 OF 2014

Between:

Dommati Prashanthi

... Petitioner

and

Indian Bank, Warangal and others

... Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 7th FEBRUARY, 2018

SUBMITTED FOR APPROVAL:

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHAVA RAO**

1. Whether Reporters of Local newspapers may be allowed to see the judgment? Yes/No
2. Whether copies of the judgment may be marked to Law Reporters/Journals Yes/No
3. Whether His Lordship wishes to see the fair copy of the judgment? Yes/No

SANJAY KUMAR, J

P.KESHAVA RAO, J

***THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHA RAO**

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<Gist:

>Head Note:

! Counsel for petitioner : Sri Ghanshyamdas Mandhani

^Counsel for respondents 1 and 2 : Sri Ambadipudi Satyanarayana

^Counsel for respondent 4 : Sri M.Ravinder Babu

^Counsel for respondents 3 and 5 : --

? CASES REFERRED:

1. (2004) 2 SCC 601
2. AIR 1956 SC 593
3. (2008) 1 SCC 125
4. (2014) 6 SCC 1
5. 2008 (4) Bom CR 719 : 2008 SCC Online Bom 489
6. 2015 SCC Online Gujarat 5178
7. 2016 SCC Online Kerala 35932
8. 2016 SCC Online Madras 5608
9. W.P.No.7300 of 2014 dated 05.09.2017
10. W.P.No.6857 of 2015 dated 11.03.2015
11. (2014) 1 SCC 479
12. W.P.No.1770 of 2015 dated 27.01.2015
13. (2010) 8 SCC 110

**THE HON'BLE SRI JUSTICE SANJAY KUMAR
AND
THE HON'BLE SRI JUSTICE P.KESHA RAO**

WRIT PETITION NO.27552 OF 2014

O R D E R

(Per Hon'ble Sri Justice Sanjay Kumar)

The petitioner is aggrieved by the order dated 21.07.2014 passed by the Debts Recovery Appellate Tribunal, Kolkata (*hereinafter* 'the Appellate Tribunal'), dismissing her Appeal No.287 of 2013 filed under Section 18 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for brevity*, 'the SARFAESI Act'). She seeks a writ of certiorari to quash the same and to consequently direct the Indian Bank (*hereinafter* 'the bank') to drop all further proceedings initiated by it under Section 13(4) of the SARFAESI Act.

The aforesaid appeal was filed by the petitioner assailing the order dated 15.07.2013 passed by the Debts Recovery Tribunal, Hyderabad (*hereinafter* 'the Tribunal'), in S.A.No.129 of 2008. This securitisation application was filed by the petitioner under Section 17 of the SARFAESI Act to set aside the sale of the house property bearing Municipal No.11-24-256, Desaipet Road, Pochamma Maidan, Warangal, by the bank in exercise of powers under the SARFAESI Act. The SA was dismissed by the Tribunal.

The petitioner's mother, Jannu Mariyamma, the third respondent herein, had mortgaged the subject house property as security for the housing loan of Rs.4,00,000/- obtained by her from the bank in March, 2006. The loan was repayable in 108 monthly instalments of Rs.5,500/- each, commencing from June, 2006. The construction of the house was completed in February, 2007. Owing to

the default in repayment of the housing loan, the bank declared the same a non-performing asset and issued demand notice dated 12.06.2007 to the third respondent under Section 13(2) of the SARFAESI Act requiring her to pay the sum of Rs.4,33,422/- along with interest. It was only thereafter that the third respondent executed registered gift settlement deed dated 03.11.2007, bearing Document No.366 of 2007, renouncing all her rights and interest in the subject house property in favour of her daughter, the petitioner herein, without any monetary consideration. This gift settlement deed was admittedly executed by the third respondent without obtaining the prior written consent of the bank.

While so, as the third respondent failed to pay the amount due in terms of its demand notice dated 12.06.2007, the bank proceeded under Section 13(4) of the SARFAESI Act and auctioned the subject house property on 10.12.2007. The fourth respondent herein emerged as the successful bidder in the said sale. Aggrieved by this sale, the petitioner filed S.A.No.129 of 2008 before the Tribunal, under Section 17 of the SARFAESI Act. Her case therein was that she was the owner and possessor of the subject house property pursuant to the registered gift settlement deed dated 03.11.2007 executed in her favour by her mother and, having stepped into the shoes of her mother, she was entitled to protect her interest. She sought to assail the auction sale in favour of the fourth respondent herein on various grounds. The bank however contested her *locus* by pointing out that she could not claim lawful ownership over the subject house property pursuant to the registered gift settlement deed dated 03.11.2007 as it was executed after issuance of the demand notice under Section 13(2) of the SARFAESI Act on

12.06.2007 and was hit by Section 13(13) of the SARFAESI Act. The bank therefore asserted that she had no *locus standi* to file the securitisation application.

The Tribunal took note of the fact that the petitioner was neither a borrower nor a guarantor for the loan secured by the third respondent from the bank. The pivotal question framed by the Tribunal was as to whether the petitioner would have the right to challenge the action taken by the bank under the provisions of the SARFAESI Act in relation to the subject house property. Taking note of the provisions of Section 13(13) of the SARFAESI Act, the Tribunal opined that the transfer of title in the subject house property by the third respondent to her daughter, the petitioner herein, without securing prior written consent of the bank was not at all valid and, therefore, she had no *locus standi* to challenge the action taken by the bank under the SARFAESI Act. The Tribunal accordingly dismissed the SA *vide* its order dated 15.07.2013.

Assailing the said order, the petitioner filed Appeal No.287 of 2013 before the Appellate Tribunal. The Appellate Tribunal opined that a harmonious reading of Section 13(13) of the SARFAESI Act with Section 35 thereof, which gave overriding effect to the provisions of the SARFAESI Act over anything inconsistent therewith in other laws, amply made the point clear that Section 13(13) of the SARFAESI Act is mandatory in nature. As it was not in dispute that the unilateral transfer of title under the registered gift settlement deed dated 03.11.2007 by the third respondent was after issuance and receipt of the demand notice dated 12.06.2007 under Section 13(2) of the SARFAESI Act, the Appellate Tribunal affirmed the view taken by the Tribunal and held that the petitioner, the donee under

the said gift settlement deed dated 03.11.2007, acquired no right in the secured house property as the gift deed was *non est* in the eye of law and in consequence, she had no *locus standi* to file the securitisation application. The Appellate Tribunal accordingly concluded that no interference was warranted with the judgment of the Tribunal and dismissed the appeal.

Sri Ghanshyamdas Mandhani, learned counsel for the petitioner, would submit that the Tribunal and the Appellate Tribunal failed to take note of the fact that any person aggrieved by any of the measures referred to in Section 13(4) taken by a secured creditor is entitled to apply to the jurisdictional Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act within 45 days from the date on which such measures were taken. He would therefore contend that the question of examining the *locus standi* of the petitioner in the context of the registered gift settlement deed dated 03.11.2007, under which she claimed title to the subject house property, did not at all arise as there could be no dispute that she was a 'person aggrieved' by the sale of the subject house property. He would further state that Section 13(13) of the SARFAESI Act cannot be construed to mean that a transfer of the secured asset by the borrower after issuance of the demand notice under Section 13(2) thereof is straightaway null and void if it is made without the prior written consent of the secured creditor. He would point out that, if the borrower or the transferee clears the dues of the secured creditor even after the transfer in violation of Section 13(13) of the SARFAESI Act, no cause would arise to categorise the transfer as null and void or *non est* in the eye of law and, therefore, the tribunals below erred in blindly treating it as such and non-suiting the petitioner on the ground of *locus*. He would draw

a parallel with Section 52 of the Transfer of Property Act, 1882 (*for brevity*, 'the Act of 1882'), which incorporates the doctrine of *lis pendens*, and assert that the tribunals below committed a patent error in law in not examining the issues raised by the petitioner in the securitisation application, by non-suiting her at the threshold.

Sri Ambadipudi Satyanarayana, learned counsel for the bank, and Sri M.Ravinder Babu, learned counsel for the fourth respondent auction purchaser, would repel these arguments contending that, as Section 13(13) of the SARFAESI Act barred the transfer of the secured asset by the borrower without prior written consent of the secured creditor after issuance of the demand notice under Section 13(2) thereof, the petitioner who is claiming rights in violation of the said provision could not be permitted to air her grievance with regard to the measures taken by the bank under Section 13(4) of the SARFAESI Act. They would point out that Section 35 of the SARFAESI Act gives overriding effect to its provisions over other laws and, therefore, the petitioner could not seek to draw an analogy from Section 52 of the Act of 1882.

The issue arising for consideration before this Court presently is whether the petitioner, who admittedly traces her title to a document executed in violation of Section 13(13) of the SARFAESI Act, can claim to be a 'person aggrieved' so as to maintain a securitisation application under Section 17(1) of the SARFAESI Act against the sale of the secured asset by the bank.

It would be appropriate at this stage to take note of pertinent statutory provisions.

Section 13(13) of the SARFAESI Act, at the relevant point of time, stated as under:

‘13. Enforcement of security interest.-

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.’

Section 17(1) of the SARFAESI Act, as it stood prior to its amendment, read as under:

‘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 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 measures had been taken.’

Section 35 of the SARFAESI Act is also apposite of extraction and reads as under:

‘35. The provisions of this Act to override other laws.— 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.’

Section 52 of the Act of 1882, which is sought to be pressed into service by Sri Ghanshyamdas Mandhani, learned counsel, is also worthy of reproduction, to the extent relevant, and it states thus:

‘52. Transfer of property pending suit relating thereto:— During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceeding which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or

otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein except under the authority of the Court and on such terms as it may impose.’

At the outset, we may note that the parallel and analogy sought to be drawn by Sri Ghanshyamdas Mandhani, learned counsel, from Section 52 of the Act of 1882 is without merit. In this regard, he placed reliance on **RAJ KUMAR V/s. SARDARI LAL**¹. Referring to the doctrine of *lis pendens* incorporated in Section 52 of the Act of 1882, the Supreme Court observed therein that a defendant cannot, by alienating the property during the pendency of the litigation, seek to deprive the successful plaintiff of the fruits of the decree and the transferee *pendente lite* is treated in the eye of law as a representative-in-interest of the judgment-debtor and held bound by the decree passed against the judgment-debtor though neither the defendant chose to bring the transferee on record nor did the transferee choose to come on record. The principle underlying Section 52 of the Act of 1882, as set out by the Supreme Court, is essentially different from the bar under Section 13(13) of the SARFAESI Act, whereby the borrower is restrained from transferring the secured asset after issuance of the demand notice under Section 13(2), except with the prior written consent of the secured creditor.

In **NAGUBAI AMMAL V/s. B.SHAMA RAO**², the Supreme Court observed that the effect of Section 52 of the Act of 1882 is not to wipe out a sale *pendente lite* altogether but to subordinate it to the rights based on the decree in the suit and as between the parties to the transaction, it would be perfectly valid and would operate to vest

¹ (2004) 2 SCC 601

² AIR 1956 SC 593

the title of the transferor in the transferee. It was observed that the words 'so as to affect the rights of any other party thereto under any decree or order which may be made therein' make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order and it is in this view that transfers *pendente lite* have been held to be valid and operative as between the parties thereto. However, this principle also is alien to the milieu and objective of Section 13(13) of the SARFAESI Act, which operates solely to protect the interest of the secured creditor.

At the fundamental level, it is to be noted that the doctrine of *lis pendens* in Section 52 of the Act of 1882 is aimed at protecting the prospective decree holder who is put at risk of being deprived of the fruits of such decree owing to the transfer pending the litigation. As between the parties to such transfer, the doctrine however makes it clear that the transaction would hold good. When Section 13(13) of the SARFAESI Act bars the very transfer of the secured asset to the detriment of the secured creditor but for the excepted categories, i.e., in the ordinary course of business or with the prior written consent of the secured creditor, the very initiation of the transaction by the borrower is barred and there is no question of such transfer or transaction being operative between the parties thereto or vesting any title in the transferee thereunder, at the cost of the secured creditor. The analogy sought to be drawn from Section 52 of the Act of 1882 is therefore wholly without basis.

The controversy mainly turns upon the effect of the prohibition envisioned by Section 13(13) of the SARFAESI Act. This provision postulates that no borrower shall transfer the secured asset, other than in the ordinary course of his business, be it by way of sale, lease

or otherwise, without the prior written consent of the secured creditor, after issuance of the demand notice under Section 13(2) of the SARFAESI Act referring to the said secured asset.

Considering this provision in **TRANSCORE V/s. UNION OF INDIA**³, the Supreme Court opined that a demand notice under Section 13(2) of the SARFAESI Act is not merely a show-cause notice as Section 13(13) thereof indicates that such a notice, in effect, operates as an attachment/injunction restraining the borrower from disposing of the secured asset.

In **HARSHAD GOVARDHAN SONDAGAR V/s. INTERNATIONAL ASSETS RECONSTRUCTION COMPANY LIMITED**⁴, the Supreme Court observed that the provisions of Section 13(13) of the SARFAESI Act were inconsistent with Section 65-A of the Act of 1882, which permits a mortgagor in lawful possession to create a lease over the property, but by virtue of Section 35 of the SARFAESI Act, a lease of a mortgaged asset by the borrower after he receives the demand notice under Section 13(2) of the SARFAESI Act, referring to the said asset, would not be a valid lease.

A Division Bench of the Bombay High Court (Aurangabad Bench), in **MAHARASHTRA STATE CO-OP. BANK LTD. V/s. STATE OF MAHARASHTRA**⁵, observed that Section 13(13) of the SARFAESI Act would come into play as soon as a notice under Section 13(2) thereof is served on the borrower and the borrower shall thereafter not be in a position to transfer by way of sale, lease or otherwise any of the secured assets referred to in the said notice.

³ (2008) 1 SCC 125

⁴ (2014) 6 SCC 1

⁵ 2008 (4) Bom CR 719 : 2008 SCC Online Bom 489

In **OM SHREE NAGRAJ GINING FACTORY V/s. UNION OF INDIA**⁶, a Division Bench of the Gujarat High Court observed that after issuance of the notice under Section 13(2) of the SARFAESI Act by the secured creditor, sale of the property referred to therein was completely prohibited without the prior consent of the secured creditor, as per the provisions of Section 13(13). The Division Bench further observed that no right or title would vest in the vendees under the so-called sale deed.

In **M.K.SIRAJ V/s. THE FEDERAL BANK LTD.**⁷, a Division Bench of the Kerala High Court observed that Section 13(13) of the SARFAESI Act makes it clear that no borrower shall, after receipt of the notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the said notice, without the prior written consent of the secured creditor, and any sale by the borrower in violation of the provision would be *per se* illegal. It was further observed that if the transfer is opposed to the nature of the interest affected and is for an unlawful object, the transfer would be illegal and as such transfer is forbidden by law and would defeat the provisions of Section 13(13) of the Act, the object with which the sale is made by the borrower can safely be said to be unlawful.

In **K.RAJU V/s. THE CHIEF METROPOLITAN MAGISTRATE COURT, EGMORE, CHENNAI**⁸, a Division Bench of the Madras High Court considered the very same provision and opined that when the petitioner therein admitted that he was inducted into the property after issuance of the demand notice under Section 13(2) of the

⁶ 2015 SCC Online Gujarat 5178

⁷ 2016 SCC Online Kerala 35932

⁸ 2016 SCC Online Madras 5608

SARFAESI Act by way of a registered lease deed, he would not be entitled to any hearing before any authority as the purported tenancy was created to hoodwink the judicial process and also the mechanism prescribed by law.

In **A.PALANIKUMAR V/s. THE AUTHORIZED OFFICER, PUNJAB NATIONAL BANK, CHENNAI**⁹, a Division Bench of the Madras High Court opined that a lessee under a lease agreement executed after issuance of the demand notice under Section 13(2) of the SARFAESI Act would not be entitled to seek protection of his possession as against the secured creditor, as the very lease under which he was claiming rights was statutorily barred by Section 13(13) of the SARFAESI Act.

The decision of a Division Bench of the Madras High Court in **HAIROONTHAI PUBLIC SCHOOL V/s. THE DISTRICT COLLECTOR**¹⁰ to the effect that a tenant could go before the District Collector-cum-Magistrate, Tiruvallur, under Section 14 of the SARFAESI Act, notwithstanding the claim of the secured creditor that the lease was created after issuance of the demand notice under Section 13(2) of the SARFAESI Act, is distinguishable on facts as there was a dispute therein as to the creation of such tenancy being hit by the bar under Section 13(13) of the SARFAESI Act.

Sri Ghanshyamdas Mandhani, learned counsel, would cite the hypothetical example of a transaction hit by Section 13(13) of the SARFAESI Act not being liable to be declared unlawful in the event the amounts due to the secured creditor are paid, be it by the borrower or the transferee. In this regard, it may be noted that the bar to the transfer of the secured asset by the borrower, in terms of

⁹ W.P.No.7300 of 2014 dated 05.09.2017

¹⁰ W.P.No.6857 of 2015 dated 11.03.2015

Section 13(13) of the SARFAESI Act, operates only for the benefit of the secured creditor and none else. The status of such transfer would therefore not be put in issue at all if repayment of all dues is then lawfully made to the secured creditor. The secured creditor, in such a situation, would have no cause to raise an objection under Section 13(13) of the SARFAESI Act. This argument is of no avail to the petitioner as that situation never arose in the case on hand.

It is therefore manifest from a conspectus of the aforestated precedential wisdom that the petitioner cannot claim any legal right or title under the subject gift settlement deed. However, the question that would then arise is as to whether the petitioner, who admittedly claims under a document hit by Section 13(13) of the SARFAESI Act, can be said to be a 'person aggrieved', competent to invoke the jurisdiction of the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act against the sale of the subject house property by the bank.

In this regard, it may be noted that the Supreme Court, in **JAGDISH SINGH V/s. HEERALAL**¹¹, while construing the provisions of Section 17 of the SARFAESI Act observed that the expression 'any person' in Section 17(1) is of wide import and takes in its fold not only the 'borrower' or the 'guarantor' but also 'any other person who may be affected by the action taken under Section 13(4) of the SARFAESI Act'.

In **J.MUSTHAQ ALI V/s. INTERNATIONAL ASSET RECONSTRUCTION COMPANY PVT. LTD.**¹², the Madras High Court also gave the widest possible connotation to 'any person aggrieved' in Section 17(1) of the SARFAESI Act, relying on **JAGDISH SINGH**⁸.

¹¹ (2014) 1 SCC 479

¹² W.P.No.1770 of 2015 dated 27.01.2015

That was also a case where the 'person aggrieved' claimed rights in the secured asset under a sale agreement executed after issuance of the Section 13(2) notice under the SARFAESI Act.

However, it may also be noted that in **UNITED BANK OF INDIA V/s. SATYAWATI TONDON**¹³, the Supreme Court observed that if the guarantor whose property was mortgaged to the bank had any 'tangible grievance' against the notice issued under Section 13(4) or the action taken under Section 14 of the SARFAESI Act, she could then avail the remedy of filing an application under Section 17(1) of the SARFAESI Act. It was observed therein that the expression 'any person' used in Section 17(1) of the SARFAESI Act was of wide import. Reference was also made to this judgment in **JAGDISH SINGH**⁸. The notable factor is that the grievance sought to be aired should be a 'tangible' one.

Significantly, the specific question as to whether a person claiming rights pursuant to a transfer hit by Section 13(13) of the SARFAESI Act could qualify as 'any person aggrieved' so as to maintain an application under Section 17(1) of the SARFAESI Act, against the measures taken by the secured creditor under Section 13(4) thereof, neither fell for consideration nor was it addressed in clear terms in any of the aforestated decisions.

Thus, though the words 'any person aggrieved' in Section 17(1) of the SARFAESI Act are not qualified or restricted by express language, the question would arise as to whether a person claiming under a transfer barred by Section 13(13) of the SARFAESI Act can be permitted to raise a grievance before the jurisdictional Debts

¹³ (2010) 8 SCC 110

Recovery Tribunal against the measures taken by the secured creditor under Section 13(4) of the SARFAESI Act.

Allowing such a person to do so, in our considered opinion, would be nothing short of dignifying and validating the unlawful transfer in his favour. When the very transaction under which such person claims rights is unlawful, giving it even a modicum of sanctity or legality, so as to permit such person to approach any forum assailing the measures taken by the secured creditor under Section 13(4) of the SARFAESI Act, would amount to making a mockery of Section 13(13) of the SARFAESI Act. Affording an opportunity of hearing to an unlawful transferee before the jurisdictional Debts Recovery Tribunal, by bringing such a transferee within the ambit of 'any person aggrieved' in Section 17(1) would practically make the bar envisioned by Section 13(13) of the SARFAESI Act otiose. The words 'any person aggrieved' in Section 17(1) must therefore be construed to mean 'any person who, *prima facie*, has a legally founded tangible grievance'. A person, such as the petitioner, who at the very threshold fails to meet this standard, as she admittedly claims rights under a document hit by Section 13(13) of the SARFAESI Act, cannot be said to be a 'person aggrieved', as the very foundation of her grievance is rooted in the illegality of the transfer under which she is claiming rights. In **K.RAJU**⁸, the Madras High Court also held to this effect.

On the above analysis, we find that the petitioner cannot be categorised as 'any person aggrieved' so as to entitle her to maintain an application under Section 17 of the SARFAESI Act in relation to the sale of the subject house property by the bank. This is so as her claim over the said property stems from the registered gift settlement

deed dated 03.11.2007 which is clearly hit by the bar under Section 13(13) of the SARFAESI Act. As the said deed would not vest any right or title in the petitioner against the bank, owing to the statutory bar under Section 13(13) of the SARFAESI Act, the question of lending sanctity to such a blatantly illegal transfer by the borrower in favour of the petitioner, even to the limited extent of permitting her to raise an attack against the subsequent sale of the subject house property by the bank, would not arise. As pointed out *supra*, the words 'any person aggrieved' in Section 17(1) of the SARFAESI Act must necessarily be construed to mean 'any person who is in a position to show, *prima facie*, that he or she has a legally founded tangible grievance' and not a person whose claim is mired in illegality at the very roots. The petitioner therefore had no *locus standi* to maintain an application under Section 17 of the SARFAESI Act. We find no error whatsoever in both the tribunals below holding to this effect and non-suiting her on that ground.

The writ petition is devoid of merit and is accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

P.KESHAHA RAO, J

7th FEBRUARY, 2018

**L/R copy to be marked -Yes
B/o Svv**