

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

WRIT PETITION NOS.22510, 22547 AND 22884 OF 2016

W.P.NO.22510 OF 2016:

Rajanala Kusuma Kumari		... Petitioner
	Vs.	
The State of Telangana rep. by its Principal Secretary, Industries and Commerce Department and others		... Respondents

W.P.NO.22547 OF 2016:

Enugala Manjula		... Petitioner
	Vs.	
The State of Telangana rep. by its Principal Secretary, Industries and Commerce Department and others		... Respondents

W.P.NO.22884 OF 2016:

Bhukya Shakuntala		... Petitioner
	Vs.	
The State of Telangana rep. by its Principal Secretary, Industries and Commerce Department and others		... Respondents

DATE OF JUDGMENT PRONOUNCEMENT: 23rd MARCH, 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
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THE HON'BLE SRI JUSTICE P.KESHA RAO**

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<Gist:

>Head Note:

! Counsel for petitioner : Sri P.Mehar Srinivasa Rao
^Counsel for respondent 1 : G.P. for Industries & Commerce (TS)
^Counsel for respondents 2 to 5 : Sri Y.N.Vivekananda

? CASES REFERRED:

1. 2017 (1) ALD 170 (DB)
2. (2004) 4 SCC 311
3. (2014) 1 SCC 479
4. (2010) 8 SCC 110
5. AIR 1969 SC 297
6. (1992) 3 SCC 159
7. (2009) 9 SCC 478
8. (2017) 1 SCC 622
9. (2009) 8 SCC 646
10. AIR 1969 SC 78
11. (2017) 1 SCC 53
12. (2000) 3 SCC 689

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C O M M O N O R D E R

(Per Sri Justice Sanjay Kumar)

Rajanala Kusuma Kumari, Enugala Manjula and Bhukya Shakuntala, the petitioners in these three cases, claim to be the owners of individual house properties bearing H.No.2-4-964/1/A, H.No.2-4-964/1/A/2 and H.No.2-4-964/1/A/1 respectively, situated at Gokul Nagar, Hanamkonda, Warangal.

Rajanala Kusuma Kumari purchased her house property under registered sale deed No.6807 of 2003 dated 11.09.2003 from one Musuku Nagi Reddy, s/o Veera Somaiah. The sale deed records that Musuku Nagi Reddy, in turn, purchased this property from one L.Venkataiah under registered Document No.1464 of 1980. The schedule of the property in this sale deed does not mention the house number and records that what was sold was Plot No.7 admeasuring 238 square yards in Sy.No.194/D of Waddepally Village, Hanamkonda Mandal, Warangal District, near H.No.2-4-964.

Enugala Manjula purchased her house property under registered sale deed No.10705 of 2004 dated 30.10.2004 from Donthi Devender Reddy, s/o Donthi Varada Reddy. The sale deed records that Donthi Devender Reddy, in turn, purchased it from Musuku Nagi Reddy, s/o Veera Somaiah, through registered Document No.8610 of 2003 dated 29.11.2003. This sale deed also does not mention the house number and describes it as an open plot in Sy.No.194/D of Waddepally Village, Hanamkonda Mandal, Warangal District, admeasuring 240 square yards. The southern boundary is shown as H.No.2-4-964/1/A/1 of B.Shakuntala.

Bhukya Shakuntala claims to be the owner of her house property by virtue of the registered sale deed No.3726 of 2004 dated 10.05.2004, whereunder she purchased it from one Annamaneni Pushpa Leela, w/o Srinivas Rao. The sale deed records that Annamaneni Pushpa Leela, in turn, purchased the property from L.Venkataiah under registered Document No.7463 of 1980. This sale deed also does not refer to a house number. The property sold is mentioned as an open plot of 200 square yards in Sy.No.194/C & D of Waddepally Village, Hanamkonda Mandal, Warangal District, and the northern boundary is shown as the plot of Devender Reddy.

All three petitioners state that they obtained construction permission from the local authority and pursuant thereto, they built individual houses in their respective plots and are presently residing there, paying necessary property taxes regularly.

Their dispute with the Andhra Pradesh State Financial Corporation (APSFC) started in June, 2013, when individual eviction notices dated 27.06.2013 were addressed to each of them by the Assistant General Manager of the APSFC at Warangal. Thereunder, they were informed that default was committed in repayment of the loan availed by one Sudhamalla Venkat Swamy of Ladella Village, Atmakur Mandal, Warangal District, for acquiring a Tipper vehicle, and a notice was issued to him under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*hereinafter*, 'the SARFAESI Act'). This was also stated to have been intimated to Kusam Eshwaraiah and Kusam Ramesh, the collateral security providers. It was further stated that as Sudhamalla Venkat Swamy and the collateral security providers had not cleared the arrears, the

loan account had become overdue and stood at Rs.3,99,514/- as on 31.05.2013. The APSFC stated that it proposed to sell the collateral/primary security properties but as it had been informed that the three petitioners were residing in the collateral security properties which were mortgaged with it, they were advised to vacate the premises occupied by them on or before 15.07.2013, failing which the APSFC threatened to take further action to take possession of the properties. All three petitioners got issued individual legal notices dated 06.07.2013 to the APSFC claiming that they were the absolute owners of their individual house properties and had nothing to do with the loan availed by Sudhamalla Venkat Swamy or Kusam Eshwaraiah and Kusam Ramesh, the guarantors for the said loan. They categorically stated that the said individuals were not known to them and were complete strangers. They informed the APSFC that they had no liability to pay any amount to it and requested it not to make any attempt to evict them or interfere with their peaceful possession and enjoyment over the house properties.

It appears that the APSFC kept quiet for a couple of years thereafter but again issued individual demand notices dated 25.01.2016 under Section 13(2) of the SARFAESI Act. In these notices, the borrower was shown as Sudhamalla Venkat Swamy; the sureties were shown as Kusam Eshwaraiah and Kusam Ramesh; and the occupants were shown as B.Shakuntala, R.Kusuma Kumari and E.Devender Reddy. Be it noted that the name of Enugala Manjula was not shown at all and the name of Donthi Devender Reddy, her vendor, was wrongly shown as E.Devender Reddy. The total outstanding dues were shown as Rs.6,51,000/- as on 31.12.2015.

Further, the particulars of the property offered as security by Kusam Eshwaraiah and Kusam Ramesh were detailed as under:

‘Residential plot admeasuring 506 square yards covered by Sy.No.194/D (New) situated at Waddepally (V), Hanamkonda (M), Warangal District, belonging to Sri Kusam Eshwaraiah and Sri Kusam Ramesh. The property is currently occupied by constructing residential building in namely 1) Smt B.Shakuntala, 2) Smt R.Kusuma Kumari and 3) Sri E.Devender Reddy.’

Again, all three petitioners got issued individual legal notices dated 01.03.2016 disclaiming responsibility and liability for the outstanding dues of Sudhamalla Venkat Swamy and requested the APSFC not to make any attempt to evict them or interfere with their possession. However, the APSFC issued individual notices dated 14.06.2016, titled ‘NOTICE TO THE BORROWER(S)/SURETY INFORMING TAKING OVER OF POSSESSION OF THE SECURED ASSET’. These notices again detailed the borrower, the sureties and the occupants as was done earlier. The APSFC stated therein that its Authorized Officer, in exercise of powers conferred by the SARFAESI Act, took symbolic possession of the secured asset on 13.06.2016 by delivering and affixing the possession notice. Possession notice dated 13.06.2016 issued in the form contained in Appendix IV of the Security Interest (Enforcement) Rules, 2002 (*for brevity*, ‘the Rules of 2002’) was appended thereto. The ‘schedule of property’ in this notice as well as in the possession notice dated 13.06.2016 reads as under:

‘SCHEDULE OF PROPERTY

Residential plot admeasuring 506 Sq. yards covered by Sy.No.194/C, 194/D (New) Situated at Waddepally (V), Hanamkonda (M), Warangal District, belonging to Sri Kusam Eshwaraiah and Sri Kusam Ramesh. The property is currently occupied by constructing residential building in namely 1) Smt B.Shakuntala, 2) Smt R.Kusuma Kumari and 3) Sri E.Devender Reddy.

Yet again, the petitioners got issued individual legal notices dated 21.06.2016 to the APSFC reiterating their earlier stand. Unmoved thereby, the APSFC issued individual notices dated 28.06.2016, titled 'DEMAND NOTICE TO BORROWER/SURETY UNDER SEC.13(4)(a) of SARFAESI ACT, 2002 DEMANDING PHYSICAL POSSESSION OF SECURED ASSETS'. Therein, the borrower, sureties and the occupants were shown as earlier. The Authorized Officer of the APSFC stated in the said notices that he had taken over symbolic possession of the secured asset under Section 13(4) of the SARFAESI Act and called upon the addressees to handover physical possession of the secured immovable asset as detailed in the schedule appended thereto on 13.07.2016 at 10.30 AM. He further stated that if they failed to do so, he would be forced to seek the assistance of the Chief Metropolitan Magistrate/District Magistrate in taking possession under the provisions of Section 14 of the SARFAESI Act. The schedule appended to these notices was the same as the schedule in the earlier possession notice dated 13.06.2016 and the notice dated 14.06.2016. At this stage, the petitioners filed the present writ petitions apprehending that their physical possession over their house properties was under threat.

W.P.No.22510 of 2016 was filed by Rajanala Kusuma Kumari, W.P.No.22547 of 2016 was filed by Enugala Manjula and W.P.No.22884 of 2016 was filed by Bhukya Shakuntala. Therein, they challenged the notices dated 28.06.2016 issued by the APSFC under Section 13(4)(a) of the SARFAESI Act and sought a declaration that the action of the APSFC in initiating proceedings under the SARFAESI Act was a product of the fraud played by its officials and the borrower and was consequently illegal and unconstitutional. They

also sought setting aside of all proceedings under the SARFAESI Act, including the impugned notices dated 28.06.2016, and a direction to the APSFC not to proceed against them or their house properties.

By separate orders dated 12.07.2016 passed in W.P.Nos.22510 and 22547 of 2016 and by order dated 13.07.2016 in W.P.No.22884 of 2016, this Court took note of the submission made by Sri Mehar Srinivasa Rao, learned counsel for the petitioners, that they were complete strangers to the loan transaction pursuant to which the APSFC had initiated proceedings under the SARFAESI Act and directed it not to take any steps against them pursuant to the possession notice dated 28.06.2016, including their dispossession from the subject house properties.

Sri Y.N.Vivekananda, learned counsel, entered appearance for the APSFC and its officers, respondents 2 to 5, and filed individual counters in the three cases. The contents thereof however run on the same lines. In the counter-affidavit filed in W.P.No.22510 of 2016, the Branch Manager of the APSFC at its Warangal Branch, Hanamkonda, stated as follows: The APSFC sanctioned a term loan of Rs.5,62,700/- on 04.10.1999 to Sudhamalla Venkat Swamy for acquiring an Ashok Leyland Tipper vehicle for transportation of coal. He thereupon acquired the Tipper vehicle bearing No.AP 36U 8064. Collateral security was offered at the time of execution of the loan documents, in addition to hypothecation of the vehicle. The property offered as collateral security was the residential plot admeasuring 506 square yards in Sy.Nos.194/C and 194/D (new) at Waddepally Village, Hanamkonda Mandal, Warangal District, standing in the names of Kusam Eshwaraiah and Kusam Ramesh. As default was committed in the repayment of this loan, the APSFC initiated

recovery proceedings under the SARFAESI Act, by issuing a notice to the collateral security providers on 13.05.2011. The notice was however returned unserved. Officials of the APSFC thereupon inspected the collateral security property and noticed that it was in the possession of three different people who were illegally residing there. Having regard to the same, the APSFC got eviction notices issued to them, *viz.*, Bhukya Shakuntala, Rajanala Kusuma Kumari and Enugala Manjula. The collateral security providers, Kusam Eshwaraiah and Kusam Ramesh, had purchased the property offered by them as security from Lingampally Ilaiah, s/o. L.Venkataiah, under registered sale deed No.1297 of 1995 dated 28.03.1995. This document was deposited with the APSFC at the time of creation of an equitable mortgage. Demand notice dated 25.01.2016 was issued by the APSFC under Section 13(2) of the SARFAESI Act and symbolic possession was taken under possession notice dated 13.06.2016. The APSFC got a notice issued on 28.06.2016 for obtaining physical possession. Aggrieved by the same, the three occupants filed these writ petitions. The Branch Manager asserted that the petitioners had no right, much less an enforceable right, entitling them to approach this Court or seek to resist the action initiated by the APSFC. He further stated that proceedings were initiated in accordance with law and that the petitioners could not claim any lawful right, title or interest in the property mortgaged with the APSFC. Significantly, he asserted that unless the petitioners established their title in an appropriately instituted proceeding, they were disentitled to seek relief from this Court in the context of the action of the APSFC under the SARFAESI Act.

Reply affidavits were filed by the three petitioners rebutting the aforestated counter affidavit averments. Therein, they asserted that it was misleading on the part of the APSFC to allege that they were illegally occupying the subject properties, as they were the absolute owners thereof. They pointed out that they had never mortgaged the house properties purchased by them and had nothing to do with the transactions between the APSFC and Sudhamalla Venkat Swamy, Kusam Eshwaraiah and Kusam Ramesh. In so far as Rajanala Kusuma Kumari is concerned, she stated that she had purchased her house property from Musuku Nagi Reddy, who, in turn, had purchased it from Lingampally Venkataiah under registered Document No.7464 of 1980. She pointed out that Kusam Eshwaraiah and Kusam Ramesh claimed to have purchased the property in the year 1995 from Lingampally Ilaiah, the son of Lingampally Venkataiah, who was the vendor of her vendor. She further pointed out that Lingampally Ilaiah was himself an attestor to the document whereunder her vendor had purchased the property from his father. She alleged that Sudhamalla Venkat Swamy, Kusam Eshwaraiah and Kusam Ramesh had hatched a plan by playing fraud and created Document No.1297 of 1995 dated 20.03.1995 so as to obtain a loan. She asserted that she was the absolute owner of her house property and that the APSFC had no right to proceed against it.

In so far as Enugala Manjula is concerned, she stated in her reply affidavit that Donthi Devender Reddy, s/o Varada Reddy, her vendor, had purchased the property from Musuku Nagi Reddy under Document No.8610 of 2003 dated 25.11.2003 and Musuku Nagi Reddy, in turn, had purchased the property from Lingampally Venkataiah under registered Document No.7464 of 1980 dated

22.12.1980. She repeated the same allegations as were made by Rajanala Kusuma Kumari.

In her reply affidavit, Bhukya Shakuntala traced the title of Annamaneni Pushpa Leela, her vendor, to Lingampally Venkataiah as she had purchased the subject property from him under registered Document No.7463 of 1980 dated 22.12.1980. She also adopted the attack launched by Rajanala Kusuma Kumari against Document No.1297 of 1995 dated 28.03.1995, by virtue of which the APSFC claimed a security interest.

All three petitioners filed copies of the documents of 1980.

In the light of the aforestated pleadings, the controversy boils down to whether the APSFC can claim to have a security interest in the subject house properties or claim to be a secured creditor in the context thereof. Resolution of this controversy would necessarily entail testing the rival title put up by the petitioners, an exercise that this Court would be loath to undertake in a writ petition.

Sri P.Mehar Srinivasa Rao, learned counsel, would place reliance on **D.RAM REDDY V/s. ASSET RECONSTRUCTION CO. (INDIA) PVT. LTD., MUMBAI**¹, a decision delivered by a Division Bench of this Court in which one of us, SK,J, was a member. Therein, in like circumstances, where the writ petitioner claimed that he was neither a borrower nor a guarantor in respect of the loan given by the bank leading to proceedings under the SARFAESI Act, it was held that when the very status of the secured asset was in doubt and applicability of the SARFAESI Act was open to question, Section 34 of the SARFAESI Act, which ousts the jurisdiction of the civil Court, would not be attracted and it was left open to the writ

¹ 2017 (1) ALD 170 (DB)

petitioner therein to approach the competent civil Court for resolution of the dispute. Learned counsel would assert that if the writ petitions are to be dismissed on the ground of maintainability, his clients should be permitted to go before the competent civil Court for redressal of their grievance.

Sri Y.N.Vivekananda, learned counsel, on the other hand, would argue that once measures under Section 13(4) of the SARFAESI Act are initiated, the proper remedy for the petitioners would be to invoke Section 17(1) thereof and file a securitization application before the jurisdictional Debts Recovery Tribunal (*hereinafter*, 'the Tribunal'). He would contend that these writ petitions ought not to be entertained and the petitioners should be relegated to the aforestated statutory alternative remedy.

Before dealing with the rival contentions of the learned counsel, it would be apposite to take note of the scheme of the SARFAESI Act, to the extent relevant. A 'borrower' is defined under Section 2(1)(f) thereof to mean any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution. Section 2(1)(zb) defines 'security agreement' to mean an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor, including the creation of mortgage by deposit of title deeds with the secured creditor. Section 2(1)(zd), as it now stands, defines 'secured creditor' to mean any bank or financial institution or any consortium or group of banks or financial institutions holding any right, title or interest upon any tangible or intangible asset, amongst others, in

whose favour security interest is created by any borrower for due repayment of any financial assistance. The term 'security interest' is defined under Section 2(1)(zf) to mean the right, title or interest of any kind upon property, other than those specified in Section 31 of the SARFAESI Act, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment etc. or such right, title or interest in any intangible asset or assignment or licence of such intangible asset. The term 'secured asset' is defined under Section 2(1)(zc) to mean the property on which security interest is created.

Chapter III of the SARFAESI Act deals with 'Enforcement of Security Interest'. The first provision in this chapter is Section 13, which is titled 'Enforcement of Security Interest'. Section 13(1) states that notwithstanding anything contained in Sections 69 and 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of a Court or Tribunal, by such creditor in accordance with the provisions of the SARFAESI Act. Section 13(2) postulates that where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of the secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as a 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 the notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Section 13(4). In turn, Section 13(4) provides that in case the borrower fails to discharge his liability in full within the

period specified in Section 13(2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, *viz.*, amongst others, taking possession of the secured asset of the borrower, including the right to transfer by way of lease, assignment or sale for realizing the secured asset, or taking over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale.

After its amendment with effect from 01.09.2016, *vide* Act No.44 of 2016, whereby the earlier title 'Right to Appeal' stood substituted, Section 17(1) of the SARFAESI Act is now titled 'Application against measures to recover secured debts'. Section 17(1) states that any person, including a borrower, aggrieved by any of the measures referred to in Section 13(4) taken by a secured creditor or its authorized officer, may make an application to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures were taken.

Section 34 of the SARFAESI Act finds place in Chapter VI thereof, titled 'Miscellaneous'. It states that no civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or Appellate Tribunal is empowered by or under the SARFAESI 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 pursuant to the powers conferred by the SARFAESI Act or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (*hereinafter*, 'the RDDB Act').

Sri Y.N.Vivekananda, learned counsel, would stress upon the phrasing of Section 17(1) of the SARFAESI Act, as extracted *supra*, and contend that as any person, who is aggrieved by any of the

measures referred to in Section 13(4) taken by a secured creditor, is entitled to make an application to the Tribunal, the petitioners cannot be permitted to get over the statutory bar to the jurisdiction of the civil Court under Section 34 of the SARFAESI Act and must necessarily be relegated to the remedy under Section 17(1) of the SARFAESI Act before the Tribunal.

We are not persuaded to agree. The argument of the learned counsel, though seemingly plausible and attractive at first glance, is inherently specious. The remedy provided under Section 17(1) before the Tribunal is with regard to 'testing of the measures' taken by a secured creditor under Section 13(4) of the SARFAESI Act. Section 13(4), as already noted *supra*, states to the effect that if the 'borrower' fails to discharge his liability in full within the time specified in Section 13(2), the 'secured creditor' may take recourse to one or more of the measures thereunder to recover his 'secured debt', namely, take possession of the 'secured asset' of the 'borrower', including the right to transfer by way of lease, assignment or sale for realizing the 'secured asset' or take over the management of the business of the 'borrower', including the right to transfer by way of lease, assignment or sale. The underlined terms are defined under Section 2(1) of the SARFAESI Act, as already referred to *supra*. Therefore, the measures taken by a secured creditor under Section 13(4) presuppose satisfaction of these definitions.

However, in the event a person does not even fall within the ambit of a 'borrower' as defined under Section 2(1)(f) or if a particular property does not qualify to be categorized as a 'secured asset' under Section 2(1)(zc), owing to a defect in the 'security interest' allegedly created therein, the very foundation of the measures, purportedly

initiated by such secured creditor under Section 13(4), is rendered shaky. When such fundamental lacunae, striking at the very root, are alleged against the so-called measures initiated by the secured creditor under Section 13(4), the question that arises is whether the person aggrieved, who alleges such essential defects, should also be relegated to the statutory remedy of filing a securitization application before the Tribunal under Section 17(1) of the SARFAESI Act.

We think not.

Be it noted that, in essence, 'testing of the measures' taken under Section 13(4) of the SARFAESI Act would not be the issue for consideration, in such a situation, as the very applicability of such measures would be under attack. Such an issue would not fit squarely into the language used in Section 17(1) of the SARFAESI Act. In consequence, a securitization application thereunder would not be the right remedy. Useful reference in this regard may also be made to the decision of a Bench of three learned Judges of the Supreme Court in **MARDIA CHEMICALS LTD. V/s. UNION OF INDIA**². The validity of the SARFAESI Act came up for consideration before the Supreme Court in this case. One of the contentions advanced was that as the remedy under Section 17(1) of the SARFAESI Act was provided only after measures were taken under Section 13(4) of the SARFAESI Act, there would be no bar to approach the civil Court prior to such measures being taken under Section 13(4). However, the Supreme Court disagreed, pointing out that a full reading of Section 34 of the SARFAESI Act showed that the jurisdiction of the civil Court was barred in respect of matters which a Debts Recovery Tribunal or the Appellate Tribunal was empowered

² (2004) 4 SCC 311

to determine in respect of any action taken or to be taken pursuant to power conferred under the SARFAESI Act and therefore, the prohibition covered even matters which could be taken cognizance of by such Tribunal, though no measures in that direction had so far been taken under Section 13(4). The Supreme Court further noted that the bar of jurisdiction was in respect of a proceeding which may be taken to such Tribunal and therefore, any matter in respect of which an action may be taken even later on, the civil Court would have no jurisdiction to entertain. The Supreme Court accordingly held that the bar to the civil Court's jurisdiction was applicable in all such matters which may be taken cognizance of by the Debts Recovery Tribunal, apart from those in which measures had already been taken under Section 13(4).

The above observations confirm that it is only the 'testing of the measures', taken or yet to be taken, under Section 13(4) of the SARFAESI Act that can be taken before the Tribunal under Section 17(1) thereof. We therefore stand strengthened in our conviction that Section 17(1) is not the remedy in a situation where the applicability of the 'measures' is itself open to doubt.

Further, having made the above observations, the Supreme Court held that to a very limited extent the jurisdiction of the civil Court can also be invoked, where, for example, the action of the secured creditor was alleged to be fraudulent or his claim is so absurd and untenable that it does not require any probe whatsoever or to say precisely to the extent the scope is permissible to bring an action in the civil Court in case of an English mortgage.

Section 58(e) of the Transfer of Property Act, 1882, defines an 'English mortgage' to mean a mortgage whereby the mortgagor binds

himself to repay the mortgage money on a certain date and transfers the mortgaged property absolutely to the mortgagee, subject to the condition that he would retransfer it to the mortgagor upon payment of the mortgage money, as agreed. As the sale of the mortgaged property would be subject to the re-transfer that can be claimed by the mortgagor upon repayment of the loan, independent proceedings under the SARFAESI Act as against such mortgaged property would not be permissible in the very nature of the mortgage created.

However, of particular relevance are the observations of the Supreme Court in Para 53 of the judgment. These observations read as under:

‘We also find it appropriate to mention at this stage that in reply to the submission made by Shri Dholakia on behalf of the guarantors that even though a guarantor may stand discharged as envisaged under Sections 133 and 135 of the Indian Contract Act e.g. where any variance in terms of the contract has been made without his consent, then too guarantor may be proceeded against and he will have no right to raise an objection, before measures have been taken against him under Section 13(4) of the Act nor could he approach the civil court. It is submitted by the respondent that in such cases a civil court may have jurisdiction to entertain the case as character as a guarantor itself is denied.’

It is clear from the aforestated extract that the Union of India, the respondent in that case, conceded that in case a guarantor, who is included within the definition of ‘borrower’ in Section 2(1)(f) of the SARFAESI Act, claims that he stood discharged either under Section 133 or 135 of the Indian Contract Act, 1872, he would be entitled to avail the ordinary civil remedy before the competent civil Court. It was this aspect that weighed with this Court in **D.RAM REDDY**¹ to hold that, when the very status of the person proceeded against as a ‘borrower’ was in question, the bar to the civil Court’s jurisdiction under Section 34 of the SARFAESI Act would not apply.

It is no doubt true that in the concluding portion of the judgment, the Supreme Court observed in Para 80 that it would be open to an aggrieved party to maintain a suit in a civil Court, within the narrow scope and on the limited grounds on which they are permissible, in matters relating to English mortgages enforceable without intervention of the Court, and no reference was made to the other aspect mentioned in Para 53 of the judgment, but this was because the Supreme Court specifically framed the questions that fell for consideration in Para 33 and, in so far as the ouster of the jurisdiction of the civil Court was concerned, the question that was framed was whether provision for sale of the properties without intervention of the Court under Section 13 of the SARFAESI Act is akin to an English mortgage and its effect on the scope of the bar of jurisdiction of the civil Court. That was the reason why the concluding remarks recorded by the Supreme Court were limited to the questions framed. However, it cannot be lost sight of that the Supreme Court recorded, without demur, the concession made by the Union of India that the civil Court's jurisdiction would not be barred when a guarantor, who is a 'borrower' within the definition as set out in Section 2(1)(f) of the SARFAESI Act, claims that his guarantee stood discharged.

Sri Y.N.Vivekananda, learned counsel, would place reliance on the decision of a Bench of two learned Judges of the Supreme Court in **JAGDISH SINGH V/s. HEERALAL**³. This decision arose out of a case filed by an auction purchaser in a sale effected under the SARFAESI Act. The grievance of the auction purchaser was that he had not been delivered possession of the property sold to him. The

³ (2014) 1 SCC 479

reason therefor was the pendency of a civil suit filed for declaration of title, partition and a permanent injunction in relation to the said property. When the secured creditor raised an objection before the civil Court that it had no jurisdiction to entertain the suit, it found favour with the civil Court; constraining the plaintiffs therein to prefer an appeal before the Madhya Pradesh High Court. The appeal was allowed by the Madhya Pradesh High Court holding that the suit was not barred under Section 34 of the SARFAESI Act as the property in question was claimed to be a Joint Hindu Family property and not exclusive property of the borrowers who had created a security interest therein in favour of the secured creditor. Aggrieved thereby, the auction purchaser approached the Supreme Court. On facts, the Supreme Court found that the property in question had been purchased in the individual names of the borrowers under registered sale deeds and no claim had ever been made at any stage by any member of the Joint Hindu Family that the property was joint and not an individual property. It was in this context that the Supreme Court held that the expression 'any person' used in Section 17(1) of the SARFAESI Act was of wide import and took within 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) thereof'. Reference was also made to the earlier decision in **UNITED BANK OF INDIA V/s. SATYAWATI TONDON**⁴.

The learned Judges further observed that irrespective of the question whether a civil suit was maintainable or not, under the SARFAESI Act itself, a remedy was provided to such persons and that they can invoke the provisions of Section 17 thereof, in case the

⁴ (2010) 8 SCC 110

secured creditor adopts any measures, including sale of the secured assets in which the plaintiffs claim interest. Though reference was also made to certain observations in **MARDIA CHEMICALS LTD.**², the learned Judges did not consider what was stated in Para 53, extracted *supra*. They further stated that any person aggrieved by any of the 'measures' referred to in Section 13(4) has got a statutory right to approach the Tribunal under Section 17. The expression which reads to the effect: 'in respect of any matter which a Tribunal or Appellate Tribunal is empowered by or under the SARFAESI Act to determine' that finds mention in Section 34 of the SARFAESI Act was construed to mean that it would take within its ambit the 'measures' provided under Section 13(4) thereof. It was in these circumstances that the Supreme Court found that the civil Court's jurisdiction was completely barred, so far as measures taken by the secured creditor in that case were concerned, as the aggrieved person had a remedy before the Tribunal to determine as to whether there was any illegality therein.

Even going by the above observations, it is clear that the bar to the civil Court's jurisdiction was held to be in respect of 'measures taken' by the secured creditor under Section 13(4) of the SARFAESI Act. However, whether such 'measures' could have been taken at all would first depend upon the concepts of 'borrower', 'secured asset', 'secured debt' and 'security interest', as defined in Section 2 of the SARFAESI Act, being satisfied. That is the issue with which we are now concerned but it was never considered in the above judgment.

Further, as already stated *supra*, the judgment also did not take into consideration the concession made by the Union of India as regards the civil Court's jurisdiction not being ousted in the event a

controversy arises as to whether a guarantor stood discharged. The decision of the larger Bench of the Supreme Court in **MARDIA CHEMICALS LTD.**² would therefore prevail and bind us, notwithstanding the seemingly contrary observations made by the smaller Bench in **JAGDISH SINGH**³.

Another decision pressed into service is that of the Supreme Court in **SATYAWATI TONDON**⁴. The issue in this case, raised before a Bench of two learned Judges of the Supreme Court, was whether the Allahabad High Court was correct in restraining a secured creditor from taking measures under Section 13(4) of the SARFAESI Act on the ground that it was proceeding against the guarantor in the first instance instead of the borrower. Referring to **BANK OF BIHAR LTD. V/s. DR.DAMODAR PRASAD**⁵, **SBI V/s. INDEXPORT REGISTERED**⁶ and **INDUSTRIAL INVESTMENT BANK OF INDIA LTD. V/s. BISWANATH JHUNJHUNWALA**⁷, the Bench observed that the liability of the guarantor and the principal debtor is not in the alternative, as it is co-extensive, and the creditor has the right to proceed against either for recovery of its dues. The Bench further observed that there was another reason as to why the High Court's order should be set aside. Referring to the expression 'any person' used in Section 17(1) of the SARFAESI Act, it was observed that the same was of wide import and would take within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) of the SARFAESI Act. Again, the issue raised before us did not fall for consideration and there was no discussion on Para 53 of **MARDIA CHEMICALS LTD.**².

⁵ AIR 1969 SC 297

⁶ (1992) 3 SCC 159

⁷ (2009) 9 SCC 478

Another judgment, strongly relied upon by Sri Y.N.Vivekananda, learned counsel, is that of a Bench of two learned Judges of the Supreme Court in **ROBUST HOTELS PRIVATE LIMITED V/s. EIH LIMITED**⁸. In the context of ouster of the civil Court's jurisdiction under Section 34 of the SARFAESI Act, the Bench noted that the earlier judgment in **NAHAR INDUSTRIAL ENTERPRISES LTD. V/s. HONG KONG & SHANGHAI BANKING CORPN.**⁹, held to the effect that the jurisdiction of the civil Court is plenary in nature and unless the same is ousted, expressly or by necessary implication, it would have jurisdiction to try all types of suits. Reference was made to the earlier decision of the Supreme Court in **DHULABHAI V/s. STATE OF M.P.**¹⁰ and illuminating observations made therein were extracted. The same read as under:

'32. ... The result of this inquiry into the diverse views expressed in this Court may be stated as follows:

* * *

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the Tribunals so constituted, and whether remedies normally associated with actions in civil courts are prescribed by the said statute or not.'

Applying the aforestated principle to Section 34 of the SARFAESI Act, the Bench found that there was an express bar to the

⁸ (2017) 1 SCC 622

⁹ (2009) 8 SCC 646

¹⁰ AIR 1969 SC 78

jurisdiction of the civil Court in respect of any matter which the Tribunal or the Appellate Tribunal is empowered by or under the SARFAESI Act to determine. It was therefore held that the bar to the civil Court's jurisdiction has to correlate to the conditions prescribed. The issue as to whether the suits filed in that case were barred by Section 34 or not was left open as the High Court, exercising original civil jurisdiction, was seized of the matter.

In **STATE BANK OF PATIALA V/s. MUKESH JAIN**¹¹, another decision relied upon by Sri Y.N.Vivekananda, learned counsel, the issue before the Supreme Court was whether the civil Court was correct in refusing an application under Order 7 Rule 11 CPC, filed on the ground that its jurisdiction was barred under Section 34 of the SARFAESI Act. The Supreme Court observed that in normal circumstances, there cannot be any action of an authority which cannot be challenged before a civil Court unless there is a statutory bar with regard to challenging such an action, but Section 34 specifically provides a bar of jurisdiction and therefore, an order passed under Section 13 of the SARFAESI Act could not have been challenged before the civil Court. This decision however turned on a distinction being drawn between the original jurisdiction of the Tribunal under Section 17 of the SARFAESI Act as opposed to its appellate jurisdiction thereunder. Be that as it may.

In **STATE OF A.P. V/s. MANJETI LAXMI KANTHA RAO**¹², the Supreme Court observed that the normal rule of law is that the civil Courts have jurisdiction to try all suits of civil nature except those, of which cognizance by them is either expressly or impliedly excluded, as provided under Section 9 CPC. It was further observed that where

¹¹ (2017) 1 SCC 53

¹² (2000) 3 SCC 689

a statute gives finality to the orders of special tribunals, jurisdiction of the civil Courts must be held to be excluded if there is adequate remedy to do what the civil Courts would normally do in a suit but such provision, however, would not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

In **NAHAR INDUSTRIAL ENTERPRISES LTD.**⁹, the Supreme Court observed that the jurisdiction of a civil Court is plenary in nature and would be ousted only in respect of matters contained in Section 18 of the RDDB Act, which has a direct correlation with Section 17 thereof, that is to say, the matter must relate to a debt payable to a bank or a financial institution. It was further observed that an application before the Tribunal would lie only at the instance of the bank or the financial institution for recovery of its debt and had the jurisdiction of the civil Court been barred in respect of a counter-claim also, the statute would have said so and Sections 17 and 18 would have been amended to introduce the provision for entertainment of a counter-claim. The Supreme Court therefore held that when a person files a civil suit, his right to prosecute the same in terms of the provisions of the CPC as also his right of appeal by way of first appeal, second appeal etc., are preserved and such rights cannot be curtailed, far less taken away, except by reason of an express provision contained in the statute. It was pointed out that this intention in the statute must be express or must be found by necessary implication. On facts, the Supreme Court found that if the civil suit was transferred to the Tribunal, the plaintiff would be deprived of his right in relation to the procedural mechanism as

contained in the Code as also the Evidence Act and his right of appeal would also stand curtailed. It was further pointed out that the RDDB Act was enacted for a specific purpose but having regard to exclusion of the jurisdiction expressly provided for under Sections 17 and 18 thereof, it would be difficult to hold that a civil Court's jurisdiction is completely ousted. It was also pointed out that banks and the financial institutions, for the purpose of enforcement of their claims for sums below Rs.10 lakh, had to file suits before the civil Courts and it is only for claims above the aforestated sum that they would be entitled to approach the Tribunal. Banks and financial institutions, keeping in view the provisions of Sections 17 and 18 of the RDDB Act, are therefore necessarily required to file such claim petitions before the Tribunal, but the converse is not true as debtors could file their claims of set-off or counter-claims only when a claim application is filed and not otherwise. As liabilities and rights of the parties have not been created under the RDDB Act and only a new forum has been created, the Supreme Court observed that the banks and financial institutions cannot approach the Tribunal unless the debt becomes due and in such a contingency, a civil suit would lie. Significantly, it was also observed that when fraud and misrepresentation are alleged, the civil Court's jurisdiction can be invoked, as issues of complicated nature may arise in such a suit. Though these observations were made in the context of the RDDB Act, they are of significance as they manifest that the Tribunal is not the panacea for all evils.

As already pointed out *supra*, the petitioners presently dispute the right of the APSFC to proceed against their house properties on the ground that their title would prevail over that claimed by Kusam

Eshwaraiah and Kusam Ramesh, the guarantors, who created a security interest in the property allegedly purchased by them in the year 1995. In effect, they cannot be categorized as illegal occupants of the said property as the validity of their rival claims requires to be tested. In the event, their claim withstands judicial scrutiny, the claim of the APSFC that the property in question is a secured asset, would be liable to be rejected. When these fundamental issues arise for consideration and would go to the very root of the so-called measures initiated by the APSFC under Section 13(4) of the SARFAESI Act, it would be rather too simplistic to sum up that as such measures have already been initiated, for what they are worth, the petitioners must necessarily go before the Tribunal under Section 17(1) of the SARFAESI Act. The Tribunal has not been constituted to undertake resolution of purely civil disputes involving title claims.

At this stage, it may also be noticed that though Section 5 of the RDDB Act prescribes that a person shall not be qualified to be appointed as a Presiding Officer of a Tribunal unless he is, or has been, or is qualified to be, a District Judge, the recent change brought about by the Government of India allows persons with no legal background whatsoever also to be appointed as Presiding Officers. Matters of complicated civil nature, such as the cases on hand, cannot be relegated to someone who has no legal wherewithal.

Another aspect that requires to be noted is that, though Section 17(5) of the SARFAESI Act prescribes the outer time limits for disposal of securitization applications filed under Section 17(1), Tribunals have not lived up to this statutory mandate. It is rare, if at all, to find a securitization application filed under Section 17(1) being disposed of in terms of the temporal mandate of Section 17(5) thereof.

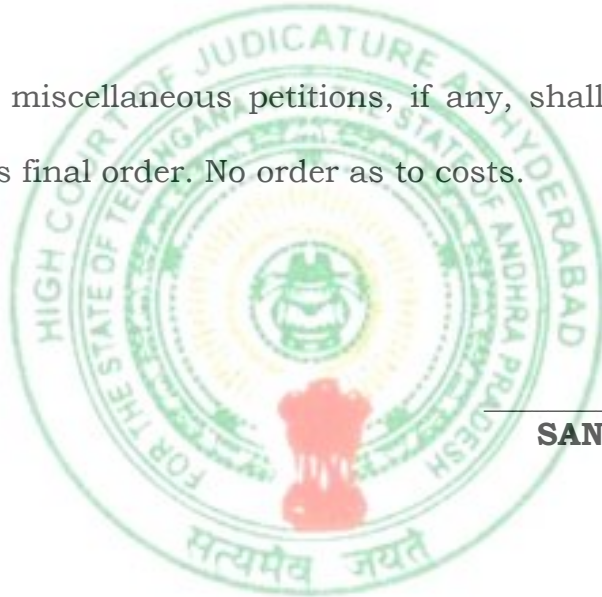
That apart, when an appeal to be filed against an order of the Tribunal under Section 17 entails deposit of at least 25% of the outstanding dues of the secured creditor and when the person aggrieved, as in the present cases, claims to be a total stranger who has no responsibility or liability for payment of such outstanding dues, it cannot be said that the remedy under Section 17 and thereafter, under Section 18, of the SARFAESI Act would be an efficacious alternative remedy.

Further, in the light of the claims put forth by the petitioners, duly supported by documentary evidence, the issue that arises goes to the very root of the claim put forth by the APSFC, whereby it is proceeding against the subject properties under the SARFAESI Act. Such an issue would necessarily entail adducing of evidence in a full-fledged trial and as the SARFAESI Act and the RDDB Act permit the Tribunal to adopt a rather informal procedure, unhindered by the provisions of the Indian Evidence Act, 1872, and the Code of Civil Procedure, 1908, the remedy under Section 17 of the SARFAESI Act, by no stretch of imagination, can be said to be an efficacious alternate remedy.

Be it viewed from any angle, we find no merit in the argument of Sri Y.N.Vivekananda, learned counsel, to the effect that the view taken in **D.RAM REDDY**¹ requires reconsideration. In a situation as is obtaining in the present cases, it cannot be said that Section 34 of the SARFAESI Act has application, whereby the petitioners would have to be relegated to the statutory remedy under Section 17(1) of the SARFAESI Act. The facts and circumstances in the cases on hand ordain otherwise.

The writ petitions are accordingly disposed of permitting the petitioners to invoke the jurisdiction of the competent civil Court within four weeks from the date of receipt of a copy of this order. It would be open to the petitioners to seek appropriate interim relief from the civil Court, which shall be dealt with expeditiously. As the petitioners have had the protection of interim orders since July, 2016, we are of the opinion that the said protection should be continued for a period of six weeks from the date of receipt of a copy of this order or disposal of their stay applications by the competent civil Court in the suits filed by the petitioners, if earlier in point of time.

Pending miscellaneous petitions, if any, shall stand closed in the light of this final order. No order as to costs.



SANJAY KUMAR,J

P.KESHAHA RAO,J

23rd MARCH, 2018

**NOTE: L.R. Copy to be marked.
(B/O) PGS**