

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

Civil Revision No.5669 of 2017(O&M)
Date of Order:21st March, 2018

State Bank of India

..Petitioner

Versus

Anish Kumar and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. Gurinderjit Singh, Advocate,
for the petitioner.

Mr. Sapan Dhir, Advocate,
for the respondents.

ANIL KSHETARPAL, J(Oral)

The question which needs determination is “whether a civil suit for declaration, permanent injunction and for separate possession by way of partition with respect to a property which had been mortgaged and proceedings are pending under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(hereinafter referred to as “SARFAESI Act, 2002”) is maintainable in the Civil Court, particularly when the plaintiff is claiming rights in the property which is sought to be taken over and auctioned by the secured creditors as per the provisions of the SARFAESI Act, 2002?”.

Learned civil court has dismissed the application filed under Order 7 Rule 11 of the Code of Civil Procedure on the ground that the relief of partition of the joint property has also been sought and no relief has been sought against the bank.

Plaintiff-respondent filed a suit claiming that he is owner of 1/8th share in the property bearing No.D-117-A, Phase-V, Focal Point, Ludhiana, which was initially owned by a firm, in which his father was a partner. He claims that the plot in question was allotted to the partnership firm. He further claims that Inder Lal, his father, unfortunately died on 28.11.2001 and hence on the death of his father, plaintiff being a natural heir has become owner of the said property to the extent of 1/4th share. Plaintiff further claims that he is not able to enjoy full fruits of the joint property and, therefore, the suit property be partitioned.

Plaintiff had impleaded his two brothers and mother as defendants. During the pendency of the suit, State Bank of India, the petitioner, was impleaded as defendant no.4, whereas the partnership firm was impleaded as defendant no.5.

Learned counsel for the petitioner-bank has drawn the attention of the court to the affidavits submitted by defendants no.1 to 3 claiming that they are partners of the firm M/s A.K. Engineering Company as per partnership deed dated 04.12.2001 and hence they are mortgaging the property in favour of the bank. Counsel for the petitioner-bank has argued that ultimately plaintiff wants to get the declaration that he is owner to the extent of 1/8th share and therefore, the mortgage of the property by the defendants No.1 to 3 with respect to 1/8th share of the property is without any authority. Learned counsel has drawn attention of the provisions of Sections 13, 17 and 34 of the SARFAESI Act, 2002 and has submitted that once the petitioner-bank had taken steps for enforcement of the security interest, any person claiming any right in the security interest, aggrieved by any of the measures referred to in Section 13 may make an application to the

Debts Recovery Tribunal. While drawing attention of the Court to provisions of Section 34 of the Act of 2002, he submits that no civil court shall have jurisdiction.

Sections 13, 17 and 34 of the SARFAESI Act, 2002 are extracted as under:-

13.Enforcement of security interest.--

(1) Notwithstanding anything contained in section 69 or section 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 the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and -his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

Provided that:-

(i) the requirement of classification of secured debt as non-performing asset under this sub-section shall not apply to a borrower who has raised funds through issue of debt securities; and

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustee;

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

[(3A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such

representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.".]

(4) In case the borrower fails to discharge his liability in full within the period specified insub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt;

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of business of the borrower which is relatable to the security for the debt.".]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made

payment to the borrower.

(5-A) Where the sale of an immovable property, for which a reserve price has been specified, has been postponed for want of a bid of an amount not less than such reserve price, it shall be lawful for any officer of the secured creditor, if so authorised by the secured creditor in this behalf, to bid for the immovable property on behalf of the secured creditor at any subsequent sale.

(5-B) Where the second creditor, referred to in sub-section 95-A), is declared to be the purchaser of the immovable property at any subsequent sale, the amount of the purchase price shall be adjusted towards the amount of the claim of the secured creditor for which the auction of enforcement of security interest is taken by the secured creditor, under sub-section (4) of Section 13.

(5-C) The provisions of Section 9 of the Banking Regulation Act, 1949 (10 of 1949) shall, as far as may be, apply to the immovable property acquired by secured creditor under sub-section (5-A).

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of subsection (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the dues of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) Where the amount of dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date of publication of notice for public auction or inviting quotations of tender from public or private treaty for transfer by way of lease, assignment or

sale of the secured assets,-

*(i) the secured assets shall not be transferred by way of lease assignment or sale by the secured creditor; and
(ii) in case, any step has been taken by the secured creditor for transfer by way of lease or assignment or sale of the assets before tendering of such amount under this sub-section, no further step shall be taken by such secured creditor for transfer by way of lease or assignment or sale of such secured assets.]*

(9) Subject to the provisions of the Insolvency and Bankruptcy Code, 2016, in the case of] financing of a financial asset by more than one secured creditors or joint financing or a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than sixty per cent in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529-A of the Companies Act, 1956:

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of relinquishing his security and proving his debt under proviso to subsection (1) of section 529 of the Companies Act, 1956, may retain the sale proceeds of his secured assets after depositing the workmen's dues with the liquidator in accordance with the provisions of section 529A of that Act;

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditor the workmen's dues in accordance with the provisions of section 529A of the Companies Act, 1956 and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor

shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation--For the purposes of this sub-section,--

(a) "record date" means the date agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, the secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clauses (a) to (d) of subsection (4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(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."

17. Application against measures to recover secured debts.

(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, 1[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:—

Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

[Explanation.—For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.

- i. *"(1A) 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;*
 - 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 debt claimed is outstanding for the time being."*

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the secured assets to the borrower or other aggrieved person, it may, by order,-

- (a) declare the recourse to any one or more measures referred to in-sub-section (4) of section 13 taken by the secured assets as invalid; and
- (b) restore the possession of the secured assets to the borrower or restore the management of the secured assets to the borrower, as the case may be, and
- (c) pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under

sub-section (4) of section 13 to recover his secured debt.

ii. "(4A) Where—

a. *any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,—*

a. *has expired or stood determined; or*

b. *is contrary to section 65A of the Transfer of Property Act, 1882; or*

c. *is contrary to terms of mortgage; or*

d. *is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and*

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act."

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993 (51 of 1993) and the rules made thereunder.]

34. Civil Court not to have jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).

On the other hand, learned counsel for the respondents-plaintiffs has submitted that the dispute in the present case is entirely different and can be adjudicated upon only by the civil court. He submits that the Debts Recovery Tribunal has no jurisdiction to either grant declaration to the plaintiff that he is owner to the extent of 1/8th share or has the jurisdiction to order separate possession by partition of the property. Hence, Debts Recovery Tribunal would not have jurisdiction.

Learned counsel for the respondents has relied upon the judgment passed by the Hon'ble Supreme Court reported as **Nahar Industrial Enterprises Ltd. v. Hong Kong & Shanghai Banking Corporation, 2009(8) SCC 646.** He has also relied upon the judgment passed by this Court while deciding Civil Revision No.7522 of 2017, decided on 25.01.2018 (**Punjab National Bank vs. Narinder Chugh and others**). He has further relied upon the judgment passed by the Rajasthan High Court reported as **Mohan Lal and another v. Dwarka Prasad and others, 2007 AIR (Raj.) 129.**

A careful reading of the judgment passed by the Hon'ble Supreme Court in **Nahar Industrial Enterprises Ltd.**(supra), establishes that the Hon'ble Supreme Court had dealt with the jurisdiction of the civil

court viz-a-viz. the provisions of The Recovery of Debts Due to Banks and Financial Institutions Act, 1993. In the aforesaid case, the Hon'ble Supreme Court was not examining the maintainability of the suit in the context of bar to the jurisdiction of the civil court as provided under the SARFAESI Act, 2002. Hence, the aforesaid judgment passed by the Hon'ble Supreme Court would have no application.

Similarly in the case of **Punjab National Bank** (supra) attention of this Court was not drawn to the provisions of Section 34 of the SARFAESI Act, 2002. In the absence thereof, the judgment passed in the Punjab National Bank's case would have no application.

As far as the judgment passed by the Rajasthan High Court in the case of **Mohan Lal and another** (supra), it may be noticed that in the aforesaid case, the plaintiffs had claimed right of preemption, which is not the case here. Hence, the aforesaid judgment passed by the Rajasthan High Court is also on different facts.

In the present case, plaintiff in the plaint has specifically pleaded that the plot in question, which is subject matter of the suit, was allotted to the partnership firm i.e. M/s A.K. Engineering Company. Sh. Inder Lal, the original partner (father of the respondent-plaintiff), is said to have died on 28.11.2001. Two sons and widow of late Sh. Inder Lal excluding the plaintiff constituted a partnership firm on 04.12.2001 and, therefore, the property was mortgaged in favour of the bank.

Section 17 of the SARFAESI Act, 2002, enables any person including borrower to make an application against the measures which are being taken by the secured creditors under the provisions of the SARFAESI Act, 2002. Debts Recovery Tribunal has been constituted and empowered

to adjudicate upon the claim not only of the borrower and the creditor but of any person. Plaintiff would certainly fall within the definition of “any person”. Plaintiff claims rights in the secured assets. Hence, the plaintiff is entitled to file an application before the Debts Recovery Tribunal.

Still further, a careful reading of Section 34 of the SARFAESI Act, 2002, would establish that the jurisdiction of the civil court has been excluded in respect of any matter to which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act of 2002 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 the SARFAESI Act, 2002. In the present case, plaintiff ultimately seeks to challenge the action taken by the petitioner-bank with respect to 1/8th share in the secured property. The question which would ultimately arise in the suit is whether the mortgage of the property to the extent of 1/8th share was legal and valid or not? In the considered opinion of this court, such question would exclusively fall within the domain of Debts Recovery Tribunal as provided under Section 17 of the SARFAESI Act, 2002

It has been noticed that borrowers or other persons interested in the property have been devising novel methods to avoid the jurisdiction of the Debts Recovery Tribunal. The intentions of the provisions of the SARFAESI Act, 2002 are clear and specific. The SARFAESI Act, 2002 has been enacted so as to expedite recovery of the amount due to the financial institutions. Banks and financial institutions have been given powers to take over the possession of the securities and to sell them without intervention of the court. The courts while examining such issue must closely examine the provisions of the SARFAESI Act, 2002 and the real

intention behind filing the suit before the civil court. If the court arrives at a conclusion that the suit has been filed just to defeat the rights of a secured creditor and proceedings under the SARFAESI Act, 2002 have been initiated, the civil court should not proceed with such suit and direct the parties to file appropriate proceedings before the Debts Recovery Tribunal.

The argument of learned counsel for the plaintiff-respondent that the question of title and partition of the property cannot be decided by the Debts Recovery Tribunal, is wholly misconceived. The Debts Recovery Tribunal has been empowered to decide the application filed by any person aggrieved by any of the measures referred to under Section 13 of the SERFACI Act, 2002. Section 17 of the Act does not in any manner restrict the jurisdiction of the Debts Recovery Tribunal to decide the question of title or partition of the property. Language of Section 17 is clear and specific. The Debts Recovery Tribunal is entitled to decide any dispute which may arise in the facts and circumstances of the case, if the proceedings under Section 13 of the Act has been initiated and the applicant is aggrieved of the same. Sub-section 3 of Section 17 lays down that the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section 4 of Section 13, taken by the secured creditor are not in accordance with the provisions of this Act, the Debts Recovery Tribunal would pass an appropriate order as is required. Once the Debts Recovery Tribunal has been constituted to examine the facts and circumstances of the case and the evidence produced by the parties, the Debts Recovery Tribunal would, of course, be required to decide first of all the rights of the applicant. After the decision of the rights

of the applicant, the Debts Recovery Tribunal would be in a position to decide whether the measures taken under Section 13 of the Act against the secured assets is valid or invalid.

In view of the discussion made above, the revision petition is allowed, the order under challenge is set aside, the plaint filed by the plaintiff shall stand rejected, due to lack of jurisdiction. Plaintiff shall be entitled to move an application before the Debts Recovery Tribunal, in accordance with law.

21st March, 2018
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(ANIL KSHETARPAL)
JUDGE

Whether speaking/reasoned
Whether reportable

: Yes/No
: Yes/No