

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NOS.313 OF 2018 WITH 585 OF 2017****WRIT PETITION NO.313 OF 2018**

Crosscraft Private Ltd.

Having its registered office at

Sesa Ghor Building,

Entrance No.1, 1st floor,

Office No.1A, Patto EDC Complex,

Patto, Panaji, Goa.

Represented by Celinda Serrao

... Petitioner

Versus

1. The Authorized Officer,
Madgaum Urban Co-op Bank Ltd.,
Having its branch at Navelkar
Trade Centre, 1st floor,
Opposite Azad Maidan,
Panaji, Goa.
2. Smt. Suraj Mascarenhas,
F-1, First floor, Bldg. No.17,
Kamat Kinara, Miramar,
Panaji, Goa.
3. The District Magistrate,
North Goa, Having Office at
Collectorate Building,
Panaji, Goa.

4. The Mamlatdar of Tiswadi,
Having Office at Collectorate
Building, Panaji, Goa.

... Respondents

Mr. S.S.Kantak, Senior Advocate with Mr. Abhijeet Kamat, Advocate
for the petitioner.

Mr. Shivan Desai and Aniroodh C. Sardesai, Advocates for respondent
no.1.

Mr. Rajesh Shivolkar, Additional Government Advocate for
respondent nos.3 and 4.

WITH

Correction carried out
as per order dated
7.3.2019.

WRIT PETITION NO.585 OF ~~2018~~ ²⁰¹⁷

Mr. Gautam Amonkar,
R/o. Flat No.D/12, Ocean Park,
Dona Paula, Goa.

.... Petitioner

Versus

1. Madgaum Urban Co-operative
Bank Ltd., A Bank Having its
Head Office at Varsha,
Aquem, Alto Margao Goa
and Having its Branch Office
at St. Andrew Parish
Premises Goa Velha, Goa.
Through its Authorised Officer,
Mr. Kishor S. Amonker,
Managing Director.
2. Smt. Suraj Mascarenhas,
wife of late Mr. Melwin Mascarenhas,

33, Lake View, Miramar,
Panaji-Goa 403001
or alternatively
C/o Trail Blazer Tours (I) Pvt. Ltd.,
201-204, 2nd Floor,
Gera's Imperium,
Patto, Panaji-Goa.

3. Shri Ronald Mascarenhas,
Son of late Mr. Melwin
Mascarenhas, 33,
Lake View Miramar,
Panaji-Goa 403001.
4. Smt. Irene Mascarenhas,
mother of late
Mr. Melwin Mascarenhas,
33, Lake View, Miramar,
Panaji-Goa 403001.
5. Shri Shawn Joao,
H.No.22, Kumbarwada,
Merces Goa.
6. Shri Charles Ajoy Estibeirol,
G-1 Caculo Paradise,
Next to Portuguese Consulate,
Altinho, Panaji-Goa.
7. State of Goa,
Through the Chief Secretary,
Having office at Secretariat,

Porvorim Goa.

8. Mamlatdar of Tiswadi,
Office of the Mamlatdar of
Panaji, Panaji, Goa.

9. The District Magistrate,
Office of the District Collector,
North Goa District, Panjim, Goa.

.... Respondents

Mr. Nitin Sardesai, Senior Advocate with Mr. Gaurish Agni,
Advocate for the Petitioner.

Mr. R.G.Ramani, Advocate for respondent no.1.

Ms. Purna Bhandari, Additional Government Advocate for respondent
nos.7 to 9.

Coram : M.S. Sonak &

Prithviraj K. Chavan, JJ.

Judgment reserved on : 06.2.2019.

Judgment pronounced on 08.02.2019.

Judgment (Per M.S.Sonak, J) :

Heard Mr. S.S. Kantak, learned Senior Advocate along
with Advocate Abhijeet Kamat for the petitioner in Writ Petition
No.313/2018, Mr. Shivan Desai, learned counsel for respondent no.1
and Mr. Rajesh Shivolkar, learned Additional Government Advocate
for respondent nos.3 and 4.

2. Heard Mr. Nitin Sardesai, learned Senior Advocate along
with Advocate Gaurish Agni for the Petitioner in Writ Petition

No.585/2017, Mr. R.G.Ramani, learned counsel for respondent no.1 and Ms. Purna Bhandari, learned Additional Government Advocate for respondent nos.7 to 9.

3. In both these petitions, the challenge is basically to the orders made by the Magistrate under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002).

4. It is the case of both the petitioners that they are neither the secured creditors qua respondent no.1-Bank nor is the property, which is the subject matter of respective petitions mortgaged or otherwise offered as a security to respondent no.1-Bank for repayment of any alleged loan amounts by Smt. Suraj Mascarenhas or other members of the Mascarenhas family. Mr. Kantak and Mr. Sardesai, learned Senior Advocates for the petitioners, contend that respondent no.1-Bank can invoke the provisions of Section 13 of the SARFAESI Act, 2002, only in a situation, where any security interest created in favour of any secured creditors may be enforced. They point out that in the present case, there is no security interest whatsoever created in the properties, which respondent no.1-Bank seeks to attach and take over by invoking the provisions of the SARFAESI Act, 2002. They,

therefore, submit that the very initiation of the proceedings either respondent no.1-Bank under the SARFAESI Act, 2002 is an exercise *ex facie* without jurisdiction and the Magistrate, therefore, was duty bound to decline the invitation to act under Section 14 of the SARFAESI Act, 2002, insofar as the properties which are the subject matter of the present petitioners are concerned. They point out that since the action of respondent no.1-Bank is *ex facie* without jurisdiction, even the bar of an alternate remedy can never apply and the reliefs prayed for in these petitions may be made absolute.

5. In the alternate, Mr. Kantak and Mr. Sardesai, point out that even under Section 14 of the SARFAESI Act, 2002, the Magistrate is required to satisfy himself as to the fulfillment of the predicates of the SARFAESI Act, 2002. In particular, they point out that the Magistrate must satisfy himself as to the contents of the affidavit to be made on behalf of respondent no.1-Bank. They submit that such satisfaction extends to at least verifying whether the property which is to be possessed, must be a property, which is mortgaged or otherwise offered as a security for repayment of the loan to respondent no.1-Bank. They point out that in the present case, detailed application was filed before the Magistrate along with documents to establish that the properties in question were never mortgaged to

respondent no.1-Bank. The Magistrate, without recording any satisfaction on this aspect has proceeded to make the impugned order, which are *ex facie* without jurisdiction and warranting interference. The learned Senior Advocates repeat and reiterate that in the present case, the properties, which are the subject matter of these petitions can never be styled as 'secured assets' and there is absolutely no dispute that the petitioners are not even creditors of respondent no.1-Bank, much less secured creditors.

6. Mr. Kantak and Mr. Sardesai, learned Senior Advocates rely on *Shri Shivabassappa I. Kankanwadi and another Vs. Mapusa Urban Co-operative Bank of Goa Ltd. and others*¹, to contend that where the Magistrate proposes to take action under Section 14 in respect of property, which was not even mortgaged to the Bank, such action, would be without jurisdiction and such action, can be interfered with under Articles 226 and 227 of the Constitution of India. They also referred to the decision in *Shoklingam Kappuswami Mudliyar Vs. Indian Bank and ors*², wherein, the learned Single Judge of the Gujarat High Court has also taken the similar view. They also referred to the decision in *Dabasree Das Vs. The State of West Bengal and others*³, in which, the learned Single Judge of the Calcutta High

1 2016 SCC OnLine Bom 2574

2 2007 SCC OnLine Guj 173

3 2011 0 AIR (Cal) 57

Court has also taken a similar view. The learned Senior Advocates rely upon the ruling of the Hon'ble Apex Court in *Standard Chartered Bank Vs. V.Noble Kumar and others*⁴, to point out that the obligations cast upon the Magistrate when exercising powers under Section 14 of the SARFAESI Act, 2002 and submit that in the present case, the Magistrate has failed to follow the principles laid down in these decisions.

7. The learned Senior Advocates also referred to the ruling of the Hon'ble Apex Court in *R. Janakiraman Vs. State*⁵ to submit that there can be no equitable mortgage created without deposit of original title documents. They rely on *Indian Bank Vs. Ms. Punjab National Bank and others*⁶, wherein, a Division Bench of the Madras High Court has taken same view. They point out that in almost all the decisions of the Hon'ble Apex Court, which lay down that the jurisdiction under Articles 226 and 227 of the Constitution of India, should not be exercised when parties have an alternate and efficacious remedy available to them under the SARFAESI Act, 2002 itself, the petitioners were borrowers and the property, which was the subject matter of such petitions was a secured asset. They point out that since these factors are absent in the present two petitions, the petitioners

4 (2013) 9 SCC 620,

5 (2006) 1 SCC 697

6 AIR 2010 Madras 84

ought not to be relegated to avail the alternate remedy before the Debt Recovery Tribunal (DRT). They point out that the DRT is located at Mumbai and the remedy, if any, available before the DRT, cannot be styled as efficacious remedy. For all these reasons, they submit that the present petitions be entertained and the reliefs prayed for therein, be made absolute.

8. Mr. R.G.Ramani and Mr.Shivan Desai, who appear for respondent no.1-bank in each of these petitions, referred to the following rulings, to submit that these petitions must be dismissed and the petitioners, if they so desire, must be relegated to the alternate and efficacious remedy available before the DRT. The learned counsel relied upon : *Kotak Mahindra Bank Ltd. and Ors. Vs. State of Maharashtra*⁷, *Authorized Officer, State Bank of Travancore & ors Vs. Matthew K.C.*⁸, *Hari Trading Corporation & Ors. Vs. Bank of Baroda and Ors.*⁹, *Kanaiyalal Lalchand Sachdev & ors Vs. State of Maharashtra and ors.*¹⁰ *Standard Chartered Bank Vs. Noble Kumar and Ors*¹¹, *United Bank of India Vs. Satyawati Tondon and Ors.*¹², *Transcore Vs. Union of India*¹³ and *ICICI Bank Ltd. ETC.ETC. Vs.*

7 Manu/MH/0877/2018

8 Manu/SC/0054/2018

9 Manu/SC/0863/2005

10 Manu/SC/0103/2011

11 Manu/SC/0874/10`3

12 Manu/SC/0541/2010

13 Manu/SC5319/2006

Umakanta Mohapatra ETC.ETC.in Civil Appeal Nos. 10243-10250 of 2018.

9. Mr. Ramani submits that in the present case the property, which is the subject matter of Writ Petition No.585/2017 was indeed mortgaged by Mascarenhas family members to the Bank by deposit of documents like original Agreements for Sale and even Share Certificates. He submits that the petitioner is only the subsequent purchaser from the Mascarenhas family and, therefore, is bound by prior encumbrances that affect the property in question. He submits that it is not the law that in every case deposit of original title deeds is a must, when it comes to creation of an equitable mortgage. He submits that an equitable mortgage can as well arise in case of constructive delivery of title deeds coupled with intention to create mortgage by deposit of title deeds. He relies on the ruling of the Hon'ble Apex Court in *K.J. Nathan Vs. S.V.Maruthi Rao*¹⁴, to submit that the question as to whether the transaction creates an equitable mortgage or not is a mixed question of law and fact. He relies on this decision also to submit that an equitable mortgage can be created even by constructive delivery of title deeds coupled with an intention to create mortgage by deposit of title deeds. He relies on *Angu Pillai Vs.*

¹⁴AIR 1965 (SC) 430

*M.S.M.Kasivishwanathan Chettiar*¹⁵, wherein, a Division Bench of the Madras High Court has also taken the similar view. He points out that in the present case, there is ample material on record to establish that the property in question was indeed equitably mortgage in favour of respondent-Bank. He submits that all this material was placed before the Magistrate and it is on the basis of this material that the Magistrate proceeded to take action under Section 14 of the SARFAESI Act, 2002.

10. Mr. Shivan Desai, learned counsel for the respondent-Bank in Writ Petition No.585/2017, whilst supporting the submissions of Mr. R.G. Ramani adds that the Magistrate, while exercising powers under Section 14 of the SARFAESI Act, 2002, cannot go into complicated issues of title but, has to merely verify whether the affidavit filed on behalf of the Bank refers to the property in question being a secured asset. He submits that in the present case, the affidavit is very categorical and, therefore, the Magistrate was entirely right in initiating action under Section 14 of the SARFAESI Act, 2002. He relies on *Kotak Mahindra Bank Limited*, (supra) wherein, the Division Bench of this Court has explained the limited scope of inquiry by Magistrate under Section 14 of the SARFAESI

¹⁵AIR 1974 Madras 16

Act, 2002.

11. Mr. Desai submits that the property in question was indeed mortgaged in favour of the respondent-Bank and, therefore, Magistrate, had every jurisdiction under Section 14 of the SARFAESI Act, 2002, to act in the matter. He points out that the petitioner in Writ Petition No.313/2018 has, in fact, instituted a suit before the Civil Court to declare that the property in question is not mortgaged in favour of the respondent-Bank. He, therefore, submits that the petition is liable to be dismissed.

12. The rival contentions fall for our determination.

13. In the present case, the petitioners mainly challenge the action of the Magistrate under Section 14 of the SARFAESI Act, 2002. It is by now, well settled that the Magistrate, under Section 14 of the SARFAESI Act, 2002, basically aids and assist the Banks to attach and take possession of secured assets. Section 13 (4) of the SARFAESI Act, 2002, empowers the Banks to take possession of the secured assets without intervention of the Courts or by seeking the assistance of the Magistrate under Section 14 of the SARFAESI Act, 2002. It is by now, well settled that the Bank, by applying to the Magistrate to take action under Section 14 of the SARFAESI Act,

2002, is taking one of the measures, as contemplated by Section 13 (4) of the SARFAESI Act, 2002. There is also no dispute that as against the measures under Section 13 (4) of the SARFAESI Act, 2002, any person, including the borrower, if aggrieved by any of the measures under Section 13 (4) of the SARFAESI Act, 2002, by the secured creditor or otherwise other authorised Officer, can make an application to the Debt Recovery Tribunal (DRT) within 45 days from the date on which such measures have been taken. The application to be made under Section 17 of the SARFAESI Act, 2002, is virtually in the nature of an original proceeding and the DRT, has sufficient powers to examine all issues, including the issue as to whether the property in question is indeed a secured asset or not. Since, action under Section 14 of the SARFAESI Act, 2002, is in the nature of a measure under Section 13 (4) of the SARFAESI Act, 2002, undoubtedly, as against such a measure, any person aggrieved, can file an application before the DRT in order to seek redressal.

14. The aforesaid means that any party, which includes the present petitioners, if aggrieved by any action under Section 14 of the SARFAESI Act, 2002, has an alternate as well as efficacious remedy available to institute an application under Section 17 of the SARFAESI Act, 2002, before the DRT in such matters.

15. The learned Senior Advocates for the petitioners, however, submit that if an action by a statutory authority is *ex facie* without jurisdiction then, the bar of an alternate remedy cannot apply. This is correct. However, this is not mean that the plea that the action of the statutory Authority being without jurisdiction, cannot be redressed before the DRT. The plea that the action of the statutory Authority is *de hors* the provisions of the SARFAESI Act, 2002, or in excess of the powers conferred upon him under the SARFAESI Act, 2002, can also be gone into by the DRT and if such a case is made out, the DRT, can certainly grant relief upon such plea. Although, the bar of an alternate remedy is only a self-imposed restriction, in matters of this nature, as has been repeatedly held by the Hon'ble Apex Court, it will not be appropriate to interfere particularly when a specialised machinery is provided under the SARFAESI Act, 2002, to deal precisely with the disputes of the nature of which the petitioners now seeking to raise in the present petitions.

16. The learned Senior Advocates for the petitioners did make attempts to demonstrate that in the present case, the properties in question have not been mortgaged to the respondent-Bank. In the alternate, they did submit that the Magistrate has failed to exercise jurisdiction, which is vested in him or in any case or acted in excess of

jurisdiction, which is vested in him. However, since, the petitioners have an alternate and efficacious remedy before the DRT, it will not be proper for us to go into such issues when such issues, can very well be gone into by the DRT, which is specialised Tribunal, created under the statute to go into specifically this kind of issues.

17. The fact that the High Court, under Articles 226 and 227 of the Constitution of India, has jurisdiction to go into such issues, is not sufficient to persuade us to exercise that jurisdiction when an alternate and efficacious remedy is very much available to the petitioners. Therefore, even assuming what the petitioners say in relation to the issue of mortgage, is correct, since the petitioners, have an alternate and efficacious remedy available to them before the DRT, it will not be appropriate for us to exercise our extraordinary jurisdiction under Articles 226 and 227 of the Constitution of India and ourselves adjudicate upon such issues.

18. The respondent-Bank has also raised some defences and the issue as to whether the properties which are the subject matter of these petitions are indeed held an equitable mortgage or not involve adjudication in disputed questions of fact and law. In any case, as held by the Hon'ble Apex Court in *K.J. Nathan Vs S.V.Maruthi Rao*

(*supra*), such issues as to the nature of the transaction involve questions of fact as well as law. Obviously, all such issues cannot be effectively adjudicated in the summary jurisdiction under Articles 226 and 227 of the Constitution of India.

19. In *Shri Shivabassappa I Kankanwadi (supra)*, which was decided prior to the ruling of the Honb'le Apex Court in *Authorised Officer, State Bank of Transkar and Vs. Matthu K.C.*¹⁷, a Division Bench of this Court recorded a finding that the security interest claimed by the bank based on the documents had already been held to be vitiated by a judgment and order dated 3.6.2011 made by the District Judge in earlier proceedings. It is perhaps on account of this distinguishing feature that the Division Bench of this Court proceeded to exercise jurisdiction under Articles 226 and 227 of the Constitution of India, whilst acknowledging that there was an alternate remedy under Section 17 of the SARFAESI Act, 2002. No such distinguishing feature arises in the present cases. In fact, in Writ Petition No.313/2018 the petitioner has instituted a suit to declare the property in question is not the subject matter of a mortgage and such suit is pending adjudication.

20. Recently, a Division Bench of this Court in *Kotak*

¹⁷.2018 (3) SCC 85

Mahindra Bank (supra), upon considering the decision in *Shoklingam Mudliyar* (supra) as also *Standard Chartered Bank Vs. Nobel Kumar* (supra) and several other decisions has held that the scope of the proceeding before a Magistrate is extremely limited and the Magistrate, is not at all entitled to go into issues of right, title or interest of the parties. A Division Bench, in fact, followed the earlier ruling in case of *Hari Trading Corproation Vs. Bank of Baroda*¹⁸, which has taken the similar view.

21. In the precise context of the High Courts entertaining petitions under Articles 226 and 227 of the Constitution of India when it comes to challenge to the action under the SARFAESI Act, 2002, this is what the Hon'ble Apex Court observed in the case of *ICICI Bank Limited* (supra):

“Delay condoned.

Leave granted.

Despite several judgments of this Court, including a judgment by Hon'ble Mr. Justice Navin Sinha, as recently as on 30.01.2018, in Authorized Officer, State Bank of Travancore and Anr. vs. Mathew K.C., (2018) 3 SCC 85, the High Courts continue to entertain matters which arise under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI), and keep granting interim orders in favour of persons who are

18.(2015) 3 BC 284)

Non-Performing Assets (NPAs).

The writ petition itself was not maintainable, as a result of which, in view of our recent judgment, which has followed earlier judgments of this Court, held as follows:-

“18. We cannot help but disapprove the approach of the High Court for reasons already noticed in Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and Another, (1997) 6 SCC 450, observing:-

“32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.””

The writ petition, in this case, being not maintainable, obviously, all orders passed must perish, including the impugned order, which is set aside.

The appeals are allowed in the aforesaid terms.

Pending applications, if any, shall stand disposed of.”

(Emphasis supplied)

22. The observations, on the very same issue in State bank of

Travancore & Others (supra) are also very specific. After taking a review of several decisions, the Hon'ble Apex Court, at paragraphs 16, 17 and 18 has made the following observations:-

*“16. It is the solemn duty of the court to apply the correct law without waiting for an objection to be raised by a party, especially when the law stands well settled. Any departure, if permissible, has to be for reasons discussed, of the case falling under a defined exception, duly discussed after noticing the relevant law. In financial matters grant of ex- parte interim orders can have a deleterious effect and it is not sufficient to say that the aggrieved has the remedy to move for vacating the interim order. Loans by financial institutions are granted from public money generated at the taxpayer's expense. Such loan does not become the property of the person taking the loan, but retains its character of public money given in a fiduciary capacity as entrustment by the public. Timely repayment also ensures liquidity to facilitate loan to another in need, by circulation of the money and cannot be permitted to be blocked by frivolous litigation by those who can afford the luxury of the same. The caution required, as expressed in *Satyawati Tondon* (supra), has also not been kept in mind before passing the impugned interim order:*

“46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes,

cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which (sic will) ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad, Whirlpool Corpn. v. Registrar of Trade Marks and Harbanslal Sahnia v. Indian Oil Corpn. Ltd. and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.”

17. *The writ petition ought not to have been entertained and the interim order granted for the mere asking without assigning special reasons, and that too without even granting opportunity to the appellant to contest the maintainability of the writ petition and failure to notice the subsequent developments in the interregnum. The opinion of the Division Bench that the counter-affidavit having subsequently been filed,*

stay/modification could be sought of the interim order cannot be considered sufficient justification to have declined interference.

18. We cannot help but disapprove the approach of the High Court for reasons already noticed in *Dwarikesh Sugar Industries Ltd. v. Prem Heavy Engg. Works (P) Ltd. And Anr.* MANU/SC/0639/1997 ;, 1997 (6) SCC 450 observing :

“32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.”

23. For all the aforesaid reasons, we dismiss these petitions but grant liberty to both the petitioners to take out appropriate proceedings before the DRT, if they so desire. Further, we continue the interim orders granted earlier for a period of two months from

today in order to enable the petitioners to apply for interim orders before the DRT. We also make it clear that since, the petitioners were before this Court up to now, should the petitioners institute proceedings before the DRT within two months, the same will not be refused to be entertained by the DRT, on the grounds of bar of limitation. According to us, the petitioners, have been *bonafide* pursuing their remedy before this Court and in the peculiar facts and circumstances of present case, the bar of limitation should not come in their way.

24. We make it clear that we have not made any adjudication or observations on the merits or demerits of the rival contentions and, therefore, nothing in our order should be construed as such. All rival contentions on merits and demerits are, therefore, left open for adjudication by the DRT should the petitioners indeed choose to avail the remedy before the DRT within the time line indicated.

25. With the aforesaid observations and liberties, both these petitions are dismissed. However, as indicated earlier, the interim orders in operation shall continue to operate for a period of two months from today.

26. All concerned to act on the basis of an authenticated copy of this order.

Prithviraj K. Chavan, J.

M.S.Sonak, J.