

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CWP No.21059 of 2018 (O&M)

***M/S SHRI SANTOSH SAW MILL THROUGH ITS PROPRIETOR-VED
PRAKASH REKHAN AND ANOTHER***

.....Petitioners

V/s.

ALLAHABAD BANK AND OTHERS

.....Respondents

CWP No.26146 of 2018 (O&M)

***M/S SHRI SANTOSH SAW MILL THROUGH ITS PROPRIETOR-VED
PRAKASH REKHAN AND ANOTHER***

.....Petitioners

V/s.

ALLAHABAD BANK AND OTHERS

.....Respondents

Reserved on 20.09.2022.

Date of Decision: 12.10.2022

CORAM: **HON'BLE MR. JUSTICE M.S. RAMACHANDRA RAO**
HON'BLE MR. JUSTICE HARMINDER SINGH MADAN

Present: Mr. Ashish Aggarwal, Senior Advocate, assisted by
 Mr. Karan Singla, Advocate
 for the petitioners.

 Mr. Sumit Batra, Advocate,
 for the respondent-Allahabad Bank.

 Mr. Sunil Chadha, Senior Advocate, assisted by
 Mr. Saurav Kanojia, Advocate
 for the respondent No.5.

M.S. RAMACHANDRA RAO, J.

 Since these two writ petitions are between the same parties and

common questions of fact and law arise for consideration, they are being

disposed of by this common order.

The background facts

 Petitioner No.1 is a proprietary concern and petitioner No.2 is

its proprietor.

The subject matter of these Writ Petitions is property bearing W-9, Industrial Area, Yamuna Nagar, Haryana.

This property was purchased under a register sale deed dt.15.10.1971 in the name of Santosh Kumar Aggarwala (Respondent No.4) by his late father Sukhdeo Prosad Aggarwala.

Initially, the petitioner No.1 was a partnership firm constituted under a partnership deed dt.03.01.1972 (P-1) with Sajjan Kumar Aggarwala (brother of respondent No.4), petitioner No.2, Smt. Shanti Devi Aggarwala and Smt. Kusum Devi Aggarwala. The firm started business on the above property with the consent of respondent No.4.

According to petitioner No.2, on 16.06.1987, the other partners of the firm executed a general power of attorney in his favour authorizing him to sell, mortgage, lease or otherwise dispose of the said plot.

In 1989-90, a loan was taken by respondent No.3 firm and respondent No.4 from Allahabad Bank (respondent No.1) (for short 'the Bank'). The above mentioned property was given as security for the said loan.

Petitioner No.2 contends that respondent No.4 relinquished his right in the said property in favour of the petitioner No.2 after taking due consideration from him and since 13.10.1997, all partners retired with their own free will by settling their accounts, that the petitioner No.1 ceased to be a partnership firm and became a proprietary concern with the petitioner No.2 as the sole proprietor.

Since there was a default committed by respondent No.3, the Bank got issued a demand notice dt.07.02.2011 under Section 13(2) of the

SARFAESI Act, 2002 demanding ₹35,03,12,775/- from the respondent No.3. Similar notice was also issued to respondent No.4, Sajjan Kumar Aggarwala (brother of respondent No.4), Suresh Kumar Aggarwala and Suresh Kumar Dorejka, who were guarantors to the said loan.

Thereafter notice dt.09.11.2011 under Section 13(4) of the Act and a sale notice dt.22.12.2011 was issued by the Bank putting the above property to sale on 31.01.2012.

SA 17 of 2012

On 24.01.2012, SA No. 17 of 2012 was filed by the petitioners before the DRT-I, Chandigarh to set aside the sale notice dt. 22.12.2011 and also to restrain the Bank from forcibly dispossessing them. Interim relief was sought to restrain the Bank from alienating the property.

On 30.01.2012, the DRT-I, Chandigarh directed that the sealed bids received pursuant to the sale notice dt. 22.12.2011 be not opened by the Bank till the next date of hearing.

On 31.01.2012, M/s Globe Panel Industries India Pvt. Ltd. (respondent No.5) quoted ₹2.40 Crores against the reserve price of ₹2.26 Crores and became the highest tenderer.

During the pendency of the SA No. 17 of 2012, an Advocate Commissioner was also appointed, who filed a report on 14.02.2012, that the petitioners are in possession of the above property.

Respondent No.5 filed an application IA No. 633 of 2012 to permit it to participate in SA No.17 of 2012 and seek *inter-se* bidding claiming to be a proper party since it had quoted ₹2.40 Crore for the said property.

By order dt. 13.07.2012, IA No. 633 of 2012 was dismissed.

The petitioners had offered to pay ₹2.40 Crore contending that they had been in physical possession of the property for the last 40 years and deposited the said amount on 12.07.2012.

Order dt.13.7.2012 of the DRT-I, Chandigarh in SA 17 of 2012

The DRT-I, Chandigarh passed order in SA No.17 of 2012 on 13.7.2012 holding that any sale of property can only take place after obtaining physical possession of the property; that the statement of the Bank in the sale notice that it had already taken possession of the property was misleading; on equity since the petitioners had deposited equivalent amount of sole bid of respondent No.5 which was received by the Bank, and which was more than the reserve price, no prejudice would be caused to be Bank if the offer of the petitioners is accepted. It therefore directed the Registrar to release the sum of ₹2.40 Crore deposited by the petitioners to the Bank within 7 days, and the Bank was directed to confirm the sale in the petitioners' favour and issue sale certificate.

Pursuant to the said order, sale certificate was issued to the petitioners on 23.07.2012 and the Bank returned the earnest money of ₹23.60 Lakhs deposited by respondent No.5.

The final order dt.23.8.2013 passed by DRT-I, Chandigarh in SA 17 of 2012

Taking note of these facts, SA No.17 of 2012 was disposed of on 23.08.2013 by the DRT-I, Chandigarh.

Proceedings before the DRAT, New Delhi initiated by respondent no.5 against the order dt.13.7.2012 of DRT-I, Chandigarh

Before the said final order was passed in the SA, an Appeal was preferred on 22.07.2012 by respondent No.5 before the DRAT, New Delhi

and it passed an order on 14.09.2012 permitting registration of the sale certificate in favour of the petitioners subject to the outcome of the Appeal.

On 24.04.2015, the DRAT, New Delhi passed orders in IA Nos. 451 and 565 of 2012 and 472 of 2014 and 912 of 2014 in Inward No.426 of 2012 setting aside the order dt. 13.07.2012 of the DRT-I, Chandigarh. It observed that the Tribunal was not justified in allowing the petitioners' to purchase the property when there was another party like respondent No.5 who was willing to enter into *inter-se* bidding; that the petitioners had no right to get the property in this manner by simply pleading that they are in occupation of the same; that the Bank had adopted a legal course to sell the property by way of auction; and the Tribunal committed illegality in directing sale of the property in favour of the petitioners just on their asking. It held that the Tribunal had acted beyond its power and jurisdiction and it could not have forfeited the right of the higher bidder (respondent No.5) in the auction. It observed that it was strange that the petitioners would not participate in the auction and wait for the outcome to see the amount offered in the auction and then make a prayer to get the property; that the mode adopted by the Tribunal did not have any sanction of law and appears to have been made to favour the petitioners; that *inter se* bidding would have fetched more amount since the total liability of the borrower was ₹35 Crore and above and it would have lessened the burden of the borrower. It also held that the respondent No.5 ought to have been impleaded in the SA since it was a proper party, if not a necessary party. It set aside the order dt.13.7.2012 of the DRT-I, Chandigarh and directed the respondent No.5 to

be impleaded in the SA if it is also willing to deposit ₹2.40 Crore, and then permit *inter se* bidding with the petitioners.

CWP No. 11486 of 2015 and order dt.26.7.2017 in it.

The petitioners challenged the order dt. 24.04.2015 of the DRAT, New Delhi in this High Court by filing CWP No. 11486 of 2015.

During the pendency of this Writ Petition, respondent No.5 enhanced its bid to ₹3 Crore and also deposited the said amount in this Court.

This Court ultimately decided CWP-11486-2015 on 26.7.2017 held that since the petitioners were not heard by the Appellate Tribunal while remanding the case, and since respondent No.5 stated that it had no objection if the Appellate Tribunal is asked to pass a fresh order, the order dt. 24.04.2015 passed by the DRAT, New Delhi is set aside and the matter is remitted back to it to hear both sides by keeping in view the fact that ₹3 Crore was deposited by respondent No.5 in the High Court and also the fact that the petitioners had been issued a sale certificate.

The subsequent order dt.1.5.2018 of the DRAT, New Delhi

The DRAT, New Delhi numbered the Appeal on remand from this Court as Misc. Appeal No. 469 of 2017.

It allowed the Appeal on 01.05.2018 and set aside the order dt.13.07.2012 passed by the DRT-I, Chandigarh which had directed conferment of ownership rights in respect of the property on the petitioners, and issuance of the sale certificate in their favour. It set aside the sale in favour of the petitioners and directed refund of money paid by them from the Bank.

It remitted the matter back to the DRT to decide the SA afresh since it was previously disposed of as infructuous without going into the merits of the case of petitioners.

As far as the fate of the auction in which the respondent No.5 had submitted its bid is concerned, the DRAT held that it would be open to the Bank to take its own decision in accordance with law.

CWP-21059-2018

Challenging this order, petitioners filed CWP No.21059 of 2018.

Another order dt.25.9.2018 of the DRAT, New Delhi

Alleging that the Bank had not acted upon the directions contained in the order dt. 01.05.2018 to take its own decision regarding the Bid of respondent No.5 made in the auction/tender dt.31.01.2012, the respondent No.5 filed a Misc. Application No.489 of 2018 in Misc. Appeal No.469 of 2017 in the DRAT, New Delhi on 13.06.2018 to execute the said direction.

Initially the DRAT, New Delhi on 24.08.2018 found fault with the Bank for not taking a decision and seeking an adjournment and imposed cost of ₹10,000/-.

Thereafter on 25.09.2018, it disposed of the said Misc. Case No. 489 of 2018.

It observed that for almost 6 months since its order dt.01.05.2018, the Bank had not taken any decision and it's conduct is unfair to the successful bidder who had deposited ₹3 Crore; complete justice would be done by now directing, in exercise its powers under Section 19(25) of the

Recovery of Debts due to Banks and Financial Institutions Act, 1993 read with Section 17 (7) of the SARFAESI Act, 2002 and Rule 22 of the Appellate Tribunal Procedure Rules, that the auction sale in favour of the respondent No.5 be confirmed, and sale certificate be issued to it by the Bank within 4 days, and also pay ₹50,000/- as costs.

CWP No. 26146 of 2018

Petitioners challenged this order in CWP No. 26146 of 2018.

Subsequent events

It is not in dispute that the SA 17 of 2012 was renumbered as SA 144 of 2018 and is pending before the DRT-II, Chandigarh which had adjourned it on 21.04.2022 *sine die* observing that the issue involved in it is *subjudice* in this Court in these two Writ Petitions.

It is also not in dispute that a sale certificate dt.28.9.2018 was also issued to respondent No.5 by the Bank and the property is also registered in its favour.

It is also not in dispute that in the first week of May, 2019 physical possession of the property was taken by respondent No.5.

Contentions of the Petitioners

A. Regarding CWP No. 21059 of 2018

Counsel for petitioners *inter alia* contended as under:

(a) the appeal filed by respondent No.5 before the DRAT, New Delhi was itself not maintainable as respondent No.5 neither has locus standi nor any right to file the said appeal, as it was only a bidder and the sale was not confirmed in its favour.

(b) respondent No.5 cannot be heard in the SA No.17 of 2012, which has been filed by the petitioners, as no application for impleadment had been filed till now by respondent No.5, as rightly held by the DRT, Chandigarh in its order dt. 17.07.2012 (P-18). Once there is no application for impleadment, the Tribunal could not have entertained the appeal filed by respondent No.5.

(c) No application under Order 1 Rule 10 of the CPC was maintainable before DRAT for maintaining appeal by impleadment since no such application was filed before the DRT, Chandigarh.

(d) The issue of maintainability of the appeal as well as of the locus of respondent No.5 to file the appeal has not been decided by DRAT.

(e) The DRAT grossly erred in law in straight away allowing the appeal filed by respondent No.5 without deciding IA No.472 of 2014 as well as IA No.912 of 2014.

(f) Since the earlier order dt. 24.04.2015 (Annexure P-34) passed by DRAT was set aside in its entirety by this Hon'ble Court vide order dt. 26.07.2017 (Annexure P-35), therefore, it was obligatory on the part of DRAT to firstly decide IA No.472 of 2014 as well as IA No.912 of 2014, which in the instant case has not been done.

(g) Factually it has already been proved on record that petitioners are in settled possession of the property in question since 1972, which fact stands further corroborated and proved by the report (Annexure P-16) of Ld. Local Commissioner.

(h) The impugned action of the Bank in putting the property in question to sale cannot be sustained in the eyes of law, being barred by limitation. At the

risk of brevity, it is submitted that the said sale notice is beyond the prescribed period of limitation, as the same has not been issued within the limitation as provided under Section 36 of the SARFAESI Act, 2002.

(i) In terms of Article 62 of the Limitation Act, 1963, the limitation to enforce payment of money secured by mortgage or otherwise charged upon an immoveable property is 12 years and the said limitation period begins to run from the date when the money sued for, becomes due.

In the instant case, the loan amount became due in the year 1992, when the loan account of respondent No.3 and 4 was declared as NPA. Therefore, the very impugned action of the respondent-Bank in auctioning the property in question, cannot be sustained in the eyes of law; and the sale notice is itself illegal and void *ab initio* and therefore, cannot be sustained in the eyes of law.

B. Regarding CWP No. 26146 of 2018

Counsel for petitioners inter alia contended as under:

(a) The application on which the impugned order dt.25.9.2018 has been passed, was/is itself not maintainable, as the same was filed in a decided case. In other words, the appeal of respondent No.5 was decided by DRAT, New Delhi vide its order dt. 01.05.2018 (Annexure P-42) and therefore, for all intents and purposes, the proceedings before DRAT, New Delhi stood culminated and therefore such an application was not maintainable and as such, should not have been entertained by DRAT, Delhi.

(b) There was no prayer by respondent no.5 either in the appeal or in the application in question for issuance of sale certificate in its favour and as

such, there was no occasion either on facts or in law, for the DRAT, Delhi to pass the impugned order.

(c) The DRAT, Delhi has exceeded its jurisdiction in passing the impugned order as it has completely overlooked and brushed aside the crucial fact that the validity of auction notice dated 22.12.2011 (Annexure P-18) is itself a subject matter of SA filed by the petitioners, which is still pending. Therefore, in view of the above fact, the DRAT, Delhi was not at all justified in law to pass the impugned order wherein a specific direction has been issued to issue the sale certificate in favour of respondent no.5.

(d) Once the DRAT, Delhi vide its order dated 01.05.2018 (Annexure P-42) has itself remanded the matter to Hon'ble DRAT, Chandigarh with the directions to decide the SA, filed by the petitioners, on merits, there was no occasion in law for passing the impugned order, which has rendered the aforesaid SA infructuous.

(e) Once the DRAT, Delhi vide its order dated 01.05.2018 (Annexure P-42) has itself issued direction that the fate of the auction in which respondent no.5 has submitted its bid, would be decided by the Bank, there was no occasion in law to modify, alter or review the aforesaid direction.

(f) There was no prayer, whatsoever, by any of the parties before the DRAT, Delhi for reviewing/ modifying of its earlier order dated 01.05.2018 (Annexure P-42). Therefore, there was no occasion in law for the Hon'ble DRAT, Delhi for modifying its earlier order.

(g) The impugned order passed by the DRAT, Delhi is in complete contradiction of its earlier order dt.01.05.2018 (Annexure P-42) and as such, cannot be sustained in the eyes of law. It is submitted that in the earlier order dt. 01.05.2018, the DRAT has directed that the SA of petitioners would be decided on merits and the fate of the auction would be decided by Bank. However, vide impugned order, the Hon'ble DRAT has directed the issuance of sale certificate to respondent no.5, which has rendered the SA infructuous.

Reply of Respondent No.5 in CWP No. 26146 of 2018

It is contended the petitioners have no right, title or interest as well as no locus to file these Writ Petitions since petitioners have never participated in the auction and raised their bid even before this Court while CWP No. 11486 of 2015 was filed.

It was denied that petitioners are in physical possession of the property in question and it is stated that petitioner No.1 had let out the whole property to M/s. M.G. Trading and M/s G.M. Industries by way of two separate rent agreements, and this fact has been concealed by the petitioners in both the Writ Petitions. It is stated that since the date of coming into existence of said two rent agreements, the tenants are in actual possession of the property in dispute measuring 2588 sq. yds and not the petitioners.

It contended that after obtaining order dt. 25.09.2018 (Annexure P-45) from the DRAT, Delhi, respondent No.1-Bank issued sale certificate to respondent No.5 on 28.09.2018 after cancelling/withdrawing the sale certificate dt. 23.07.2012 which was issued in favour of the

petitioners, and directed the petitioners to collect their refund of ₹2.40 Crores.

It is also pleaded that the sale certificate dt. 28.09.2018 issued by the respondent-Bank in favour of respondent No.5 was registered on 05.10.2018, and on the basis of the said sale certificate respondent No.5 got fresh electricity connection.

It is asserted that the tenants left the actual/physical possession of the property on 29.03.2019 in favour of respondent No.5 after coming to know that the petitioners are not the owners of the said property and that respondent No.5 is the registered owner of the property on the basis of the sale certificate.

The counsel for the respondent no.5 supported both the impugned orders challenged in the Writ Petitions and urged that this Court ought not to interfere with these orders in view of the fact that respondent no.5 had paid ₹3 Crores , was issued a sale certificate, it was also registered and possession of the property is also with it.

Stand of the Bank

No reply has been filed by the Bank in both Writ Petitions but the counsel for the Bank supported the stand of the auction purchaser.

Consideration by the Court

Before we consider the contentions of the petitioners in both the Writ Petitions with regard to the correctness of the orders passed by the DRAT, New Delhi on 01.05.2018 and subsequently on 25.09.2018 respectively, we need to examine **what sort of rights are the petitioners claiming in the Writ Petitions *qua* the property in question.**

This issue is important to consider first because **if petitioners have has no right *qua* the property prior to the filing of the SA No.17 of 2012, whether the mere fact that the petitioner No.1, which had not filed its tender to the sale notice dt.22.12.2011, was allowed to bid for the property by the DRT-I, Chandigarh on 13.07.2012 and obtain a sale certificate for ₹2.40 Crore on 23.07.2012 in regard to the property in question, confers any right on the petitioners to get any relief in these Writ Petitions.**

Respondent No.4 was the original owner of the property

Petitioners admit that the property in question was purchased under a registered sale deed dt. 15.10.1971 by the father of respondent No.4 in the name of respondent No.4. **So the owner of the property was respondent no.4.**

Respondent No.4 was not partner in petitioner No.1 firm (as it then was)

No doubt, the petitioner No.1 was initially a firm constituted under a deed of partnership dt. 03.01.1972 doing business in the said property. Though petitioner No.2, brother of respondent No.4 and other family members of respondent No.4 were partners, it is not the case of the petitioners that respondent No.4 was a partner of the petitioner No.1 firm (as it then was).

No material filed to show that property was made property of petitioner no.1 firm

There is no material placed by the petitioners before this Court to show that the subject property became an asset of the petitioner No.1, though the petitioners assert it to have become the property of the firm.

Therefore, at best the possession of the property by the petitioner No.1-firm can only be termed as *permissive possession*, permitted by the respondent No.4, *and not as owner thereof*.

Petitioners do not acquire title to property under the GPAs dt.16.6.1987

Petitioners firstly contended that on 16.06.1987, partners of the petitioner No.1 (which was a firm at that point of time) executed a General Power of Attorneys in favour of petitioner No.2 authorizing him to sell, mortgage, lease or otherwise dispose of the said property. The said Power of Attorneys have been filed alongwith an additional affidavit dt.03.10.2018 by the petitioners as Annexures P-41.

Even these documents do not describe the property in question as an asset of the firm and merely mention it as the place of business of the firm. If it is not the firm's property, the partners cannot be said to have power to authorize its sale by executing the said Power of Attorneys in favour of petitioner No.2.

Moreover, it is settled law that a Power of Attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property.

In *Suraj Lamp & Industries (P) Ltd. (2) v. State of Haryana*¹, the Supreme Court held:

“20. A power of attorney is not an instrument of transfer in regard to any right, title or interest in an immovable property. The power of attorney is creation of an agency whereby the grantor authorises the grantee to do the acts specified therein, on behalf of grantor, which when executed will be binding on the grantor as if done by him (see Section 1-A and Section 2 of the Powers of Attorney Act, 1882). It is revocable or

¹ (2012) 1 SCC 656

terminable at any time unless it is made irrevocable in a manner known to law. Even an irrevocable attorney does not have the effect of transferring title to the grantee.

.....

24. We therefore reiterate that immovable property can be legally and lawfully transferred/conveyed only by a registered deed of conveyance. Transactions of the nature of “GPA sales” or “SA/GPA/will transfers” do not convey title and do not amount to transfer, nor can they be recognised or valid mode of transfer of immovable property. The courts will not treat such transactions as completed or concluded transfers or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognised as deeds of title, except to the limited extent of Section 53-A of the TP Act.”

(Emphasis supplied)

Thus, the plea of petitioners that some right accrued to petitioner No.2 under the said General Power of Attorneys executed by the partners of petitioner No.1-firm on 16.06.1987, cannot be accepted.

There is no proof of relinquishment of ownership in favor of petitioner no.2 by respondent no.4

Next it is contended by petitioners that respondent No.4 relinquished his right in the property after taking due consideration from petitioner No.2.

No date of such relinquishment, nor any deed by which such relinquishment is said to have been done, has been filed by the petitioners.

Without executing a registered relinquishment deed as mandated by Section 17(1) (b) of the Registration Act,1908 , the right, title and interest of respondent No.4 cannot be said to have been transferred in favour of petitioner No.2.

Mere long possession of petitioners of the property does not create any right in it in favor of petitioners

No doubt the petitioners were in possession of the property for a long time from 03.01.1972 till at least 14.02.2012 as found by the Local Commissioner in his report dt.14.02.2012 appointed by the DRT-I, Chandigarh in its order dt.30.01.2012).

But even the said report shows that the petitioners had granted a lease on 28.03.1996 to M/s. MRF Tyres Ltd. which appears to have been renewed on 01.04.2018.

But the actual physical possession by petitioners is in fact disputed by respondent No.5 in its reply filed in CWP No. 26146 of 2018.

Be that as it may, it is settled law that mere long possession *without anything more* would not create title in the person in possession *qua* the property of which he is in possession.

In ***Deva v. Sajjan Kumar***², the Supreme Court declared:

“12).....Mere long possession of the defendant for a period of more than 12 years without intention to possess the suit land adversely to the title of the plaintiff and to the latter’s knowledge cannot result in acquisition of title by the defendant to the encroached suit land.”

In the course of oral submissions, petitioners’ counsel raised a plea of adverse possession of the petitioners *qua* the property.

No doubt in para T of the SA 17 of 2012 there is a plea of Adverse possession. It is stated therein that *“applicants are entitled to keep the possession of the property on the basis of adverse possession and the respondents are not entitled to dispossess the applicants from the property in any manner without due course of law.”*

² (2003) 7 SCC 481

But the basis on which the plea of adverse possession is being raised is not indicated. Merely to protect the petitioners' possession against forceful dispossession, this plea seems to have been raised.

Counsel for petitioners next contended that respondent No.4 had filed a Civil Suit on 7.10.2009 before the Civil Judge, Senior Division, Jagadhari for eviction of the petitioners, mesne profits etc., that in the said suit it was alleged that petitioner No.2 was a licensee, and that the said suit was dismissed for default. So from the date of filing of such proceeding, adverse possession commenced. *But no such plea is raised in the Writ petitions.* Without even a plea of adverse possession in the pleadings, petitioners cannot be permitted to make such submissions.

Even so, if possession became adverse on 7.10.2009, by the date of the sale i.e., 31.1.2012, the twelve year period to make it adverse does not get completed. Also once the SA was filed the adverse possession stops.

We are also of the view that, having specifically pleaded acquisition of title under General Power of Attorneys and relinquishment, it is not open to the petitioners to take the plea of adverse possession. This is because both pleas are mutually inconsistent.

In *Arundhati Mishra (Smt) v. Sri Ram Charitra Pandey*³, the Supreme Court held:

“ 4.The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. It is his own case that he came into possession of the suit house in his own right and remained in possession as an owner. The appellant is only

³ (1994) 2 SCC 29, at page 31

benamidar. Therefore, his plea is based on his own title. He never denounced his title nor admitted the title of the appellant. He never renounced his character as an owner asserting adverse possession openly to the knowledge of the appellant and the appellant's acquiescence to it. Thereafter, he remained in open and peaceful possession and enjoyment to the knowledge of the appellant without acknowledging/or acquiescing the right, title and interest of the appellant. The plea of adverse possession, though available to the respondent, was never raised by him. Only on receipt of the first notice he denied title of the appellant and made it known to him for the first time through the reply notice got issued by him. Even then the plea of adverse possession was not raised in the written statement. No explanation for the belated plea was given. Even assuming that the reply dated March 15, 1971 constitutes assertion of adverse possession, the limitation would start running against the appellant only from March 15, 1971 and not earlier. The suit was filed in 1978 within 12 years. Under these circumstances, the High Court is not justified in permitting the respondent to raise the plea of adverse possession."

Similar view was taken by it in ***L.N. Aswathama v. P. Prakash***⁴

and it was held:

*"To establish a claim of title by prescription, that is, adverse possession for 12 years or more, the possession of the claimant must be physical/actual, exclusive, open, uninterrupted, notorious and hostile to the true owner for a period exceeding twelve years. It is also well settled that long and continuous possession by itself would not constitute adverse possession if it was either permissive possession or possession without animus possidendi. The pleas based on title and adverse possession are mutually inconsistent and the latter does not begin to operate until the former is renounced. Unless the person possessing the property has the requisite animus to possess the property hostile to the title of the true owner, the period for prescription will not commence. (Vide **P. Periasami v. P. Periathambi**², **Md. Mohammad Ali v. Jagadish Kalita**³ and **P.T. Munichikkanna Reddy v. Revamma**⁴.)"*

Thus, the petitioners have failed to establish that they have any right, title or interest in the property in question.

⁴ (2009) 13 SCC 229

The decisions cited by the counsel for the petitioners in *Vishal N. Kalsaria Vs. Bank of India*⁵ and *Bajarang Shyamsunder Agarwal Vs. Central Bank of India and Another*⁶ are cases relating to persons claiming tenancy rights in respect of secured assets mortgaged to Banks, and have no application to the instant case.

Petitioners cannot contend that the recovery through sale by the Bank is barred by limitation

The petitioners are neither the borrowers of the loan from respondent No.1-Bank, nor are they guarantors to it. They are also not owners of the property and are merely persons in permissive possession of the same for some time.

They are therefore precluded from raising any pleas which are available to an owner of the property such as :

- (a) plea that sale notice dt.22.12.2011 issued by the Bank is beyond the period of limitation prescribed under Section 36 of the SARFAESI Act, 2002 or
- (b) that Article 62 of the Limitation Act, 1963 bars the said action on the basis that the loan amount of respondent No.3 became due in 1992 and the sale was to be held on 31.1.2012.

Such pleas can only be raised by borrowers/guarantors or like interested persons in the secured asset and none else.

Petitioner also cannot contend that sale notice cannot be issued without actual physical possession being taken by the secured creditor/Bank

Admittedly, the Bank had an equitable mortgage over the property created by respondent no.4 for the loan granted by it to respondent

⁵ 2016 (3) SCC 762

⁶ 2019 (9) SCC 94

no.3. It had issued notices under sec.13(2) and Sec.13(4) of the SARFAESI Act,2002 on 7.2.2011 and 9.11.2011 respectively and thereafter issued a sale notice on 22.12.2011 proposing to put the property in question to sale by way of tender to recover more than ₹35 Crores owed to it by respondent No.3. This procedure is in conformity with the SARFAESI Act,2002.

The notice issued under Sec.13(4) clearly mentioned that the Bank had taken “possession (symbolic)” of the property.

The plea of the petitioners that without actual physical possession of the property being taken, sale cannot be held, cannot be accepted. No such provision is contained in the SARFAESI Act,2002. If after following procedure in Rule 8(1) and Rule 8(2) of the Security Interest (enforcement) rules, the Bank is not able to get possession of the property, it can approach the District Magistrate under Sec.14 and get actual physical possession, which it can later hand over to the auction purchaser.

In *Hindon Forge (P) Ltd. v. State of U.P.*⁷, the Supreme Court rejected a similar argument that a lease cannot be granted or a sale cannot be held by a secured creditor without actual physical possession being taken. It held:

“25. When we come to Section 13(4)(a), what is clear is that the mode of taking possession of the secured assets of the borrower is specified by Rule 8. Under Section 38 of the Act, the Central Government may make rules to carry out the provisions of the Act. One such rule is Rule 8. Rule 8(1) makes it clear that “the authorised officer shall take or cause to be taken possession”. The expression “cause to be taken” only means that the authorised officer need not himself take possession, but may, for example, appoint an agent to do so. What is important is that such taking of

⁷ (2019) 2 SCC 198

possession is effected under sub-rule (1) of Rule 8 by delivering a possession notice prepared in accordance with Appendix IV of the 2002 Rules, and by affixing such notice on the outer door or other conspicuous place of the property concerned. Under sub-rule (2), such notice shall also be published within 7 days from the date of such taking of possession in two leading newspapers, one in the vernacular language having sufficient circulation in the locality. This is for the reason that when we come to Appendix IV, the borrower in particular, and the public in general is cautioned by the said possession notice not to deal with the property as possession of the said property has been taken. This is for the reason that, from this stage on, the secured asset is liable to be sold to realise the debt owed, and title in the asset divested from the borrower and complete title given to the purchaser, as is mentioned in Section 13(6) of the Act. There is, thus, a radical change in the borrower dealing with the secured asset from this stage. At the stage of a Section 13(2) notice, Section 13(13) interdicts the borrower from transferring the secured asset (otherwise than in the ordinary course of his business) without prior written consent of the secured creditor. But once a possession notice is given under Rules 8(1) and 8(2) by the secured creditor to the borrower, the borrower cannot deal with the secured asset at all as all further steps to realise the same are to be taken by the secured creditor under the 2002 Rules.

... ..

“32. Another argument that was raised by the learned Senior Counsel for the respondents is that the taking of possession under Section 13(4)(a) must mean actual physical possession or otherwise, no transfer by way of lease can be made as possession of the secured asset would continue to be with the borrower when only symbolic possession is taken. This argument also must be rejected for the reason that what is referred to in Section 13(4)(a) is the right to transfer by way of lease for realising the secured asset. One way of realising the secured asset is when physical possession is taken over and a lease of the same is made to a third party. When possession is taken under Rules 8(1) and 8(2), the asset can be realised by way of assignment or sale, as has been held by us hereinabove. This being the case, it is clear that the right to transfer could be by way of lease, assignment or sale, depending upon which mode of transfer the secured creditor chooses for realising the secured asset. Also, the right to transfer by way of assignment or sale can only be exercised in accordance with

Rules 8 and 9 of the 2002 Rules which require various preconditions to be met before sale or assignment can be effected. Equally, transfer by way of lease can be done in future in cases where actual physical possession is taken of the secured asset after possession is taken under Rules 8(1) and 8(2) at a future point in time. If no such actual physical possession is taken, the right to transfer by way of assignment or sale for realising the secured asset continues. This argument must also, therefore, be rejected.

(emphasis supplied)

RE : Other contentions

Only respondent No.5 gave a bid in response thereto by offering ₹2.40 Crores on 30.01.2012, and **admittedly the petitioners did not file any bid in response to the sale notice.**

But they filed SA No.17 of 2012 under Section 17 of the SARFAESI Act, 2002 pleading continuous possession of the property since 1972 and sought to set aside the sale notice dt.22.12.2011 and to protect their possession from forcible eviction by respondent No.1-Bank and also to restrain it from selling it.

While they may be entitled to file the SA as “*any person aggrieved by any of the measures referred to in Sub-Section (4) of Section 13*” [as per Sec.17(1)], they are not entitled to any substantial relief therein because their plea of acquisition of title to the property under the General Power of Attorneys dt. 16.06.1987 and alternatively under relinquishment by respondent No.4, could not have been accepted, as held above. Even the plea of adverse possession raised in Para T thereof cannot be accepted being inconsistent with their plea of title.

When such substantial relief in the main SA itself could not have been granted on the basis of the pleadings raised therein, *can any relief*

be granted to the petitioners in the SA on the basis of being allowed to make an offer to purchase the property in question pending the SA?

We think not.

The petitioners cannot be allowed to take advantage of the order passed by DRT-I, Chandigarh on 13.07.2012 *pending* SA No.17 of 2012 permitting petitioners to deposit ₹2.40 Crores and obtaining a sale certificate on 23.07.2012, without even making a bid in response to the sale notice dt. 22.12.2011 issued by respondent No.1-Bank.

The DRAT, New Delhi entertained the Appeal on 14.09.2012 against the said order at the instance of respondent No.5, and directed that registration of sale certificate would be subject to the outcome of the Appeal.

In the meantime, on 23.08.2013, the DRT-I, Chandigarh disposed of the SA 17 of 2012 as infructuous.

Ultimately on 24.04.2015, the DRAT, New Delhi permitted the respondent No.5 to prosecute the Appeal, though it was not a party in the SA taking note of the fact that respondent No.5 wanted to deposit ₹2.40 Crores quoted by it in its bid and remanded the matter back to the DRT-I, Chandigarh by setting aside the order dt. 13.07.2012 passed by the latter.

This Court in CWP No. 11486 of 2015 interfered with the said order on the ground that the petitioners were not heard by the DRAT, New Delhi after taking note of the fact that respondent No.5 had enhanced its bid to ₹3 Crores and also deposited it and then remitted the matter back to the DRAT, New Delhi to decide it.

The reasons given by the DRAT, New Delhi in its order dt.1.5.2018 are correct

Thereafter, on 01.05.2018, the DRAT, New Delhi allowed the Appeal MA No.469 of 2017, set aside the order dt. 13.07.2012 of DRT-I, Chandigarh which had directed conferment of ownership rights in respect of the property in question upon the petitioners, and issuance of a sale certificate in their favour, and also set aside the sale of the property in their favour. It directed the Bank to refund their money. It also held that the DRT should have decided the SA which it had merely disposed of as infructuous vide its order dt.23.08.2013.

The DRAT, New Delhi, in our opinion, rightly held that when the bid contained in the sealed envelope submitted by respondent No.5 were permitted to be opened by the DRT-I, Chandigarh vide its order dt. 24.05.2012 in IA 608 of 2012 in SA 17 of 2012, the petitioners and the entire world came to know that respondent No.5 had submitted its bid for ₹2.4 Crores, and only then the petitioners offered to purchase the mortgaged property for the same price, and the Tribunal erroneously permitted them to purchase and directed issuance of a sale certificate to the petitioners.

The DRAT in our opinion rightly held that such kind of discretion exercised by the DRT shocks the judicial conscience; that the DRT was not justified in ordering the production of the sealed tender before it particularly after it itself had earlier permitted the Bank to go ahead with auction of the secured asset; that in case the DRT decided to do that, the respondent No.5 became entitled to intervene in the SA on account of the said action of the DRT; and the DRT was not even listening to respondent No.5, the sole bidder.

It also held that respondent No.5 had no forum to approach for opposing any move by anyone to have its bid rejected; and it was not proper to the DRT to take upon itself the task of deciding the fate of the bid submitted by respondent No.5 particularly when nobody had raised any doubts about the genuineness of the bidding process adopted by respondent-Bank.

It also held that such directions of the DRT are perverse and they had to be set aside at the instance of respondent No.5 in exercise of supervisory jurisdiction which the Chairperson of DRAT exercises over DRTs.

It observed that the petitioners, who have come to DRT to save their possession, were given ownership of the property in question without there being any adjudication of any kind by the DRT; that the direction given at the interim stage for issuance of sale certificate in favour of the petitioners was totally without jurisdiction and such relief could not have been given to the petitioners even after the full trial since all that they had claimed in the SA was that they could not be dispossessed from the property in their occupation by the Bank to recover its alleged outstanding dues from its defaulting borrower/mortgagor.

It also held that the DRT could not have dispensed with the requirement of holding of an enquiry into the alleged grievances of the petitioners/security applicants in the SA and straightaway conferred upon them any relief which could be granted only after the returning a finding that measures initiated by the Bank under SARFAESI Act, 2002 were illegal and suffering from any infirmity.

It held that when no such finding was returned by the Presiding Officer of the DRT, he could not have granted a totally unmerited relief to the petitioners at the interim stage and subsequently disposing of the SA as infructuous.

We completely agree with the above reasons given by the DRAT and hold that without finding any infirmity in the bid process, no relief could not have granted in favour of the petitioners by the DRT particularly when their only claim was to protect their possession over the property in question on the basis of their long possession.

The contention of petitioners is that a bidder in an auction like respondent no.5 has no vested right in the property till the auction sale is confirmed in it's favor and cannot compel the bank to accept it's bid and confirm the sale in it's favor.

But where the SA is not filed by a borrower/guarantor, but by a third party who has no right, title or interest in the secured asset, and who, without giving a sealed bid in response to sale notice dt.22.12.2011, challenges the proposed sale, and the sealed cover containing the respondent no.5's bid is opened after filing of SA by an order of the DRT, and it's bid is rejected, in our opinion, it has a right to get impleaded before the DRT and challenge the actions of the DRT also before the DRAT as a "person aggrieved".

We are also of the view that the DRT was not justified in ordering the production of the sealed tender before it particularly after it itself had earlier permitted the Bank to go ahead with auction of the secured asset; and once it had done it, the respondent No.5 became entitled to

intervene in the SA on account of the said action of the DRT. As rightly held by the DRAT, the respondent No.5 had no forum to approach for opposing any move by anyone to have its bid rejected; and it was not proper to the DRT to take upon itself the task of deciding the fate of the bid submitted by respondent No.5 particularly when nobody had raised any doubts about the genuineness of the bidding process adopted by respondent-Bank.

Though the matter was remitted back by the DRAT, Delhi again to the DRT, Chandigarh, to decide the SA, since we have already dealt with the issues about the right, title and interest of the petitioners *qua* the property in question, there is no necessity for the SA to be decided again on merits by the DRT-I, Chandigarh. This is also because of the fact that the possession of the property in question is no longer with the petitioners and the relief of protection of their possession has therefore been rendered infructuous. This modification, this Court is entitled to do in its power to mould relief as held in *M.Sudhakaran vs. V.Manoharan*⁸ and *Food Corporation of India vs. S.Nagarkar*⁹.

Therefore, SA 144 of 2018 (previously SA 17 of 2012) pending before the DRT-II, Chandigarh is dismissed.

CWP No. 21459 of 2018 is dismissed with costs of ₹ 25,000/- to be paid by the petitioners to respondent No.5 within 4 weeks. However the respondent No.1 bank shall refund to the petitioners, if not already done, the amount of ₹2.40 Cr deposited by petitioners with 6% interest from the date of such deposit till 28.9.2018. Such refund shall be made to the petitioners within 4 weeks.

⁸ 2011 (1) SCC 484

⁹ (2002) 2 SCC 475

CWP-26146-2018

Coming to CWP-26146-2018, no doubt the actions of the DRAT, New Delhi in

(a) the entertainment of the application bearing Misc. Case No.489/2018 filed by respondent No.5 after it passed the order dt.01.05.2018 in Misc. Appeal No.469/2017, for implementation of the directions contained in it as to fate of auction in which respondent No.5 submitted it's bid,

and

(b) passing of the order dt. 25.09.2018 by it therein directing confirmation of the sale in favour of the respondent No.5 and issuing sale certificate and registering the sale

are unusual and may be even improper since it would practically amount to reviewing it's previous order dt. 01.05.2018 and also rendering the SA infructuous, we are not inclined to interfere with the same for the reason that we are satisfied that substantial justice has been done in the matter, and it is not necessary in the interest of justice to interfere with both the said actions or the order dt. 25.09.2018 passed by the DRAT, New Delhi or to grant any relief to the petitioners in the Writ Petition.

In ***Ramesh Chandra Sankla v. Vikram Cement***¹⁰, the Supreme Court held that jurisdiction of the High Courts is discretionary and equitable to meet the ends of justice. It followed it's decision in ***Roshan Deen Vs. Preeti Lal***¹¹ where it was held that the lookout of the High Court is not merely to pick out any error of law through an academic angle, but to see

¹⁰ (2008) 14 SCC 58

¹¹ (2002) 1 SCC 100

whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous view of law, the High Court is not expected to erase such justice in the name of correcting the error of law. It held:

*“90. Now, it is well settled that jurisdiction of the High Courts under Articles 226 and 227 is discretionary and equitable. Before more than half a century, the High Court of Allahabad in the leading case of **Jodhey v. State**¹² observed: (AIR p. 792, para 10)*

“10. ... There are no limits, fetters or restrictions placed on this power of superintendence in this clause and the purpose of this article seems to be to make the High Court the custodian of all justice within the territorial limits of its jurisdiction and to arm it with a weapon that could be wielded for the purpose of seeing that justice is meted out fairly and properly by the bodies mentioned therein.”

(emphasis supplied)

91. The power of superintendence under Article 227 of the Constitution conferred on every High Court over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction is very wide and discretionary in nature. It can be exercised ex debito justitiae i.e. to meet the ends of justice. It is equitable in nature. While exercising supervisory jurisdiction, a High Court not only acts as a court of law but also as a court of equity. It is, therefore, power and also the duty of the Court to ensure that power of superintendence must “advance the ends of justice and uproot injustice”.

*92. In **Roshan Deen v. Preeti Lal**, dealing with an order passed by the High Court setting aside an order of the Commissioner for Workmen’s Compensation, this Court stated: (SCC p. 106, para 12)*

*“12. ... Time and again this Court has reminded that the power conferred on the High Court under Articles 226 and 227 of the Constitution is to advance justice and not to thwart it (vide **State of U.P. v. District Judge, Unnao**¹³). The very purpose of such constitutional powers being conferred on the High Courts is that no man should be subjected to injustice by violating the law. The lookout of the High Court is, therefore, not merely to pick out any error of law through an academic angle but to see whether injustice has resulted on account of any erroneous interpretation of law. If justice became the by-product of an erroneous*

¹² AIR 1952 All. 788

¹³ (1984) 2 SCC 673

view of law the High Court is not expected to erase such justice in the name of correcting the error of law.”

Therefore, CWP No. 26146 of 2018 is also dismissed.

In the result:

- (i) CWP No. 21059 of 2018 is dismissed with costs of ₹25,000/- to be paid by the petitioners to respondent No.5 within 4 weeks. However the respondent No.1 bank shall refund to the petitioners, if not already done, the amount of ₹2.40 Cr deposited by petitioners with 6% interest from the date of such deposit till 28.9.2018. Such refund shall be made to the petitioners within 4 weeks.
- (ii) CWP No. 26146 of 2018 is dismissed. No costs.
- (iii) SA No.144 of 2018 (previously SA No.17 of 2012) pending before the DRT-II, Chandigarh stands dismissed.

Pending application(s), if any, shall stands disposed of.

(M.S. RAMACHANDRA RAO)
JUDGE

12 .10.2022
Ess Kay

(HARMINDER SINGH MADAN)
JUDGE

- | | | |
|-------------------------------|---|--------|
| 1. Whether speaking/reasoned? | : | Yes/No |
| 2. Whether reportable? | : | Yes/No |