OD-7

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
ORIGINAL SIDE

WPO /580/2024

SRI DIN DAYAL KAYAN
VS
CANARA BANK AND ANR.

BEFORE:
The Hon'ble JUSTICE SHAMPA SARKAR
Date : 9th July, 2024

Appearance:
Mr. Jaydip Kar, Sr. Adv.
Mr. Avirup Chatterjee, Adv.
Mr. Rishov Das, Adv.
...for the petitioner

Ms. A. Rao, Adv.
Ms. S. Roy, Adv.
...for the respondents

1. The Court: The writ petition has been filed, inter alia, challenging the communication dated May 13, 2024, of the respondent no. 2 in his capacity as the authorised officer of the respondent no. 1 bank, The communication was a notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (in short, SARFAESI Act). It is contended by Mr. Kar, learned Senior

Advocate that the purported notice under section 13(2) of the Act had been issued almost after 19 years from the date when the loan account of the petitioner had been declared NPA, i.e., January 1, 1985. Section 36 of the SARFAESI Act, 2002 provides that no steps under Section 13(4) of the said Act can be taken after the period of limitation prescribed under the Limitation Act. Article 62 of the Limitation Act provides that to enforce payment of money secured by a mortgagee or otherwise charged upon the immovable property, the suit or the proceeding has to be initiated within 12 years from when the money sued for becomes due. Thus, the notice should have been issued within January 1, 1997.

2. Reference is made to the decision of this Court in the matter of *Dr. Dipankar Chakraborty vs. Allahabad Bank & Ors.* reported in AIR 2017 Cal 289. A proceeding under the SARFAESI Act cannot be initiated beyond the period provided under Article 62 of the Limitation Act.

3. The relevant portion of the said decision is quoted below:

> *"15. In the facts of the present case, the petitioner has not contended that, the claim made by the secured creditor before the Debts Recovery Tribunal under Section 19 of the Act of 1993 is barred by the laws of limitation. In any event, the issue of limitation of the*

proceedings under Act of 1993 is an issue which is to be decided by the Debts Recovery Tribunal before which such proceedings are pending. A Writ Court in a collateral proceeding is not required to answer such an issue. Such an issue also does not fall for consideration in the present case. Rather the issue as to whether the lodging of the proceedings under Section 19 of the Act of 1993 continues the period of limitation, or in other words, stops the running of the period of limitation on and from the date of lodging of such proceedings has arisen for consideration in the present case.

16. The issue of limitation in the context of Section 36 of the Act of 2002 was looked at and considered in Somnath Manocha (supra). The Division Bench of the Delhi High Court in Somnath Manocha (supra) has held that,

"15. The requirement of <u>Section 36</u> is that the claim in respect of "financial asset" is made within the period of limitation prescribed under the <u>Limitation Act. Claim in respect of</u> "financial asset" is defined as defined by <u>Section 29(1)</u> of the SARFAESI Act means debt of receivables and includes a claim to any debt or

receivables or part thereof, whether secured or unsecured, and also any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent. Section 2(1)(t) which defines "property" is also relevant. The definition reads as under:

"(t) "property" means –

(i) immovable property;

(ii) movable property;

(iii) any debt or any right to receive payment of money, whether secured or unsecured;

(iv) receivables, whether existing or future;

(v) intangible assets, being know-how, patent, copyright, trade mark, licence , franchise or any other business or commercial right of similar nature;"

16. So far as good. The question is as to whether in the facts of this case, the claim had become time barred. The property in question is mortgaged with the bank. However, the bank did not file Suit for recovery under Order XXXIV of the CPC. Instead, in para 17 of the plaint, specific averment was made that it was not *claiming any relief against the mortgaged immovable property in the said suit and right was reserved to proceed against the said mortgaged property as provided under provisions of Order XXXIV Rule 14 of the CPC.*

17. It could not be disputed that under ordinary law, the respondent bank has lost the remedy of enforcing the aforesaid security by way of mortgage as limitation of 12 years as provided in Article 62 of the Schedule to the Limitation Act, 1963 has expired. The bank chose to file only a suit for recovery of money and in spite of averment made in Para 17 of the plaint, it did not file any suit under Order XXXIV of the CPC. No doubt, in terms of order XXXIV Rule 14, the bank was entitled to bring the mortgaged property to sale by instituting a suit for sale in enforcement of the mortgage whereafter obtaining a decree for payment of money, in satisfaction of the claim under mortgage. However, such a suit could be filed within the period of limitation prescribed under Article 62 in the Schedule to the Limitation Act. Thus, under the ordinary law, the bank is precluded from filing a mortgage suit in respect of the aforesaid *property.*

18. Thus, on the date of notice under Section 13(2) of SARFAESI Act, there was no such existing or subsisting right qua mortgage. We agree with the contention of the appellant that the remedy provided under SARFAESI Act is simply a new means of enforcing a pre-existing right, i.e. one that existed before the SARFAESI Act came into existence. That remedy is the right to sell a mortgage property and recover the sum which it secures from the sale proceeds. In the present case, since the right to file a suit or proceedings stood extinguished, the SAREAESI Act would not revive this extinguished claim.

19. Position would have been different if the bank had filed mortgage suit and such a suit was pending. In Ivee Injectaa Ltd. (supra), mortgage suit has already been filed and therefore, claim for enforcing mortgage rights was subsisting as it was pending adjudication. If the period of 12 years had not expired under Article 62 in the Schedule to the Limitation Act and there was still time to file the proceedings of mortgage suit even that would have saved the right of the Bank to enforce the provision of SARFAESI. But even that action has become *time barred. In the facts of this case, we hold that the claim is barred under Section 36 of SARFAESI Act and therefore, it was not open to the bank to proceed under this Act. We, thus, allow this appeal and quash the impugned notice under Section 13(2) and 13(4) of SARFAESI Act issued by the bank."*

4. In this case the notice under Section 13 (2) was issued after 19 years from declaration of the account as NPA. If the law bars a notice under Section 13 (4) beyond 12 years from declaration of the account as NPA, in that event a notice under Section 13 (2) which precedes a notice under Section 13 (4) cannot be issued beyond 12 years.

5. Section 36 of the SARFAESI Act is quoted below:-

> **"36.** No secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963)."

6. Article 62 of the Limitation Act is quoted below:-

Description of suit	Period of limitation	Time from which period begins to run
62. To enforce payment of money secured by a mortgage or otherwise charged upon immovable property."	Twelve years	When the money sued for becomes due.

7. The proceeding under the SARFAESI Act is enforcement of a right to sell a mortgaged property and recover the sum which it secures from the sale proceeds. A writ petition can be entertained as the petitioner cannot approach the Tribunal due to the bar in the proviso to Section 13 (3A) of the SARFAESI Act.

8. The bank had already filed a suit in 1985 in the court of the Civil Judge at Agra, being Original Suit No. 75 of 1985. The said suit was transferred to the Debts Recovery Tribunal, Agra. The suit was registered as TA 7 of 2024. The learned Advocate for the bank submits that the earlier notice under section 13(2) of the SARFAESI Act was challenged by the petitioner before the Debts Recovery Tribunal. The petitioner should avail of the same remedy. An appeal challenging the order of the Tribunal is pending. This Court refrains from making any observation with regard to the earlier proceeding. The impugned notice under section 13(2) of the SARFAESI Act is barred under Section 36 of the SARFAESI Act and Article 62 of the Schedule of the Limitation Act, 1963. The decision in *Dr. Dipankar Chakraborty vs. Allahabad Bank & Ors.* (supra) is in favour of setting aside the impugned notice. The impugned notice is set aside. The suit which has been filed by the bank shall continue in accordance with law and the bank is at liberty to proceed in the suit by taking necessary steps to realise the debt in

accordance with law.

Accordingly, WPO/580/2024 is disposed of.

All parties are to act on the server copy of this order.

(SHAMPA SARKAR, J.)

sg/kc.