*Civil Revision*

Present : **The Hon'ble Justice Harish Tandon.**

Judgment on : 06.10.2010

**C.O. No. 3284 of 2007.**

**State Bank of India**
**-vs-**
**Sri Mrinal Sarkar & Anr.**

Point:
BAR OF CIVIL COURT: Action under section 13(4) of the SARFAESI Act- Civil Court whether entertain the same-Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 S.34

**Facts:**

The petitioner bank granted a cash credit facility of Rs. 5,00,000/- to the opposite party no. 1 being the principal borrower for running business, against a hypothecation of stocks and other collateral securities. The opposite party no. 2 stood as a guarantor. In addition to such hypothecation of stocks the opposite parties executed Demand Promissory Note of Rs. 5,00,000/- and other documents. The principal borrower failed to repay the interest as well as the principal amount The petitioner bank ultimately recalled the said loan and made a demand of the principal amount together with an accrued interest During the pendency of the said suit the petitioner bank issued a notice to the opposite parties under section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 After the expiration of the statutory period as contemplated under section 13(2) of the SARFAESI Act, the petitioner bank took steps under

section 13(4) of the SARFAESI Act and took physical possession of the property mentioned in the Schedule B to the plaint.The opposite parties thereafter filed an application under section 151 of the Code of Civil Procedure challenging the said steps of the petitioner bank on the pretext that such physical possession has been taken in gross violation of provisions contained in the SARFAESI Act. The court below allowed the said application and directed the petitioner bank to revert back the physical possession to the opposite parties at once. Challenging the said order the petitioner bank has filed instant revisional application

Held:

Section 34 of the SARFAESI Act expressly and by its intendment have ousted the jurisdiction of the Civil Court. Civil Court therefore has no power to decide or determine or to pass any order touching the action taken by a secured creditor under the SARFAESI Act. Para-13

The petitioner bank having resorted an action under section 13(4) of the SARFAESI Act the remedy of the person aggrieved by such act is provided under section 17 of the said Act. Since the jurisdiction of the Civil Court has been expressly ousted under section 34 of the SARFAESI Act, any order passed by the Civil Court touching the action of the secured creditor under the SARFAESI Act is illegal, without jurisdiction and cannot be allowed to sustain. In the case in hand the court below allowed the said application under section 151 filed by the opposite parties directing the petitioner bank to revert back the possession and/or hand over the possession back to the opposite party though such possession has been taken by taking recourse to section 13(4) of the SARFAESI Act. Such an order cannot be sustained in view of an ouster clause embodied under section 34 of the SARFAESI Act. Paras- 14 & 15

For the petitioner : Mr. Kamalesh Jha

For the Opposite Party : None appears

The Court:
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In spite of service none appears on behalf of the opposite party.

2. This revisional application is directed against an order dated July 19, 2007 passed by the Civil Judge (Senior Division) Ranaghat, Nadia in Title Suit No. 19 of 2005.

3. Briefly stated the facts, the petitioner bank granted a cash credit facility of Rs. 5,00,000/- to the opposite party no. 1 being the principal borrower for running business, against a hypothecation of stocks and other collateral securities. The opposite party no. 2 stood as a guarantor. In addition to such hypothecation of stocks the opposite parties executed Demand Promissory Note of Rs. 5,00,000/- and other documents.

4. The principal borrower failed to repay the interest as well as the principal amount despite several request made by the petitioner bank. The petitioner bank ultimately recalled the said loan and made a demand of the principal amount together with an accrued interest thereupon which was duly crystallized as on the date of filing of Title Suit no. 19 of 2005 to Rs. 5,71,377.23.

5. During the pendency of the said suit the petitioner bank issued a notice on March 5, 2007 to the opposite parties under section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (hereinafter termed as SARFAESI Act).

6. The opposite parties, having received the said notice issued under section 13(2) of the SARFAESI Act by the petitioner bank, did not take steps for repayments of the demanded amount. After the expiration of the statutory period as contemplated under section 13(2) of the SARFAESI Act, the petitioner bank took steps under section 13(4) of the SARFAESI Act and took physical possession of the property mentioned in the Schedule B to the plaint.

7. The opposite parties thereafter filed an application under section 151 of the Code of Civil Procedure challenging the said steps of the petitioner bank on the pretext that such physical possession has been taken in gross violation of provisions contained in the SARFAESI Act. The court below allowed the said application and directed the petitioner bank to revert back the physical possession to the opposite parties at once. What really weighs the court below was that there was no compliance of the provision contained in the SARFAESI Act.

8. Challenging the said order the petitioner bank has filed instant revisional application. Mr. Kamalesh Jha, learned Advocate appearing on behalf of the petitioner bank submits that the court below do not have any jurisdiction to question any steps taken under the SARFAESI Act as an embargo is created under the said Act upon the Civil Court to interfere.

9. Having considered the submission made by the learned Advocate appearing on behalf of the petitioner bank and to scrutinize the same it is necessary to refer the following provisions of the SARFAESI Act.

**“13. Enforcement of security interest. –** (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 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 installment 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 sub-section (4).

(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 in sub-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 lese, 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 such business of the borrower which is relatable to the security or the debt;

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

(d) require at any tine 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.

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**14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. –** (1) where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him –

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate of the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

**17. Right to Appeal. -** (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, 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 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 subsection (1) of section 17.]

(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 business of the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and 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.

(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 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 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 the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 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)."

10. On a meaningful reading of the various sections of the SARFAESI Act as quoted above it is apparent that the said Act basically deals with a liability which crystallized the asset which at one point of time was sufficient to cater the entire loan becomes non-performing asset by passage of time which is nothing but a cost to an economy. If it is found that the borrower makes a default in repayment of the secured debt which is classified as non-performing asset then the secured creditor may require to give written notice to the borrower to liquidate its liabilities within the stipulated period as envisaged under section 13(2) of the SARFAESI Act. The intendment of the legislature to provide such time is to give another opportunity to the borrower as the secured asset has been

classified as non-performing asset. It is, in effect, communicated to the borrower that his asset has become doubtful substandard and at a loss.

11. By inserting section 13 (3A) to the SARFAESI Act an opportunity has been given to the borrower to object to the liability as well as against the classification of his account as non-performing asset the secured creditor is bound to communicate to the borrower of his decision for acceptance or non-acceptance of the representation and/or objection by giving reasons. The next step which the secured creditor is entitled to take possession of the secured asset or to take management of the business of the borrower or to appoint manager to administer the secured asset or any person who has acquired any secured asset from the borrower in order to liquidate the secured debt to the secured creditor. The point which emerges for consideration is whether the secured creditor having initiated a suit before the Civil Court for recovery of the dues, can take recourse to the SARFAESI Act during the pendency of the said suit. The answer to such question can be had from a judgment of the supreme Court in case of **Transcore Vs. Union of India & anr.** reported in **(2008) 1 SCC 125** in the following terms :

> "59. The heart of the matter is that the NPA Act proceeds on the basis that an interest in the asset pledged or mortgaged with the Bank or FI is created in favour of the bank/FI; that the borrower has become a debtor, his liability has crystallised and that his account with the bank/FI (which is an asset with the bank/FI) has become substandard.
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> 60. Value of an asset in an inflationary economy is discounted by "time" factor. A right crated in favour of the bank/FI involves corresponding obligation on the part of the borrower to see that the value of the security does not depreciate with the passage of time which occurs due to his failure to repay the loan in time.
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> 61. Keeping in mind that above circumstances, the NPA Act is enacted for quick enforcement of the security. The said Act deals with enforcement of the right vested in the bank/FI. The NPA Act proceeds on the basis that security interest vests in the bank/FI.

Sections 5 and 9 of the NPA Act are also important for preservation of the value of the assets of the banks/FIs. Quick recovery of the debt is important. It is the object of the DRT Act as well as the NPA Act. But under the NPA Act, authority is given to the banks/FIs, which is not there in the DRT Act, to assign the secured interest to securitisation company/asset reconstruction company. In cases where the borrower has bought an asset with the finance of the bank/FI, the latter is treated as a lender and on assignment the securitisation company/asset reconstruction company steps into the shoes of the lender bank/FI and it can recover the lent amounts from the borrower.

62. According to Snell's Principles of Equity (31st Edn. At P. 777, a dual obligation could arise on the same transaction, namely, A's obligation to repay a sum of money to B or some other obligation. In such a case, B can sue A for money or for breach of the obligation. However, B will often have some security which covers the obligation of A, say, in the form of an asset over which B can exercise his rights. B may be entitled to this security either by law or by operation of common law principles or under the transaction (contract). In addition, B may acquire personal right of action against the third party. Security over the asset (property) may be obtained by mortgagee, charge, pledge, lien, etc. Security in the form of right of action against a third party is known as guarantee. Broadly, there are three types of security over the asset. One is where the creditor obtains interest in the asset concerned (mortgage). Second is securities in which the rights of the creditor depends on possession of the asset (pledge/lien). The third is charge where the creditor neither obtains ownership nor possession of the asset but the asset is appropriated to the satisfaction of the debt or obligation in question (charge). The dichotomy, which is of importance, is that more than one obligation could arise on the same transaction, namely, to repay the debt or to discharge some other obligation.

63. Therefore, when Section 13(4) talks about taking possession of the secured asset or management of the business of the borrower, it is because a right is created by the borrower in favour of the bank/FI when he takes a loan secured by pledge, hypothecation, mortgage or charge. For example, when a company takes a loan and pledges its financial asset, it is the duty of that company to see that the margin between what the company borrows and the extent to which the loan is covered by the value of the financial asset hypothecated is retained. If the borrower company does not repay, becomes a defaulter and does not keep

up the value of the financial asset which depletes then the borrower fails in its obligation which results in a mismatch between the asset and the liability in the books of the bank/FI. Therefore, sections 5 and 9 talk of acquisition of the secured interest so that the balance sheet of the bank/FI remains clean. Same applies to immovable property charged or mortgaged to the bank/FI. These are some of the factors which the authorised officer of the bank/FI has to keep in mind when he gives notice under Section 13(2) of the NPA Act. Hence, equity exists in the bank/FI and not in the borrower. Therefore, apart from obligation to repay, the borrower undertakes to keep the margin and the value of the securities hypothecated so that there is no mismatch between the asset-liability in the books of the bank/FI. This obligation is different and distinct from the obligation to repay. It is the former obligation of the borrower which attracts the provisions of the NPA Act which seeks to enforce it by measures mentioned in Section 13(4) of the NPA Act, which measures are not contemplated by the DRT Act and, therefore, it is wrong to say that the two Acts provide parallel remedies as held by the judgment of the High Court in **Kalyani Sales Co.** As stated, the remedy under the DRT Act falls short as compared to the NPA Act which refers to acquisition and assignment of the receivables to the asset reconstruction company and which authorizes banks/FIs to take possession or to take over management which is not there in the DRT Act. it is for this reason that the NPA Act is treated as an additional remedy (Section 37), which is not inconsistent with the DRT Act."

12. Thus there is no manner of doubt that an action taken under the SARFAESI Act is different and distinct from the obligation to repay.

13. Section 34 of the SARFAESI Act expressly and by its intendment have ousted the jurisdiction of the Civil Court. Civil Court therefore has no power to decide or determine or to pass any order touching the action taken by a secured creditor under the SARFAESI Act.

14. The petitioner bank having resorted an action under section 13(4) of the SARFAESI Act the remedy of the person aggrieved by such act is provided under section 17 of the said Act.

15. Since the jurisdiction of the Civil Court has been expressly ousted under section 34 of the SARFAESI Act, any order passed by the Civil Court touching the action of the secured creditor under the SARFAESI Act is illegal, without jurisdiction and cannot be allowed to sustain. In the case in hand the court below allowed the said application under section 151 filed by the opposite parties directing the petitioner bank to revert back the possession and/or hand over the possession back to the opposite party though such possession has been taken by taking recourse to section 13(4) of the SARFAESI Act. Such an order cannot be sustained in view of an ouster clause embodied under section 34 of the SARFAESI Act.

16. Thus the order impugned is hereby set aside. The revisional application succeeds. However, there shall be no order as to costs.

17. It is however made clear that the dismissal of an application under section 151 of the Code of Civil Procedure or any finding made in this revisional application by this court will not stand in the way of the appropriate forum while deciding the rights of the opposite parties vis a vis the petitioner bank and the appropriate forum shall be free to decide in accordance with law.

**(Harish Tandon, J.)**