



THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 13th AUGUST, 2015

S.B. : HON'BLE MR. JUSTICE S. P. WANGDI, JUDGE

WP(C) No.07 of 2015

Petitioners : 1. United Bank of India
through its Senior Manager,
Gangtok Branch,
Girls School Road,
Deorali, Gangtok,
East Sikkim.

2. The Authorised Officer,
United Bank of India,
through its Senior Manager,
Gangtok Branch,
Deorali, Gangtok,
P.O. Tadong,
East Sikkim.

versus

Respondents : 1. Shri Pradeep Basnet,
S/o Shri U.K. Basnet,
R/o Upper Sichey,
Below Forest Colony,
P.O. Sichey,
Gangtok,
East Sikkim.

2. Shri Bhakta Bahadur Tamang,
S/o Late Kaziman Tamang,
R/o Upper Sichey,
Below Forest Colony,
P.O. Sichey,
Gangtok,
East Sikkim.



Bank of India through Senior Manager, Gangtok Branch and Another vs. Shri Pradeep Basnet and Others

3. Shri Birendra Mangla,
S/o Shri H. C. Mangla,
R/o Rangpo,
P.O. Rangpo,
East Sikkim.

Application under Articles 226 and 227 of the Constitution of India

Appearance

Mr. Rajendra Upreti, Advocate for the Petitioners.

Ms. K. D. Bhutia, Ms. Zamyang Choden Bhutia, Ms. Archana Sharma and Ms. Kunzang Dichen Bhutia, Advocates for the Respondent No.1.

Mr. Jagan D. Thapa and Mr. Sunil Rai, Advocates for the Respondent No.2.

Mrs. L. Chakraborty, Advocate with Ms. Rogena Gurung, Advocate for the Respondent No.3.

J U D G M E N T (ORAL)

Wangdi, J.

1. This Writ Petition has been preferred by the Petitioners-Bank seeking to quash the order dated 17-11-2014 of the Principal District Judge, East and North Sikkim at Gangtok, in Title Appeal No.02 of 2013, whereby their Appeal filed against the order of the Civil Judge, East Sikkim at Gangtok, dated 09-05-2013 in Title Suit No.09 2012, granting injunction in favour of



the Respondent No.1, the Plaintiff in the Title Suit, was dismissed.

2. To state the facts of the case briefly, Title Suit No. 09 of 2012 was preferred by the Respondent No.1 being aggrieved by the action of the Petitioners, in invoking the provision of Sub-Section (4) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the "SARFAESI Act") in respect of the land on which the building premises in his occupation stood and seeking to take over possession of it. His case in that suit was that the action could not be sustained as the premises was in his possession by virtue of a lease agreement dated 04-10-2000 entered into between him and the Respondent No.2 which also was a conditional sale in respect of an RCC building constructed by him on the land in question to be confirmed after 20 (twenty) years of the date of its execution.

3. The case of the Petitioners, on the other hand, is that the land had been secured by a mortgage agreement executed between them and the Respondent



No.2 dated 18-10-2005 as security against an advance granted to the Respondent No.3, the Defendant No.4 in the Title Suit, which was eventually declared as a non-forming asset that led them to invoke the mortgage agreement under the SARFAESI Act.

4. On an application filed by the Respondent No.1-Plaintiff under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 (for short the "CPC"), in Title Suit No.09 of 2012, the Learned Civil Judge upon detailed consideration of the facts and circumstances and the relevant law, passed the impugned order dated 09-05-2013 restraining the Petitioners from giving effect to the notice under Sub-Section (4) of Section 13 of the SARFAESI Act issued by them to the Respondent No.2 until further orders.

5. The Petitioners then moved the Court of the Principal District Judge, East and North Sikkim at Gangtok, in Title Appeal No.02 of 2013 seeking to set aside this order but was again unsuccessful as it was upheld by the said Court by its order dated 17-11-2014. It is against this that the present Writ Petition has filed.



6. At the outset, the Respondents have raised the question of maintainability of the Writ Petition in view of there being an effective statutory remedy of a Second Appeal available under Section 100 CPC. It was submitted that the Writ Petition would not lie also for the reason that the issues raised therein were alien to the conditions under which such proceedings can be initiated.

7. Mr. Rajendra Upreti, Learned Counsel, appearing on behalf of the Petitioners, urged that the Writ Petition was maintainable in view of the broad ambit and scope of Articles 226 and 227 of the Constitution of India under which the Writ Petition had been filed. It was then submitted that even assuming that the Writ Petition is not maintainable at all in the present form, this Court was vested with the necessary jurisdiction to convert it into an Appeal in exercise of its inherent powers. In support of this contention, he would rely upon ***Nawab Shafiqat Ali Khan and Others VS. Nawab Imdad Jah Bahadur and Others : (2009) 5 SCC 162.***



8. I have carefully considered the submissions of the Learned Counsel for the parties and am of the view that the Writ Petition is not maintainable.

9. Indisputably, the Writ Petition has been filed to assail the order of the Principal District Judge, East and North Sikkim, passed in an Appeal, under Section 96 CPC the remedy for which is provided under Section 100 CPC. No doubt, it is a settled position of law that this Court in exercise of its inherent power can convert a Writ Petition into an Appeal and vice versa which has been re-emphasised in the case of **Nawab Shaqafath Ali Khan (supra)**. In the present case, if inherent power is exercised as urged by Mr. Upreti, the Writ Petition will have to be converted into an appeal under Section 100 but, Section 100 CPC prescribes certain conditions for the appeal to be maintainable. The very decision in **Nawab Shaqafath Ali Khan (supra)** referred to by Mr. Upreti lays down in paragraph 48 that the High Court "*subject to fulfillment of other conditions*" can even convert a Revisional Application or a Writ Petition into an Appeal or vice versa in exercise of its inherent power. One of the conditions under which the Second Appeal under Section



100 CPC can be entertained is prescribed under Sub-Section (3) which provides that "*in an appeal under this section, the memorandum of appeal shall precisely state the substantial question of law involved in the appeal*". This condition apparently has not been fulfilled in the present Writ Petition. Even if, the Court intends to convert the Writ Petition to a Second Appeal the condition prescribed under Sub-Section (3) of Section 100 CPC would be quite insurmountable. For these reasons, the Writ Petition would not be maintainable.

10. Even otherwise, there does not appear to be any merit in the case. The foundation of the case of the Petitioners is that under Section 34 of the SARFAESI Act, the jurisdiction of a Civil Court is barred in dealing with the matters connected with the Act. The Trial Court appears to have elaborately dealt with the facts and the legal position obtaining in such matters in arriving at the impugned finding. In the appeal, the Principal District Judge upheld this having found the findings of the Trial Court to be sound and unassailable. I am in respectful agreement with both the Courts below.



11. The very decision in *Harshad Govardhan Sondagar*
 VS. *International Assets Reconstruction Company Limited and*
Others : (2014) 6 SCC 1 referred to by Mr. Upreti, reads as
 follows: -

“32. When we read sub-section (1) of Section 17 of the SARFAESI Act, we find that under the said sub-section "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 the chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with the Mr Vikas Singh that the words "any person" are wide enough to include a lessee also. It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset. But when we read Sub-section (3) of Section 17 of the SARFAESI Act, we find that the Debts Recovery Tribunal has powers to restore possession of the secured asset to the borrower only and not to any person such as a lessee. Hence, even if the Debts Recovery Tribunal 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 the Act, it cannot restore possession of the secured asset to the lessee. Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is in accordance with the requirements of Section 65-A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under Section 17 of the



SARFAESI Act to the lessee to protect his lawful possession under a valid lease.

[underlining mine]

12. The case of the Respondent No. 1 is that the agreement between him and the Respondent No.2 was executed on 04-10-2000 and possession of the land taken soon thereafter which was several years prior to 18-10-2005 when the mortgage agreement was entered into between the Petitioners and the Respondent No.2. Under these circumstances, even if it is accepted that the proceedings under Section 13(4) of the SARFAESI Act initiated by the Petitioners should be allowed to continue uninterruptedly culminating in the Petitioners assuming possession of the land relegating the Respondent No.1 to the Debts Recovery Tribunal under Sub-Section (1) of Section 17 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, as contended on behalf of the Petitioner, he would be deprived of the relief of recovery of possession of the property as the Tribunal lacks necessary jurisdiction to restore possession of the property in question to him but is vested with the power to do so only to the borrower. Thus, as held in *Harshad Govardhan Sondagar (supra)*



Section 17 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, is not an effective alternative relief available to the Respondent No.1 as asserted by the Petitioners.

13. Therefore, I am of the considered opinion that the only remedy available to him was to approach the Civil Court for the reliefs as sought for in the suit and that is what he has precisely done. The order of injunction which is being assailed appears to be sound as the Courts below have taken into consideration the parameters and the condition relevant and germane for disposal of such application. This, of course, is subject to what will transpire in the suit when it is heard in its merits at the trial.

14. The decisions cited at the bar by Mr. Upreti, namely, *M. G. Ashwatha Shastri VS. Canara Bank, Chamarajpet Branch, Chamarajpet, Bangalore & Others : AIR 2011 Karnataka 138; Mardia Chemicals Ltd., etc. etc., VS. Union of India and Others etc. etc., : AIR 2004 SC 2371* and *United Bank of India VS. Satyawati Tondon and Others : (2010) 8 SCC 110*, are distinguishable from the facts of the present case and,



as observed earlier, the case of the Respondent No.1 is clearly covered by the decision in *Harshad Govardhan Sondagar (supra)*.

15. In the result, the Writ Petition is dismissed both on the question of maintainability and in its merits.

16. It is, however, made clear that remarks and observations made in this judgment shall not be construed as opinion of this Court on the merits of the case.

17. No order as to costs.

18. A copy of this judgment be transmitted forthwith to the Courts below for information and compliance.

Sd/-
(**S. P. Wangdi**)
Judge
13-08-2015

Approved for reporting : **Yes**

Internet : **Yes**