

\$~

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on : 01.09.2015

Pronounced on: 06.11.2015

+ W.P.(C) 7344/2015

ONIL SADH

..... Petitioner

Through: Mr.M.K.Ghosh, Advocate.

versus

FEDERAL BANK LTD. AND ORS.

..... Respondents

Through: Mr. S.N.Relan, Mr. Puneet Relan
and Mr. Abhinav Thereja,
Advocates for R-1.

Mr.Prasanta Varma, Advocate/
Receiver in person: R-2.

Mr.Anurag Ahluwalia, CGSC with
Mr.Arunava Mukherjee, Advocate
for UOI/R-3.

CORAM:

HON'BLE THE CHIEF JUSTICE

HON'BLE MR. JUSTICE JAYANT NATH

JAYANT NATH, J.

1. By the present Writ Petition the petitioner seeks an appropriate writ declaring section 14 of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI' Act, 2002) as ultra vires and in violation of Articles 14, 21 and 300A of the Constitution of India. The petitioner also seeks a Writ of Mandamus to declare order dated 06.07.2015 passed by respondent No.4/Chief Metropolitan Magistrate

(hereinafter referred to as 'CMM'), Saket District Court under Section 14 SARFAESI Act as illegal and void and for directions to restrain respondent No.2/Receiver appointed from taking possession or interfering with the rights and ownership of the petitioner in property No.A-27, East of Kailash, New Delhi without due process of law. Other reliefs are also sought.

2. The brief facts which led to filing of the writ petition are that the petitioner claims to be the owner of the ground floor, first floor and second floor of the property A-27, East of Kailash, New Delhi by means of three different registered sale deed. It is stated that the said plot was originally allotted by DDA on lease hold basis to Shri Anand Kumar Chona vide deed dated 01.09.1972. The said Mr.Chona got the property converted from lease hold to free hold vide registered conveyance deed dated 24.09.2001. Different floors were thereafter sold to different persons by the said Shri Anand Kumar Chona. The petitioner purchased the ground floor of the property from one Shri Satinder Singh on payment of the sale consideration of Rs.1.10 crores vide registered sale deed dated 10.06.2011. The first floor was purchased from Shri Rakesh Jain after payment of a sale consideration of Rs.1 crore vide registered sale deed dated 10.06.2011. The second floor is stated to have been purchased from Shri Tirath Singh and Smt.Gulshan Kaur on payment of sale consideration of Rs.50 lacs vide registered sale deed dated 7.7.2011.

3. It is urged that the petitioner was enjoying peaceful possession of the property since the date of purchase till a notice under section 13(4) of the SARFAESI Act dated 19.2.2015 was affixed on the premises in question. It is averred that the petitioner was shocked to see the said

notice as the petitioner had not taken any loan on the said property in question nor mortgaged the property to respondent No.1 Federal Bank Limited. It is urged that the petitioner is not an overnight inductee, inducted by the borrower to defeat the rights of respondent No.1. The petitioner aggrieved by the notice dated 19.2.2015 filed an appeal under section 17 of SARFAESI Act before the Debt Recovery Tribunal, Delhi (hereinafter referred to as 'DRT'), on 23.03.2015. It was urged that all the original documents regarding the property are in possession of the petitioner and that the respondent No.1 Bank does not have any valid equitable mortgage in its favour. Interim relief was also prayed for. Some hearings took place before the DRT. Notice was also issued to respondent Federal Bank Ltd. It is further averred that on 22.7.2015 the petitioner was surprised to see a notice of the same date affixed on the property in question mentioning that receiver Shri Prashant Verma respondent No.2 appointed by the Court of Chief Metropolitan Magistrate would take possession of the property in question with police aid after 15 days of the notice i.e. on or before 6.8.2015. It is stated that it was from the said notice that the petitioner learnt that the Chief Metropolitan Magistrate had passed the order on 6.7.2015 in exercise of powers under Section 14 of SARFAESI Act. It is urged that before the Chief Metropolitan Magistrate, respondent No.1/Bank intentionally concealed that an appeal under section 17 of the SARFAESI Act filed by the petitioner is pending before the DRT and notice has already been issued on the same. It is further urged that in the affidavit filed by the concerned Chief Manager before the CMM, a false and incorrect statement was made that an equitable mortgage has been created by the borrower by deposit of the

original title deed whereas the fact is that the petitioner is in possession of all the original documents of the property. Hence, the present writ petition was filed seeking the aforementioned reliefs. This court on 04.08.2015 directed the parties to maintain status quo.

4. Respondent No.1/Bank has filed a counter affidavit. It is urged that the writ petition seeks to challenge the constitutional validity of section 14 of the SARFAESI Act and this issue is no more *res integra* in view of the judgment of the Supreme Court in ***Mardia Chemicals Ltd. vs. Union of India, (2004) 4 SCC 311*** which upheld the constitutional validity of the entire act except section 17(2). It is also pointed out that the property was mortgaged by late Shri Anand Kumar Chona, owner of the property with respondent No.1 as a collateral security for the credit facilities availed by M/s.S.S.Computer Galaxy, a proprietorship concern of Shri Sunit Kumar Chona by way of a registered mortgage deed. As the debt became bad, a recovery suit was instituted by respondent No.1 before this Court which was registered as CS(OS)605/1997. This was later transferred to Tis Hazari District Court. A judgment and money decree, i.e. a preliminary decree was passed by the Court of Additional District Judge on 04.08.2005 which was later on modified on 19.09.2007. A final decree was passed in favour of Respondent No.1 Bank on 17.3.2008. It is further urged that respondent No.1 took possession of the mortgaged property on 19.2.2015, which action was challenged by the petitioner before DRT under section 17(1) of the SARFAESI Act. Hence, no relief can be sought by the petitioner on this aspect before this Court. It is further urged that the orders of CMM passed under section 14 of the SARFAESI Act could also have been challenged by the petitioner before

DRT. It is stated that as the petitioner has an alternate remedy the present writ petition would not lie.

5. Respondent No.3/UOI has also filed a short affidavit opposing the writ petition. It is urged that the present writ petition is not maintainable on account of the petitioner having an alternate remedy by way of an appeal under section 18 of the SARFAESI Act before the Appellate Tribunal. Reliance is also placed on the judgment of the Supreme Court to support this submission in the case of ***United Bank of India vs. Satyawati Tondon, (2010) 8 SCC 110***. It is further urged that even if the contention of the petitioner is taken on merits, respondent No.1 had filed a suit for recovery of its dues and foreclosure of mortgage before this Court in 1997. The petitioner claims to have bought the suit property sometimes in 2011. Hence it is urged that doctrine of *lis pendens* would apply as provided under section 52 of the Transfer of Property Act and the alleged sale in any case would be subject to directions passed by the appropriate court.

6. We have heard learned counsel for the parties and gone through the record. Learned counsel appearing for the petitioner has submitted that the provisions of section 14 of the SARFAESI Act are violative of Article 14, 21 and 300A of Constitution of India and liable to be declared unconstitutional. He submits that the judgment of the Supreme Court in ***Mardia Chemicals Ltd. vs. Union of India (supra)*** does not deal with the constitutional validity of section 14. He further submits that without prejudice to the above contention if for some reason this Court does not accept the said contention, then in any case the order passed by CMM

dated 6.7.2015 is illegal inasmuch as no notice was issued to the petitioner before passing the impugned order. He relies upon the judgment of the Supreme Court in the case of ***Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Others., (2014) 6 SCC 1***. It is urged that in view of the said judgment of the Supreme Court the issue of notice to the petitioner was mandatory. The attempt of the Receiver to take over possession of the property without giving any opportunity to the petitioner to bring forth his case before the CMM vitiates the said order.

7. Regarding the contention of their being an alternate remedy, again reliance is placed on the judgment of the Supreme Court in the case of ***Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Others (supra)***. It is averred that the order of the CMM can be challenged before this Court only.

8. Learned counsel appearing for respondents No.1 and 3 have strenuously urged that the petitioner has an alternate remedy as explained above and the present writ petition would not be maintainable.

9. We may first look at some of the relevant provisions of the statute. Section 13(4) and section 14 of the SARFAESI Act reads as follows:-

“13(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 lease, 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 manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time 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.

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset- (1)

Where the possession of any secured assets 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:

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorized officer of the secured creditor, declaring that-

- (i) The aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;
- (ii) The borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;
- (iii) The borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;
- (iv) The borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;
- (v) Consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non performing asset;
- (vi) Affirming that the period of 60 days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;
- (vii) The objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non acceptance of such objection or representation had been communicated to the borrower;
- (viii) The borrower has not made any repayment of the financial assistance inspite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the

secured assets under the provisions of Sub-section (4) of Section 13 read with section 14 of the principal Act.

- (ix) That the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceedings pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorize any officer subordinate to him-

- (i) to take possession of such assets and documents relating thereto; and
- (ii) to 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 or 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 any officer authorized by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section shall be called in question in any court or before any authority”

Similarly, section 17(3) of the Act reads as follows:-

“17(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 secured assets to 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 assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets 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.”

10. As per the statutory scheme after issuance of appropriate notice under Section 13 (2) of the SARFAESI Act, in case the borrower fails to discharge his liability, the secured creditor can take recourse to Section 13 (4) of the Act and take steps to recover the secured debt in any manner stated thereunder. In the present case we are concerned with Section 13(4)(a) of the SARFAESI Act inasmuch as respondent No.1 seeks to take possession of the secured asset including the right to transfer the same by way of sale. Section 17(1) provides a right of appeal to any person (including borrowers) aggrieved by any of the measures taken under Section 13(4) by the secured creditor. An application may be filed before the concerned DRT having jurisdiction. Section 17 (3) provides that the DRT if after examining the facts and circumstances of the case and the evidence produced comes to a conclusion that the measures taken under section 13(4) by the secured creditors are not in accordance with the provisions of the Rules made thereunder, it may by order, declare the steps taken by the secured creditor as invalid and restore possession of the secured assets to the borrower.

11. While dealing with the various provisions of the SARFAESI Act, and with regard to challenge to the SARFAESI Act, the Supreme Court in ***Mardia Chemicals Ltd. & Ors. vs. Union of India & Ors., (supra)*** stated the procedure to be followed as stipulated in the Act as follows:-

“80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows:-

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debt Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition at it may deem fit and proper to impose.

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.”

12. We can now deal with the two contentions of the petitioner regarding constitutional validity of section 14 of the Act and challenge to the order of CMM dated 6.7.2015. As far as the challenge to the constitutional validity of section 14 is concerned reference may be had to the judgment of the Supreme Court in ***Mardia Chemicals Ltd. vs. Union of India (supra)***. In that case the Supreme Court was dealing with the validity of the SARFAESI Act. The Court struck down section 17(2) of the Act as ultra vires Article 14 of the Constitution of India. Regarding the other provisions of the statute the Supreme Court held as follows:-

“81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debts Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional

in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest.

82. We, therefore, subject to what is provided in paragraph 80 above, uphold the validity of the Act and its provisions except that of sub-section (2) of Section 17 of the Act, which is declared ultra vires Article 14 of the Constitution of India.”

13. Clearly, the constitutional validity of the Act has been upheld by the Supreme Court and the contention of the petitioner to the contrary cannot be accepted. The subsequent judgments of the Supreme Court on interpretation of section 14 of the Act may also be looked into.

14. Reference may be had to the judgment of the Supreme Court in the case of ***United Bank of India vs. Satyawati Tondon & Ors. (supra)***. This case pertained to an objection raised by the guarantor whose property had been mortgaged to the Bank. Facing eminent threat of losing the mortgaged property, respondent No.1 had pleaded that the notices issued under Section 13 be quashed because no action had been taken against the principal borrower for recovery of the outstanding dues. The High Court had passed an appropriate injunction order. In that factual background, the Supreme Court held as follows:-

“42. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide

import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.”

15. Similarly, reference may also be had to the judgment of the Supreme Court in the case of **TRANSCORE vs. Union of India & Anr., 2008 (1) SCC 125**. The Supreme Court while dealing with Section 14 and 17 of the SARFAESI Act held as follows:-

“74.Section 14 of the NPA Act states that 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, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the *status quo ante*. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the

dispute adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous.”

16. In the case of ***Standard Chartered Bank v. V. Noble Kumar & Ors., (2013) 9 SCC 620*** the Supreme Court noted the procedure to be followed by the CMM while dealing with a petition under Section 14 of the Act. The Court stated as follows:

“24. Under the scheme of Section 14, a secured creditor who desires to seek the assistance of the State's coercive power for obtaining possession of the secured asset is required to make a request in writing to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction, secured asset is located praying that the secured asset and other documents relating thereto may be taken possession thereof. The language of Section 14 originally enacted purportedly obliged the Magistrate receiving a request under Section 14 to take possession of the secured asset and documents, if any, related thereto in terms of the request received by him without any further scrutiny of the matter.”

In 2013, there was an amendment in Section 14 of the SARFAESI Act and a proviso was added which stipulates that an application by the secured creditor under Section 14 before the CMM would be accompanied by an affidavit containing various information as stipulated in the proviso. The Supreme Court on the newly added proviso in the aforesaid judgment of ***Standard Chartered Bank*** (supra), stated as follows:

“28. The satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) necessarily requires the

Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset.

.....

37. Thus, there will be three methods for the secured creditor to take possession of the secured assets:

(i) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

(ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinize the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14 (1)(A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

(iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinize the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forwards them to the secured creditor as under Clause (ii) above.”

17. Reference may also be had to judgment of the Supreme Court in

the case of ***Kanaiyalal Lalchand Sachdev & Ors. v. State of Maharashtra & Ors., (2011) 2 SCC 782***. This was a case in which the secured creditor issued notice under Section 13 (2) of the Act. On the receipt of reply, the secured creditor communicated its reasons for not accepting the reply. Thereafter, the secured creditor approached the CMM under Section 14 of the Act for taking possession of the secured assets. The Magistrate allowed the application. The borrower filed a Writ Petition which was dismissed on the ground that an alternative remedy was available to the borrower under Section 17 of the Act. The Supreme Court in those facts in appeal held as follows:

“16.....Section 14 of the Act provides that the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction, the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor. (See: ***United Bank of India v. Satyawati Tondon and Ors.*** MANU/SC/0541/2010: (2010) 8 SCC 110). Therefore, it follows that a secured creditor may, in order to enforce his rights under Section 13(4), in particular Section 13(4)(a), may take recourse to Section 14 of the Act.”

18. Reference may also be had to the judgment of the Full Bench of this Court in ***Amish Jain & Anr. vs. ICICI Bank Limited, AIR 2013 Delhi 172*** which observed as follows:-

“17. Further, the relief to be granted by the DRT in an appeal under Section 17(1) of the SARFAESI Act, if successful, is (under Section 17(3)) of restoration of possession/

management of the secured asset to the borrower and to pass such order as it may consider appropriate and necessary in relation to the recourse taken by the Banks /Financial Institution under Sub-Section (4) of Section 13 of the SARFAESI Act. This relief also, we find, the DRT within whose jurisdiction the secured asset to be so restored to the borrower is situated, to be the most competent to grant and implement. The orders which the DRT under Section 17(3) of the SARFAESI Act may be required to pass may also entail exercising jurisdiction over the CMM / DM which is approached by the Bank /Financial Institution for assistance for taking over possession / management. Notice in this regard may be taken of *Kanaiyalal Lalchand Sachdev Vs. State of Maharashtra*; (2011) 2 SCC 782 and of *United Bank of India Vs. Satyawati Tandon* : (2010) 8 SCC 110 suggesting that appeal under Section 17(1) can be filed after the Bank has filed application under Section 14, even if possession / management has not been taken. In such a situation, DRT may be required to issue direction to the CMM / DM approached by the Bank /Financial Institution....”

19. The above judgments of the Supreme Court and this Court also negate the second contention of the petitioner that the CMM was obliged to issue notice to the petitioner before disposing off the petition under Section 14 of the Act. In the case of ***Standard Chartered Bank vs. V. Noble Kumar & Ors. (supra)*** the Supreme Court held that the Magistrate while dealing with an application under section 14(1) is only required to examine the factual correctness of the assertion made in the affidavit accompanying the application. After recording his satisfaction the Magistrate can pass appropriate orders regarding taking possession of the secured assets.

20. Further, in ***United Bank of India vs. Satyawati Tandon (supra)*** the

Supreme Court held that in case any person has a grievance against an action taken under section 13(4) or section 14 of the Act, the remedy is to file an application under section 17(1) before DRT. To the same effect is the judgment of the Supreme Court in ***Kanaiyalal Lalchand Sachdev & Ors. v. State of Maharashtra & Ors. (supra)*** and the full bench of this High Court in ***Amish Jain vs. ICICI Bank Ltd. (supra)***.

21. The reliance of the petitioner on the judgment of the Supreme Court in the case of ***Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Limited and Others.(supra)*** is misplaced. That was a case in which the appellants before the Supreme Court were tenants of different premises which had been mortgaged to different banks as securities for loans. The tenants were in physical possession of the property as lessees. The Supreme Court in those facts held that there is no provision under Section 13 of the SARFAESI Act that a lease in respect of a secured asset shall stand determined when the secured creditor decided to take measures under Section 13 of the said Act. The court further held that without the determination of a valid lease, the possession of the lessee is lawful and such lawful possession of the lessee has to be protected by all courts and tribunals. The court further held that the possession of the secured asset from a lessee in lawful possession under a valid lease is not required to be taken under the SARFAESI Act and the CMM does not have any power under Section 14 of the SARFAESI Act to take possession of the secured asset from such a lessee. Hence, the premises was held to be outside the scope of Section 14 of the SARFAESI Act. It was in those facts that the Supreme Court concluded that where a lessee is in possession, the CMM in a petition

under Section 14 will give an opportunity of hearing to the person claiming to be a lessee.

22. The facts of the present case are that the petitioner claims to be a bona fide purchaser of the property without knowledge of the prior alleged mortgage by the borrower in favour of respondent No.1. The contentions of the petitioner would necessarily have to be adjudicated upon under Section 17 of the SARFAESI Act by the DRT. It would not be for the CMM to adjudicate on the rights of the petitioner. Hence, there is no merit in the submission of the petitioner about illegality of the order of CMM dated 6.7.2015.

23. In the light of the above, we see no merits in the present petition. The petitioner has an alternative remedy which he has availed. Hence, this Writ Petition would not be maintainable [(Re: **Kanaiyalal Lalchand Sachdev & Ors. v. State of Maharashtra & Ors. (supra)**)]. It would be open for the petitioner to raise all his objections before the DRT in the petition under Section 17(1) which is pending being SA 43/2015. The concerned Tribunal may deal with the said petition of the petitioner in accordance with law.

24. Before we close the matter, we may state that we have looked into the facts of the case, as pleaded on record. Respondent No.1 has issued the appropriate notice under Section 13(4) of the SARFAESI Act on 19.02.2015. The petitioner aggrieved by the said notice filed an appeal being SA No. 43/2015 under Section 17 of the Act before DRT on 23.03.2015. No interim orders have been passed in favour of the petitioner by DRT.

25. It appears that simultaneously respondent No.1 has on 09.03.2015

initiated action under Section 14 of the SARFAESI Act before the CMM, Saket, New Delhi with a prayer for taking vacant possession of the said property. There is no mention in the said petition about the petitioner. This petition under Section 14 filed by respondent No. 1 has been disposed of by the CMM vide order dated 06.07.2015 appointing respondent No.2 as a Receiver to take possession of the property. The Receiver has thereafter on 22.07.2015 issued notice to the borrowers which is also pasted on the concerned property which is a 15 days' notice stating that the possession would be taken over on or before 06.08.2015. Copy of the notice has also been sent to the petitioner though the petitioner was not a party before the CMM. The notice of respondent No.2 as to why the petitioner was served with the notice, is stated as follows:-

“Note. The copy of the notice has been issued by the Court Appointed Receiver to Mr. Onil Sadh on the written request of the Federal Bank for the reason that in SA No.43/2015 filed by Sh.Onil Sadh vs. Federal Bank before DRT-I, it was orally directed by the Hon'ble Judge that notice of possession be given to Sh.Onil Sadh before taking possession.”

26. It is apparent from the counter affidavit filed by respondent No.1 that respondent No.1 had filed a suit for recovery of its dues against the borrower before this court which was registered as CS(OS) 605/1997. Subsequently due to enhancement of the pecuniary jurisdiction, the suit was transferred to District Court Tis Hazari. A final decree was passed on 17.03.2008. Respondent No.1 has not brought out as to whether any interim orders were passed before the civil court when the suit for

recovery was pending. There appears to have been no attempt to protect the property during this long period of litigation which has been pending since 1997.

27. It is also strongly contended by the petitioner that there is no mortgage in favour of respondent No.1 as the original title documents are in his possession. This fact is not denied by respondent No.1 in the counter affidavit. It may also be noted that the Civil Court in 2008 passed a final decree in favour of respondent No.1. Steps under section 13 of the Act appear to have been taken now in 2015. The Counter affidavit of respondent No.1 gives no details about any proceedings taken by the bank to protect its secured asset.

It is also quite clear that the borrower having sold the property is not interested in defending the case or protecting the property.

28. Keeping in view the above facts it would be in the interest of justice that adjudication takes place on the contentions of the petitioner before any adverse steps are taken against the property. We accordingly direct that parties will continue to maintain status quo as on 4.8.2015 when interim orders were passed by this Court till adjudication of S.A.43/2015 filed under section 17 of the Act by the petitioner which is pending before DRT. However, respondent No. 1 is given liberty to approach DRT with an appropriate application for vacation/modification of the present directions passed by us in case it so desires. In case any such application is moved by respondent No.1, DRT would adjudicate the said application in accordance with law uninfluenced by any observations on facts made by us in the present judgment.

29. We also request the concerned DRT to expeditiously dispose off

the petition of the petitioner taking into account the provisions of section 17(5) of the Act.

30. The petition is disposed of with the above directions.

(JAYANT NATH)
JUDGE

(CHIEF JUSTICE)

NOVEMBER 06, 2015
n/rb/v