(2007) 135 CompCas 514 : (2007) 78 SCL 222

Madras High Court

Case No: Writ Petitions No"s. 34022, 35859 and 40817 of 2005 and 12407 to 12410, 12841 and 16513 to 16515 of 2006 and W.P.M.P. No"s. 36939, 38676, 41939 and 43792 of 2005 and 14004 to 14007, 14433 and 15988 to 15990 of 2006 and W.V.M.P. No"s. 111, 384, 1405 to

A. Venkatramani		APPELLANT
	Vs	
LIC Housing Finance Limited		RESPONDENT

Date of Decision: Sept. 28, 2006

Acts Referred:
Constitution of India, 1950 â€" Article 226#Recovery of Debts Due to Banks and Financial Institutions Act, 1993 â€" Section 19(1)#Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) â€" Section 13(2), 13(3), 13(4), 14(1), 35#State Financial Corporations Act, 1951 â€" Section 29, 3, 31#Transfer of Property Act, 1882 â€" Section 55(1)

Citation: (2007) 135 CompCas 514 : (2007) 78 SCL 222

Hon'ble Judges: M. Thanikachalam, J

Bench: Single Bench

Advocate: K. Ravi, for Rugan and Arya in WP. 34022/2005, AR.L. Sundaresan, S.C., Pitty Parthasarat and Pitty Parthasarathy, in WP. 35859/2005, AR.L. Sundaresan, S.C. for K. Palanisamy, in W.P. No. 40817/2005, A.S. Kailasam Associates in WP. Nos. 12407 to 12410 and 12841/2006, Vijayanarayanan, S.C. For Vijayalakshmi Rajagopal Vijayalakshmi Rajagopal, in Wps.16513 to 16515/2006, for the Appellant; E. Omprakash, for Ramalingam and Associates in WP. 34022/2005 and Krishna Srinivasan, for S.Ramasubramaniam and Associates in WPs. 35859, 40817/2005, 12407 to 12410, 12841 and 16513 to 16515/2006 and WPMP. 14433/2006, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

M. Thanikachalam, J.
With the consent of either counsel, the main writ petitions themselves have been taken up

for final disposal.

2. In all these writ petitions, the petitioners are challenging the Demand Notices issued by the" " financial institutions " "under Section 13(2) of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (Act 54 of 2002) (in short "SARFAESI

Act"). Since common questions of law have been raised in all these writ petitions, they are all disposed of by this common order.

3. These writ petitions have been filed either by the borrowers/debtors of the" " financial institutions " "or the purchasers from the debtors of the

financial institution, to whom the" " financial institutions " "have marked a copy of the Demand Notice, while sending the demand notices to the

original creditors; or by the guarantors.

4. While W.P.Nos.34022 of 2005, 35859 of 2005, 40817 of 2005 have been filed by the guarantors, W.P.Nos.12407 to 12410 of 2006 and

12841 of 2006 have been filed by the purchasers of the secured property from the debtors of the financial institution and W.P.Nos.16513 to

16515 of 2006 have been filed by the debtors themselves.

5. In W.P. No. 34022 of 2005, the petitioner submits that the impugned notice has been issued to him, under the guise that he offered his

residence, as security, for the loan obtained by Kaashyap Radiant Systems Limited. This petitioner submits that he never offered his immovable

property as security for the loan sanctioned by the respondent/LIC Housing Finance Limited to the said Kaashyap Radiant System Limited. When

the said company approached the respondent with a request to sanction a Corporation Loan of Rs. 200 lakhs, this petitioner offered his

immovable property as security for the said Corporate Loan alone, but the said corporate loan was not sanctioned and was not availed by the said

Company. But, sanction was made unilaterally by the respondent only under the scheme for construction-finance for developing and building

housing units. In Article 3 of the loan agreement, under the caption "security" it has been clearly mentioned that his immovable property was not

meant to be a security for repayment of the loan sanctioned and availed under the said agreement.

6. In W.P.Nos.35859 of 2005 and 40817 of 2005, it has been mentioned that the second respondent therein viz.New ERA Urban Amenities

Limited, represented by its Managing Director Mr.S.Thiyagaraja Chettiar, the third respondent herein, had agreed to develop the properties by

building flats on the lands belonging to the petitioner, but the second respondent never turned up afterwards. The second respondent, with the

active collusion and abatement with the officials of the fourth respondent/LIC Housing Finance Limited had forged, misrepresented and fabricated

documents, to show as if the petitioner had executed mortgage in favour of the fourth respondent, whereas the true fact remains, that the petitioners

had never executed any mortgage in favour of the first respondent/IND Bank Housing Limited. The 4th respondent has claimed, in the impugned

notice, that they had advanced a project loan, as a consortium, with the first respondent, but the fact remains that the petitioners had never

executed any mortgage in favour of the first respondent or the fourth respondent, nor stood as guarantor for the alleged loan availed by the second

respondent.

7. In W.P.Nos.12407 to 12410 and 12841 of 2006, the petitioners would project a similar case that they all have purchased flats from

Mohammed Yaseen, Proprietor of Coronet Constructions, by entering into sale agreements, in January 1994. The original documents of title

relating to the said properties were produced before Advocate for LIC, Home Trust, etc., who then advanced loans for purchasing the flats. The

fact, that certain" " financial institutions " "extended loans to purchase the flats, would clearly reveal that the original title deeds were shown to

those institutions and that there was no encumbrance. The flats were constructed and possession was handed over in October, 1995 and even at

this point of time, no action was taken by the second respondent/Ind Bank Housing Limited; that for more than tens years now, they have been

exercising all rights of ownership over the said flats. The second respondent herein filed C.S. No. 209 against the said Mohamed Yaseen and these

petitioners, for recovery of a sum of Rs. 14,96,158/= and a perusal of the ''A'' schedule to the said suit, would reveal that the alleged mortgage

was only in respect of land and only on receipt of summons, they came to know that there was an alleged mortgage, by deposit of title deeds,

which had been apparently done by Mohamed Yaseen. These petitioners have taken a stand that they are bonafide purchasers without notice of

the alleged mortgage. Now, pending the suit, the impugned notice u/s 13(2) of the SARFAESI Act has been issued to the borrower and therefore,

only the borrower is entitled to give an explanation to the same. But, the notice has been marked to these petitioners, for information, and

therefore, the impugned notice cannot be treated as a show-cause notice to these petitioners, though their rights are being infringed upon and since

they are in possession of the property, the impugned notices threaten to take possession and therefore, they filed these writ petitions.

8. In W.P.Nos.16513 to 16515 of 2006, the petitioners submitted that they are alleged to have availed financial assistance from the

respondent/Ind Bank Housing Limited and the respondent alleged recalling of the loan and on the said allegations, had also instituted the suits on

the file of this Court and they are pending. The claim was denied by these petitioners; that no prior demand was ever made and even by their own

pleadings, the claim is hopelessly time barred. These petitioners further stated that there were series of discussions and proposals and a one time

settlement was offered to settle all the claims of the group companies to which the petitioners are also parties; that as per the one time settlement

accepted by the respondent, the preliminary obligation cast on the petitioners was discharged and the respondent had defaulted in performing their

part of the obligation, which resulted in the one time proposal, though accepted and acted upon, unable to be proceeded further. The respondent

had requested for enhancement of proposal for one time settlement, pursuant to which, letters were addressed by the petitioners, without prejudice

to their rights and to the knowledge of the petitioners, the respondent had accepted the proposal, though no formal confirmation was issued.

9. In matters wherein LIC Housing Finance Limited is a party, it has been submitted by the petitioners that the LIC Housing Finance Limited is not

a "financial institution and secured creditor" within the meaning of Section 2(1)(zd) of the SARFAESI Act; that only a secured creditor within the

meaning of Section 2(1)(zd) of the SARFAESI Act can invoke Section 13 of the SARFAESI Act. Therefore, the LIC Housing Finance has no

jurisdiction at all to invoke the provisions of Section 13 of the SARFAESI Act.

10. As far as the matters wherein Ind Bank is a party, it has been contended by the petitioners that the Ind Bank is not a ''notified financial

institution'' under the Recovery of Debts Due to Banks and'' '' financial institutions '' ''Act, 1993 (hereinafter referred to as Act 51 of 1993) as well

as the SARFAESI Act and therefore, they cannot invoke the provisions of the SARFAESI Act.

11. It is the further submission of all the petitioners that since the concerned Banks have already filed civil suits for recovery of the alleged dues,

without withdrawing the said civil suits, the Banks could not proceed under the provisions of the SARFAESI Act; that as per Section 19(1) of the

Act 51 of 1993, before taking any action under the SARFAESI Act, the Banks should apply for permission to the Honourable High Court,

wherein the civil suits are pending, to withdraw the suits, otherwise, it would not only amount to parallel proceedings but also abuse of due process

of law.

12. By filing the above writ petitions, the petitioners got interim stay of the impugned orders, which are sought to be vacated by filing vacate stay

petitions.

13. The LIC Housing Finance Limited has filed counter affidavits, in W.P.Nos.34022, 35859 and 40817 of 2005, denying the allegations of the

writ petitioners and further submitting that this respondent is a housing finance company,; that by a notification dated 10.11.2003, issued by the

Department of Economic Affairs, Ministry of Finance, this respondent is notified as a "financial institution" within the meaning of SARFAESI Act

and therefore, they are entitled to invoke the provisions of the said Act; that the loans availed by the writ petitioners remain unpaid for longtime and

in spite of various efforts, they were unable to realize their dues and the accounts being Non-performing Assets, they have issued the notices u/s

13(2) of the SARFAESI Act. Regarding the allegation of the petitioners that before initiating the proceedings under the SARFAESI Act, the Bank

has to withdraw the civil suit, this respondent would submit that this respondent is not notified as the Bank or financial institution under the

provisions of Act 51 of 1993 and therefore, they do not fall within the purview of the Debts Recovery Tribunal under the said Act and therefore,

the amendment made in the Act 51 of 1993, introducing proviso (i) to Section 19(1), does not have a bearing on the civil suits filed by this

respondent. The remedy available under the SARFAESI Act, being a special procedure, this respondent is entitled to invoke the same for

realization of their dues.

14. The contention of the Ind Bank Housing Limited, in the counter affidavits, besides denying the allegations of the writ petitioners, is that this

respondent has been notified by the Government of India as a "Financial Institution" under SARFAESI Act on 16.3.2006 and therefore, there is

every legal right for this respondent to issue such notices. Regarding the allegation of the petitioners, that before initiating the proceedings under the

SARFAESI Act, the Bank has to withdraw the civil suit, this respondent would submit that this respondent is not a notified financial institution

under Act 51 of 1993 and therefore, the amendment introduced to Section 19(1) of the Act 51 of 1993 does not preclude the Institution of any

civil action, the pendency of the civil suit does not amount to parallel proceedings.

15. In all these writ petitions, the firm stand of the respondents/Banks is that the only remedy available for the writ petitioners is to challenge the

further action u/s 13(4) of the SARFAESI Act, before the concerned Debts Recovery Tribunal, by filing necessary application u/s 17 of the

SARFAESI Act.

16. Regarding the contentions raised by the purchasers, viz. the petitioners in W.P.Nos.12407 to 12410 and 12841 of 2006, the Ind Bank would

submit that these petitioners, who claim to be bonafide purchasers, do not seem to have invoked the remedy available to them against the

seller/mortgagor u/s 55(1)(a) of the Transfer of Property Act, for non-disclosure of mortgage, amounting to fraud, and have also not taken steps to

set aside the sale and claim damages and therefore, these writ petitions are liable to be dismissed. The very fact, that these petitioners have not

chosen to implead Mr.Mohammed Yaseen, proprietor of Coronet Constructions, itself would demonstrate that the version of these petitioners is

lacking bonafides. The mere perusal of the sale deeds would show that the sale deeds were executed by the power of attorney of the owners of

the land, who was also the promoter of the property. Clause 7 of the power of attorney executed in favour of Mr.Mohammed Yaseen, Proprietor,

Coronet Constructions, by the land owners clearly reveal, that he was given powers to mortgage the property. That being so, it is highly

improbable that the petitioners have not verified as to whether a mortgage has been created on the land, which was being purchased by them. Even

otherwise, the sale of the property, to the petitioners, is subsequent to the creation of equitable mortgage and therefore, the mortgage is subsisting

and valid and the contention, that the petitioners had purchased the property, without the knowledge of the mortgage, is unacceptable.

17. In W.P. No. 35859 of 2005, wherein the demand notice issued by the LIC Housing Finance, was challenged, the Ind Bank Housing Limited

has filed W.P.M.P. No. 41939 of 2005, praying to implead them as party respondent, on the ground that the fourth respondent therein viz. M/s.

New Era Urban Amenities Limited, had entered into an Inter-se Participating Agreement with this respondent and the LIC Housing on 9.5.1994

with regard to total loan of Rs. 880.36 lakhs sanctioned i.e. Rs. 618 lakhs granted by Ind Bank Housing Limited and Rs. 262.36 lakhs granted by

LIC Housing Finance Limited and the said New Era Urban Amenities Limited issued a memo. of confirmation on 7.5.1994, confirming that the title

deeds relating to 25.93 acres of land in Semmanchery village had been given as security with an intention to create an equitable mortgage for the

loan facilities availed from the proposed party. Since the fourth respondent defaulted in repayment, C.S. No. 663 of 1998 was filed against the

respondents 4 and 5 for recovery of a sum of Rs. 4,54,71,475/-, obtained an exparte decree on 23.4.2004 and hence, the charge created by the

fourth respondent on the lands admeasuring 25.93 acres is subsisting and valid in law. Therefore, they have to be impleaded as a party to the

above writ petition.

18. The counter affidavit filed by the LIC Housing Finance Limited was rebutted by the petitioner in W.P. No. 35859 of 2005, by filing a

rejoinder, submitting that although the LIC Housing Finance has submitted that they are a financial institution entitled to invoke the provisions of

SARFAESI Act, but they have stated that they are not a Bank or financial institution under Act 51 of 1993, thus they are taking contrary stands.

This petitioner would further reiterate the stand that continuing the proceedings under SARFAESI Act and civil suit simultaneously, would amount

to double jeopardy.

19. All the writ petitions are filed either by the borrowers or guarantors or by the subsequent purchasers from the borrowers of the Ind Bank

Housing Limited or the LIC Housing Finance Limited, denying their liability and questioning the notices issued by them, invoking the jurisdiction

conferred upon them under the SARFAESI Act, as provided u/s 13(2), inter alia on the following grounds viz.

i) that the Ind Bank Housing Limited or the LIC Housing Finance Limited are not the notified "financial institutions" and therefore, as such, they are

incompetent to invoke the jurisdiction of the SARFAESI Act;

ii) that for the recovery of the amounts alleged as due, either the Ind Bank or the LIC Housing Finance Limited had filed civil suits before this Court

and this being the position, without withdrawing those suits, issuing notice u/s 13(2) of the SARFAESI Act is not maintainable since it would

amount to double jeopardy; and

iii) that before invoking Section 13(2) of the SARFAESI Act, they should have opted their election, to choose the provisions of SARFAESI Act, if

applicable, or to maintain the civil suits, the position being so, according to them, they cannot proceed for the same relief under two different fora,

for which they are estopped.

20. All the writ petitions, are opposed by the contesting respondents, inter alia on the grounds viz.

i) that the " financial institutions ", viz. Ind Bank and LIC are notified under SARFAESI Act, and therefore, they are competent to invoke the

jurisdiction of SARFAESI Act;

ii) that the writs are premature, as well as not maintainable, since the notices were issued only u/s 13(2) of SARFAESI Act, contemplating further

proceedings, if the replies are not satisfactory;

iii) that if any action is taken, after the reply and consideration, invoking Section 13(4) of the SARFAESI Act, if at all, the remedy available for the

parties, viz. the writ petitioners, is only to prefer appeals before the Debts Recovery Tribunal, having jurisdiction, as contemplated u/s 17 of the

SARFAESI Act and in this view, as per the settled proposition of law, the writs are not maintainable;

iv) that the remedies made available to the" " financial institutions " "are in addition to the remedies available as per the existing law and not in

derogation of the same, and therefore, it is not mandatory, that before invoking Section 13(2) of the SARFAESI Act, they should withdraw the

pending civil suits; and

v)that the principles of estoppel or election, would not arise in this case, since both the remedies are not barred by statute, the fact being there

cannot any estoppel against statute.

21. Heard Mr.K.Raju, learned Counsel for the petitioner in WP.34022/2005, Mr.AR.L.Sundaresan, learned senior counsel for the petitioners in

W.P.Nos.35859 and 40817 of 2005, Mr.A.S.Kailasam, learned Counsel for the petitioners in WP.Nos.12407 to 12410 and 12841/2006,

Mr.Vijayanarayanan, learned senior counsel for the petitioners in Wps.16513 to 16515/2006, Mr. Krishna Srinivasan, learned Counsel for the

contesting respondents in WPs.35859, 40817, 12407 to 12410,12841 of 2005 and 16513 to 16515/2006 & forpetitioner in WPMP.14433 of

2006 and Mr.E.Omprakash for the respondent in WP.34022 of 2005 elaborately on the above points.

22. The learned Counsel appearing for either side, inviting my attention to various provisions of Act 51 of 1993 and SARFAESI Act, in addition to

the common law principle, advanced their arguments for and against the points stated above. In the Writ Petitions, though many more grounds are

projected, based on facts, which are even disputed, no argument was advanced on those grounds, except on the above grounds. To appreciate

the facts in issue, we have to remember the admitted factual matrix to some extent, in order to apply the correct provisions of law, then and there.

23. The learned Counsel for the writ petitioners, though had urged originally that the" " financial institutions " "viz. the Ind Bank Housing Limited

and the LIC Housing Limited, which have invoked the provisions of SARFAESI Act are not notified, then, fairly conceded, on seeing the materials

that they are the "financial institutions", notified for the purpose of SARFAESI Act and therefore, it is to be seen, whether they are competent to

issue notices in view of the admitted position, civil suits have been already filed and pending.

24. It is an admitted position, though the Ind Bank Housing and LIC Housing are the notified "financial institutions" under the SARFAESI Act, the

provisions of Act 51 of 1993 are not made applicable to them. Therefore, on the basis of Section 19(1) of Act 51 of 1993, question of withdrawal

of the cases pending before the civil Court as mandatory may not be absolutely necessary, since Proviso (i) to Section 19(1) of the Act 51 of 1993

reads:

Provided that the bank or financial institution may, with the permission of the Debts Recovery Tribunal, on an application made by it, withdraw the

application, whether made before or after the Enforcement of Security Interest and Recovery of Debts Laws (Amendment) Act, 2004 for the

purpose of taking action under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of

2002), if no such action had been taken earlier under that Act.

thereby making it clear, the application made before the DRT alone has to be withdrawn, and this question also will arise only when Act 51/1993

is applicable and O.A. pending, which is not the case here.

25. However, Mr.Vijayanarayanan, learned senior counsel appearing for some of the writ petitioners and Mr.AR.L.Sundaresan, learned senior

counsel appearing for some of the writ petitioners would submit that the doctrine of election applies in all the cases including estoppel and

therefore, without withdrawing the suits already pending, invoking Section 13(2) of the SARFAESI Act is not legally correct. In opposing the

above submissions, the learned Counsel appearing for the" " financial institutions " "would submit that neither the doctrine of election nor estoppel

would operate against them, since in the SARFAESI Act, there is no bar to invoke the provisions of Section 13(2) of the SARFAESI Act, though

already suits have been filed and pending, not withdrawn, that too in view of specific provisions made available in Section 37 of the SARFAESI

Act.

26. Section 37 of the SARFAESI Act reads:

The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the

Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act, 1992 (15 of 1992), the Recovery of

Debts Due to Banks and" " financial institutions " "Act, 1993 (51 of 1993) or any other law for the time being in force.

Thus, prima facie, it is clear, that there could be no bar, for initiating the proceedings u/s 13(2) of the SARFAESI Act despite the fact, civil suits

are pending. The" " financial institutions " "in this case are taking the recourse under common law as well as under the special law viz. SARFAESI

Act. It is not the case, that they are taking the aid of SARFAESI Act, as well as Act 51 of 1993, since in that case alone there is an embargo. Act

51 of 1993 contemplates, as per proviso (i) of Section 19(1), quoted above, when the Bank or financial institution chooses to take action under

the SARFAESI Act, they should seek the permission of the Debts Recovery Tribunal concerned, to withdraw the Original Application pending

therein. This kind of situation is not available, admittedly, in this case, since the" " financial institutions " "have not filed any Original Applications

before the Debts Recovery Tribunal, which they cannot do also, because of the admitted position, that the" " financial institutions " "are not notified

under Act 51 of 1993 also.

27. It is the submission of the learned Counsel appearing for the" " financial institutions " "that the remedy sought by them before the civil Court is

essentially different from the remedy now claimed under SARFAESI Act and therefore, Doctrine of Election is not applicable and in aid my

attention was drawn to a decision in Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, , wherein the Apex

Court has ruled:

The Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are

available, has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is

essentially different.

28. In the case on hand, suits are filed for the recovery of the amounts due to the '' financial institutions '', where cumbersome procedure is

contemplated - trial, preliminary decree followed by final decree etc. under law coupled with CPC. Because of the prolonged litigation unavoidable

and available under common law, when there is no certainty in realising the amount due to this kind of'' '' financial institutions '' ''as well taking into

account the pathetic situation of the '' financial institutions '', who have advanced huge amounts to the borrower, unable to realise the same and are

suffering, as per the recommendation of the Committee, the Government, after deep consideration, has brought into force the SARFAESI Act, for

speedy recovery of the amounts, in addition to Act 51/1993. Under the SARFAESI Act, the recovery procedures are simplified, options are given

to the'' '' financial institutions '' ''to issue notice, wait till the statutory period, then invoking Section 13(4), taking possession of the property even to

sell the secured asset, without intervention of the Court, thereby showing the ambit and scope of the two remedies invoked by the'' '' financial

institutions '' ''are essentially different, though the goal sought to be achieved may be one and the same. For these reasons, I am of the considered

opinion that there can be no estoppel, based upon the doctrine of election, and this conclusion is fortified as per the law laid down by the Apex

Court in Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills and another, .

29. In the case involved in the above decision, the question raised was ''whether the State Financial Corporation, set up u/s 3 of the State Financial

Corporation Act (63 of 1951), is entitled to take recourse to the remedy available to it u/s 29 of the Act, even after obtaining order or a decree,

after invoking the provisions of Section 31 of the Act, but without executing the decree/order. The Apex Court, considering the doctrine of

election, as well as the provisions available in the Act 63 of 1951, viz. Section 29, has come to the conclusion, which reads as follows:

The doctrine of election as commonly understood, would, thus, not be attracted under the Act in view of the express phraseology used in Section

31 of the Act, viz. ""without prejudice to the provisions of Section 29 of this Act"". While the Corporation cannot simultaneously pursue the two

remedies, it is under no disability to take recourse to the rights and remedy available to it u/s 29 of the Act even after an order u/s 31 has been

obtained but without executing it and withdrawing from those proceedings at any stage the use of the expression ""without prejudice to the

provisions of Section 29 of the Act"" in Section 31 cannot be read to mean that the Corporation after obtaining a final order u/s 31 of the Act from

a court of competent jurisdiction is denuded of its rights u/s 29 of the Act. To hold so would render the above quoted expression as redundant in

Section 31 of the Act and the Courts do not lean in favour of rendering words used by the Legislature in the statutory provisions redundant. The

Corporation which has the right to make the choice may make the choice initially whether to proceed u/s 29 of the Act or Section 31 of the Act,

but its rights u/s 29 of the Act are not extinguished, if it decides to take recourse to the provisions of Section 31 of the Act. It can abandon the

proceedings u/s 31 of the Act at any stage, including the stage of execution, if it finds it more practical, and may initiate proceedings u/s 29 of the

Act.

30. From the above observations, it is seen, when two remedies are available for the same relief, prosecuting the same, without not pressing the

other proceedings or not withdrawing the other case, is well maintainable, which could be seen from Section 37 of the SARFAESI Act also, which

is supported by judicial precedent also.

31. A Division Bench of the Kerala High Court in Abdul Azeez v. Punjab National Bank CDJ 2005 Ker HC 442, has considered a similar

situation of the case on hand, wherein it is concluded, "here is no illegality in the Bank taking recourse to the provisions of the Securitization Act,

2002, even though civil suits are pending concerning the subject matter". In the case involved in the above decision also, when the civil sits are

pending, the Bank sought the aid of the provisions of Section 13 of the SARFAESI Act against the borrower and the same was questioned, as if

when the suits are already pending, invoking Section 13(2) or 13(4) of the SARFAESI Act, without withdrawal of the civil case, is legally

incorrect. The Division Bench of the Kerala High Court, considering the purpose and effect of Section 37 of the SARFAESI Act, has held:

the provisions of the Act or the Rules made thereunder shall be in addition to, and not in derogation of, the other laws. So the remedy provided

under the Act is an additional remedy which is unless barred by the statute can be enforced at any point of time. This being the legal position, we

find no illegality in the Bank taking recourse to the provisions of the Securitization Act, 2002, even though civil suits are pending concerning the

subject matter. The question of law posed by the counsel is answered accordingly. In such circumstances, there is no merit in the appeals and they

are accordingly dismissed.

32. A similar view was taken by the Division Bench of the Bombay High Court also in Asha Oil Foods Pvt. Ltd. v. The Jalgaon Janta Sahakari

Bank Ltd. and Ors. 4 (2005) BC 29. In the case involved in the above decision, the action taken by the financial institution under the Maharashtra

Cooperatives Societies Act, 1960 as well as the action taken under the SARFAESI Act, invoking Section 13 was the subject matter. Considering

the provisions of Section 101 of the Maharashtra Cooperative Societies Act, as well as Section 37 of the SARFAESI Act and the remedy

provided u/s 13, as well as seeking aid from Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., , the Division Bench of the

Bombay High Court has ruled, negativing the contention of the borrower, as follows:

The contention raised by the petitioner expressing that it ought to be held that the Bank does not have the remedy available u/s 13 of the

Securitisation Act since recourse will render the scheme of the recovery of dues u/s 101 of the Act redundant, is a submission which is based on

total illusion. No question of such nature is now left open for any further adjudication in view of Mardia Chemicals Case.

This principle is squarely applicable to the case on hand also.

33. Per contra, the learned Counsel appearing for some of the writ petitioners, inviting my attention to a Division Bench decision of the Punjab and

Haryana High Court in 1 (2006) BC 1 , would contend that the Banks or" " financial institutions " "cannot be permitted to avail the remedy under

the SARFAESI Act, when they have already invoked the jurisdiction of civil Court, wherein the Division Bench, has considered not only the

pending case before the civil Court for an amount less than Rs. 1 lakh but over Rs. 1 lakh, in addition to invoking the jurisdiction under Act 51 of

1993. Finally, the Division Bench has ruled, drawing support from other Rulings also, that â€‹simultaneous action under the Recovery of Debts Due to

Banks and" " financial institutions " "Act, 1993 or before the civil Court when the action under SARFAESI Act is contemplated, is not reasonable

and fair. It is also further observed, once the Bank decides to proceed under the SARFAESI Act, the SARFAESI Act imposed an obligation on

the Bank or the financial institution to withdraw the Original Application filed before the Debts Recovery Tribunal, as required under provision (i)

to Section 19(1) of the Act 51 of 1993, which situation is not available in the case on hand. The decision of the Division Bench of the Kerala High

Court also, which I have referred to above, was brought to the notice of their Lordships and distinguishing the same, it is held, the financial

institution has to elect its remedy to either proceed under the Act 51 of 1993 or to withdraw the same, to enable them to initiate action under the

SARFAESI Act.

34. As seen from Paras 36 and 37 of the judgment, an argument was advanced that Doctrine of Election has no applicability, if the remedy is

provided under two different statutes, that is under SARFAESI Act as well as under Act 51/1993. This submission was repelled quoting Section

35 of the SARFAESI Act since it is inconsistent with Section 14(1) of the Act 51/1993 as seen from para 36 of the judgment. Both the

enactments are for speedy recovery, which is not available under common law, since at every stage, there would be hurdle for the financial

institution. Therefore, it may not be possible to apply this Ruling, considering the purposes of the Acts and action taken pursuant to the same. It is

also brought to my notice that the said decision rendered by the Division Bench of the Punjab and Haryana High Court is stayed by the Supreme

Court, though to the limited extent, in Civil Appeal No. 908 of 2006, dated 3.3.2006, which reads:

There will be stay of the operation of the impugned order insofar as it relates to the applications pending before the introduction of the proviso in

Section 19.

35. By going through the judgments of both the Division Benches viz. Kerala and Punjab and Haryana High Courts, in my opinion, the reasons

assigned by the Kerala High Court appears to be well considered, since Section 37 of the SARFAESI Act was elaborately considered therein,

which is not the case in Punjab and Haryana Division Bench case, except a passing reference. Therefore, following the same, I conclude, it is not

necessary or mandatory for the" " financial institutions " "to invoke Section 13, only after withdrawing the civil suits, pending before the civil court.

36. The submission of the learned Counsel for the contesting respondents, that the writ petitions, as such, are not maintainable, has valid force, for

its acceptance since it has the support of settled position of law. A notice issued u/s 13(2) of the SARFAESI Act, if it is not otherwise shown,

basically without jurisdiction, not liable to be challenged invoking Article 226 of the Constitution, which is now well settled, because notice u/s

13(2) of the SARFAESI Act is in the nature of show-cause notice, requesting the borrower, which should include the person claiming interest in

the secured assets also, to discharge the liabilities within sixty days, thereby giving opportunity for the borrower or person claiming under him, to

explain and satisfy the creditor, failing which the secured creditor shall be entitled to exercise the rights under Sub-section (4). In all the cases,

whether it is the borrower or the person claiming interest under them, having interest over the secured assets, only notices u/s 13(2) have been

issued on various dates and therefore, they ought to have submitted their explanations, responding to Section 13(2) notice, which should be

considered by the secured creditor mandatorily and pass appropriate orders, in order to invoke Section 13(4) of the SARFAESI Act. Rejecting

the contention of the borrower or the person claiming under the borrower, if Section 13(4) of the SARFAESI Act is invoked, then, the remedy

available for them, as ruled by the Division Bench of this Court in Digivision Electronics Ltd. v. Indian Bank and Anr. VOL.126 COMPANY

CASES 630, is only u/s 17 of the SARFAESI Act and not prematurely, maintaining writs, as did in all these cases. In this view also, all the writ

petitions are not maintainable.

37. The submission made on behalf of the petitioners in W.P.Nos.12407 to 12410 and 12841 of 2006, that since they are not the actual

borrowers and no notice has been issued to them directly or there is no valid mortgage, may not be a ground to invoke the jurisdiction of this

Court, since an order passed u/s 13(4) of the SARFAESI Act is appealable, not only at the instance of the borrower but also by â€‹any person

aggrieved by all the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under Chapter-III

of SARFAESI Act. Therefore, the right of the subsequent purchasers or the bona fide purchasers or was there any valid mortgage, as the case

may be, could be decided by the Debts Recovery Tribunal, having jurisdiction, since the action taken by the secured creditor u/s 13(4) is with

reference to secured assets of the borrower. If the Tribunal, mentioned u/s 17 of the SARFAESI Act, has no right to decide, which is the secured

asset, whether the third party is an aggrieved person or not, or the property is not liable for the debt, then only, alleging that the Appellate Authority

constituted under the SARFAESI Act has no jurisdiction to decide those points, the jurisdiction of this Court could be invoked, to set right the

alleged illegality, if any, under Article 226 of the Constitution of India.

38. u/s 17(2) of the SARFAESI Act, the Debts Recovery Tribunal is competent to decide, whether any of the measures referred to in Section 13

of the SARFAESI Act, taken by the secured creditor, for enforcement of security are in accordance with the provisions of the Act and the Rules

made therein. Therefore, I am of the considered opinion, whether the property purchased by the third parties could be proceeded as secured asset

also could be decided by the Tribunal, since that falls within Section 13(4) of the SARFAESI Act because of the fact, Section 13(4)(a) reads:

(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 measure 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;

This being the position, which could be deduced from going through the provisions of Law, if at all, the petitioners in W.P.Nos.12407 to 12410

and 12841 of 2006, who claimed that they are the bonafide purchasers, should have awaited till a decision is taken u/s 13(4) of the SARFAESI

Act and before that, maintaining these writ petitions, as if they are aggrieved, in my opinion, is illusion, for which there cannot any remedy in view of

further fact alternate remedy would be available u/s 17 of the SARFAESI Act.

39. Section 36 of the SARFAESI Act prescribes the period of limitation to proceed u/s 13(4) of the SARFAESI Act, which says â€‹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). The period prescribed for enforcing the secured debt

or mortgage is 12 years from the date when the money becomes due, as contemplated u/s 62 of the Limitation Act, 1963. If there was any

subsequent acknowledgment, that also should be taken into consideration, in calculating the period of 12 years, as contemplated in Section 36 of

the SARFAESI Act.

40. The learned Counsel appearing for the petitioners in W.P.Nos.16513 to 16515 of 2005 urged that the notice u/s 13(2) of the SARFAESI Act

has been issued after the period of limitation is over and this being the position, they can maintain the writ petitions, challenging the notices issued

u/s 13(2) of the SARFAESI Act. As seen from Section 13(2) notices, issued on 31.3.2006, in all these matters, charge was created over the

properties on 27.5.2004. Therefore, the question of limitation will not come, since within the period of limitation, action has been initiated, to

enforce the charge and take possession of the secured assets, as contemplated u/s 13(4) of the SARFAESI Act. In this view of the matter, it

cannot be said, at any stretch of imagination, that while the secured creditor had initiated the proceedings, the claim is barred and therefore, these

writ petitions are maintainable.

41. All the writ petitions are taken together and legal position was considered. As far as opposing the writ petitions are concerned, there is no

conflicting interest between the Ind Bank Housing Limited and LIC Housing Finance Limited. Therefore, impleading Ind Bank as a party in W.P.

No. 35859 of 2005 does not arise for consideration. Hence, W.P.M.P. No. 41939 of 2005 is dismissed.

42. In the light of the above discussion, all the writ petitions appear to be meritless, but invoked aiming to protract the proceedings u/s 13(2)

followed by 13(4) of the SARFAESI Act, having the benefit of borrowing, which should not be encouraged. Hence, all the writ petitions are

dismissed, but ordering the parties to bear their respective costs.