

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.756 OF 2015

M/s Printex Graphix (India) Pvt. Ltd.

.....Petitioner.

V/s

District Magistrate Thane.
Authorized Officer,
M/s Abhyudaya Co-operative
Bank Ltd.

.....Respondent

Mr. Partha Sarathy Sarkar for the Petitioner.
Mr. Vishwajeet Sagare, AGP for Respondent No.1.
Mr. Sanjeev Punalekar i/b PRS Legal for Respondent No.2.

**CORAM: V. M. KANADE &
REVATI MOHITE DERE, JJ.**

DATE: 30th January, 2015

P.C.:-

1. By this Petition which is filed under section 226 of the Constitution of India, Petitioner is seeking the following reliefs:-

“17 PRAYER - It is thus most humbly prayed, that this Hon'ble Court may be pleased to issue a Writ of Mandamus or any other appropriate Writ, Order or Directions to the effect -

- a) Directing respondent no-1 not to pursue its order dated 1st Sept, 2014 in taking possession of the assets of the petitioner.
- b) Grant any other relief(s), which will be deemed fit and appropriate in the facts and circumstances of the case.
- c) Saddle the cost of this petition onto the respondent(s)."

2. Brief facts are that the Respondent – Bank filed an application under section 14 of the SARFAESI Act dated 24/01/2014, seeking an order from the District Magistrate for taking possession of the assets of the Petitioner. After the order was passed, the Petitioner herein made inquiries and also filed an application under RTI Act, seeking certified copy of the application. After the certified copy was received by the Petitioner, it was discovered that the application which was filed by the Respondent – Bank was not accompanied with the affidavit duly affirmed by the authorized Officer of the Bank. Petitioner has, therefore, filed this Petition seeking aforesaid reliefs which are found in para 17 of the Petition.

3. The learned Counsel appearing on behalf of the Petitioner submitted that the Petitioner had made an

application to Respondent No.1 not to proceed with the execution of the impugned order. However, his application was rejected on 1/12/2014. He submitted that under section 14 of the SARFAESI Act, the application has to be accompanied with duly affirmed affidavit by the authorized officer of the secured creditor i.e. Respondent No.2. It is submitted that since no such duly affirmed affidavit was filed alongwith the application, impugned order cannot be executed. He submitted that the Petitioner has not prayed for setting aside of the impugned order. He submitted that even if the said order is set aside, the District Magistrate would be barred from entertaining the application under the provisions which are analogous to the principle of *res judicata*. He, therefore, submitted that the Petition may be allowed as per the reliefs claimed by the Petitioner.

4. On the other hand, the learned Counsel appearing on behalf of the Bank fairly conceded that inadvertently the application was not accompanied with the affidavit duly affirmed by the authorized Officer. He submitted that the matter may be remanded so that the District Magistrate may consider the application after the Respondent – Bank files an affidavit duly affirmed by its authorized Officer.

5. In our view, after the application is filed before the Magistrate, Office of the Magistrate has to raise objections if

the application is incomplete. It appears that the Office did not verify whether the application was accompanied by the affidavit duly affirmed by the authorized Officer of the Bank. The Respondent – Bank, therefore, also could not cure the defect or irregularity in the said application. If this fact had been pointed to the Bank, it would have filed duly affirmed affidavit of its authorized officer alongwith the said application. The affidavit which is to be filed has to be in accordance with section 139 of the Code of Civil Procedure. It is well settled that any defect in verification or affirmation under the Rules is a curable defect as has been held by the Apex Court in several cases. Only in cases where there is a special statute like the Representation of the People Act, 1950 which specifically states that non-affirmation is non-curable defect and which leads to dismissal of the Election Petition under sections 83 and 86 of the Representation of People Act, that such defect becomes incurable. There is no such embargo in respect of the application which is filed before the learned Magistrate under section 14 of the SARFAESI Act.

6. For the aforesaid reasons, we are of the view that the order which has been passed by the District Magistrate is ultra vires since it is contrary to the proviso under section 14 of the SARFAESI Act. However, since the defect is curable, we remand the matter back to the learned District Magistrate

permitting the Respondent – Bank to cure the defect and file an affidavit duly affirmed by its authorized Officer and we direct the learned District Magistrate to thereafter pass the order in accordance with law by giving hearing to the Petitioner if such requirement is there in law. The said application after it is accompanied by the duly affirmed affidavit shall be considered and disposed of within four weeks from today.

7. With the above directions, Petition is disposed of.

(REVATI MOHITE DERE, J.)

(V.M. KANADE, J.)