Ladda **IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION (Lodging) No. 1005 OF 2015.

Golf Technologies (P) Ltd and Anr .. Petitioners.

Versus

Axis Bank Ltd & 28 Ors .. Respondents.

Mr Deepak Khosla a/with Devvrat Singh a/with Ms Manali a/with Dilip Kamath i/by Lawfin & Ass for the petitioners.
Mr Iqbal Chagla, Senior Counsel a/with Mr Rohit Gupta a/with Amit Sajoo Atulsingh, Gaurangi Patil i/by PKA Advocates for Respondent No.1.

CORAM : V.M.KANADE & A.R. JOSHI, JJ.
DATE: 7th April,2015.

P.C.

1) Heard learned Counsel appearing on behalf of the petitioners and the learned Senior Counsel appearing on behalf of the respondent No.1 bank.

2) This petition is filed under Article 226 of the Constitution of India challenging the order dated 3rd January, 2015 and also rejecting the application filed by the petitioners seeking recall of the earlier order dated 12th September, 2014 passed by the learned Chief Metropolitan Magistrate, Esplanade, Mumbai ("the Magistrate")under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the SARFAESI Act" for the sake of brevity).

3) Brief facts which are germane for the purpose of deciding this petition are as under :

The petitioners are borrowers and have secured financial assistance from the respondent No.1 bank. The respondent No.1 bank declared the said account as non-performing asset and issued notice under Section 13 (2) of the SARFAESI Act and on the payment not being made within the stipulated time, initiated proceedings under Section 13 (4) of the SARFAESI Act and for the purpose of taking possession of the secured assets, filed an application under Section 14 of the SARFAESI Act in the Court of the learned Magistrate. The learned Magistrate was pleased to allow the said application by his order dated 12th September, 2014. The petitioners herein being aggrieved by the said order preferred an application before the learned Magistrate seeking recall of the said order on various grounds.

4) The learned Magistrate, however, without taking into consideration the grounds raised by the petitioners held that after he has passed an order under Section 14 on 12th September,2014, he has become functus officio and secondly he came to the conclusion that the borrowers did not have any locus to challenge the said order and, therefore, rejected the said application.

5) Being aggrieved by the aforesaid two orders, the petitioners have approached this Court by filing the present petition.

6) The learned Counsel appearing on behalf of the

petitioners, firstly submitted that the petitioners have come out with a specific case of fraud being played on the learned Magistrate and, therefore, it was submitted that the learned Chief Metropolitan Magistrate was duty bound to recall the said order passed by him and to adjudicate issue raised by the petitioners. Reliance was placed on the judgment of the Apex Court in the case of **United India Insurance Co. Ltd** (Appellants) **Vs. Rajendra Singh and Ors** (respondents) reported in AIR 2000 Supreme Court 1165 and also other judgments on the point which have been referred to by the Apex Court in the said judgment, more particularly in paragraphs 12,13, 14, 15 and the observations made by the Apex Court in paragraph 17. It was submitted that one other specific ground was raised by the petitioners in the said application and that under Section 31(j) of the said Act the amount has not become due and payable since it was less than 20% of the amount which was taken by the borrowers and as such, therefore, no order could have been passed under Section 14 of the SARFAESI Act. It was submitted that the learned Magistrate, therefore, ought to have adjudicated the said issue after giving hearing to the petitioners. It is also further submitted that the learned Magistrate has incorrectly referred to the judgment of the Apex Court in the case of **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Co. Ltd & Ors** in Criminal Appeal No. 736 of 2014 (arising out of S.L.P. (Cri) No.1666 of 2012).

7) Per contra, the learned Senior Counsel appearing on behalf of the bank has invited our attention to the judgment delivered by this Court in the case of **M/s Hari Trading Corporation** (petitioner) **Vs Bank of Baroda** (respondent) in Writ Petition No.11459 of 2014 decided on 23rd February, 2015. It is submitted that this Court in terms of the said judgment that the borrower even after the amendment of Section 14 has no locus to agitate an issue about the correctness or otherwise of the order passed by the Magistrate under Section 14. It was submitted that the petitioners had filed a Suit in the Delhi High Court on the various issues which have been raised on the ground of fraud and also the order passed by the Magistrate has been challenged and a declaration is sought that it is a nullity. It is submitted that further proceedings have also been initiated under Section 340 of the Cr.P.C. which are pending.

8) He, therefore, submitted that the petitioners have already approached other competent court challenging the action of the Magistrate and, therefore, this petition deserves to be dismissed in limini.

9) The learned Counsel appearing on behalf of the petitioners in rejoinder has invited our attention to the prayers in the said Suit and has submitted that the order passed by the Magistrate may be stayed for couple of days in order to enable the petitioners to approach the Court.

10) After having heard both the Counsel at length, we are of the view that submissions made by the learned Counsel appearing for the petitioners cannot be accepted. Recently, we have heard a group of petitions on the issue of locus of the borrower to be heard by the Metropolitan Magistrate in an application filed by the bank under Section 14 of the SARFAESI Act and in the said group of the petitions we have considered various issues which have been raised and finally we have held that the borrower does not have any locus to appear before the Magistrate since the procedure which is followed by the Magistrate is non-adjudicatory in nature and that the borrower has an alternate remedy of filing an appeal under Section 17 of the SARFAESI Act.

11) In the present case, it is submitted that the bank has exercised fraud on the Magistrate and, therefore, the Magistrate ought to have recalled the order and permitted the petitioners to bring on record the material establishing fraud committed by the bank.

12) We are afraid that if such a permission is granted, then, the entire procedure which is followed by the Magistrate would become adjudicatory and that is not permitted by law.

13) Alternatively, it is submitted that even if the borrowers are not heard, if the material is placed on record Magistrate can consider the said material after calling upon the bank to give its explanation. We afraid that such a procedure is not contemplated under Section 14 of the SARFAESI Act.

14) Shri Chagla, learned Senior Counsel appearing on behalf of bank has also invited our attention to a Division Bench judgment of this Court in Writ Petition No. 4033 of 2010 in the **Union of Bank of India Vs. The State of Maharashtra** decided on 5th July, 2010 wherein a similar issue regarding power of the Magistrate to recall its own order was considered. We have perused the said judgment. The Division Bench has in terms held that after the order passed under Section 14 by the Magistrate, he virtually becomes functus officio to the concerned issue. We concur with the observations made by the Division Bench and we are, therefore, not in a position to accept the submissions by the learned Counsel appearing on behalf of the petitioners.

15) It was further submitted that the affidavit filed by the bank under Section 14 of the SARFAESI Act was not a proper affidavit since it did not contain any averment that the provisions of Section 31(j) have been complied with and that the amount which is due to the bank is more than twenty per cent of the amount which was borrowed by the borrowers. On the other hand, the learned counsel appearing on behalf of the bank has submitted that the entire loan amount has been recalled and, therefore, this more than twenty per cent of the amount recalled. This fact has been vehemently disputed and opposed by the learned counsel appearing on behalf of the petitioners. Be that as it may, in our view, this issue as to whether the amount was merely twenty per cent and whether the signatures of the petitioners'

Directors were forged and whether the correspondence made by the bank with the petitioners was on a old letter head will have to be agitated in the proceedings which are initiated by either parties before the Debt Recovery Tribunal under Section 17 of the SARFAESI Act or under RBBI. We, are therefore, not inclined to interfere with the order passed by the learned Magistrate while exercising our writ jurisdiction under Article 226 of the Constitution of India. Writ petition is, therefore, dismissed. The bank may not take possession for a period of ten days. Possession may be taken on 22nd April, 2015 without prejudice to the petitioners right to approach before the Competent Authority.

16) Parties to act on an authenticated copy of this order.

(A.R. JOSHI, J) **(V.M.KANADE,J)**