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HIGH COURT OF CHHATTISGARH, BILASPUR

WPC No. 2366 of 2015

1. Mahesh Sachdev S/o Late Shri Dwarka Das Sachdev, Aged About 53 Years R/o C 204, 1st Floor, Jai Lakshmi Complex, Main Road, Fafadih, Raipur, P. S. Pandri District Raipur, Chhattisgarh.

2. Smt. Sunita Sachdev, W/o Shri Mahesh Sachdev, Aged About 49 Years R/o C 204, 1st Floor, Jai Lakshmi Complex, Main Road, Fafadih, Raipur, P. S. Pandri District Raipur, Chhattisgarh.

---- Petitioner

Versus

1. State Of Chhattisgarh Through Its Secretary, Department Of Revenue, Mahanadi Bhawan, Naya Raipur, Chhattisgarh.

2. The District Collector & District Magistrate, Raipur, District Raipur, Chhattisgarh.

3. India Bulls Housing Finance Limited, Through Its Authorised Officer, India Bulls House, 448- 451, Udyog Vihar, Phase V, Gurgaon 122016, Haryana

---- Respondent

For Petitioners	Shri Satish Agrawal, Advocate and Shri Ankit Singhal, Advocate
For Respondent/State	Adhiraj Surana, Dy. Govt. Advocate
For respondent No.3	Shri Rajesh Maindiretta and Shri Harsh Wardhan, Advocate

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Hon'ble Shri Justice Prashant Kumar Mishra

C A V Order

06/04/2016

1. In this petition under Article 226 of the Constitution of India, the petitioners would pray for quashment of the orders dated

13.04.2015 & 20.07.2015 passed by the respondent No.2, Collector/District Magistrate, Raipur directing delivery of possession of the mortgaged property to the respondent No.3, India Bulls Housing Finance Limited. By the second order, the District Magistrate has rejected the petitioners' application for review of the previous order dated 13.04.2015.

2. The petitioners had obtained loan of Rs.48,50,000/-, Rs.40,34,542/- and Rs.1,22,00,000/- for their business and for construction of house as well. The loan facility was secured by creating mortgage of the residential property bearing plot Nos. C-94/2 and C-95/2 situated at Scheme No.2 of the Raipur Development Authority, Devendra Nagar, Phaphadih, Raipur. On petitioners' failure to repay the loan amount, proceedings under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (*for brevity 'the Act, 2002'*) were initiated. On petitioners' failure to repay the amount despite service of notice under Section 13 (2) of the Act, 2002 and obtainment of symbolic possession under Section 13 (4), the respondent No.3 moved an application under Section 14 of the Act, 2002 for delivery of physical possession of the mortgaged property. It is this application of the respondent No.3, which has been allowed by the impugned order dated 13.04.2015.

3. A preliminary objection has been raised by the respondent that the petitioners have alternative remedy of preferring an appeal under Section 17 of the Act, 2002, therefore, the writ petition is not maintainable. It has also been averred that the petitioners have concealed by not disclosing pendency of S.A. No.154/2014 and S.A.No.155/2014 before the Debts Recovery Tribunal, Jabalpur (*for brevity 'the DRT'*), which have been preferred by the petitioners in the month of December, 2014 and the same are pending consideration.

4. It has been argued on behalf of the petitioners that the order passed under Section 14 is not appealable because Section 14 (3) attaches finality to the proceeding, therefore, the petitioners have no other alternative remedy. It is also put forth by the petitioners that the possession has not yet been obtained, therefore, despite law laid down by the Supreme Court in **Standard Chartered Bank v. V. Noble Kumar and others**[1]**,** the petitioners are not in a position to avail the remedy available under Section 17 of the Act, 2002.

5. The question as to whether an order under Section 14 of the Act, 2002 is appealable was dealt with by the Supreme Court in **Standard Chartered Bank** (supra). In the said matter, the following has been held by the Supreme Court in paras 26 to 28 :

> 26. It is in the abovementioned background of the legal frame of Sections 13 and 14, we

1 (2013) 9 SCC 620

are required to examine the correctness of the conclusions recorded by the High Court. Having regard to the scheme of Sections 13 and 14 and the object of the enactment, we do not see any warrant to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under Section 13(4) and on facing resistance, he may still approach the Magistrate under Section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under Section 14. The submission that such a construction would deprive the borrower of a remedy under Section 17 is rooted in a misconception of the scope of Section 17.

27. The “appeal” under Section 17 is available to the borrower against any measure taken under Section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under Section 13(4). Alienating the asset either by lease or sale, etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, Section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower (sic the secured creditor). Therefore, the borrower is always entitled to prefer an “appeal” under Section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the secured creditor or by resorting to the procedure under Section

> 14. We are of the opinion that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available.
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> 28. It can be noticed from the language of the proviso to Section 13(3-A) and the language of Section 17 that an "appeal" under Section 17 is available to the borrower only after losing possession of the secured asset. The employment of the words "aggrieved by … taken by the secured creditor" (emphasis supplied) in Section 17(1) clearly indicates the appeal under Section 17 is available to the borrower only after losing possession of the property. To set at naught any doubt regarding the interpretation of Section 17, the proviso to sub-section (3-A) of Section 13 makes it explicitly clear that either the reasons indicated for rejection of the objections of the borrower or the likely action of the secured creditor shall not confer any right under Section 17.

6. The Supreme Court in **Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and others**[2] held that the decision taken by the District Magistrate under Section 14 can be challenged before the High Court under Article 226/227 of the Constitution of India.

7. In **K. Arockiyaraj and others v. Chief Judicial Magistrate and another**[3], the Full Bench of the Madras High Court held that while proceeding to hand over possession of secured assets to the bank/financial company, the Chief Metropolitan Magistrate or

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2 (2014) 6 SCC 1
3 I (2014) BC 6 (FB) (Mad.)

the District Magistrate does not get involve in adjudication of rights and that power of assistance under Section 14 is an executive function and not as a judicial function. The following has been held by the Full Bench of the Madras High Court in paras 15 to 18 :

> 15. On perusal of Sections 13(2), 13(4), 14(1) and 14(2), it is evident that the secured creditor can proceed against the secured assets, if the borrower makes any default in repayment of secured debts or any installment thereof. Any person aggrieved against the order passed under section 13(4) of the Act is given a right of appeal under section 17 of the Act. The adjudication of the rights of parties will come only if the action of the secured creditor is challenged in an appeal filed under section 17. A further appeal to the Appellate Tribunal (DRAT) is also provided under section 18 of the Act.
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> 16. Section 14 (1-A), inserted through the Amendment Act No.1 of 2013, contemplates delegation of power to assist, by the District Magistrate/Chief Metropolitan Magistrate, to any officer subordinate to him, amplifies the intention of the Parliament to treat the power of assistance as an executive function and not as a judicial function. If the power is a judicial function, adjudicatory in nature, there may not be such delegation to any subordinate officer. It is well settled in law that the adjudicating authority cannot delegate his power as it will run contrary to the principle '*Delegata potestas non potest deligari*'.
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> 17. Section 2 of the SARFAESI Act, 2002, deals with definitions. Sub-section (2) of section 2 saved the definitions contained in the Indian Contract Act, 1872; Transfer of Property Act, 1882; the Companies Act,

> 1956; the Securities and Exchange Board of India Act, 1992; which are not inconsistent with the definition given in the SARFAESI Act, 2002. The said section reads as follows:
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> > "2(2) Words and expressions used and not defined in this Act but defined in the Indian Contract Act, 1872 (9 of 1872) or the Transfer of Property Act, 1882 (4 of 1882) or the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall have the same meaning respectively assigned to them in those Acts."
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> 18. Thus, it is beyond any shadow of doubt that no adjudication of rights are involved while getting assistance from the Chief Metropolitan Magistrate or the District Magistrate by the Financial Institution/ secured creditor under Section 14 of the Act.

8. A Division Bench of the Bombay High Court in **Asset Recovery Corporation India Ltd. v. State of Maharashtra and others**[4] the following has been held in paras 6 to 8 :

> 6. The impugned order of the Respondent No.2 has clearly transgressed the limitations on his jurisdiction. The Respondent No.2 has virtually entered upon an adjudication by coming to the conclusion that the procedure under the Act has not been complied with. The objection of the Respondent Nos.3 & 4 to the adoption of a measure under Section 13 (4), has to be addressed before the DRT under Section 17 of the Act. Those objections cannot be either urged before the District Magistrate or be adjudicated at the stage when the Bank or financial institution seeks an order under Section 14. Under Section 14, it has been provided that the District Magistrate, within

4 IV (2012) BC 733 (DB)

whose jurisdiction the secured asset is situated, can be moved where possession of the asset is required to be taken by the secured creditor or if any of the secured assets is required to be sold or transferred by the secured creditor under the Act. The order of the District Magistrate under Section 14 is in aid of the measure that the secured creditor seeks to take under Section 13 (4) by taking over possession of the secured asset. As a matter of fact, as was held by the Division Bench in Trade Well, even a notice to the borrower is not contemplated at that stage. The remedy of the borrower is under Section 17, once the measure has been taken under Section 13 (4). The judgment of the Learned Single Judge of the Karnataka High Court in Vijaya Bank case, in fact, also adopts a position in law consistent with what has been stated in the judgment of this Court in Trade Well. In any event, the Respondent No.2 was duty bound to act in accordance with the law laid down by this Court, which is binding upon him. In failing to do so and in virtually entering upon the merits of the entitlement of the Petitioner, the Respondent No.2 has exceeded his jurisdiction. There is absolutely no dispute about the position that a notice under Section 13(2) was served on the Respondent Nos.3 & 4 and that the secured asset is within the jurisdiction of the Respondent No.2. Once these two facts were established, the Respondent No.2 could not have refused to pass an order under Section 14.

7. The Learned AGP has placed on the record of the Court, two letters addressed to the Respondent No.2 on 18 November 2010 and 17 January 2011 by the office of the Government Pleader requesting him to furnish instructions to file an affidavit in reply in these proceedings. No reply has been filed by the Respondent No.2 despite adequate communication to that effect by the office of the Government Pleader.

8. For these reasons, we allow the Petition by setting aside the impugned order

> of the Sub Divisional Magistrate at Solapur dated 16 July 2010 in Application No.4 of 2010. We direct that the Respondent No.2 shall, within a period of one week from the date on which an authenticated copy of this judgment is produced before him, pass an order under Section 14 and thereupon take steps forthwith to effectuate compliance with the order. The Respondent No.2 shall take necessary steps under Sub-section (2) of Section 14 for effectuating compliance.

9. In order to assail the legality and validity of the proceedings initiated by the District Magistrate, the petitioners are required to demonstrate inherent fatal defect in exercise of jurisdiction, which is so arbitrary and unreasonable requiring this Court to step in under Article 226 of the Constitution of India.

10. In a given case, the proceedings may be wholly arbitrary and stinking requiring the Court to exercise the writ jurisdiction, however, perusal of the order sheets before the District Magistrate would reveal that notice was served on the petitioners by affixture and, thereafter, the petitioners were proceeded *ex parte* on 16.02.2015 and the final order was passed on 13.04.2015. The petitioners, thereafter, moved an application for review of the order. When notice of this review application was issued to the respondent No.3, WPC No.1015/2015 came to be filed by the respondent No.3, which was dismissed by this Court on 03.12.2015 for having rendered infructuous in view of the subsequent order passed by the District Magistrate on 20.07.2015.

11. The petitioners have also contended that the residential property in question is occupied by a tenant and physical possession was not obtained, however, the said facts being having been disputed by the respondents, it is not open for scrutiny by the writ Court.

12. The petitioners having failed to repay the amount of Rs.2,67,29,480/- as stated by the respondent No.3 in its reply to the application for grant of ad-interim relief and the securitisation application Nos.154 and 155 of 2014 preferred under Section 17 of the Act, 2002 are already pending before the Debt Recovery Tribunal, the appropriate remedy for them lies in raising the matter before the Debts Recovery Tribunal.

13. This Court in **Dansingh Rai v. Manoj Kumar Sharma**[5], held thus in para 4 to 6 :

> 4) Perusal of the impugned order would indicate that the Bank had issued notice to the petitioner under Section 13 of the Act, 2002 and has thereafter proceeded to invoke provisions contained under Section 14 of the Act to obtain possession of the secured asset. Attempt made by learned counsel for the petitioner to take this Court through the statement of accounts is not open for scrutiny by this Court in this petition, wherein challenge is to the proceedings under Section 14 of the Act, 2002. The petitioner should have preferred an appeal before the jurisdictional Debt Recovery Tribunal when the Bank proceeded to take steps under Section 13 of the Act, 2002. Having failed to prefer any

5 WPC No.2026 of 2015 (decided on 18-11-2015)

appeal, it is not open for the petitioner to question the correctness of the account at this stage.

5) In the considered opinion of this Court, the petitioner having not brought to the notice of the Court any procedural defect of substantial nature committed by the District Magistrate while invoking under Section 14 of the Act, 2002, no ground for interference in this petition is made out. The Supreme Court in the matter of B.K. Muniraju Vs. State of Karnataka and others, has held thus in para 22:-

> "22. It is settled law that a writ of certiorari can only be issued in exercise of extraordinary jurisdiction which is different from appellate jurisdiction. The writ jurisdiction extends only to cases where orders are passed by inferior courts or tribunals or authorities in excess of their jurisdiction or as a result of their refusal to exercise jurisdiction vested in them or they act illegally or improperly in the exercise of their jurisdiction causing grave miscarriage of justice. In regard to a finding of fact recorded by an inferior tribunal or authority, a writ of certiorari can be issued only if in recording such a finding, the tribunal/authority has acted on evidence which is legally inadmissible, or has refused to admit an admissible evidence, or if the finding is not supported by any evidence at all, because in such cases the error amounts to an error of law. It is needless to mention that a pure error of fact, however grave, cannot be corrected by a writ."

6) The petitioner has failed to point out any such inherent or palpable defect of jurisdiction in the impugned order, therefore, the writ petition deserves to be and is hereby dismissed.

14. Applying the well settled principles of law to the facts of the present case and for the reasons mentioned hereinabove, the present petition is, thus, held not maintainable and it is accordingly dismissed. Sd/-

Judge

Prashant Kumar Mishra

Gowri