BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 21.07.2016
CORAM :

THE HONOURABLE MR.JUSTICE NOOTY.RAMAMOHANA RAO
and
THE HONOURABLE MR.JUSTICE S.S.SUNDAR

Writ Petition (MD) No.12789 of 2016

United Bank of India,
Madurai Branch,
Rep by its Chief Manager/
Authorized Officer,
Southern Regional Office,
R.K.Math Road,
Mandaveli, Chennai 28. ... Petitioner

Vs.

The District Collector/
District Magistrate, Madurai District. ... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Mandamus, directing the respondent to dispose of the application filed by the petitioner Bank under Section 14 of the SARFAESI Act, 2002 in Roc.No.C3/27889/2015, dated 03.07.2015 by following due procedure contemplated under law within the time fixed by this Court.

For Petitioner : Mr.H.Arumugam
For Respondent : Mr.M.Alagathevan
Special Govt.Pleader

ORDER

(Order of the Court was made by **NOOTY.RAMAMOHANA RAO,J**)

This writ petition can be disposed of without putting the opposite party on notice in view of the nature of the order which we propose to pass.

2.It appears that the Authorised Officer of the United Bank of India, Madurai Branch, the writ petitioner herein has filed an application under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (henceforth, for brevity referred to as the SARFAESI Act) before the District Collector and District Magistrate, Madurai for securing the assistance of the District Collector for taking possession of a particular immovable property. The District Collector has examined the said application of the Authorised Officer and by his communication, dated 03.07.2015 sought for some additional information. Unfortunately, he has asked for the following information also “it may also be clarified whether the borrowed property is still in the physical possession of the Bank.” In response thereto, the Bank appears to have secured another affidavit of the Authorised Officer sworn to on 05.10.2015 and filed it before the District Collector. It is asserted that the borrower has created a security interest in the immovable property in question by creating a mortgage overthere in favour of the Bank and that the borrower is in possession of the said property and he has not leased out the mortgaged property to any other person and hence, the Bank has solicited the District Collector to pass appropriate orders. The affidavit of the Authorised Officer has also drawn the attention of the District Collector that in case the physical possession of the property were to be lying with the Bank in question, the need to secure the assistance of the District Collector for taking possession of the said immovable property would not simply arise, thus implying that the District Collector has to order for taking possession of the immovable property now only to hand over the same to the Authorised Officer of the Bank. The District Collector once again addressed another communication, dated 17.11.2015 the content of which is verbatim the same as that is contained in the earlier communication of the District Collector, dated 03.07.2015.

3.Obviously, the District Collector has not applied his mind to the contents of the affidavit sworn to by the Authorised Officer on 05.10.2015 wherein it is made clear to the Collector that the possession of the secured asset **is still lying with the borrower** and he has not created any lease hold interest therein. Therefore, the communication addressed by the District Collector, Madurai on 17.11.2015 is obviously without any serious application of mind on the part of the Collector. In those set of circumstances, finding that the Collector is not acting in the matter in accordance with law, another request has been made by the Bank on 26.02.2016 pointing out that the application under Section 14 of the Act has been lodged with the Collector's Office on 18.06.2015 and that the borrower's due is more than 32 lakhs as on 25.02.2016 to the Bank and hence, the Bank requires to take possession of the secured asset immediately. In this back drop, the above writ petition has been filed.

4.Since we are facing on a regular basis similar grievance nurtured by the Banks and other financial institutions, on one hand and also borrowers/guarantors on the other, we require to clarify the role, position and the action to be undertaken by the agency entrusted with the task under Section 14 of the Act.

5.The expression 'Bank' has been defined in Section 2(1)(c) of the Act which includes a Banking company or the State Bank of India or any subsidiary Bank or a multi-state co-operative Bank or such other Bank which the Central Government may, by notification, specify for the purposes of the Act.

6.The expression 'borrower' has been defined in Section 2(1)(f) of the Act as any person who has been granted financial assistance by any Bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any Bank or financial institution and includes a person who becomes borrower of a securitization company or reconstruction company consequent upon acquisition by it of any rights or interest of any Bank or financial institution in relation to such financial assistance. Thus, the expression 'borrower' has been defined in broad terms which would include not only the person who has availed the financial assistance from the Bank or financial institution concerned but would also include the person who has given any guarantee (guarantor) or created any mortgage (i.e.) the mortgagor or the person who has created a pledge on immovable assets in favour of the Bank or financial institution.

7.The expression 'property' has been defined in Section 2 (1) (t) of the Act as meaning both movable and immovable property, and any debt or any right to receive payment of money, whether secured or unsecured; receivables, whether existing or future; or intangible assets, being know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature.

8.The expression 'security agreement' has been defined in Section 2(1)(zb) of the Act as meaning an agreement, instrument or any other document or arrangement under which security interest is created in favour of the secured creditor **including the creation of mortgage by deposit of title deeds with the secured creditor.** (Emphasis is brought out now)

9.The expression 'secured creditor' has been defined to mean in Section 2(1)(zd) as any Bank or financial institution or any consortium or group of banks or financial institutions.

10.The expression 'security interest' has been defined in Section 2 (1) (zf) as meaning the right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31.

11.Therefore, the writ petitioner being a Banking company answers the description of the expression 'Bank' as defined in Section 2(1)(c) of the Act and the borrower answers the description of borrower as defined in Section 2(1)(f) of the Act.

12.Under Section 13 of this enactment, which has been ushered in by the Parliament for purposes of securtisation and reconstruction of financial assets and enforcement of security interest, measures which could be taken for enforcing the security interest have been provided for.

13.In case, the borrower failed to discharge his liability in full, within the period specified in the demand notice raised under sub-section (2) of Section 13 of the Act, the secured creditor may take recourse to one or more of the measures to recover his secured debt provided under sub-section (4) of Section 13 of the Act. Where any borrower makes any default in repayment of the secured debt or any installment thereof and such a debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights provided for under sub-section (4). Sub-section (4) thereof, is relevant for our present inquiry and it reads as under:-

"*(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 for 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.Thus a right gets accrued in favour of a secured creditor, if the borrower fails to respond to the notice issued by the secured creditor under sub-section (2) of Section 13, by liquidating the debt and as a sequence of the further default of the borrower in not liquidating the liability towards the secured creditor, the secured creditor can take recourse to the provisions under sub-section (4) of Section 13. As can be noticed from the provision contained in sub-section (4) of Section 13, one of the measures which can be taken is to take possession of the secured asset of the borrower including the right to transfer it by way of lease, assignment or sale. Therefore, the right to take possession of an immovable property accrues to the secured creditor if the demand notice under sub-section (2) of Section 13 has not been responded to and the liability is not completely liquidated by the borrower.

15.Under Section 14 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 by such a secured creditor, it 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 is situated, to take possession thereof and forward such asset and documents to the secured creditor later on.

16.Therefore Section 14 is an enabling provision which can be invoked by the secured creditor in case of the continued default on the part of the borrower to liquidate the liability in spite of receiving the demand notice raised under sub-section (2) of Section 13 and in spite of expiry of sixty days time thereafter, and if the liability has not been liquidated in full, the action to take possession of the secured asset or control of it, with a view to transfer by way of lease, assignment or sale would accrue to the secured creditor.

17.In law no person can take possession of an immovable property without following the due process of law. However, strong the right, the title and interest of an individual might be in a particular immovable property but nonetheless, the person in possession of such property cannot be dispossessed, without exercising his right in accordance with law. It is in recognition of the said principle of law that the Parliament has incorporated Section 14 enabling the Chief Metropolitan Magistrate or the District Collector, as the case may be, to take possession of an immovable property of a borrower and forward such asset to the secured creditor. In other words, the State's power to take possession of immovable property is lent via Section 14 of the Act to the secured creditor. In effect, Section 14 came to be recognised as an enabling provision and the exercise of power under that section is not in the nature of an adjudicatory role. In fact, the District Collector is only required to be satisfied that the State's power to take possession of immovable property which is vested in his hands by the provision contained under Section 14 of the Act, is put to proper use and hence he is required to be satisfied of the necessity to exercise such power. That was the reason why certain information contemplated under various sub clauses (i) to (ix) of Section 14 are required to be placed before the authority under Section 14, accompanied by a sworn affidavit of the Authorised Officer of the secured creditor. The information is therefore, furnished to the authority under Section 14 of the Act to enable him to be satisfied about the genuine requirement of exercise of power by that authority.

18.It is apt to notice the principle enunciated by the Supreme Court in ***Standard Chartered Bank Vs.V.Nobel Kumar, (2013) 9 SCC 620*** wherein in paragraphs 25 and 26, it has been held as under:-

"25.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.

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

19.Therefore, wherever an application is filed before the District Collector, under Section 14 of the Act, he is required to note that the power of the State to take possession of immovable property is invoked by the secured creditor. The secured creditor, on his own, need not take steps to possess the secured asset in question. It is also not necessary that the secured asset should be put to any process of its transfer **before** the provision under Section 14 is invoked by the secured creditor. Section 14 is a facility created in favour of the secured creditors by the Parliament for the purpose of enabling them to take control of the secured asset including the right to transfer the same by way of lease or sale etcetera, later on.

20.Since in a majority of the cases, we find that there was some kind of trepedition on the part of the District Collectors, we clarify that their satisfaction that the matter requires the assistance to be rendered to the secured creditor **is to be arrived** at upon carefully appreciating the information furnished by the Authorised Officer of the secured creditor. The affidavit of the Authorised Officer vouching for the facts and data contained in the information could be obtained. This measure is obviously contemplated so that in case of any inaccuracies in the information furnished to the District Collector, it is the Authorised Officer of the secured creditor who will become accountable and responsible but not the District Collector.

21.With the mounting arrears of debts to be recovered by the Banking sector in the country, it is imperative that the District Collector concerned shall deal with any such request made by the secured creditor as expeditiously as is possible and preferably with a maximum period of two months from the date of receipt of such request. The District Collector is also empowered to secure any information which is relevant and required for recording his satisfaction. **The satisfaction of the District Collector, can be recorded in the files maintained in his office and the same shall also preferably be adverted to in the order which he passes**, so as to clear all such possible doubts which persist in the minds of the borrowers as to whether the District Collector has truly been satisfied or not about the need and necessity, to exercise the power conferred under Section 14 of the Act. As noticed by us in this case, the District Collector, **shall not insist for information to be furnished with regard to the possession of the secured asset lying with the secured creditor or not.** That would amount to begging the question itself. If the possession of the secured asset were to be lying with the secured creditor, the need and necessity to invoke the provision contained under Section 14 of the Act itself would not arise.

22.It is also necessary for us to clarify that the information can be obtained by the District Collector from the Authorised Officer and it is open to the District Collector to get it verified as to whether the secured asset is in possession of any tenant and in case any such tenant is in possession of the secured asset, it shall be open to the District Collector to put such a tenant on notice, hear him and then pass an appropriate order.

23.For all the aforementioned reasons, we direct the District Collector, Madurai to deal with the application filed by the writ petitioner Bank by the Authorised Officer on 18.06.2015 duly taking into consideration the information furnished by the Authorised Officer of the secured creditor on 05.10.2015 and pass appropriate orders, recording his satisfaction clearly, within a maximum period of sixty days from today.

24.We hope and trust that the Additional Chief Secretary to the Government and Chief Commissioner of Land Administration, Government of Tamil Nadu, Chennai would take this opportunity to clarify to all the District Collectors concerned in the State, if necessary by circulating a copy of this judgment for the purpose of their guidance.

25.Registry is directed to forward a copy of this judgment to the Additional Chief Secretary to the Government and Chief Commissioner of Land Administration, Government of Tamil Nadu, Chennai.

26.With this, the writ petition stands disposed of at the admission stage. No costs.

Sd/
Assistant Registrar(AE)

/TRUE COPY/

Sub Assistant Registrar

To
The District Collector/
District Magistrate, Madurai District.

Copy to:
1 The Additional Chief Secretary to the Government,
State of Tamil Nadu,
Secretariat, Chennai - 9.

2. The Chief Commissioner of Land Administration,
Government of Tamil Nadu, Chepauk,
Chennai - 5.(for further action)

+1cc to Special Government Pleader in SR.No.39114

Writ Petition (MD) No.12789 of 2016
21.07.2016

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