BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 09.11.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN
and
THE HONOURABLE MRS. JUSTICE J.NISHA BANU

W.P(MD)No.21453 of 2016
and W.M.P.(MD) No.15333 of 2016

S.Senthilathiban ... Petitioner

Vs.

1.The District Collector,
Virudhunagar District,
Virudhunagar.

2.The Thasildhar,
Aruppukottai,
Virudhunagar District.

3.The Authorized Officer/Chief Manager,
Indian Bank, Zonal Office,
Madurai.

4.The Indian Bank,
Rep. by its Chief Manager,
No.137, Pandalgudi Road,
Aruppukottai,
Virudhunagar District. ... Respondents

PRAYER: The Writ Petition is filed under Article 226 of the Constitution of India to issue a Writ of Certiorari, calling for the records relating to the impugned order passed by the 1st respondent in his proceedings ROC.C3/43478/2015 dated 27.07.2016 and consequential impugned order passed by the 2nd respondent in his proceedings Na.Ka.A2/5946/2016 dated 28.10.2016.

For Petitioner : Mr.R.Rajesh
For Respondents 1 & 2 : Mr.A.K.Baskarapandian
Special Government Pleader
For Respondents 3 & 4 : Mr.S.Suresh
for M/s.Aiyar and Dolia

ORDER

(Judgment of this Court was delivered by M.SATHYANARAYANAN, J.)

Heard the submission of learned counsel for the petitioner, Mr.AK.Baskarapandian, learned Special Government Pleader, who accepts notice on behalf of the respondents 1 and 2 and Mr.S.Suresh, who accepts notice on behalf of the 3rd respondent.

2.By consent this writ petition is taken up for final disposal.

3.The petitioner is a borrower, who had availed loan facilities from the 4th respondent bank and challenged the legality of the order passed by the 1st respondent under Section 14 of the SARFAESI Act, 2002, has filed this Writ Petition.

4.The petitioner in the affidavit filed in support of the writ petition would aver among things that he is the sole proprietor of M/s.Sankaralingam Chettiar, a waste cotton mill unit and in order to develop his business, he borrowed a sum of Rs.39,00,000/- from the 4th respondent and for the purpose of securing the loan he has mortgaged his properties to the extent of 1.87 acres situated at S.No.298/2A, T.S.No.5/2, Ward No.G, Block No.13 and Survey No.298/3A, T.S.No.5/2 ward No.G, Block No.13 and he claimed to have paid the dues without default. It is further stated by the petitioner that on account of recession in the business, coupled with a fire accident took place in his factory, he was not in a position to pay the dues in time, but claimed to have settled the amount on 01.08.1997. However, the respondents 3 and 4 have arrived at an exorbitant amount of Rs.1,20,66,338/- as outstanding amount and immediately he approached the 4th respondent seeking details of the account, but it was refused and to his shock and surprise the 3rd respondent issued a demand notice under Section 13(2) of the Act on 16.09.2002 upon the petitioner as well as the guarantor to pay the said sum and it was also followed by Possession Notice under Section 13(4) of the SARFAESI Act on 19.03.2008, which made the petitioner to file S.A.No.86 of 2008. In the interregnum, recovery proceedings were initiated in O.A.No.28 of 1999, which came to be ordered and the auction sale was fixed on 19.11.2015 and the respondents 3 and 4 claim to have taken symbolic possession. Thereafter, the 3rd respondent has approached the first respondent under Section 14 of the SARFAESI Act to take possession of the property and it was ordered on 28.10.2016. Challenging the legality of the order, he has filed the present writ petition.

5.The learned counsel for the petitioner would submit that admittedly before ordering the said petition, neither the petitioner nor the guarantor was put on notice and despite the fact that the entire loan amount has been settled, still the 4th respondent has chosen to claim Rs.1,20,66,338/- and as such prays for quashing of the same.

6.Per contra, Mr.A.K.Baskara Pandian, learned Special Government Pleader appearing for the respondents 1 and 2 would submit that the first respondent on correct application of law and on going through the materials has rightly ordered the petition. Therefore, interference of this Court is not warranted.

7.The learned Standing Counsel for respondents 3 and 4 would state that right from the year 1997 he did not pay the principal and interest due, but more than 10 occasions stalled the proceedings and sale has been effected to a third party/successful bidder and sale certificate has also been issued and possession of the property continue to remain with the petitioner. Hence, the 3rd respondent was constrained to approach the first respondent by invoking Section 14 of the SARFAESI Act. Since the impugned order has been passed with due and proper application of mind, he prays for dismissal of the writ petition.

8.This court has paid its best attention to the materials on record and also to the respective submissions made.

9.A division Bench of this Court in a Writ Petition enumerated the procedure to be followed while ordering the petition under Section 14 of the SARFAESI Act, against which SLP was filed, which was converted as Civil Appeal and the Hon'ble Supreme Court in its decision, which was reported in **2013(1) SCALE 540 [Standard Chartered Bank vs. V.Noble Kumar]**, has elaborated the scope of Section 14 and it is relevant to extract paragraphs 27, 34 and 36.

> **“27.** 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.
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> ...
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> **34.** We are of the opinion that the High Court clearly erred in recording such a conclusion. The language of Rule 8 does not demand such a construction. On the other hand, a Magistrate whose functioning is structured by the Code of Criminal Procedure is required to act in accordance with the provisions of the said Code unless expressly ordained otherwise by any other law. It is not a case that CrPC never prescribed for the procedure to be followed by the Magistrate in a case where the Magistrate is required to take possession of property. For example, under Section 83 of the Code, a criminal court is authorised to attach the movable or immovable property or both belonging to a proclaimed offender. Sub-sections (3) and (4) to Section 83 specifically provide that once an order of attachment under sub-section (1) is made by the criminal court, the property which is the subject-matter of such attachment shall either be seized or taken possession of as the case may be

depending upon the fact whether the property is movable or immovable. Both the sub-sections contemplate the appointment of Receiver. It is declared under sub-section (6) that the powers, duties and liabilities of a Receiver appointed under Section 83 are the same as those of a Receiver appointed under the Code of Civil Procedure, 1908. Order 40 of the Code of Civil Procedure deals with the appointment of the Receiver. Rule 1 authorises the court to appoint a Receiver:

"**1. *Appointment of Receivers.***—(1) Where it appears to the court to be just and convenient, the court may by order—

(*a*) appoint a Receiver of any property, whether before or after decree;

(*b*) remove any person from the possession or custody of the property;

(*c*) commit the same to the possession, custody or management of the Receiver, and

(*d*) confer upon the Receiver all such powers, as to bringing and defending suit and for the realisation, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.

(2) Nothing in this Rule shall authorise the court to remove from the possession or custody of property, any person whom any party to the suit has not a present right so to remove."

It can also be noticed from Rule (1) that the power of the civil court to appoint a Receiver could be exercised either before or after passing of the decree.

...

36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:

(*i*) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

(*ii*) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinise the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1-A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

(*iii*) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinise the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forward them to the secured creditor as under clause 36.2.(*ii*) above."

10.As per the ratio laid down in the above cited decision, it is not necessary on the part of the first respondent to put the borrower on notice and the only requirement is he has to examine the factual correctness of the assertions made in the affidavit / application in respect of the action to be initiated under Section 14 of the SARFAESI Act. It is also held in the decision that as against the measure as contemplated under Section 14 appeal is also maintainable under Section 17 of SARFAESI Act. However, as the respondent choose to challenge the decision of the Magistrate by invoking the jurisdiction of the High Court under Article 226 of the Constitution of India, he would not be entitled to avail the remedy as he has stalled the proceedings for almost 4 years.

11.In the considered opinion of the Court, the first respondent on detailed consideration passed an elaborate order. It is strictly in compliance with Section 14 of the SARFAESI Act and also the ratio laid down in the above decision and this Court further taking into consideration of the submission of the learned counsel appearing for respondents 3 and 4 that there were serious litigations pertains to the loan account and in that the property in question has been auctioned and sold in favour of a third party and sale certificate was issued in his favour, is not inclined to grant liberty to the petitioner herein to file appeal under Section 17 of the SARFAESI Act in the light of the observation made in paragraph 41 of the above cited decision. This Court having found no merits in this petition is not inclined to entertain this writ petition.

12.In the result, this Writ Petition is dismissed confirming the order of the 1st respondent dated 27.07.2016 and the consequential order passed by the 2nd respondent dated 28.10.2016. However, in the circumstances, there shall be no order as to cost. Consequently, connected Miscellaneous petition also stands dismissed.

Sd/-
Assistant Registrar (Writ)

/True Copy/

Sub Assistant Registrar

To

1.The District Collector,
Virudhunagar District,
Virudhunagar.

2.The Thasildhar,
Aruppukottai,
Virudhunagar District.

+ 1 CC TO Mr.R.RAJESH, ADVOCATE IN SR No. 67962
+ 1 CC TO SPECIAL GOVERNMENT PLEADER IN SR No. 67417

SJ
TE/GSV-PM : 22/11/2016 : 6P/5C

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