HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE SRI JUSTICE A. SHANKAR NARAYANA

WRIT PETITION No.30459 OF 2015

ORDER: (Per Hon'ble Sri Justice A. Shankar Narayana)

The Secured Creditor - Andhra Bank, Hyderabad (hereinafter referred to as 'bank'), filed the instant Writ Petition to issue *Mandamus* declaring the order, dated 12.06.2015, in Criminal M.P. Nos.1470 and 1471 of 2015 in Criminal Miscellaneous Petition (Main) No.272 of 2015 passed by the learned Chief Metropolitan Magistrate, Nampally, Hyderabad, as illegal and void and consequently to direct respondent Nos.11 and 12 - Advocate-Commissioners to execute the warrants, dated 06.02.2015.

2 (a) The facts would show that respondent No.2 (hereinafter referred to as 'borrower') availed Open Cash Credit (OCC) Facility of Rs.15.00 crores from November, 2010 onwards, duly executing documents and offering immovable property securities from time to time and also availed working capital term loan (WCTL) facility of Rs.250.00 lakhs in the month of December, 2013 by executing relevant documents by offering immovable property securities. When the borrower became irregular in payment of installments and interest and even failed to

route the realizations through its account with the bank, the accounts of the borrower were classified as Non-Performing Asset (NPA) and the bank initiated measures under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI Act') by issuance of demand notice, dated 04.04.2014, under Section 13(2) of the SARFAESI Act to the borrower and its guarantors to repay the outstanding debt of Rs.18,08,41,140-40 paise. as on 31.03.2014 followed by possession notice, dated 11.10.2014, under Section 13(4) of the SARFAESI Act in accordance with the rules.

(b) According to the bank, the borrower has challenged the possession notice by filing S.A. No.700 of 2014 before the Debts Recovery Tribunal, Hyderabad (DRT), along with I.A. No.4812 of 2014 seeking stay of all further proceedings. The DRT has granted interim stay on condition of the borrower paying 20% of the amount under the possession notice, dated 11.10.2014, within eight weeks and further making it clear that no further extension of time for deposit would be entertained; but the borrower failed to comply with the said order. Consequently, the bank filed Criminal M.P. No.272 of 2015 under Section 14 of the SARFAESI Act before the Chief Metropolitan Magistrate, Hyderabad, and orders were passed appointing respondent Nos.11 and 12 as Advocate-

Commissioners for delivery of physical possession of the secured assets specified in the possession notice and the said order was extended on 16.05.2015 for execution of warrants returnable by 17.07.2015.

(c) The bank states that respondent Nos.3 to 9 as one set and respondent No.10 as the other set filed Criminal M.P. No.1471
and 1470 of 2015, respectively, in Criminal M.P. No. 272 of 2015 to recall the order, dated 06.02.2015, alleging that respondent No.10
has obtained leasehold rights on the secured assets which warrant
was entrusted to respondent No.12. The bank states that the
Chief Metropolitan Magistrate passed orders on 12.06.2015
directing respondent Nos.11 and 12 not to proceed with the execution of warrants and keep the same in abeyance until further orders
and, thereafter, the matter was adjourned to 17.07.2015 and
further adjourned to 07.08.2015, 21.08.2015 and 25.09.2015.

(d) The bank's grievance is that the order, dated 12.06.2015,

to keep the original order, dated 06.02.2015, in abeyance is not
in conformity with the provisions contained under Section 14 of
the SARFAESI Act as no adjudication is permissible thereunder
and thus, no legally vested right was available to any of the petitioners
in Criminal M.P. Nos.1470 and 1471 of 2015 in Criminal M.P. No.272 of 2015, and, therefore, sought to quash the said order.

3. On service of notice on respondent Nos.3 to 9 as one set entered appearance, whereas respondent No.10 as the other entered appearance and filed counter.

4 (a) Respondent Nos.3 to 9, in their counter, state that the instant writ petition is not maintainable as there is efficacious remedy available by way of an appeal under Section 17 of the SARFAESI Act, and that the law is well settled by the Hon'ble Supreme Court in the decisions in **United Bank of India v. Satyawati Tondon and others**[1]**, Kanaiyalal Lalchand Sachdev v. State of Maharashtra and others**[2]**, Standard Chartered Bank v. V. Noble Kumar and others**[3]**, and Jagdish Singh v.**

Heeralal and others[4]**.** They further state that the Chief Metropolitan Magistrate is having jurisdiction to hear both sides on merits and pass final orders under Section 14 (1) (a) of the SARFAESI Act. Since the matter is still pending, the instant writ petition invoking the jurisdiction of this Court under Article 226 of the Constitution of India is not maintainable. Since the parties to the proceedings in Criminal M.P. Nos.1470 and 1471 of 2015 are different and the properties concerned in each Criminal M.P. are different, single writ petition is not maintainable.

(b) It is stated by them that the instant writ petition suffers from vices of '*suppressio vari suggestio falsi',* and the bank approached this Court with unclean hands. They state that they have not served with any notice under Section 13(2) of the SARFAESI Act. Even they denied service of possession notice, dated 11.10.2014, under Section 13(4) of the SARFAESI Act and its publication in daily Newspaper. They expressed their ignorance as to the borrower challenging the possession notice in Securitisation Appeal No.700 of 2014 and the DRT granting conditional order, and the borrower not complying with the same.

(c) They state that their signatures were obtained on some printed documents and unfilled forms by misrepresentation. They attribute collusion between the bank and the borrower.

Thus, they sought to dismiss the instant writ petition.

5 (a) The case of respondent No.10 is that it has taken the secured assets on lease and running business. It states that the instant writ petition is not maintainable against the impugned orders, dated 12.06.2015, passed in Criminal M.P. Nos.1470 and 1471 of 2015 since single writ petition is filed.

(b) The next ground is that the instant writ petition is also not maintainable as against the Court which passed the orders as the writ petition is filed against the Chief Metropolitan Magistrate, Hyderabad, as respondent No.11 and the Advocate Commissioners appointed by the Chief Metropolitan Magistrate, Hyderabad as respondent Nos.12 and 13. Yet another ground is that an effective and alternative remedy is available to the bank under the SARFAESI Act and, therefore, the

instant writ petition is not maintainable. Still, further ground taken by it is that the writ petition suffers for misjoinder of parties.

(c) It is stated that the warrant issued on 06.02.2015 was retuned unexecuted by 30.04.2015 and on the request of the bank further extension for execution of warrant was granted on 16.05.2015 returnable by 17.07.2015; during the interregnum, when it learnt about the proceedings, it has filed Criminal M.P. No.1470 of 2015 on 05.06.2015 for recalling the warrant issued afresh on 16.05.2015 and after hearing both parties, orders, dated 12.06.2015 were passed by the Court keeping the execution of warrant in abeyance entrusted to respondent No.11 and adjourned to 17.07.2015 for arguments. Thereafter, the Criminal M.P. was posted to 07.08.2015 and 21.09.2015 and the said facts have been suppressed by the bank.

(d) Respondent No.10 states that as a tenant, it has been in occupation of the premises since 01.07.2010 and the same is being renewed from time to time and it is a proprietary concern and is part of Bhagyanagar Hotels Private Limited through which rents have been regularly paid to the borrower by deducting T.D.S. (Tax Deducted from Source) and remitting the same to the Income Tax Department.

(e) According to respondent No.10, neither lease nor enjoyment of the property as such, is prohibited during the course of

loan period by any owner and there is neither statutory nor contractual bar and the bank can as well take notional possession and deal with the property including claiming of deposit of rents which would enable respondent No.10 also to carry on the business activity.

Thus, contending that it is a tenant under the borrower holding valid leasehold rights, sought to dismiss the writ petition.

6. Heard Sri M. Narender Reddy, learned standing counsel for the petitioner - Bank, Sri Koka Rahava Rao, learned senior counsel appearing for respondent Nos.3 to 9, and Sri J. Prabhaker, learned counsel for respondent No.10.

7. Learned counsel for the bank would submit that the learned Chief Metropolitan Magistrate, Hyderabad, having passed order under Section 14 of the Act on 06.12.2015 in Criminal M.P. No.272 of 2015 ceased to have jurisdiction to entertain Criminal M.P. Nos.1470 and 1471 of 2015 filed by respondent Nos.3 to 9 to recall the order,

dated 06.02.2015 and passed interim orders keeping the original order, dated 06.02.2015 in abeyance until further orders as the said order amounts to an order reviewing the earlier order, dated 06.02.2015, which is forbidden by the Code of Criminal Procedure, 1973

(for short 'Cr.P.C.'). It is his submission that the Code does not provide review power, and, therefore, exercising jurisdiction by the learned Chief Metropolitan Magistrate in

keeping the earlier order
passed in abeyance amounts to illegality, and, therefore, sought to set aside the order in Criminal M.P. Nos.1470 and 1471 of 2015, dated 12.06.2014.

i) Learned counsel also would submit that respondent No.2 - borrower committed default in abiding the interim orders passed by the DRT in S.A. No.700 of 2014 filed by him challenging the notice, dated 11.10.2014 issued under Section 13(4) of the Act in depositing 20% of the due amount as ordered by the DRT. Hence, now it is not open for respondent Nos.3 to 9 and 10 claiming as mortgagers and lessee in filing Criminal M.P. Nos.1470 and 1471 of 2015 and obtaining orders keeping the earlier orders, dated 06.02.2015 in abeyance obstructing the bank to obtain possession through the aid of the Court under Section 14 of the Act.

8. Learned counsel for respondent Nos.3 to 9 would submit that the order, dated 06.02.2015, passed by the learned Chief Metropolitan Magistrate was without putting respondent Nos.3 to 9 to notice though, they were in lawful possession of the secured asset and thus, there was violation of principles of natural justice and their dispossession by the process of the Court adversely affects their interest, and, therefore, a right is vested in them to move the Court to recall the order in order to afford an opportunity of being heard and pass appropriate

orders, and, therefore, the orders passed by the learned Chief Metropolitan Magistrate keeping the earlier order, dated 06.02.2015, in abeyance is in exercise of inherent power of rectifying the error based on doctrine of implied power. To fortify the said submission, learned counsel placed reliance on the decision of the Hon'ble Supreme Court in **Rupa Ashok Hurra v. Ashok Hurra and another**[5]**, Noble Kumar's Case** (Supra 3)**, Kanaiyalal's Case** (Supra 2)**, Jagdish Singh's Case** (Supra 4)**, Satyawati Tondon's Case** (Supra 1)**, Ram Kishun and others v. State of U.P. and others**[6] and a decision of the Bombay High Court in **M/s. Ritex Overseas v. Dena Bank**[7] and also a decision of the Karnataka High Court in **Nagarathna & others v. The Indian Bank, Koramangala Branch and others**[8]**.**

9. Learned counsel for respondent No.10 - lessee would submit that the writ petition itself is not maintainable in view of alternative and efficacious remedy available to the bank to approach the DRT.

It is his submission that inherent power is vested with the Court

which passes an order to rectify the error crept into in the said order. His further submission is that no notice was issued preceding the order, dated 06.02.2015, which amounts to violation of principles of natural justice. It is his submission that no procedure is prescribed to follow in deciding an application under Section 14 of the Act, and, therefore, it cannot be viewed that the order passed by the learned Chief Metropolitan Magistrate, dated 06.02.2015, passed in

Criminal M.P. Nos.1470 and 1471 of 2015 was without jurisdiction. Learned counsel placed reliance on the decision of the Delhi High Court in Criminal Miscellaneous (Main) No.1219 of 1987, dated 09.12.1987, in **Sh. Suhird Kamra v. Smt. Neeta and another**[9] and the Hon'ble Supreme Court in **Savitri v. Govind Singh Rawat**[10] in order to substantiate his submission that implied power is vested in the Magistrate based on doctrine of implied power. The learned counsel also placed reliance on the decisions of the Hon'ble Supreme Court in **Maharaja Chintamani Saran Nath Shahdeo v. State of Bihar and others**[11], **Raj Kumar Soni and another v. State of U.P. and another**[12] and **Bhartiya Seva Samaj Trust v. Yogeshbhai Ambalal Patel and another**[13] for the proposition that this Court can refuse to exercise discretion of striking down the order impugned, when such striking down will result in restoration of the order passed on 06.02.2015 in favour of the bank and against respondent Nos.3 to 9 in violation of the principles of natural justice.

10. From the aforesaid contentions raised by the learned counsel for either side, we are confronted with two important questions;

1. Whether the instant writ petition is not maintainable in view of the so-called remedy available under Section 17 of the SARFAESI Act to approach the DRT?

2. Whether the learned Chief Metropolitan Magistrate, Hyderabad, has got inherent powers to pass order, dated 12-06-2015, in Criminal M.P. Nos.1470 and 1471 of 2015, keeping the order, earlier passed by him, dated 06-02-2015, under Section 14 of the SARFAESI Act, in abeyance?

11. Learned counsel for respondent Nos.3 to 9 and respondent No.10 placed reliance on the decisions in **Noble Kumar's Case** (Supra 3)**, Kanaiyalal's Case** (Supra 2)**, Jagdish Singh's Case** (Supra 4) and **Satyawati Tondon's Case** (Supra 1) in support of their contention that the bank cannot maintain a writ petition for *mandamus,* as alternative remedy is available to it under Section 17 of the SARFAESI Act to approach the DRT challenging the order impugned herein.

i) In **Noble Kumar's Case** (Supra 3)**,** the Hon'ble

Supreme Court held in paragraph No.27, thus:

> “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.
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> 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.”

ii) In **Kanaiyalal's Case** (Supra 2), the Hon'ble Supreme Court held in paragraph Nos.22 and 23, thus:

> "22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT.
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> 23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See: *Sadhana Lodh v. National Insurance Co. Ltd.* [(2003) 3 SCC 524: 2003 SCC (Cri) 762], *Surya Dev Rai v. Ram Chander Rai [(2003) 6* SCC 675] and *SBI v. Allied Chemical Laboratories* [(2006) 9 SCC 252]".

iii) In **Jagdish Singh's Case** (Supra 4), the Hon'ble Supreme Court held in paragraph Nos.19, 20 and 24, thus:

> "19. The expression "any person" used in Section 17 is of wide import and takes within its fold not only the borrower but also the guarantor or any other person who may be affected by action taken Under Section 13(4) of the Securitisation Act. Reference may be made to the judgment of this Court in *Satyavati Tondon*'s case [(2010) 8 SCC 110 :

(2010) 3 SCC (Civ) 260].

20. Therefore, the expression “any person” referred to in Section 17 would take in the plaintiffs in the suit as well. Therefore, irrespective of the question whether the civil suit is maintainable or not, under

the Securitisation Act itself, a remedy is provided to such persons so that they can invoke the provisions of Section 17 of the Securitisation Act, in case the bank (secured creditor) adopt any measure including the sale of the secured assets, on which the plaintiffs claim interest.

24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing the secured assets. Any person aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have the jurisdiction to entertain any suit or proceeding "*in respect of any matter*" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression “n respect of any matter” referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently, if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the

remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. The civil court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well."

iv) In **Satyawati Tondon's Case** (Supra 1), the Hon'ble Supreme Court held in paragraph Nos.55 and 56, thus:

> "55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.
> 56. Insofar as this case is concerned, we are convinced that the High Court was not at all justified in injuncting the appellant from taking action in furtherance of notice issued under Section 13(4) of the Act. In the result, the appeal is allowed and the impugned order is set aside. Since the respondent has not appeared to contest the appeal, the costs are made easy."

12. We would like to observe that we are confronted with
a peculiar situation in the instant writ petition. We have narrated the factual aspect in the above. Turning to the question whether the learned Chief Metropolitan Magistrate has got jurisdiction to stay its own order earlier passed on the applications moved by the respondents therein, we would like to mention that certainly, the order impugned compels this Court to exercise extra ordinary writ jurisdiction under Article 226 of the Constitution of India, since, in our view, the said order is not susceptible for challenge under Section 17 of the SARFAESI Act. The decisions relied on by the learned counsel for respondents, referred to in the above, are rendered in the context of challenging a final order passed under Section 14 of the SARFAESI Act by either the borrower or the guarantors. In fact, such a remedy was really open to the respondent Nos.3 to 9 and 10 herein to challenge the order passed by the learned Chief Metropolitan Magistrate, Hyderabad, dated 06.02.2015, in Criminal M.P. No.272 of 2015, by approaching the DRT under Section 17 of the SARFAESI Act, but, on the contrary, they moved the learned Chief Metropolitan Magistrate by filing separate applications and obtained the impugned orders. Therefore, these decisions relied on by

respondent Nos.3 to 9 and 10 would not render any assistance to them to resist the bank herein in maintaining the writ petition.

13. The learned counsel has also relied on the decision in

Ram Kishun's Case (Supra 6)**,** to the effect that recovery of the public dues must be made strictly in accordance with the procedure prescribed by law, in the context of non-issuance of notices to respondent Nos.3 to 9 and 10 before passing the order under Section 14 of the SARFAESI Act by the learned Chief Metropolitan Magistrate, which, in our view, also would not render any assistance in the present fact-situation.

14. Adverting to the second question in the direction of examining whether the learned Chief Metropolitan Magistrate has got inherent powers to keep the order earlier passed by him in abeyance on subsequent applications filed by the respondents therein, it is to be seen whether exercise of such power would amount to reviewing the earlier order passed by him as contended by the bank or whether such power was exercised by virtue of the so-called implied power, if any, to rectify the error committed in passing the earlier order, if any, as canvassed by the guarantors and tenant. In the

said context, learned counsel for respondent Nos.3 to 9 placed reliance on the observations of the Hon'ble Supreme Court contained in paragraph Nos.42, 50 and 51 in **Rupa Ashok's Case** (Supra 5), thus:

> "42. The concern of this Court for rendering justice in a cause is not less important than the principle of finality of its judgment. We are faced with competing principles - ensuring certainty and finality of a judgment of the Court of last resort and dispensing justice on reconsideration of a judgment on the ground that it is vitiated being in violation of the principles of natural justice or giving scope for apprehension of bias due to a Judge who participated in the decision-making process not disclosing his links with a party to the case, or on account of abuse of the process of the court. Such a judgment, far from ensuring finality, will always remain under the cloud of uncertainty. Almighty alone is the dispenser of absolute justice - a concept which is not disputed but by a few. We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error. After giving our anxious consideration to the question, we are persuaded to hold that the duty to do justice in these rarest of rare cases shall have to prevail over the policy of certainty of judgment as though it is essentially in the public interest that a final judgment of the final court in the country should not be open to challenge, yet

> there may be circumstances, as mentioned above, wherein declining to reconsider the judgment would be oppressive to judicial conscience and would cause perpetuation of irremediable injustice.
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> 50. The next step is to specify the requirements to entertain such a curative petition under the inherent power of this Court so that floodgates are not opened for filing a second review petition as a matter of course in the guise of a curative petition under inherent power. It is common ground that except when very strong reasons exist, the Court should not entertain an application seeking reconsideration of an order of this Court which has become final on dismissal of a review petition. It is neither advisable nor possible to enumerate all the grounds on which such a petition may be entertained.
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> 51. Nevertheless, we think that a petitioner is entitled to relief *ex debito justitiae* if he establishes
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> (1) violation of the principles of natural justice in that he was not a party to the lis but the judgement adversely affected his interests or, if he was a party to the lis, he was not served with notice of the proceedings and the matter proceeded as if he had notice, and (2) where in the proceedings a learned Judge failed to disclose his connection with the subject-matter or the parties giving scope for an apprehension of bias and the judgment adversely affects the petitioner."

15. Learned counsel also placed reliance on the decision of a Division Bench of Hon'ble Bombay High Court in **Rangara Industries Pvt. Ltd. & Others v. SICOM Limited**[14]**,** wherein the facts would show that

the borrowers approached the High Court aggrieved by the order passed by the learned Magistrate, dismissing the application filed by them, firstly, on the ground that the provisions of Section 362 of the Act do not empower him to review his own order and, second, that the borrowers have no '*locus standi*' to pursue any application filed under Section 14 of the Act. The Hon'ble Division Bench held that the borrower has also right to be heard before the learned Chief Metropolitan Magistrate and found fault with the findings recorded by the learned Magistrate. It is held in paragraph No.3, thus:

> "3. However, since the learned Magistrate has expressed his inability only on account of the restriction imposed on him under Section 362 Cr.P.C., in our view, this Court while exercising jurisdiction under Article 226 of the Constitution, as also while exercising the power of superintendence under Article 227 of the Constitution, can set aside the impugned order and remand the matter back to the Metropolitan Magistrate. The learned Metropolitan Magistrate shall hear the Petitioner and also take into consideration the amended provisions of the SARFAESI Act, more particularly Section 14 of the said Act. All contentions, raised by both the parties in this petition, are kept open."

16. Yet another decision relied on by the learned counsel for respondent Nos.3 to 9 is in **Ritex Overseas's Case** (Supra 7), rendered by the Hon'ble Division Bench of Bombay High Court, wherein, it was held that the borrower has *'locus standi'* to make an application

seeking right to be heard in the application filed under Section 14 of the Act by the bank. The learned counsel relied on the decision in **Nagarathna's Case** (Supra 8), rendered by a single Bench of Karnataka High Court at Bengaluru, wherein, the order passed by the learned Chief Metropolitan Magistrate was affirmed as he passed the order after hearing the borrowers and the bank.

17. Learned counsel for respondent No.10 placed reliance on a decision of Delhi High Court in **Suhird Kamra's Case** (Supra 9) for the proposition that the Criminal Court has power to restore a petition filed under Section 125 of Cr.P.C. on sufficient cause being shown, if the petition had earlier been dismissed for default on appearance of the petitioner. He has also relied on the decision in **Savitri's Case** (Supra 10) for the very same proposition that under Section 125 Cr.P.C., Magistrate has implied power on being *prima facie* satisfied on the basis of an affidavit filed for maintenance, to pass interim order directing the person from whom maintenance claimed to pay a reasonable sum by way of maintenance to the applicant pending disposal of the application.

18. The learned counsel for respondent No.10, in order to substantiate his contention that the order dated 06.02.2015, passed under Section 14 of the SARFAESI Act on the application of the bank was tainted with the

illegality as no opportunity was afforded to the borrowers and the lessee and, therefore, the order now impugned would in case quashed, it would have the effect of reviving the earlier order, placed reliance on the decisions in **Maharaja Chintamani Saran Nath Shahdeo's Case** (Supra 11), **Raj Kumar Soni's Case (**Supra 12) and **Bhartiya Seva Samaj Trust's Case** (Supra 13).

i) In **Maharaja Chintamani Saran Nath Shahdeo's Case** (Supra 11) in the context of examining the order passed by the Board of Revenue Members under Sections 18 and 31 of Bihar Land Reforms Act, 1950 (30 of 1950) observing that though, the Act vests no powers on the Board of Revenue to pass such order, still, setting aside such an order would result in reviving an invalid order for payment of excess compensation held in paragraph No.38, thus:

> "38. For what has been stated above we hold that the order of the learned Member of Board of Revenue directing action to be taken for refund of the excess compensation was valid and proper though he had no jurisdiction to pass the order. In the event it is set aside it would amount to reviving an invalid order of payment of excess compensation to the

appellant.”

ii) To the same effect is the decision rendered by the Hon’ble Supreme Court in **Raj Kumar Soni’s Case (**Supra 12), wherein the Hon’ble Apex Court restated the proposition laid down in

M.C. Mehta v. Union of India[15]**,** relying upon the decision in

Gadde Venkateswara Rao v. Government of Andhra Pradesh[16] in paragraph Nos.17 and 18 thus:

> “17. In *M.C. Mehta v. Union of India* [(1999) 6 SCC 237 : AIR 1999 SC 2583] this Court, relying upon *Venkateswara Rao* [AIR 1966 SC 828] observed:
> (SCC p.244, para 17)
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> “The above case is a clear authority for the proposition that it is not always necessary for the Court to strike down an order merely because the order has been passed against the petitioner in breach of natural justice. The Court can under Article 32 or Article 226 refuse to exercise its discretion of striking down the order if such striking down will result in restoration of another order passed earlier in favour of the petitioner and against the opposite party, in violation of the principles of natural justice or is otherwise not in accordance with law.”

> 18. In our view, on the admitted and indisputable facts set out above, any interference with the impugned order of the District Collector would result in restoration of orders passed earlier in favour of the appellants which are otherwise not in accordance with law."

iii) In **Bhartiya Seva Samaj Trust's Case** (Supra 13), the Hon'ble Supreme Court held that Court should not set aside illegal orders if its effect is to revive another illegal order since in such eventuality illegality would be perpetuated and award a premium to undeserving party/person.

19. Now reverting to the question, whether the learned Chief Metropolitan Magistrate passed the impugned order in
exercise of implied power, we would like to examine the consequence of orders that would be passed in Criminal M.P. Nos.1470 and 1471 of 2015, in case the instant writ petition is dismissed. It is obvious that the order that would be passed either rejecting the requests of the borrowers and tenant in the aforesaid Criminal M.Ps. or allowing the same, would tantamount to reviewing the order passed on 06.02.2015 in Criminal M.P. No.272 of 2015. Whether exercise of such a power by the learned Chief Metropolitan Magistrate is forbidden by the Code of

Criminal Procedure or whether the Code would vest the Magistrate with such an implied power is the question that requires an answer. The relevant provision for the present purpose is Section 362 of Cr.P.C. The provisions of Section 362 of Cr.P.C. impose a restriction on the Magistrate in exercising the power to review his own order. When the Code does not contain a provision empowering the Magistrate to review the order passed, it has to be construed that passing of such an order reviewing the earlier order is forbidden by law. Exercise of such power, which is forbidden by law, is nothing but illegal exercise of jurisdiction and the order passed by the Magistrate has to be treated as an order tainted with illegality. Thus, in the absence of express provision in the Code, exercise of jurisdiction under the garb of so-called implied power since tantamounts to illegal exercise of power, the order impugned herein is nothing but an order passed by the learned Chief Metropolitan Magistrate in illegal exercise of his jurisdiction. When viewed so, the decisions in **Rupa Ashok Hurra's Case** (Supra 5) and **Nagarathna's Case** (Supra 8), on which reliance has been placed by the learned counsel for respondent Nos.3 to 9, cannot be made applicable. Even, the decisions in **Suhird Kamra's Case** (Supra 9) and **Savitri's Case (**Supra 10), would not render any assistance to advance the case of respondent No.10, since proviso to Sub-Section (2) of Section 126 of Cr.P.C. empowers the Magistrate to set aside the dismissal order for default passed by the Magistrate under Section 125 of Cr.P.C. So, it cannot be said that the Magistrate was exercising implied power in setting aside the dismissal order for default. Even the decisions in **Maharaja Chintamani Saran Nath Shahdeo's Case** (Supra 11), **Raj Kumar Soni's Case** (Supra 12) and **Bhartiya Seva Samaj Trust's Case** (Supra 13) would not render any assistance to respondent No.10 for the reason that it cannot be said at this stage that the learned Chief Metropolitan Magistrate passed an invalid order, dated 06.02.2015 under Section 14 of the SARFAESI Act. Mere non-issuance of notice to the borrowers and tenant before passing the order under Section 14 of the SARFAESI Act is no ground to obstruct the said order by filing criminal petitions by the borrowers and tenant to ask the learned Chief Metropolitan Magistrate to exercise the power of review, though not directly, but amounting to reviewing his own order, dated 06.02.2015. The borrowers and tenant, in such a situation ought to have invoked jurisdiction of this Court by challenging the order passed under Section 14 of the SARFAESI Act, but not making applications before the same Court for the relief sought therein.

20. In the case of **Rangara Industries** (Supra 14), the Division Bench of Bombay High Court, ultimately agreeing with the view expressed by the learned Magistrate therein as to his inability only on account of the restriction imposed on him under Section 362 of Cr.P.C. dismissed the applications filed by the borrowers, exercised the jurisdiction under Article 226 of the Constitution of India in setting aside the order impugned therein and remitted the matter to the Magistrate directing him to hear the contentions of both the parties therein and to dispose of the matter in accordance with the amended provisions of the SARFAESI Act, more particularly, Section 14 of the SARFAESI Act. In **Ritex Overseas's Case** (Supra 7), the facts are not clear as to at what stage the borrower has filed the application seeking right to be heard in the application filed under Section 14 of the SARFAESI Act by the bank. In the present case, the stage at which the borrowers and the tenant approached the learned Chief Metropolitan Magistrate, Hyderabad was after passing the final order by the learned Chief Metropolitan Magistrate under Section 14 of the SARFAESI Act, and only execution of the same was pending, as mentioned in the above while narrating the facts. Therefore, we are not convinced with the arguments advanced by the learned counsel for the borrowers - respondent Nos.3 to 9 and the learned

counsel for the tenant - respondent No.10. On the other hand, only remedy open to the bank is to invoke the writ jurisdiction of this Court to challenge the impugned order and rightly the bank did so.

21. In view of the foregoing discussion, the writ petition is allowed setting aside the impugned orders, dated 12.06.2015,
passed by the learned Chief Metropolitan Magistrate, Nampally, Hyderabad, in Criminal M.P. Nos.1471 and 1470 of 2015, filed by respondent Nos.3 to 9 and respondent No.10, respectively. No order as to costs.

22. As a sequel thereto, Miscellaneous Applications, if any, pending in the writ petition stand closed.

R. SUBHASH REDDY, J

A. SHANKAR NARAYANA, J

January 7, 2016.
PV/Mgr

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[1]. 2010 (8) SCC 110

[2]. 2011 (2) SCC 782

[3]. 2013 (9) SCC 620

[4]. 2014 (1) SCC 479

[5] (2002) 4 SCC 388

[6] AIR 2012 SC 2288(1)

[7] Judgment in W.P. No.10615 of 2014, dated 26-11-2014

[8] 2015 (4) KarLJ 105

[9] 1998 (14) DRJ

[10] (1985) 4 SCC 337

[11] (1999) 8 SCC 16

[12] (2007) 10 SCC 635

[13] (2012) 9 SCC 310

[14] **W.P. No.10692 of 2014, dated 15-12-2014**

[15] (1999) 6 SCC 237

[16]. AIR 1966 SC 828