

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.09.2017

Coram

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

W.P.No.18914 of 2017
and
W.M.P.Nos.20416 & 20417 of 2017

1. M/s. Buhariya Traders,
Rep. By its Sole Proprietor
B.Khizer Shahel Hamid,
Old No.53,54,55 and New No.61,
Old Slaughter House Road,
Royapuram, Chennai - 600 013.
2. B.Khizer Shahel Hamid,
3. K.Farida (Guarantor) ...Petitioners
- Vs.
1. The Chief Metropolitan Magistrate,
Allikulam, Chennai - 600 003.
2. M/s Axis Bank Limited,
Retail Asset Centre,
Kodambakkam Branch,
Chennai - 600 024.
Represented by its Authorized Officer
M.Gopikrishnan. ...Respondents

Writ Petition has been filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorarified Mandamus to call for the records on the file of the 1st Respondent in impugned order in Crl.M.P.No.8583 of 2017 dated 25.04.2017, and quash the same as illegal, arbitrary and permit the petitioners to raise their objections before the 1st Respondent.

For Petitioners : M/s.R.Sivaraman

ORDER

The petitioners are praying to issue a Writ of Certiorarified Mandamus, to call for the records on the file of the 1st respondent in the impugned order in Crl.M.P.No.8583 of 2017 dated 25.04.2017 and quash the same as illegal, arbitrary

and permit them to raise their objections before the 1st respondent.

2. The brief facts of the case of the petitioners as averred in the Writ Petition are as follows:-

2.1 The first petitioner is a proprietorship concern represented by the 2nd petitioner. The 3rd petitioner is the wife of 2nd petitioner. They are doing business in Iron and Steel for past 40 years and they being a SME unit, they were granted a loan of Rs.100,00,000/- (Rupees one crore only) in the nature of Cash Credit Facility to meet the working capital requirements, by M/s.Axis Bank Limited, Kodambakkam Branch, Chennai. The third petitioner is the guarantor to the above loan amount. They had been paying interest and other charges from 2007 to 2016, without any default.

2.2 They have also mortgaged the properties in the year 2011. The 2nd respondent classified the loan account as NPA without giving any information to them and it was not as per the guidelines issued by the Reserve Bank of India. On 16.02.2016, the 2nd respondent issued a demand notice under Section 13(2) of the SARFAESI Act, in which, they claimed a sum of Rs.1,30,28,176.78. Since the claim of interest at the rate of 15.75% was exorbitant, the petitioners have requested the 2nd respondent to withdraw the above notice and to regularize the account by removing the classification as NPA. Subsequently, the 2nd respondent withdrew the demand notice dated 16.02.2016, but on 21.03.2016 issued a second demand notice with the reduced interest at the rate of 15.65% from 15.75%, and arrived at a total demand of Rs.1,12,12,709.39.

2.3 The petitioners have requested the bank to give them 10 days time to pay a sum of Rs.15,00,000/- and the same has also been acknowledged by the 2nd respondent. On 05.07.2016 the 2nd respondent sent a possession notice under Section 13(4) of the SARFAESI Act to take symbolical possession of the property. Subsequently, the petitioners have paid a sum of Rs.5,00,000/- on 29.09.2016. The petitioners also gave a letter dated 06.10.2016 to the 2nd respondent, requesting waiver of interest and also for one time settlement of Rs.90,00,000/-. The 2nd respondent did not respond, but issued a Notice Prior to Intimation dated 13.10.2016 to Reserve Bank of India as a Willful Defaulter. Later, the petitioners have given a suitable reply dated 28.10.2016. The 2nd respondent has sent a Rejoinder dated 22.11.2016 and simultaneously, approached the learned Chief Metropolitan Magistrate, Allikulam, Egmore, Chennai - 3 under Section 14 of the SARFAESI Act and got an order for taking physical possession of the properties mortgaged by the petitioners. A Commissioner was also appointed by the learned Chief Metropolitan Magistrate, Allikulam, Egmore, Chennai - 3. On 15.06.2017, the Advocate Commissioner informed the

petitioners about the said order and the petitioners have received the order copy on 17.06.2017 and filed SARFAESI Appeal before the Debts Recovery Tribunal-II, Chennai in S.A.No.128 of 2017 for the following relief:-

a) Set aside the order dated 25.04.2017 received by the Appellants on 17.06.2017 passed by the Hon'ble Chief Metropolitan Magistrate, Allikulam, Egmore, Chennai in CrI.M.P.No.8583 of 2017 and quash the same as null and void; and

b) Grant such other or any other reliefs that this Hon'ble Tribunal may deem fit and proper under the circumstances of the above case and thus render justice.

2.4 The petitioners have also stated that their intention is to challenge the Possession Notice dated 05.07.2016 but inadvertently they have not been advised so, and therefore, they have filed the said Sarfaesi Appeal only to challenge the order passed by the learned Chief Metropolitan Magistrate, Allikulam, Egmore, Chennai-3 in CrI.M.P.No.8583 of 2017 dated 25.04.2017 which they received on 17.06.2017 and now they have been advised to challenge the Possession Notice dated 05.07.2016 issued by the 2nd respondent under Section 13(4) of the SARFAESI Act, 2002. They had filed a Change of Vakalath on 15.07.2017 along with applications to condone the delay in preferring the appeal challenging the Possession Notice dated 05.07.2016 and to amend the prayer in the above SARFAESI Appeal for the following relief, instead of the earlier relief:

a) to set aside and quash the entire proceedings initiated by the 2nd respondent under Section 13(4) of the SARFAESI Act, 2002 and consequently, restore possession; and

b) to award the cost of the application and to grant compensation under Section 19 of the Act and such other relief's as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case and thus render justice.

2.5 The above S.A.No.128 of 2017 is posted for hearing on 07.08.2017. The possession is still with the petitioners and the 2nd respondent has neither issued notice under Section 13(4) of the Act nor passed any order under Section 13(3) of the Act, so as to proceed against the petitioners for taking possession.

2.6 The petitioners were victims of the malafide conduct of the 2nd respondent, though they were ready to settle the loan amount and offer one time settlement, the 2nd respondent ought to have given an opportunity to settle the loan amount and passed an order in accordance with Section 13(3) of the Act. Therefore,

the proceedings of the 2nd respondent under Section 14 of the SARFAESI Act is misconceived, malafide and excess exercise of powers and the 2nd respondent has no authority to invoke section 14 of the Act. Hence, the petitioners are before this Court challenging the order dated 25.04.2017 passed by the learned Chief Metropolitan Magistrate, Egmore, Chennai-3 made in CrI.M.P.No.8583 of 2017.

3. Heard the learned counsel for the petitioner and perused the materials available on records.

4. The learned counsel for the petitioner would submit that without hearing the petitioners, the order passed by the learned Chief Metropolitan Magistrate in the application filed under Section 14 of the SARFAESI Act is against law and contrary to the principles of natural justice. Classification of the account as NPA by the second respondent on 31.12.2015 is illegal for the reason that the account was not remaining overdue for a continuous period of 90 days and the petitioners paid the monthly interest to the second respondent. Having received the interest on 31.12.2015, the second respondent cannot classify the account as NPA, which is against the rule laid down by RBI. Since the classification of account as NPA is illegal, the initiation of measures under the SARFAESI Act by issuing demand notices dated 16.02.2016 and 21.03.2016 and the possession notice dated 05.07.2016 are void-ab-initio and liable to be struck down. In such circumstances, the learned counsel prays to set aside the order of the learned Chief Metropolitan Magistrate, passed in CrI.M.P.No.8583 of 2017. In support of the above contentions, the learned counsel for the petitioner relied on the following decisions:-

i) Supreme Court Judgment in the case of Mardia Chemicals Ltd. Etc. Etc. Vs U.O.I. & Ors. Etc. Etc on 8 April, 2004 reported in <https://indiankanoon.org/doc/1059476> , wherein it is held as follows:-

"80. Under the Act in consideration, we find that before taking action a notice of 60 days is required to be given and after the measures under Section 13(4) of the Act have been taken, a mechanism has been provided under Section 17 of the Act to approach the Debt Recovery Tribunal. The above noted provisions are for the purposes of giving some reasonable protection to the borrower. Viewing the matter in the above perspective, we find what emerges from different provisions of the Act, is as follows :-

1. Under sub-section (2) of Section 13 it is incumbent upon the secured creditor to serve 60 days notice before proceeding to

take any of the measures as provided under sub-section (4) of Section 13 of the Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief they may be, must be communicated to the borrower. In connection with this conclusion, we have already held a discussion in the earlier part of the judgment. The reasons so communicated shall only be for the purposes of the information/knowledge of the borrower without giving rise to any right to approach the Debt Recovery Tribunal under Section 17 of the Act, at that stage.

2. As already discussed earlier, on measures having been taken under sub-section (4) of Section 13 and before the date of sale/auction of the property it would be open for the borrower to file an appeal (petition) under Section 17 of the Act before the Debt Recovery Tribunal.

3. That the Tribunal in exercise of its ancillary powers shall have jurisdiction to pass any stay/interim order subject to the condition as it may deem fit and proper to impose.

4. In view of the discussion already held on this behalf, we find that the requirement of deposit of 75% of amount claimed before entertaining an appeal (petition) under Section 17 of the Act is an oppressive, onerous and arbitrary condition against all the canons of reasonableness. Such a condition is invalid and it is liable to be struck down.

5. As discussed earlier in this judgment, we find that it will be open to maintain a civil suit in civil court, within the narrow scope and on the limited grounds on which they are permissible, in the matters relating to an English mortgage enforceable without intervention of the court.

81. In view of the discussion held in the judgment and the findings and directions contained in the preceding paragraphs, we

hold that the borrowers would get a reasonably fair deal and opportunity to get the matter adjudicated upon before the Debt Recovery Tribunal. The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of economy of the country and welfare of the people in general which would subserve the public interest.

82. We, therefore, subject to what is provided in paragraph 80 above, uphold the validity of the Act and its provisions except that of sub-section (2) of Section 17 of the Act, which is declared ultra vires of Article 14 of the Constitution of India.

83. Before we part with the case, we would like to observe that where a secured creditor has taken action under Section 13(4) of the Act, in such cases it would be open to borrowers to file appeals under Section 17 of the Act within the limitation as prescribed therefor, to be counted with effect from today. "

(ii) AIR 2007 MADRAS 148 (Sree Lakshmi Products Rep. By its Partner Vs. State Bank of India), wherein it is held as follows:

"Section 14 of the NPA Act states that 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, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of Appeal. Section 17 (3) states that if the DRT as an Appellate Authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession

to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante."

....

The provisions of the Securitisation Act shall have effect notwithstanding anything in consistent therewith contained in any other law for the time being in force. In respect of transactions governed by the said Act, the overriding provisions effectively nullify the rights normally admissible even to a tenant, as available under the Rent Control Act, as it can be only subservient to a later Central enactment.

ii) 2007 CRI.L.J. 2544 (M/s.Trade Well, a proprietorship Firm, Mumbai & Anr. Vs. Indian Bank & Anr.), wherein it is observed as follows:-

"80. It was also argued that Section 14 (3) gives finality to order passed by the CMM/DM under Section 14 and, therefore, it is necessary to hear parties who are likely to be adversely affected by it.

81. We find no substance in this submission. In this connection, it is necessary to have a look at Section 14(2) and (3). It reads thus:

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.

1) x x x x x x x x x

(2) For the purpose of securing compliance with the provisions of Sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate

done in pursuance of this section shall be called in question in any court or before any authority.

82. Sub-section (3) is preceded by Sub-section (2) under which for securing compliance of Sub-section (1), that is for taking possession, the CMM/DM can take such steps and use or cause to be used, such force, as may in his opinion, be necessary. Sub-section 3 grants immunity to the CMM/DM as regards steps taken by him or force allowed to be used by him for providing assistance for taking possession. Since as stated by us adjudication of rival claims is absent at that stage, there is no question of his dealing with rival claims and giving a reasoned judgment as regards the merits of the case and obviously there is no question of such a reasoning assuming finality. In any event, if a party has any grievance as regards contents of that order, his remedy would be to voice them in the application under Section 17 before the DRT after measures under Section 13(4) are taken.

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"87. The Supreme Court clarified that though no provision of the DRT Act expressly ousts the jurisdiction of the High Court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available, judicial prudence demands that the court refrains from exercising its jurisdiction under the constitutional provisions. The Supreme Court observed that the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the guarantor to take recourse to appeal mechanism provided under the DRT Act.

88. There can be no dispute about this proposition. Generally, such writ petitions should not be entertained and parties must be relegated to alternative remedy available to them in law and, in fact, this course is being followed by this Court. However, the Supreme Court has not ruled in the above

judgment that even in an exceptional case of gravest injustice remedy of writ is not available to a party. For instance if without obtaining an order under Section 14 of the NPA Act, with the help of police, a person is dispossessed, the High Court may have to entertain such a writ petition, protect the secured asset by appropriate conditions and relegate that person to DRT. Similarly if the High Court finds that the action taken by the bank or financial institution on the face of it cannot be sustained because it is hit by Section 31 of the NPA Act, the High Court may entertain a writ petition. As done by the Nagpur Bench of this Court in M.R. Gowai Enterprises' case (supra), a writ petition may have to be entertained if reasons for not accepting objections of the borrower to notice under Section 13(2) are not communicated to the borrower. It will depend on the facts and circumstances of each case. Such cases would be exceptional and few and far between."

v) (2008) 1 Supreme Court Cases 125 (Transcore ..vs.. Union of India and another), wherein the Hon'ble Supreme Court observed as follows:-

"25. Reading the scheme of Section 13(2) with Section 13(4), it is clear that the notice under Section 13(2) is not a mere show cause notice and it constitutes an action taken by the bank/ FI for the purposes of the NPA Act.

26. Section 13(6) inter alia provides that any transfer of secured asset after taking possession or after taking over of management of the business, under Section 13(4), by the bank/FI shall vest in the transferee all rights in relation to the secured assets as if the transfer has been made by the owner of such secured asset.

33. Section 17 of NPA Act confers right to appeal. It inter alia states that any person including borrower, aggrieved by exercise of rights by the secured creditor under Section 13(4), may make an application to the DRT as an appellate authority within forty-five days from the date on which action under Section 13(4) is taken. That

application should be accompanied by payment of fees prescribed by the 2002 Rules made under the NPA Act. A proviso is added to Section 17(1) by amending Act 30 of 2004. It states that different fees may be prescribed for making the application by the borrower and the person other than the borrower. By way of abundant caution, an Explanation is added to Section 17(1) saying that the communication of the reasons to the borrower by the secured creditor rejecting his representation shall not constitute a ground for appeal to the DRT. However, under Section 17(2), the DRT is required to consider whether any of the measures referred to in Section 13(4) taken by the secured creditor for enforcement of security are in accordance with the provisions of the NPA Act and the Rules made thereunder. If the DRT, after examining the facts and circumstances of the case and the evidence produced by the parties, comes to the conclusion that any of the measures taken under Section 13(4) are not in accordance with the NPA Act, it shall direct the secured creditor to restore the possession/ management to the borrower (vide Section 17(3) of NPA Act). On the other hand, after the DRT declares that the recourse taken by the secured creditor under Section 13(4) is in accordance with the provisions of the NPA Act then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to any one or more of the measures specified under Section 13(4) to recover his secured debt.

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35. The tribunal under the DRT Act is also the tribunal under the NPA Act. Under Section 19 of the DRT Act read with Rule 7 of the Debts Recovery Tribunal (Procedure) Rules, 1993 ("1993 Rules"), the applicant bank or FI has to pay fees for filing such application to DRT under the DRT Act and, similarly, a borrower, aggrieved by an action under Section 13(4) of NPA Act was entitled to prefer an application to the DRT under Section 17 of NPA. Similarly, the borrower was required to file an appeal to DRT under Section 18 of the NPA Act. For such appeals a borrower was required to pay fees as

prescribed by Section 20 of the DRT Act read with Rule 8 of the Debts Recovery Appellate Tribunal (Procedure) Rules, 1994 ("1994 Rules").

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63. Therefore, when Section 13(4) talks about taking possession of the secured assets or management of the business of the borrower, it is because a right is created by the borrower in favour of the bank / FI when he takes a loan secured by pledge, hypothecation, mortgage or charge. For example, when a company takes a loan and pledges its financial asset, it is the duty of that company to see that the margin between what the company borrows and the extent to which the loan is covered by the value of the financial asset hypothecated is retained. If the borrower company does not repay, becomes a defaulter and does not keep up the value of the financial asset which depletes then the borrower fails in its obligation which results in a mis-match between the asset and the liability in the books of the bank/ FI. Therefore, Sections 5 and 9 talks of acquisition of the secured interest so that the balance sheet of the bank/ FI remains clean. Same applies to immovable property charged or mortgaged to the bank/ FI. These are some of the factors which the Authorised Officer of the bank/ FI has to keep in mind when he gives notice under Section 13(2) of the NPA Act."

vi) (2009) 8 Supreme Court Cases 366 (Authorised Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill), wherein the

"21. It is clear that while enacting the SARFAESI Act the Legislature was concerned with measures to regulate securitisation and reconstruction of financial assets and enforcement of security interest. The Act enables the Banks and Financial Institutions to realise long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The provisions of Section 13 enable the secured creditors, such as Banks and Financial

Institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale for realizing secured assets, subject to the conditions indicated in the two provisos to Clause (b) of Sub-Section (4) of Section 13.

22. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the Banks or Financial Institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in Sub-Section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in Sub-Section (3) thereof.

23. The intention of the legislature is, therefore, clear that while the Banks and Financial Institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee. The consequences of the authority vested in DRT under Sub-Section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. The Legislature by including Sub-Section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr. Gopalan and Mr. Altaf Ahmed that the DRT has no jurisdiction to deal with a post 13(4) situation, cannot be accepted. The dichotomy in the views expressed by the Bombay High Court and the

Madras high Court has, in fact, been resolved to some extent in the Mardia Chemicals Ltd.'s case (supra) itself and also by virtue of the amendments effected to Sections 13 and 17 of the principal Act. The liberty given by the learned Single Judge to the appellants to resist S.A.No.104 of 2007 preferred by the respondents before the DRT on all aspects was duly upheld by the Division Bench of the High Court and there is no reason for this Court to interfere with the same.

24. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated under Section 13(4) of the Act. On the other hand, the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set aside but even the status quo ante can be restored by the DRT."

vi) (2010) 8 Supreme Court Cases 110 (United Bank of India Vs. Satyawati Tondon and Others). In the said decision, the Hon'ble Supreme Court made the following observations:-

" 42.If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13 (4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective.

43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is

available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

46. It must be remembered that stay of

an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad AIR 1969 SC 556, Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (1998) 8 SCC 1 and Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order. "

vii) In the decision reported in AIR 2011 BOMBAY 163 (International Asset Reconstruction Company Pvt. Ltd. Vs. Union of India & Ors), the Hon'ble Bombay High Court, by relying on the decisions cited supra, issued some guidelines, in addition to the guidelines laid down in Trade Well Case, which are as follows:-

"GUIDELINES

(i) The Banks / Financial Institutions shall annex a copy of the notice issued under Section 13(2) of the SARFAESI Act along with proof of despatch of the said notice and affidavit of service to that effect to their application under Section 14 of the SARFAESI Act.

(ii) The application shall contain a statement that the secured assets which are intended to be taken over are within the jurisdiction of the DM/CMM concerned.

(iii) On receipt of an application, the office of the DM/CMM shall number the same serially in the Register maintained specifically for this purpose.

(iv) Within 15 days of filing of the application, the office of the DM/CMM shall verify whether the banks / financial institutions have complied with the requirements / guidelines and if that is not done then in that event, the DM/CMM shall direct the banks / financial institutions to comply with the same immediately.

(v) On the date on which all objections are complied with, the office of the DM/CMM shall immediately inform the applicant the date of hearing before the DM/CMM.

(vi) As already laid down by this court in the case of Trade Well, DM/CMM is not required to issue any notice to the borrower or any other person at the time of hearing of the application filed under Section 14 of the SARFAESI Act.

(vii) The borrower / mortgagor or any other person has no locus to participate / object / be heard at the time of the passing of order or any other stage including the execution or implementation of the order.

(viii) All applications filed under Section 14 which are in compliance with the requirements and the guidelines shall be disposed of by the DM / CMM as expeditiously as possible and in any event, within a period of two months from the date of proper presentation of the application.

(ix) The order passed on the application filed under Section 14 shall (i) authorize the taking of physical possession of the secured asset with reasonable force which includes the breaking open of locks, wherever necessary; (ii) direct the police station concerned to provide help / assistance in taking possession.

(x) The representative of the DM/CMM who takes possession of the secured asset shall

draw panchnama and take inventory of the secured assets before handing over physical possession to the Authorized Officer of the banks/financial institutions;

(xi) The possession of the secured asset shall be taken by the designated representative of the DM/CMM as expeditiously as possible after the passing of the order under the application by the DM/CMM."

viii) (2014) 6 SCC 1 (Harshad Govardhan Sondagar ..vs.. International Assets Reconstruction Company Limited and Others), wherein it is held as follows:-

29. Sub - section (3) of Section 14 of the SARFAESI Act provides that no act of the Chief Magistrate or the District Magistrate or any officer authorised by the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of Section 14 shall be called in question in any court or before any authority. The SARFAESI Act, therefore, attaches finality to the decision of the Chief Metropolitan or the District Magistrate and this section cannot be challenged before any court or any authority. But this Court has repeatedly held that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution, because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in *Columbia Sportswear Co. v. Director of Income Tax* 12 : (SCC p. 234, para 17)

"17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the legislature making the decision of the tribunal final or conclusive, we hold that sub-section

(1) of Section 245-S of the Act insofar as it makes the advance ruling of the authority binding on the applicant, in respect of the transaction and on the Commissioner and Income Tax Authorities subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the authority."

In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law."

.....
36. Section 107 of the Transfer of Property Act provides that a lease of immovable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made 'only by a registered instrument' and all other leases of immovable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the instrument or from the date of delivery

of possession in his favour by the landlord.

.....

37.2 In case the applications of the secured creditors under Section 14 of the SARFAESI Act are still pending, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, will consider the claims of the appellants that they were in possession of the secured asset under a lease made prior to the creation of the mortgage and decide the applications under Section 14 in accordance with this judgment and any other law that may be relevant. In case, during the pendency of these appeals, orders have been passed by the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act, the orders so passed will stand quashed and the Chief Metropolitan Magistrate or the District Magistrate will pass fresh orders in accordance with this judgment and any other law that may be relevant after giving an opportunity of hearing to the appellants and the secured creditors."

5. The facts we find from the records are that before the learned Chief Metropolitan Magistrate, the second respondent herein has filed a petition under Section 14 of the SARFAESI Act in CrI.M.P.No.8583 of 2017 and submitted that the petitioners were irregular and failed to repay the loan amount and therefore, the respondent bank classified the account as NPA (Non-Performing Asset) on 31.12.2015 and issued demand notices dated 16.02.2016 and 21.03.2016 and the possession notice dated 29.07.2016 for taking symbolic possession of the property. After considering the averments as stated in the above petition by the 2nd respondent and upon perusing the records, the learned Chief Metropolitan Magistrate, Allikulam, Egmore, Chennai - 3 has allowed the said petition, thereby, appointed an Advocate commissioner to take possession of the schedule mentioned property and handover the same to the 2nd respondent herein. The order of the learned Chief Metropolitan Magistrate, Allikulam, Egmore, Chennai-3 reads as under:-

1) This petition has been filed by the petitioner u/s. 14 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (hereinafter called as Act) praying this Court to pass an order, enabling the petitioner to take possession of the secured assets, more

fully described in the schedule.

2) It is the case of the petitioner bank that the respondents were sanctioned an amount of Rs.100,00,000/- as per the request of the 2nd respondent on behalf of the 1st respondent vide Letter of Sanction in Reference No.AXISBK/SZO/CHE/ADVPOW/038/2007-08 dated 18.08.2007 and the said loan amount was periodically renewed the cash credit facility on the working capital of the respondents by way of letters dated 08.02.2011 vide reference No.AXISBK/SME/CHE/SMEPOW/ 275/2010-11. The respondents had executed hypothecation of current assets and movables (composite) deed dated 09.02.2011 hypothecating the tangible movables and had executed Power Trade facility agreement confirming the collateral security of the property for the facility availed. The deed of guarantee was executed by the 3rd respondent in favour of the petitioner on 14.03.2011 guarantying to repay the credit facility availed without default and the undertaking affidavit was executed by the 1st respondent on 09.02.2011 not to divert the facility availed to any other purpose other than the sanctioned purpose. The respondents also submitted a Declaration cum confirmation deed on the property and also created a Mortgage on the property by way of depositing the title deeds of the schedule mentioned property on 11.07.2006 with intent to create security for the due repayment of the loan and the same was extended by Memorandum of Entry for extension of Equitable Mortgage on 09.02.2011. The respondents submitted the Partition Deed Doc.No.1165/1987 in favour of the 2nd respondent with regard to the Item no.1 of the schedule and Sale Deed Doc.No.827/1995 in favour of the 2nd respondent at SRO, Royapuram Thereafter, the respondents were irregular and failed to repay the loan liability owned by them to the petitioner bank. Therefore, the petitioner classified the respondents account as Non-performing Asset on 31.12.2015. Hence the petitioner bank had issued a demand notice dated 16.02.2016 u/s.13(2) of the Act calling upon the respondents to settle their dues in full for a sum of Rs.1,30,28,176.78/- within 60 days and the same was duly received by the respondents. Immediately the petitioner had

withdrawn the earlier demand notice by their letter dated 21.03.2016 and a fresh demand was made by demand notice dated 21.03.2016 for Rs.1,12,12,709.38/- which was also served on the respondents. But they did not show any interest to repay the arrears and did not settle the dues. Hence the petitioner bank had issued a possession notice u/s.13(4) of the Act dated 29.07.2016 for taking symbolic possession of the property. The petitioner bank had also effected the paper publication of the said possession notice in two daily newspapers in both languages English and Tamil on 04.08.2016. As the respondents failed to settle the dues, the said amount is liable to be recovered by the sale of the secured assets. The secured assets cannot be sold or transferred to realize the dues of the petitioner bank without taking physical possession of the same. Hence it is prayed to order for taking physical possession of the secured asset from the respondent by appointing an Advocate Commissioner and direction may be given to provide adequate protection to take physical possession. The petitioner further submits and declares that there is no stay or injunction in any other court or tribunal for taking physical possession of the secured assets under the provisions of SARFAESI Act.

3) The authorized officer of the petitioner / financial institution has filed his proof affidavit in support of his petition confirming the measures taken by the petitioner before filing this petition. He has produced the copies of documents viz., Cash credit sanction letter, composite hypothecation deed. Power trade facility agreement, deed of guarantee, undertaking affidavit, declaration cum confirmation deed, partition deed, sale deed, Memorandum of Deposit of Title Deeds, Notice u/s.13(2) and 13(4) of the Act, acknowledgement cards, paper publications etc., along with the petition, to prove that he has taken all the measures as enumerated in Section 13 of the Act.

4) The authorized officer of the petitioner bank has categorically stated in his affidavit that none of the tenants is residing in the schedule of property and there is no

stay granted by any other Court preventing the petitioner from taking steps u/s.13 of the Act. As per the averments found in the petition as well as in the Proof Affidavit, the schedule mentioned secured asset is in Royapuram, North Chennai which is well within the jurisdiction of this Court. This petition has been filed by the petitioner to take the physical possession of the secured asset enabling the petitioner to sell or transfer in accordance with law. The authorized officer of the petitioner bank has also filed an affidavit declaring the aggregate amount of financial assistance granted to the respondents with the period of fault committed by the respondents and all other aspects to fulfill the requirements made in Section 13 and 14 of the Act. The contents found in the Proof Affidavit are sufficient to satisfy this Court to pass an order for taking physical possession of the secured asset.

5) The petitioner has followed the procedures laid down u/s.13 & 14 of the Act and as a banking company, the petitioner is entitled to get the assistance of this Court and also to get police protection in order to take possession of the schedule mentioned property and to bring the same for sale. However, the right of the petitioner can be exercised only through a Court Officer or the Advocate Commissioner appointed by the Court to avoid further complications.

6) After considering the entire materials. this Court is of the opinion that u/s.14(1) of the Act, the petitioner is entitled to take possession of the schedule mentioned assets. The petitioner has also complied with the provisions U/s.13(4) of the Act and under Rule 8 (1) & (2) of Security Interest (Enforcement) Rules 2002.

7) In the result, this petition is allowed. Mr.G.Prabu (Advocate) is appointed as Advocate Commissioner to take possession of the schedule mentioned Property mentioned in Schedule after taking inventory if necessary with the assistance of the Station House Officer, N1 Royapuram Police Station, Chennai and to handover the same to the petitioner. The Advocate commissioner shall file an undertaking

affidavit before this Court to perform his duty of execution of warrant without any deviation, and if there is any deviation on his part, he would be liable for action under the law.

8) A sum of Rs.20,000/- is ordered as remuneration to the Advocate Commissioner, in which, Rs.5,000/- has to be paid directly to the Advocate Commissioner by the petitioner initially, and the balance of Rs.15000/- has to be paid after execution of the warrant. The Advocate Commissioner shall execute the warrant without causing any physical harm to the inmates. He shall execute the warrant within 60 days from the date of issuance of warrant and submit his report to this Court.

9) On filing affidavit by the petitioner that no appeal or stay is pending in any other Court in respect of the schedule mentioned property, warrant will be issued.

9. The present Writ Petition is filed challenging the aforesaid order of the learned Chief Metropolitan Magistrate, Egmore, passed in CrI.M.P.No.8583 of 2017 dated 25.04.2017. Challenging the very same order, the petitioners have already filed an Appeal in S.A.No.128 of 2017 before the Debts Recovery Tribunal-II, Chennai with the delay of 329 days. When the said Appeal is pending, in the Month of July 2017, the petitioners have sought for amendment to the prayer in the said Appeal by substituting the prayer challenging 13(4) notice dated 05.07.2016 issued by the 2nd respondent herein, instead of the earlier prayer challenging the order passed by the learned Chief Metropolitan Magistrate, Allikulam, Egmore, Chennai - 3 under Section 14 of the SARFAESI Act, as stated below:

"AMENDED AS

a) to set aside and quash the entire proceedings initiated by the Respondent under Section 13(4) of the SARFAESI Act, 2002 and consequentially restore possession ; and

b) to award the cost of the application and to grant compensation under Section 19 of the Act and such other relief's as this Hon'ble Tribunal may deem fit and proper in the circumstances of the case and thus render justice."

"INSTEAD OF

a) Set aside the order dated 25.04.2017 received by the Appellants on 17.06.2017 passed by the Hon'ble Chief Metropolitan Magistrate, Allikulam, Egmore,

Chennai in CrI.M.P.No.8583 of 2017 and quash the same as null and void ; and

b) Grant such other or any other reliefs that this Hon'ble Tribunal may deem fit and proper under the circumstances of the above case and thus render justice."

10. According to Section 14(3) of The Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002, no act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of Section 14 of the Act shall be called in question in any court or before any authority. For better understanding, Section 14 of the SARFAESI Act is extracted hereunder:-

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.-

(1) Where the possession of any secured assets 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 provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be, the District Magistrate shall, on such request being made to him-

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor. (2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority.

11. It is categorically clear from Section 14 of the SARFAESI Act that the petitioners were not able to obtain order from DRT-II, Chennai, against the order passed by the learned Chief Metropolitan Magistrate, Allikulam, Egmore, Chennai - 3, in a petition filed under Section 14 of the SARFAESI Act by the 2nd respondent bank in Crl.M.P.No.8583 of 2017 dated 25.04.2017. Except the decision of the Hon'ble Supreme Court reported in (2014) 6 SCC 1 (Harshad Govardhan Sondagar ..vs.. International Assets Reconstruction Company Limited and Others) cited supra, which deals with leased property and is not applicable to the case on hand, all other decisions relied on by the learned counsel for the petitioners supported Section 14 (3) of the SARFAESI Act. Moreover, in para 10 of affidavit of the Writ Petition, it is stated by the petitioners that "Also, we are left with no other option except to knock the doors of this Hon'ble Court to safeguard our interest and protect our hard earned & acquired properties mortgaged with the 2nd respondent....., as in the present scenario, it has practically become in difficult to obtain urgent and necessary orders from the Hon'ble DRT-II, Chennai." In such circumstances, the petitioners have approached this Court under Article 226 of the Constitution of India challenging the above order of the learned Chief Metropolitan Magistrate, Egmore. In the meanwhile, the petitioners have also sought to amend the prayer in the Appeal before the Debts Recovery Tribunal - II by substituting the prayer to challenge Section 13(4) Notice issued by the 2nd respondent instead of the earlier prayer challenging the order of the learned Chief Metropolitan Magistrate, Egmore. The attitude of the petitioners cannot be entertained for adopting such methods of forum shopping attitude, when the matter is already pending before the Debts Recovery Tribunal - II. Once the petitioners approached Debts Recovery Tribunal - II, it is for them to agitate all the factual aspects and grounds before the Tribunal and they cannot approach this Court under Article 226 of the Constitution of India. Hence, the Writ Petition is dismissed. No Costs. Consequently, connected miscellaneous petitions are closed.

/sd/-

Assistant Registrar

/True Copy/

Sub Assistant Registrar

raja/mra
To

1. The Chief Metropolitan Magistrate,
Allikulam, Chennai - 600 003.

+1 CC to Mr. R. Saravanan , Advocate Sr.No. 68658

W.P.No.18914 of 2017 and
W.M.P.Nos.20416 & 20417 of 2017

ths : 28/10/2017



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