

HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CWP No.16366 of 2016 (O&M)

Date of Decision: 18.08.2017

Asset Reconstruction Company (India) Ltd. ... Petitioner

VS.

State of Haryana & Ors. ... Respondents

**CORAM: HON'BLE MR.JUSTICE SURYA KANT
HON'BLE MR.JUSTICE SUDHIR MITTAL**

Present: Mr. Joy Saha, Senior Advocate with
Mr. VK Sachdeva, Advocate for the petitioner

Mr. Vijesh Sharma, DAG Haryana

Mr. Anand Chhibbar, Senior Advocate with
Mr. Gaurav Mankotia, Advocate for respondents No.3 to 6

SURYA KANT, J.

(1) The petitioner is an Asset Reconstruction and Securitisation Company, registered duly under Section 3 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short, 'the SARFAESI Act'). It seeks quashing of the order dated 14.06.2016 which eventually merged into the final order dated 24.10.2016 whereby the District Magistrate, Sonapat firstly adjourned the proceedings initiated under Section 14 *sine die* "till the consideration/disposal of objections..." and thereafter declared the order dated 08.02.2016 (P2) as null and void, vide which the application filed by the petitioner-institution under Section 14 of the SARFAESI Act was allowed, and consequently has dismissed that application.

(2) The petitioner-Company (in short, 'ARCIL') is the assignee of (i) Industrial Development Bank of India Ltd (IDBI); (ii) Punjab National Bank (PNB); and (iii) the Union Bank. The Assigner-Banks vide their

22.12.2008 have assigned all the rights, title and interest over the dues recoverable from respondent No.3 – Kiran Overseas Exports Ltd. with underlying securities. ARCIL has acquired these rights within the meaning of Section 5 of the SARFAESI Act.

(3) It is broadly an admitted fact that the assigner-Banks granted financial assistance to respondent No.3 for setting up an industrial unit to manufacture leather goods and garments and granted various financial assistance in the nature of term loans and working capital loans. The assigner-Banks granted an aggregate principal amount of ₹ 29.06 crores to respondent No.3 under Diverse Loan Agreements. Respondent No.3 created equitable mortgage by depositing the original property documents and title deeds of the immovable property comprising a piece of land measuring 69 kanal 10 marla situated within the revenue estate of village Rasoi, Tehsil and District Sonapat together with other structures, fixed plant machinery, fixtures and fittings. Respondent No.4 to 6 stood guarantors and executed Deed of Guarantee and thus their liabilities are continuing and co-extensive with that of the borrower Company.

(4) Respondents No.3 to 6 admittedly failed to pay the due instalments as a result of which the loan accounts of respondent No.3 were classified as Non Performing Assets. The Authorised Officer of the IDBI issued notice to the borrowers on 26.10.2006 under Section 13(2) of the SARFAESI Act calling upon them to pay the dues of ₹ 110.90 crores as on 01.10.2006. The borrowers submitted their reply to the said notice which was duly considered.

(5) Thereafter IDBI obtained consent of other secured creditors representing 3/4th of the outstanding dues and its Authorised Officer

proceeded to take physical possession of the movable and immovable secured assets on 27.07.2007. It appears that respondent No.4 who is the Managing Director of respondent No.3, came forward with a proposal that since the industrial unit was functional and in operation, he may be appointed as an agent of Authorised Officer of IDBI and as custodian of the secured assets. His offer was accepted and a “Custody Arrangement Agreement” dated 27.07.2007 (R3) was entered into between the Authorised Officer and respondent No.4. Some of the salient terms and conditions of the said agreement are to the following effect:-

“4. The Authorised Officer does hereby expressly authorize and permit the custodian to operate the unit of the Borrower. However in consideration of the Authorised Officer agreeing to appoint him as the Custodian and as her agent, the Custodian agrees to pay to the Authorised Officer a sum of Rs.5,00,000 (Rupees Five Lakhs only per month as Royalty met of all taxes, duties, cess, if any the payment shall be made in advance on the first working day of every month by way of a demand draft drawn on a nationalized bank and made in favour of “The Authorised Officer, Industrial Development Bank of India Ltd. – A/c Kiran Overseas Exports Ltd.” payable at Mumbai.

5) The custodian hereby agrees and undertakes that:

- i) xxxx xxxx*
- ii) xxxx xxxx....*

xii) Return to the Authorized Officer as and when called upon to do so, the possession and control of the Secured Assets hereby entrusted to the Custodian in good condition and care.

6) This Agreement may be terminated by the Authorised Officer at her discretion by giving 1 (one) weeks prior notice in writing to the Custodian. This

Agreement can be terminated by the Custodian only by giving one month's prior notice in writing to the Authorised Officer."

(6) As may be seen from the Custody Arrangement Agreement, the 4th respondent agreed to pay ₹ 5 lacs per month as Royalty to the IDBI. It appears that this arrangement continued for a while but later on respondent No.4 stopped paying the Custodianship Fee.

(7) Meanwhile, ARCIL acquired the rights, title and interest over the dues recoverable from respondent No.3 and, may be at the borrower's request, the parties entered into a settlement in the year 2010 which later on failed due to non-compliance of the terms and conditions by the respondent-borrower.

(8) ARCIL eventually terminated the Custodian Arrangement Agreement vide notice dated 23.10.2015 and as per its claim, the borrowers – respondent No.3 to 6 are under an obligation to pay a sum of ₹ 1121,56,57,689 outstanding as on 15.11.2015 together with future interest and various other charges etc.

(9) ARCIL thereafter filed an application before District Magistrate, Sonapat under Section 14 of the SARFAESI Act seeking assistance for taking over possession of the mortgaged property. In the said application (P4) it was explicitly disclosed that the Authorised Officer of IDBI sought to take possession of the secured assets on 27.07.2007 when the Managing Director of respondent No.3 came forward and expressed his willingness to act as an agent of the Authorised Officer and that the parties entered into a Custody Arrangement Agreement dated 27.07.2007, a copy of which was also appended along with the application. It was further averred

he failed to pay since July, 2010 onwards or that the borrowers applied for the settlement which was duly sanctioned in the year 2010 but was not honoured by the borrowers. The factum of termination of the Custody Arrangement Agreement vide notice dated 23.10.2015 was also disclosed.

(10) The District Magistrate, Sonapat, upon consideration of ARCIL's application under Section 14 of the SARFAESI Act passed a self-speaking order dated 08.02.2016 (P2) directing the Naib Tehsildar-cum-Executive Magistrate, Rai ***"to take possession of the assets as mentioned in the above referred application and hand over the same to the secured creditor..."***.

(11) The borrower-company then moved an application dated 12.06.2016 (P3) before the District Magistrate, Sonapat requesting to further defer the proceedings for taking physical possession of the assets, questioning the very competence of ARCIL for acquiring the assets or filing an application under Section 14. It was further averred that the borrowers have filed a memorandum of proposal for settlement before the DRT at Chennai for ₹ 25 crores and if ARCIL is permitted to take physical possession of property so as to avoid settlement before DRT, *"it will kill welfare of families of 83 workmen employed by our Company apart from survival of the Company and Industrial growth of State of Haryana"*.

(12) Though ARCIL through its reply dated 23.06.2016 opposed the borrower's application but regardless thereto, the new incumbent District Magistrate, Sonapat passed the impugned order dated 14.06.2016 adjourning the ongoing proceedings *sine die* till the objections filed by the borrowers or counter-objections of ARCIL were to be decided. The operative part of the order reads as follows:-

“Now therefore, in the light of above said facts, on going proceedings on the petition of the creditor ARCIL Company under SARFAESI Act are hereby adjourned sine-die till the consideration/disposal of the objections of the objector by ARCIL, i.e. creditor. A copy of the objections along with relevant record be sent to the petitioner ARCIL creditor. The petitioner ARCIL Company would have liberty to restore their petition after consideration/disposal of objections of objector.”

(13) The District Magistrate, Sonapat subsequently passed the second impugned order dated 24.10.2016 whereby he has declared his predecessor's order dated 08.02.2016 as null and void which cannot be implemented, and consequently has dismissed the original application filed by ARCIL under Section 14 of the SARFAESI Act. The reasons which have found favour with the District Magistrate are that:-

- (i) the physical possession of the secured assets had already been taken by the Authorised Officer of IDBI;
- (ii) the said Authorised Officer exercised powers under Section 13(4)(c) of the SARFAESI Act and appointed respondent No.4 as the Custodian to manage the secured assets;
- (iii) respondent No.4 is in possession of the secured assets as an agent of the secured creditors, hence the assets which are already in possession of the Bank cannot be ordered to be taken over again through the District Magistrate;
- (iv) the Custody Arrangement Agreement is still operative and has not been terminated as only a notice to terminate the same has been served;

- (v) the dispute has arisen out of breach of the said agreement for which the party should take the matter before the competent court of law;
 - (vi) the District Magistrate has no jurisdiction to order repossession of the assets which are already in the custody of the Bank.
- (14) ARCIL filed the instant writ petition assailing the District Magistrate's first order dated 14.06.2016. The final order dated 24.10.2016 was passed during the pendency of this writ petition and this order too has been questioned through supplementary pleadings.
- (15) The borrowers as well as the District Magistrate, Sonapat have filed their respective affidavits, opposing ARCIL's claim in this petition.
- (16) We have heard Sh. Joy Saha, Senior Advocate on behalf of the petitioner-ARCIL and Sh. Anand Chhibber, Senior Counsel on behalf of the borrowers as well as learned State counsel defending the action of the District Magistrate, at a considerable length and gone through the record.
- (17) The following questions thus fall for consideration:-
- (i) What is the scope of powers exercisable by a District Magistrate under Section 14 of the SARFAESI Act?
 - (ii) Whether ARCIL in the instant case is entitled to seek assistance of the District Magistrate under Section 14 of the SARFAESI Act to recover possession of the secured asset from respondent No.3&4?
 - (iii) Whether the District Magistrate is competent to 'review' his own order or the one passed by his predecessor under Section 14 of the SARFAESI Act?

- (iv) What is the remedy available to a borrower or guarantor against whom the District Magistrate has passed an order under Section 14 to provide assistance to the secured creditor in taking possession of the secured asset?

Question No.(i)

(18) One of the noticeable legislative object of the SARFAESI Act is to empower the Banks and financial institutions ***“to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower’s account as non-performing asset...”***. To achieve this object, Section 13(1) of the Act authorizes a secured creditor to enforce any security interest created in its favour “without the intervention of the Court or Tribunal”. Section 13(2) provides that where a borrower has made any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt has been classified as non-performing asset, then the secured creditor may serve the borrower with a notice containing full details of the amount payable, calling upon to discharge his liabilities in full to the secured creditor within 60 days. Section 13(4) further provides that in case the borrower fails to discharge his liability within the specified period, the secured creditor may take recourse to one measure or the other prescribed to recover his secured debt, namely, (i) take possession of the secured assets of the borrower; (ii) take over the management of the business of the borrower; (iii) appoint any person to manage the secured assets the possession of which has been taken over by the secured creditor; and (iv) require at any time by notice in writing any person who has acquired a secured asset from the borrower from whom any money is due to the

borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(19) The scheme of the SARFAESI Act, 2002 as discernible from Section 13 thus fully entitles a secured creditor to take over the possession of the secured assets, movable or immovable, and sell them to recover the secured debt, especially when the borrower or the occupier of the secured asset does not resist the delivery of possession. Such a recourse can be adopted without the intervention of the Court or Tribunal. Still further, the aforesaid right of a secured creditor is not restricted against the borrower only, rather under Section 13(11), the secured creditor is entitled to proceed against the guarantors or sell the pledged asset without first taking any of the measures specified in Clauses (a) to (d) of Section 13(4) of the SARFAESI Act.

(20) Section 14 of the SARFAESI Act thereafter provides 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 or control of any such secured assets, make a request in writing to the Chief Metropolitan Magistrate or the District Magistrate concerned, to take possession thereof and on receipt of such request, the CMM/DM, as the case may be, is obligated to take possession of the secured asset and documents relating thereto and forward such asset and documents to the secured creditor. Such a recourse, nonetheless, shall be taken by the District Magistrate only when the application to be submitted by the secured creditor is accompanied by an affidavit of its Authorized Officer to satisfy the ingredients of Clauses (i) to (ix) mentioned in first *proviso* to Section 14(1) of the SARFAESI Act. In

other words, once the conditions specified in first *proviso* to Section 14(1) are satisfied, a District Magistrate is obliged to take possession of the secured asset and documents relating thereto and forward the same to the secured creditor. [Please see (i) **United Bank of India vs. Satyawati Tondon & Ors. (2010) 8 SCC 110** and (ii) **Kanaiyalal Lalchand Sachdev & Ors. vs. State of Maharashtra & Ors. (2011) 2 SCC 782**]

(21) The SARFAESI Act provides three methods to a secured creditor to take possession of the secured assets. All these methods have been explained eloquently by the Hon'ble Supreme Court in its judgment in **Standard Chartered Bank vs. V.Noble Kumar (2013) 9 SCC 620:-**

“36.1 (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 authorized 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.

36.2 (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 scrutinize 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 authorize 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.

36.3 (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 scrutinize the application as provided in Section 14, and then if satisfied, authorize 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.”

(22) It is well settled by now that a District Magistrate is neither vested with any quasi-judicial power nor the obligation cast upon him under Section 14 of the SARFAESI Act involves any adjudicatory process. The nature of the duty assigned to a District Magistrate under this provision is essentially administrative in nature which he has to exercise after due application of mind. The duty entrusted to a District Magistrate is akin to an executing agency designated for the aid and assistance of a Bank or financial institution to secure physical possession of the ‘secured asset’ when it cannot be taken over in the ordinary process under Section 13(4) of the Act. The District Magistrate is vested with no discretion to refuse assistance where the ingredients of first *proviso* to Section 14(1) are unambiguously satisfied.

Question No.(ii)

(23) It is undeniable that IDBI as the lead Bank and with the consent of 3/4th of its secured creditors decided to enforce the security interest and served the notice under Section 13(2) on the borrower(s). Their reply-cum-objections were also duly considered before having recourse to one of the measures under Section 13(4) of the Act. The Authorised Officer of IDBI eventually invoked powers under Clauses (a) & (c) of sub-Section (4) and appointed the 4th respondent as Custodian-cum-Manager of the secured assets, the possession of which had been taken over. It is also a matter of

record that respondent No.4 was appointed as the Custodian owing to his capacity as Managing Director of the borrower [see *Clause 5 of the Custody Arrangement Agreement*]. The Custody Arrangement Agreement could be terminated by giving one week prior notice to the custodian. The Custodian was admittedly served with such a notice by ARCIL on 23.10.2015. The Agreement did not stipulate any further action except the service of a notice for its termination. On termination of the Custody Arrangement Agreement, respondent No.4 lost his status as the Custodian or a licensee to retain possession of the entrusted assets for and on behalf of the secured creditor. In legal parlance, he stood reverted to his original status as one of the guarantor of the principal borrower – respondent No.3. His refusal or resistance to hand over physical possession of the ‘secured assets’ thereafter surely entitled the ARCIL to apply under Section 14 and secure the possession of such assets with the aid and assistance of District Magistrate. Still further, even if the Custody Arrangement Agreement is assumed not to have been terminated before ARCIL applied under Section 14 of the Act, yet the District Magistrate was duty-bound and obligated to entertain the application under Section 14 of the Act, for the said agreement did not affect the nature of the property on which secured interest was created in favour of the Banks succeeded by ARCIL. So long as a property is a ‘secured asset’ and its possession cannot be taken over by the secured creditor in ordinary course, such secured creditor is entitled to seek assistance of the District Magistrate under Section 14 to recover its possession. The solitary purpose of the exercise contemplated under Section 13(4) or as a next step under Section 14 is to make available the physical control of the secured asset to the secured creditor to enable the latter to sell such assets and appropriate the

sale proceeds to satisfy the secured debt fully or partially, as the case may be. Till such time, a secured creditor is unable to do so, his right to apply under Section 14 and the corresponding duty of the District Magistrate shall continue to subsist. We are thus of the view that ARCIL was well within its right when it applied to the District Magistrate on 18.11.2015 to act within the framework of Section 14 and recover the secured assets from respondent No.4, to be handed over to ARCIL.

(24) Sh. Chibber, learned senior counsel for the borrowers vehemently contended that once the possession of the secured assets is taken over under Section 13(4)(a), no application lies under Section 14 to initiate an infructuous exercise. We, however, do not find any substance in the contention. The chapter is not closed on mere securing physical possession of an asset under Section 13(4)(a) till the entire process reaches to its logical conclusion, namely, the sale of such secured asset and appropriation of the sale proceeds to discharge the debt liability. The duty of the District Magistrate under Section 14 is to facilitate the secured creditor in achieving the above-stated legislative object and such obligation shall remain alive till the secured creditor transfers the secured assets through an auction sale or private negotiation or any other permissible mode of parting with possession for consideration.

(25) The order or action under Section 14 is not and cannot be a one-time exercise. For example, if a secured creditor is forcibly dispossessed after taking over possession of the secured assets, can the District Magistrate deny assistance under Section 14 on the plea that such assistance had been availed earlier? We firmly answer in the negative. In the event of any change in the circumstances, the District Magistrate would be under a

bounden duty to repeat the exercise under Section 14 till the assets are appropriated by the secured creditor. It is a continuing obligation on the District Magistrate.

(26) The reliance placed by Sh. Chhiber on the decisions of the Hon'ble Supreme Court in (i) **Harshad Govardhan Sondagar vs. International Assets Reconstructions Co.Ltd. & Ors. (2014) 6 SCC 1;** (ii) **Vishal N. Kalsaria vs. Bank of India & Ors. (2016) 3 SCC 762;** (iii) **Krishan Singh Rana vs. Haryana State Industrial Development Corporation (2001) 1 PLR 149** is totally misplaced. These are the cases where the rights of a tenant/lessee who came into possession of the 'secured assets' much before the same were mortgaged, have been protected. That is not the case here. The 4th respondent took over possession as a trustee or a receiver on behalf of the Authorised Officer of IDBI. No legal right has been created in his favour to retain the possession. He cannot resist dispossession and force ARCIL to go to Civil Court. Once the arrangement was terminated, the 4th respondent returned to his status as the Managing Director of the borrower-company. His reluctance to hand over the possession therefore, falls within the mischief of Section 14 of the Act. The decisions of the High Court of Himachal Pradesh in **India Bulls Housing Finance Ltd. vs. Rakesh Kumar Banta & Ors. (CMPMO NO.158 of 2015), 2016 ILR (HP) 832** and that of the High Court of Bombay in **Atul Daulatrai Desai vs. State of Maharashtra & Ors. (W.P.No.7745 of 2016) 2016 (6) Mh.L.J. 321** are also about the tenants craving for the protection of their possession.

Question No.(iii)

(27) The powers exercisable by a District Magistrate under Section 14 are creation of a Statute. Those powers are required to be exercised within the four corners of the said provision. In the case in hand, the then District Magistrate, Sonapat rightly exercised such power and passed the order dated 08.02.2016 thereby directing his subordinate officer, namely, Naib Tehsildar-cum-Executive Magistrate to take possession of the secured assets and hand over the same to ARCIL. It could not be disputed by the learned State counsel or senior counsel for the borrowers that there is no provision under the SARFAESI Act under which the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, can review, recall or modify his order. The successor District Magistrate, therefore, had no jurisdiction whatsoever either to entertain the borrower's application dated 12.06.2016 or to pass the impugned orders dated 14.06.2016 and 24.10.2016. These orders are totally without jurisdiction and *void ab initio*, for it is well settled that the power to review is not an inherent power and it must always be conferred by law either expressly or by necessary implication. The so-called reasons assigned by the successor District Magistrate, even if assumed to be correct, did not and can not clothe him with a non-existent power to review the order passed by him or his predecessor. [Ref. (i) **Patel Narshi Thakershi & Ors. vs. Shri Pradyumansinghji Arjunsinghji (1971) 3 SCC 844**; (ii) **Kewal Chand Mimani (D) By Lrs. Vs. S.K. Sen & Ors. (2001) 6 SCC 512**].

(28) It would be apt to cite a Division Bench decision of Allahabad High Court in **Writ-C No.30899 of 2016 (Kotak Mahindra Bank Ltd. vs.**

State of UP & 4 others) decided on 21.10.2016, where an identical question came up for consideration and the High Court viewed as follows:-

“Be that it may, we are of the considered opinion that the District Magistrate has absolutely no jurisdiction to review his order dated 24.06.2013 passed under the Act, 2002 specifically when the order was subjected to challenge before the Debt Recovery Tribunal and such application was dismissed by a reasoned order holding therein that the borrower had not approached the Tribunal with clean hands. If they were not satisfied they had the remedy of approaching the Appellate Tribunal under Section 18 of the Act, 2002. We are, therefore, more than satisfied that such order of the District Magistrate cannot be permitted to stand on record. The order of the District Magistrate dated 27.04.2016 and dated 30.06.2016 are hereby quashed.”

We are respectfully in agreement with the view taken by the Allahabad High Court. Consequently, it is held that the District Magistrate, Sonapat had no authority or power to review the order dated 08.02.2016 and his subsequent orders being without any authority of law, cannot sustain.

Question No.(iv)

(29) In our considered view, once the District Magistrate, Sonapat had invoked his powers under Section 14 of the Act and passed the order dated 08.02.2016, the borrowers had no other remedy except to approach the Debt Recovery Tribunal under Section 17 of the Act. The order passed by a District Magistrate under Section 14 is surely supplemental to one of the

measure defined under Section 13(4)(a) of the Act. Hence the appropriate remedy with respondent No.3&4 was to move an appropriate application before the DRT instead of filing a review application before the District Magistrate. In **Kanaiyalal Lalchand Sachdev's** case (supra), the Supreme Court has unequivocally held that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4) and therefore would fall within the ambit of Section 17(1) of the Act. As the borrowers failed to avail their remedy under Section 17 of the Act, the order dated 08.02.2016 passed by the District Magistrate has attained finality and it has to be given effect to so that the physical possession of the property is restored to ARCIL.

(30) For the reasons afore-stated, we allow this writ petition with cost of ₹ 50,000 on respondents No.3&4; set aside the impugned orders dated 14.06.2016 and 24.10.2016 and direct the District Magistrate, Sonapat to give effect to the order dated 08.02.2016 within one month and submit a compliance report to the Registrar Judicial of this Court. Respondent No.3&4 are directed to deposit the cost amount with Mediation and Conciliation Centre of the High Court within one month. The amount shall be spent on the Children's Room of Mediation and Conciliation Centre which is being set up under the supervision of Hon'ble Ms. Justice Ritu Bahri.

(Surya Kant)
Judge

18.08.2017
vishal shonkar

(Sudhir Mittal)
Judge