IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.12629/2017

Phoenix ARC Pvt. Ltd. ... Petitioner

V/s.

Additional Collector, Satara & Ors. ... Respondents

Mr. Charles De Souza a/w. Aneesa Cheema a/w. Mithila Damle for the Petitioner
Mrs. Sushama S. Bhende, AGP for Respondent Nos.1 and 2.
Mr. D. B. Shinde for Respondent No.10.

CORAM: K.K. TATED &
N. J. JAMADAR, JJ.
DATED : OCTOBER 22, 2018

P.C. :

1 Heard. By this petition under Article 226 and 227 of the Constitution of India the Petitioner challenges the order dated 17.04.2017 passed by the learned Additional Collector, Satara on their Application u/s.14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 (Said Act).

2 The learned counsel for the Petitioner submits that earlier, the Karnataka Bank Ltd. had made an Application u/s.14 of the said Act for taking possession of the secured assets before the District Collector, Satara, which was allowed vide order dated 06.02.2016. He submits that thereafter the Karnataka Bank assigned their entire rights in the said loan transaction in favour of the Petitioner. Hence, the Petitioner made an Application

before the concerned Authority for taking possession of the suit property. At that time, the concerned Authority had directed them to make a fresh Application u/s.14 of the said Act. As per the said direction, they made Application u/s.14 of the said Act for taking physical possession of the mortgaged / secured properties on 08.03.2017. He submits that instead of deciding the said Application on merits, the learned Additional Collector directed to hold an enquiry, as to whether the suit property is mortgaged with the Wai Urban Cooperative Bank, Wai. He submits that as per the division bench judgment of this court in the matter of ***Kotak Mahindra Bank Ltd. Vs. State of Maharashtra 2018 (4) All M.R. 37,*** there is no question of holding an enquiry. He submits that the Division Bench of this court has specifically held that before passing any order, the Authority has to consider whether the Applicant has complied with the provisions of section 14 of the said Act. Paragraph 17 of the said judgment reads thus:

> *"17. We find that two Division Benches of this Court have considered the law laid down in the Noble Kumar's judgment in Hari Trading (supra) and Bank of Maharashtra (supra). In both these Judgments, this Court had concluded that the aggrieved person would be at liberty to prefer a proceeding under Section 17 so as to challenge the order under Section 14(3). It is further held that the Magistrate is only required to satisfy himself that the statements made in the nine clauses under Section 14(1) are correct. Once this has been done, the Magistrate is required to pass WP 1273-17 an order under Section 14(3) for taking the actual physical possession of the mortgaged assets. This Court, in Hari Trading (supra) after considering Noble Kumar (supra) has concluded in paragraphs 15 and 16 as under:*

> *15. The words in italic therefore were not there before Section 14 was amended in 2013. In our view, amendment to Section 14 has not changed the character of the application which is made by the secured creditor, seeking assistance of the Magistrate in getting possession of the secured assets. The amendment only seeks to impose further obligation on the Bank (I) to file an application which is duly affirmed by the authorized Officer and (ii) to give the relevant information as provided in clauses (i) to (ix) of the proviso and all that the Magistrate is called upon to do is to check whether this information is supplied or not. In the event, the Magistrate finds that all the information is given in the application under Section 14 then he has no other option but to pass an order allowing the application under Section 14 and in the event he finds that some information is not provided then he has to return the application to the secured creditor and only after all the information is provided final order under Section 14 will be passed. Much emphasis has been laid on the words "after satisfying the contents of the affidavit" which are found in the amended provision.*

We are afraid that we are unable to accept the contention raised by the learned Counsels appearing on behalf of the Petitioners viz (i) that the inclusion of these words indicate that the Magistrate has now to adjudicate and decide the correctness or otherwise of the information which is given in the application and (ii) that by virtue of inclusion of these clauses, principal borrower gets right of taking part in these proceedings for the purpose of assisting the Magistrate. It is also not possible to accept the submission that since the Section 14(3) contemplates a finality to the orders passed by the Magistrate, the principal borrower does not get any right to point out that the decision WP 1273-17 of the Bank of declaring the Account of the borrower as non- performing asset is not correct or the measures taken by the Bank are not in accordance with law and, therefore, under Section 14 alone the borrower would get a right to point out to the Magistrate that these measures not being taken properly, the order directing that the possession should be taken cannot be passed without giving hearing to him.

16. It will be necessary to briefly see the scheme of the SARFAESI Act. The objects and reasons of the Act clearly reveal that when the legislature found that the Recovery of Debts due to Banks and Financial Institutions Act, 1993 did not serve the purpose of making quick recovery of secured assets from the borrowers/guarantors, the SARFAESI Act was passed. The Act therefore gives right to the Bank to take possession of the secured assets upon there being default in payment of secured debt or any installment thereof and if his Account in respect of such debt is classified by the secured creditor as non- performing asset, then, the secured creditor can give notice in writing to the borrower to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor will have right to exercise all or any other rights under sub- section (4) of Section 13of the SARFAESI, Act; one of which includes taking possession of the secured asset. The relevant provisions of Section 13 of SARFAESI Act viz section 13(1), 13(2), 13(3), 13(3A), 13(4) read as under:-

"13. Enforcement of security interest.-

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such WP 1273-17 creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non- performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4).

(3) The notice referred to in sub-section (2) shall

give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

[(3A) If, on receipt of the notice under subsection (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate [within fifteen days] of receipt of such representation WP 1273-17 or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District Judge under section 17A.]

(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely :-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of WP 1273-17 the business of the borrower is held as security for the debt:

Provided further that where the management of whole, *of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;]*

(c) appoint any person (hereinafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing , any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt (5) ....

(6) ....

(7) ....

(8) ....

(9).....................

(10)....................."

Sub-section (3A) to section 13 was inserted by the Act 30 of 2004 with effect from 11-11-2004. The procedure, therefore, which is contemplated under section 13 is that the secured creditor can give a WP 1273-17 notice in writing to the borrower to discharge in full his liability if (i) he makes any default in payment of secured debt or any installment thereof and (ii) his Account in respect of such debt is classified by the secured creditor as non-performing asset. Sub-section (3) of section 13 provides that the notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non- payment of secured debts by the borrower. By virtue of insertion of Section (3A), right has been given to the borrower to make a representation or raise an objection and if such a representation is made, the secured creditor has to consider such representation or objection and if he *fins that such representation or objection is not acceptable, he has to communicate within fifteen days of receipt of such representation the reasons for non-acceptance of the representation. Proviso to sub-section (3A) clearly provides that upon the secured creditor rejecting the representation of the borrower, no right would confer upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17. Sub-section (4) of section 13 gives a right to the secured creditor to take possession of the secured assets of the borrower if he fails to discharge his liability within a period specified in sub-section (2). It is obvious therefore that right of the secured creditor to take possession flows from section 13(4) and not from section 14 of the SARFAESI Act. section 14 clearly contemplates that Chief Metropolitan Magistrate or District Magistrate can pass an order under section 14 so as to assist the secured creditor to take possession of the secured assets and, if necessary, with the police help. section 14 therefore is not a stage for adjudication of rights and liabilities between the parties before the Magistrate. Prior to the said amendment, it was a settled position in law that borrower did not have any locus when application under section 14 was filed by secured creditor in the Court of the Chief Metropolitan Magistrate or before the District Magistrate. Even after amendment to section 14 , no such right, therefore, can be read into WP 1273-17 the said provision merely because the words "after satisfying the contents of the affidavit" have been used in the proviso to section 14 after amendment in 2013."*

We are in agreement with the view taken by this Court in Hari Trading (supra)."

3 The learned counsel for the Petitioner submits that in view of this judgment, the Respondent Authority i.e. Additional District Collector, Satara be directed to decide their Application on merits as early as possible but in any case within 30 days as per the provisions of the said Act.

4 Considering the submissions made by the learned counsel for the Petitioner and the division bench judgment of this court in the matter of Kotak Mahindra Bank Ltd (supra), we are satisfied that the Petitioner has made out a case for issuing directions to the Additional Collector to decide the Petitioner's Application on merits as early as possible but in any case within 30 days from the date of receipt of copy of this order.

5 At this stage, the learned counsel for Respondent No.10 Bank submits that he may be permitted to intervene in the Application made by the Petitioner u/s.14 of the said Act. It is to be noted that there is no provision of intervention in the said Application. Hence, Respondent No.10 is free to take appropriate steps for the same, if available in law.

6 In view of these facts, following order is passed:

a. The Respondent No.1 Additional Collector, Satara is directed to decide the Petitioner's Application dated 08.03.2017 u/s.14 of the said Act for seeking assistance to take physical possession of the mortgaged/secured properties, according to law, considering the judgment of this court in the matter of Kotak Mahindra Bank Ltd. Vs. State of Maharashtra 2018 (4) All M.R. 37, as early as possible but in any case within 30 days from the date of receipt of copy of this order.

b. The learned AGP is directed to inform the order of this court to the concerned authority immediately.

c. Parties to act on an authenticated copy of this order.

d. Writ Petition stands disposed of accordingly.

e. No order as to costs.

(N. J. JAMADAR, J.) **(K. K. TATED, J.)**