

***IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

*** HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN
AND**

*** HON'BLE MS. JUSTICE J. UMA DEVI**

+W.P.No.15550 of 2018

Date: 30-04-2018

#Between:

M/s. KREATIVE HOSTS ATRIA PVT LTD, having
their office at 4-1-1001, Atria Mall, Abids,
Hyderabad, represented by its Director Dr. V. Manohar Rao

... Petitioner

And

Dewan Housing Finance Corporation Ltd.,
Represented by its Authorised Officer,
Flat No.201 and 202, Mahavir Lok,
Himayath Nagar Main Road, Hyderabad
and another

... Respondents

! Counsel for the Petitioner : Mr. K.V. Satyanarayana

^ Counsel for Respondents :

<GIST:

> HEAD NOTE:

? Cases referred

HON'BLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

HON'BLE MS. JUSTICE J. UMA DEVI

W.P.No.15550 of 2018

ORDER: *(per V. Ramasubramanian,J)*

Challenging an order passed by the Chief Metropolitan Magistrate, Hyderabad, under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), way back on 19-02-2016 and a notice dated 11-04-2018 issued by the Advocate Commissioner appointed by the Court, the lessee of a property, half undivided share of which is stated to be under mortgage to the 1st respondent, has come up with the above writ petition.

2. Heard Mr. K.V. Satyanarayana, learned counsel for the petitioner.

3. The case of the petitioner is that the entire land and building comprised in "Methodist Atria Mall, 4-1-1001, Abids, King Koti Road, Hyderabad" is jointly owned by two persons, one of whom had mortgaged his half undivided share in favour of the 1st respondent for securing the loan taken by him. The petitioner herein took half undivided share of land and half constructed area, from the borrower and the other half from the third party, who is neither a borrower nor the guarantor.

4. According to the petitioner, a demand notice under Section 13 (2) of SARFAESI Act was issued on 14-02-2012, demanding a

sum of Rs.11,80,79,646/- and that thereafter the borrower made several payments over a period of 4 years from 24-04-2012 to 26-05-2016, totaling to Rs.9,40,00,000/-. But the 1st respondent approached the Chief Metropolitan Magistrate, under Section 14 and obtained an order dated 19-02-2016 in CrI.M.P.No.258 of 2016. According to the petitioner, the Advocate Commissioner appointed by the Chief Metropolitan Magistrate, issued a notice dated 24-03-2016 threatening to take possession. But nothing happened thereafter. Now a fresh notice dated 11-04-2018 has been issued by the advocate appointed by the Chief Metropolitan Magistrate, forcing the petitioner to come up with the above writ petition.

5. The main grounds of attack to the order of the Chief Metropolitan Magistrate and the notice issued by the Advocate Commissioner are:

- (1) that Section 14 (1A) of the Act empowers the Chief Metropolitan Magistrate to authorize only an officer subordinate to him and that an advocate is not an officer subordinate to the Chief Metropolitan Magistrate;
- (2) that when the secured asset is only half undivided share of land and building, with the other half not being a secured asset, actual physical possession cannot be taken; and
- (3) that since huge amounts have been paid after the demand notice under Section 13 (2) of the Act, the same demand notice cannot form the basis for a proceeding under Section 14.

6. We have carefully considered the above submissions.

7. Sub-section (1A) of Section 14, inserted by way of Amendment Act 1 of 2013 with effect from 15-01-2013, empowers the District Magistrate or the Chief Metropolitan Magistrate to authorize any officer subordinate to him to take possession of the assets and documents. Therefore, the first contention of Mr. K.V. Satyanarayana, learned counsel for the petitioner is that since an Advocate cannot be considered as an officer subordinate to the Chief Metropolitan Magistrate, the appointment of an Advocate to take possession is illegal. The words “any officer subordinate to” had already fallen for consideration before a Full Bench of this Court in **B. Veeraswamy v. State of A.P.**¹ The question referred to the Full Bench in that case was whether the State Government can authorize the Regional Transport Officer to exercise the powers and discharge the functions of the State Transport Authority under Sections 48A, 51A and 56A of the Motor Vehicles Act. The Madras High Court had taken a view in respect of Section 44A that to fall within the scope of the words stated above, there must be statutory subordination. But the Full Bench of this Court took the view in **B. Veeraswamy** that the word “any” excludes limitation or qualifications and hence, these words do not merely include officers whose subordination is statutorily determined, but all eligible subordinate officers. Hence it is contended by the learned counsel for the

¹ AIR 1959 AP 413

petitioner that an Advocate who cannot be construed as an officer subordinate to the CMM, cannot be appointed.

8. We do not know how the aforesaid decision of the Full Bench is of any assistance to the petitioner. It is true that an advocate is neither statutorily nor judicially subordinate to the Chief Metropolitan Magistrate. But an advocate is an officer of Court irrespective of whether he is appointed as a Commissioner or not. Section 75 of the Code of Civil Procedure empowers a Court to issue a Commission (i) to examine any person, (ii) to make a local investigation, (iii) to examine or adjust accounts, (iv) to make a partition, (v) to hold a scientific, technical or expert investigation, (vi) to conduce a sale of property and (vii) to perform any ministerial act. Order XXVI of the Code of Civil Procedure empowers the Court to issue a commission (1) for the examination on interrogatories of any person, (2) for making local investigation, (3) for making scientific investigation, (4) for performing any ministerial act, (5) for the sale of movable property, (6) for the examination of accounts, (7) for the partitioning of properties. In fact, Order XXVI Rule 16 of the Code, enumerates the powers of the Commissioner. It reads as follows:

“16. Powers of Commissioners.- Any Commissioner appointed under this Order may, unless otherwise directed by the order of appointment,—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him;

(b) call for and examine documents and other things relevant to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order.”

9. In fact, the definition of the expression “Public Officer” under Section 2 (17) of the Code of Criminal Procedure is so elastic as to include every Officer of a Court of Justice whose duty it is, to investigate or report on any matter of law or fact. Under Section 2 (17) (d) of the Code, every person especially authorized by a Court of Justice to perform any of the duties enumerated therein will also be a public officer.

10. The case that arose before the Full Bench of the Madras High Court, which was distinguished by the Full Bench of this Court in **B. Veeraswamy**, arose in the context of performance of statutory functions, ordained to be performed by statutory authorities by the sovereign. But the functions performed by the Chief Metropolitan Magistrate, under Section 14 are judicial and he is empowered specifically to authorize any person subordinate to him to do merely a ministerial act namely that of taking actual physical possession. The Advocate appointed by the Chief Metropolitan Magistrate is not called upon to perform either a statutory or a judicial or a quasi judicial function, but a ministerial function, for which power is conferred upon him under Section 75 (g) read with Order XXVI Rule 16 CPC.

11. We are conscious of the fact that the proceedings before the Chief Metropolitan Magistrate under Section 14 are quasi

criminal in nature. But we have referred to section 75 and Order XXVI of the CPC only for the purpose of inspiration.

12. If the words “any officer subordinate to him” are to be interpreted to mean only an officer who is judicially or administratively subordinate in the hierarchy, the same would lead to disastrous consequences. A Civil Court has a battery of officers like Amins etc., to assist in the execution of decrees. In contrast, the Criminal Court has police powers under their control. This is why sub-section (2) of Section 14 empowers the Chief Metropolitan Magistrate to take such steps and use **such force** as may be necessary for the purpose of securing compliance with the provisions of sub-section (1) of Section 14. The moment an advocate is appointed, he comes under the control of the Chief Metropolitan Magistrate. Since he is also a court officer, he becomes subordinate in the sense that he is under the full control of the Chief Metropolitan Magistrate. ***Subordination should be understood in the context of control. The power to exercise control, the power to discipline and the power to correct the actions of someone are the indicia of subordination.*** All these three elements are present when an advocate is appointed as a Commissioner to take possession.

13. The word “subordinate” is not to be understood in the context of subordination of courts as prescribed in Section 3 of the Code of Civil Procedure or as prescribed in Section 10 or 15 or 19 or 23 of the Code of Criminal Procedure.

14. Interestingly, the provisions of Section 3 of the Code of Civil Procedure are simpler and less cumbersome than the corresponding provisions of the Code of Criminal Procedure. Section 3 of the Code of Civil Procedure states that the District Court is subordinate to the High Court and every Civil Court of a grade inferior to that of a District Court and every Court of Small Causes is subordinate to the High Court and District Court.

15. But in the context of the Code of Criminal Procedure, there are four different provisions, which speak of subordination. Section 10 makes all Assistant Sessions Judges subordinate to the Sessions Judge, in whose Court they exercise jurisdiction. Section 15 makes every Judicial Magistrate subject to the general control of the Sessions Judge, as subordinate to the Chief Judicial Magistrate and the Chief Judicial Magistrate as subordinate to the Sessions Judge. Section 19 makes every Metropolitan Magistrate subordinate to the Chief Metropolitan Magistrate and every Chief Metropolitan Magistrate including the Additional Chief Metropolitan Magistrate as subordinate to the Sessions Judge. Similarly Section 23 of the Code of Criminal Procedure makes all Executive Magistrates subordinate to the District Magistrate. But these provisions relate to the manner of exercise of judicial powers and the distribution of business among various Courts, which are subordinate to one Court within a particular area.

16. The expression “subordinate” appearing in Section 14 (1) should not be mixed up with the word “subordination” appearing

either in Section 3 of the Code of Civil Procedure or in Sections 10, 15, 19 or 23 of the Code of Criminal Procedure. Therefore, the first contention of the learned counsel for the petitioner cannot be sustained.

17. In fact, a Division Bench of Kerala High Court had an occasion to consider the very same question in **Mohd. Ashraf and another v. Union of India**². In that case, the primary contention was that the Chief Judicial Magistrate was not vested with the power and jurisdiction to deal with an application under Section 14. The secondary contention was that even if the Chief Judicial magistrate had jurisdiction, he cannot depute a Commissioner to take possession of the secured assets. In fact sub-section (1A) of Section 14 was not available at that time. Even then the Division Bench of the Kerala High Court held, based upon the decision of the Supreme Court in **Sakiri Vasu v. State of U.P.**³ that when a power is given to a statutory authority to do something, it includes such incidental or implied powers which would ensure the proper doing of that thing.

18. The above decision of the Division Bench of the Kerala High Court was taken on appeal to the Supreme Court. But the Supreme Court dismissed the S.L.P. (Civil) No.1671 of 2009 by an order dated 02-02-2009.

18. The second contention of the learned counsel for the petitioner is that when the secured asset is only half undivided share in a building, it is not permissible for the authorized officer either by

² AIR 2009 (Kerala) 14

³ 2008 (2) SCC 409

himself or through the machinery provided in Section 14 to take actual physical possession.

19. But it is seen from the demand notice issued under Section 13(2) that what was mortgaged was a building with a built up area of 52,000 SFT in the second, third, fourth and fifth floors of the building at Methodist Atria Mall. The description of item-1 of the secured assets as found in the demand notice under Section 13 (2) is as follows:

“Mortgage of the building with built up area of 52,000sq.ft. (II, III, IV and V floors) situated at Methodist Atria Mall, 4-1-1001, Abids, King Koti Road, beside Taj Mahal Road, Hyderabad, with undivided share of land equivalent to 1,725 sq.yds. bounded as under:

Towards East: By road to YWCA and Fernandes Hospital

Towards West : Taj Mahal Hotel

Towards North : Road to King Kot

Towards South : Methodist Boys High School”

20. It is this secured asset, which is sought to be taken possession through the machinery provided in Section 14. The description of property contained in the order passed by the Chief Metropolitan Magistrate under Section 14 tallies with the description of property contained in the demand notice under Section 13 (2).

21. Interestingly the petitioner has not only enclosed a copy of the demand notice dated 14-02-2012 issued under Section 13 (2) to the borrowers, but has also enclosed copies of the letters written by the borrowers on 12-10-2012 and 30-11-2012 and a few cheques issued by them. In these letters issued in response to the demand

notice, the borrowers have not disputed the description of the property. Therefore, it is not permissible for a lessee, who feigns ignorance of the loan transaction, to come up with a contention that what was mortgaged was half undivided share in a building and that therefore, actual physical possession cannot be taken. Apart from the fact that the petitioner cannot raise such a dispute, this Court will also not go into the disputed questions of fact in a writ petition under Article 226 of the Constitution. Therefore, the second contention of the learned counsel for the petitioner is also unsustainable.

22. The third contention is that due to several payments of huge amounts made after the issue of the demand notice under Section 13 (2), the 1st respondent cannot proceed with the coercive steps under Section 14 on the basis of the very same demand notice.

23. But the above contention cannot be taken note of in view of the fact that the petitioner is guilty of pleading facts on a selective basis. As we have stated earlier, the petitioner claims to have taken half undivided share in the land and building from a third party, who has nothing to do with the 1st respondent. The petitioner has also taken the other half undivided share of the land and building from the borrowers. While the petitioner has chosen to file in the material papers, a copy of the registered leased deed entered into by them with the third parties strangers in relation to the other half undivided share, the petitioner has not chosen to file the copy of the other lease deed under which the other half undivided share, which

allegedly forms the secured asset, was taken on lease. This is what we have to call as placing of material on a selective basis.

24. Additionally the petitioner has pleaded knowledge about the demand notice under Section 13 (2) and they have pleaded knowledge about the various payments made pursuant to the demand notice. But the petitioner has failed, either by design or by default, to secure or place before this Court, information relating to the possession notice issued under Section 13 (4). The petitioner has also not secured or placed before this Court any information about the steps taken by the borrowers as against the possession notice. Therefore, we cannot examine the third contention, on the basis of the half truths (assuming that they are truths).

25. Relying upon a judgment of a Division Bench of this Court in **Sampoorna Bhattu v. ICICI Bank**⁴, it was contended by Mr. K.V. Satyanarayana, learned counsel for the petitioner that what is authorized in law to be done by an authorized officer should be only done by him and by no one else.

26. But there is no scope for the above contention in the case on hand. In the case on hand the demand notice under Section 13 (2) was issued by the authorized officer. The order under Section 14 was passed by the Chief Metropolitan Magistrate. The petitioner has not taken care to verify who issued the possession notice under Section 13 (4) and when it was issued. Therefore, the third contention has no application to the facts of the case.

⁴ 2012 (3) ALD 245

In view of the above, the writ petition deserves to be dismissed and accordingly, it is dismissed.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed.

V. RAMASUBRAMANIAN, J

J. UMA DEVI, J

Date: 30-04-2018

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