IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 3894 OF 2019

1. Mrs. Mangal Dayanand Khopar]
Guru Gaurav Bunglow, Plot No. 42,]
RSC-16/20, Part-I, Sector-II, MHADA]
Charkop, Kandivali (W),Mumbai- 400 067.]
]
2. Pravin Dayanand Khopar,]
Guru Gaurav Bunglow, Plot No. 42,]
RSC-16/20, Part-I, Sector-II, MHADA]
Charkop, Kandivali (W),Mumbai- 400 067.]**....PETITIONERS**

VERSUS

1. State of Maharashtra, through Public]
Prosecutor.]
]
2. Dena Bank, a Body corporate constituted]
under the provision of Banking]
Companies (Acquisition & Transfer]
of Undertaking) Act, 1970, having its]
Registered Office at Dena Corporate]
Centre, Bandra Kurla Complex Bandra]
(East), Mumbai- 400 051 and having]
inter-alia its branches at 410 Mahim,]
Solitude, Bhagoji Keer Marg, Mahim]
(West), Mumbai- 400 016 through its]
Authorized Officer and Attorney]
Smt. Arti Prafula Shinde.]
]
3. Siddhi Enterprise, B/102, Rajshree]
Co-Op. Hsg. Soc. Deolwadi, Off Sahar]
Road, Andheri (E), Mumbai-400 099.]
Also at]
206, 2nd Floor, Rainbow Chamber, S.V.]
Road, Poisar, Kandivali (W), Mumbai-]

400 067. And also at]
L/720/3, GIDC Saigram, Bhilad Tal:]
Umbergram, Valsad, Gujarat- 395 155.]
]
4. Mohanish Anil Karnik,]
B/102, Rajsrhee Co-Op Housing Society]
Deolwadi, Off Sahar Road, Andheri (E)]
Mumbai- 400 099.]
]
5. Advocate Mr. Shyam Dhar,]
Court Commissioner, 2 E/3, Bombay]
Taximen's CHSL, Plot No. 306, L.B.S.]
Road, Kurla (W), Mumbai- 400 070.]
Mob Nos. 9892741030/ 9323889310.]
]
6. Senior Inspector of Police, Charkop,]
Kandivali (W), Mumbai.]..... **RESPONDENTS**

Mr. Mathews Nedumpara a/w. Mr. Amit Pal Singh Advocate for Petitioner.
Mr. S.R. Agarkar, APP for Respondent/State.
Mr. A.R. Bamne, Advocate for Respondent No. 2.

CORAM : <u>S. S. SHINDE</u>
DATED : 31st July 2019

<u>JUDGMENT</u>

1. The present petition is filed inter alia to challenge the order dated 11.7.2019 passed by the Hon'ble Additional Sessions Judge, presiding in Court No. 30, in the Court of Sessions for Greater Mumbai, at Mumbai by which the learned Sessions Court after hearing the Misc. Application for staying the order dated 5.4.2019 which was impugned before it for revision, on the point of jurisdiction alone, dismissed the entire Revision Application filed by the

petitioner.

2. It is the case of the petitioners that, Respondent-Bank and Respondent Nos. 3 and 4, borrowers without the knowledge of the petitioner seems to have mortgaged the property of the petitioner for the purpose of securing the loan that the Respondent Bank had disbursed to Respondent No. 3 and 4 and in furtherance of the same, certain officers of Respondent Bank as well as the borrower entered into some kind of understanding to use the documents pertaining to the property of the petitioner without the knowledge of the petitioner for the purpose of disbursing loan.

3. It is further the case of the petitioner that, an exparte order has been obtained by the Respondent Bank from the learned CMM against the petitioner's property. The petitioner was not aware at all about the said proceedings. The petitioner learnt of the same only when the Respondent Bank came with the police and dispossessed the petitioner from the petitioner's property. It is further the case of the petitioner that, perusal of order dated 18.12.2017 passed by the said Court would make it crystal clear that, there is no direction or order to the petitioners and her son. Therefore, there is no question of breach of any direction contained in the order dated 18.12.2017. Therefore, no contempt would lie against the petitioner and therefore, learned CMM had no jurisdiction to entertain

the contempt petition.

4. It is the case of the petitioner that, being aggrieved by the order passed by learned ACMM, petitioner filed revision before the Court of Additional Sessions Judge, however, said revision has been rejected observing that, revision is not maintainable. Hence this writ petition.

5. Learned Advocate Mr. Mathews Nedumpara a/w. Amritpal Singh appearing for petitioners submits that, the learned Additional Sessions Judge failed to appreciate that the order dated 18.12.2017, valid or invalid, has been executed and therefore the Ld. CMM acting under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the said Act") had become *functus officio.* It is submitted that, the phrase ***functus officion*** means "having performed his or her office", which in turn means that the public officer is without further authority or legal competence because the duties and functions of the original commission have been fully accomplished. It is further submitted that, the learned Additional Sessions Judge failed to appreciate that the aforesaid order has been executed and therefore the Ld. ACMM has no jurisdiction to entertain and try the contempt petition or pass any order in the same matter in a second time. The petitioner

was, although not issued notice in the original proceedings and was summoned in the contempt application in complete breach of law. However, petitioners filed a reply in said contempt petition. It is submitted that, the Court Commissioner issued a letter dated 9th July 2019 to the Inspector of Police, concerned Police Station, Mumbai, for dispossessing the petitioners of their only residential premises on 31.07.2019 at 11.00 am. The order passed under Section 14 of the said Act, is essentially an administrative order. The violation of that order by any manner cannot be remedied by either a contempt of court proceedings or by the Magistrate himself trying the violation of an Administrative order, by holding a judicial hearing. Any violation of an administrative order can only be remedied by taking recourse to the specific provisions mentioned in the IPC or any other specific statutes made in that behalf. However, the Additional Sessions Judge failed to appreciate the aforesaid position in law and erroneously rejected the revision filed by the petitioners. Learned Additional Sessions Judge, did not appreciate the fact that, house of the petitioner constitutes to be the evidence in the allegation of criminal trespass alleged against petitioners and, that if this very house is allowed to be taken possession of the bank, the same would amount to destruction of evidence and that would jeopardize the trial of the petitioners against whom offences have been alleged.

6. It is submitted that, Section 14 of the said Act, although an administrative power has chosen an officer of the State none less than CMM, because the act contemplates the discharge of the power application of mind. The ACMM or his equivalent as contemplated in this provision, with much respect, is not a mere clerk to check the list of documents as per the format provided to him, he is an officer of high learning and discretion. When he is granted a discretionary power, he must use that power prudently and when the power under Section 14 of the said Act is not used in the manner provided under Section 14 of the said Act or in the manner contemplated by the said Act, the order passed by the CMM is illegal and amenable to the jurisdiction of this Court under Section 399 of the Code of Criminal Procedure. It is submitted that, the petitioners are not borrowers and petitioner No. 1 is the purported guarantor, nay a guarantee created by fraud without the knowledge of the so called guarantor.

7. It is further submitted that, the Petitioner No. 1, is a 70 year old lady. She and her husband, a pensioner and children have no other property and they could never even in their dreams mortgage their only shelter. This is the only residential property they possess. It is submitted that, the borrower, Mr. Mohanish Anil Karnik, the purported borrower and his friend one Mr. Rajesh Dahanurkar, an agent, in connivance with the Bank officials, played fraud upon

the applicant, who was never informed neither benefited even by one rupee. The learned Additional Sessions Judge failed to appreciate that the learned I/C. ACMM had become *functus officio* since his order dated 18.12.2017 had been executed and that nothing remains in the matter. The learned Additional Sessions Judge failed to appreciate that once the judgment/order in the same matter has been passed on 18.12.2017 and the said order has been executed and also, in view of the complete embargo of the provisions of Section 362 Cr.P.C. the Court having become *functus officio* was not competent to reopen the case and, thus proceedings subsequent to 18.12.2017 are a nullity for want of competence/jurisdiction and the court has become *functus officio* and it had no competence to reopen the case vide order dated 05.04.2019. The learned Additional Sessions Judge is wrong in deciding that the petitioners have wasted precious time of the Court, which needs to be dealt with stern hands by saddling the compensatory costs of Rs. 10,000/- each payable to the State as condition precedent, which is recoverable under Section 421 of Cr.P.C. as penalty or fine.

8. Learned counsel appearing for the petitioner further submits that, provisions of Cr.P.C. and SARFAESI Act, requires to be interpreted harmoniously, however, learned Sessions Judge has not properly appreciated the contention of the petitioners and erroneously rejected the revision filed on the ground of

maintainability. Learned counsel invites attention of this Court to the pleadings in the petition, grounds taken therein and annexures thereto and submits that, petition deserves to be allowed.

9. On the other hand learned counsel appearing for Respondent No. 2 invites attention of this Court to the order passed by learned CMM and also learned Additional Sessions Judge, Greater Mumbai and submits that, neither the revision was maintainable nor any illegality is committed by the Court of learned CMM while passing the impugned order. It is submitted that, the order passed by the learned ACMM has attained finality. The petitioners have remedy under Section 17 of the said Act, against the order passed under Section 13 sub section 4 of the said Act. In support of aforesaid contention, learned counsel appearing for Respondent No. 2-Bank placed reliance upon the exposition of law by Hon'ble Supreme Court in the case of ***Standard Chartered Bank Vs. Noble Kumar, LEX (SC) 2013 8 85***. Learned counsel invites attention of this Court to the fact that, the petitioner's property is rightly attached, and the Court Commissioner accordingly handed over the physical possession of the secured asset on 4th September 2018 to the respondent-Bank, and the Bank had put lock and seal on it. However, subsequently on 2nd October 2018, the Bank officials came to know that lock of the said secured asset has been broken and Respondent No. 4 is in

possession of the said secured asset. Therefore, Respondent-Bank was constrained to file an application requesting the assistance of the Court of learned CMM, and accordingly the impugned order has been passed. Therefore, learned counsel for second respondent relying upon the reasons recorded by the Courts below submits that, petition may be rejected.

10. Heard learned counsel appearing for the parties at length. With their able assistance perused pleadings and grounds taken in the petition, annexures thereto and orders impugned in the present petition.

11. At the outset, it would be apt to reproduce herein below Sub Section 3 of Section 14 of the said Act.

> ***14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset***
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> *(1)*------------
>
> *(2)*------------
>
> *(3) No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any Court or before any authority.*

12. Admittedly, the order which was impugned before the Court of Additional Sessions Judge, was passed taking recourse to Section 13 of the said Act. In view of Section 14 (3) of the said Act, it is abundantly clear that, no act of the learned CMM done in pursuance of Section 14 of the said Act, shall be called in question in any Court or before any authority. Therefore, impugned order was passed under Section 14 of the said Act and therefore, learned Additional Sessions Judge has rightly held that, revision was not maintainable. So far as the remedy to the petitioner is concerned to challenge the order passed under Section 13 of the said Act, the Hon'ble Supreme Court in the case of ***Standard Chartered Bank*** (supra) in para 29 held as under:-

> *"29. The "appeal" under section 17 is available to the borrower against any measure taken under section 13(4). Taking possession of the secured asset is only one of the measures that can be taken by the Secured creditor. Depending upon the nature of the secured asset and the terms and conditions of the security agreement, measures other than taking the possession of the secured asset are possible under section 13(4). Alienating the asset either by lease or sale etc. and appointing a person to manage the secured asset are some of those possible measures. On the other hand, section 14 authorises the Magistrate only to take possession of the property and forward the asset along with the connected documents to the borrower. Therefore, the borrower is always entitled to prefer an "appeal" under section 17 after the possession of the secured asset is handed over to the secured creditor. Section 13(4)(a) declares that the secured creditor may take possession of the secured assets. It does not specify whether such a possession is to be obtained directly by the*

> *secured creditor or by resorting to the procedure under Section 14. We are of the opinion that by whatever manner the secured creditor obtained possession either through the process contemplated under section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under section 17 is available.*

13. In that view of the matter, the impugned order which was under challenged in revision was passed under section 14 (3) of the said Act, and learned Additional Sessions Judge, has rightly held that, the revision is not maintainable.

As already observed the petitioner has remedy under Section 17 of the said Act, to challenge the order passed under Section 13 (4) of the said Act, if the said remedy is already not availed by the petitioner. For the aforesaid reasons, this Court is not inclined to entertain the present petition, hence petition stands rejected.

[S.S. SHINDE, J.]