

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION (L) NO. 28480 OF 2019

Mr.Subir Chakravarty & Anr	.. Petitioners
Versus	
Kotak Mahindra Bank Limited	
and anr	.. Respondents

...

Mr. Aloukik Pai i/b Raghavan Saathi with Nikhil Waje with
Apurva Sanglikar i/b Thodur Law Associates for the petitioner.

Mr. Praful Paliwal for Respondent Bank.

CORAM: PRADEEP NANDRAJOG, C.J.
AND BHARATI DANGRE, J.

DATED : 6th NOVEMBER, 2019

P.C:-

1 Heard learned counsel for the petitioners.

2 The contesting parties are the petitioners and the first
respondent which is represented through counsel on account of
the advance copy being served upon the First Respondent.

3 The petitioners are aggrieved by the order dated 26th
July 2019, communicated to the petitioners by Ms.Priti S.
Chavan, an Advocate on 11th October 2019. The order has been

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passed by the Addl. Chief Metropolitan Magistrate, 3rd Court, Mumbai on an application filed by the Respondent Bank under Section 14 of the SARFAESI Act, 2002.

4 The order records that the Bank had advanced a loan in sum of Rs.4.44 crore on 31st January 2015 to the petitioners who had mortgaged Flat No.262, 26th floor, Building No.02 with two basement car spaces in a building known as 'Kalpataru Pinnacle' in Goregaon (West), Mumbai. The order records that the borrowers had defaulted and on 30th October 2017 the account was being declared NPA. As a sequel on 13th November 2017, notice under Section 13(2) of the SARFAESI Act was issued to the petitioners and posted by Registered Post A.D. The docket was returned with '*intimation posted*' meaning thereby, the noticees were not available at the given address. The order records that thereafter the Bank served the notice upon the petitioners by publication on 13th December 2017 calling upon the noticees to repay the outstanding amount within 60 days and that the loan was not repaid.

5 Noting that under sub-section (1) of Section 14 of the SARFAESI Act, 2002, the Court may authorize any officer subordinate to it to take possession of the secured asset, recording that the Court was flooded with applications under Section 14 of the SARFAESI Act, 2002 and considering that officers

subordinate to the Court were overburdened, relying upon an order dated 17th March 2017 passed by a Division Bench of this Court in Writ Petition No.3248 of 2017 the Court appointed Ms.Priti S. Chavan as the Court Commissioner to take over possession of the secured asset.

6 In paragraph No.7 of the order, the learned Metropolitan Magistrate has further observed as under :-

“7 Before parting with order, I would like to mention here that, this Court has experienced time and again that under the garb of settlement talks are going on, the applicant bank through its Authorized Officer is dictating/suggesting/directing to Court Commissioner that not to comply the writ of commission within stipulated time granted by the Court. Such attempt by Bank/ Financial institution may amounts to contempt of Court. Thus, such practices have to be deprecated. The Bank/financial institutes have to permit Court Commissioner to comply writ of commission and if any settlement works out then release the property to concerned. But at any cost not required to be restrained to Court Commissioner from compliance of writ of commission.

7 Learned counsel for the petitioners does not dispute that the petitioners are in default of the terms of the loan. Learned counsel also concedes that the impugned order is amenable to a challenge before the Debt Recovery Tribunal but urges that in view of the fact that the impugned order has relied

upon a Division Bench judgment of this Court which permits an Advocate to be authorized to take possession of a secured asset, said point may not be considered by the Debt Recovery Tribunal and hence the present petition.

8 Sub-section (1) of Section 14 of the SARFAESI Act, 2002 reads as under :-

- (1) 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 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 asset, 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 assets and documents to the secured creditor.*

9 The language of the legislature is clear. The District Magistrate or the Chief Metropolitan Magistrate may authorize any officer subordinate to take possession of such asset and this means that the person authorized to take possession has to be an officer subordinate to the District Magistrate or the Chief Metropolitan Magistrate.

10 The decision dated 17th March 2017 passed by the Division Bench was not premised on a challenge to the authorization in favour of an Advocate to take possession of a secured asset. The observations at the end of the order are probably the result of the facts noted in the impugned order. The overburdened Metropolitan Magistrates or the District Magistrates having inadequate subordinate staff find it a handicap to deal with large number of applications under Section 14 of the SARFAESI Act, 2002, but this would be no ground to violate the language of the statute. The legislature may be requested to intervene. We propose to do that at the end of the present order.

11 Sub-Rule (3) of Rule 8 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 reads as under :-

(3) In the event of possession of immovable property is actually taken by the authorized office, such property shall be kept in his own custody or in the custody of any person authorized or appointed by him, who shall take as much care of the property in his custody as a owner of ordinary prudence would, under the similar circumstances take of such property.

12 A perusal of the sub-rule shows that after possession of immovable property is physically taken over by the Officer authorized custody thereof can be handed over for care and protection of the property to any person authorized or appointed

by him. Thus, after possession of a secured asset is taken over, its custody can be entrusted to any person who need not be an Officer of the Court or authorized subordinate staff of the Court. This could perhaps solve half the problem faced by District Magistrates and Chief Metropolitan Magistrates.

13 The cry of anguish in paragraph No.7 of the impugned order is also justified. Each day, atleast two, if not three petitions, are filed by way of mercy pleading to this Court that some time be given to the defaulting borrower to clear the defaulting loan so that the property mortgaged can be saved. Wide and varied facts such as exams of the children are ensuing, old and aged parents, paternal or maternal aunt are suffering from an ailment and are under going treatment at a nearby hospital are pleaded. The borrower is making attempts to sell another property to clear the outstanding amounts etc. Equities are pleaded.

14 Courts in India being not only Courts of Justice but Courts of Equity, the orders passed under Section 14 are stayed, but ultimately the petitions fail.

15 Howsoever inconvenient it may be to a Court, rights of parties cannot be curtailed in the manner done in the impugned order. If law permits, the borrower can always tender the outstanding amounts to the Bank or the Financial Institution

before a sale of the secured assets take place.

16 The two troubling parts of the impugned order being dealt with by us resulting in the hurdle in the way of the petitioner to seek further reliefs from the Debt Recovery Tribunal having been clear, we dispose of the petition expunging the directions in paragraph No.7 of the impugned order, as also expunging the authorization in favour of Ms.Priti S. Chavan, Advocate to take possession of the Security as a Court Commissioner requiring the learned Metropolitan Magistrate to appoint an officer subordinate to take possession of the secured asset who, in turn may give custody thereof to any person.

16 We terminate the proceedings in the instant writ petition observing that on the merits of the order passed, the petitioners may approach the Debt Recovery Tribunal.

17 Copy of this order be sent to the Secretary, Finance, Government of India who is requested to consider whether it would be advisable to amend sub-section (1A) of Section 14 of SARFAESI Act, 2002 and empower District Magistrates or Chief Metropolitan Magistrates to authorize any person to take possession of secured assets.

18 No costs.

SMT. BHARATI DANGRE, J

CHIEF JUSTICE