IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 13.09.2019

CORAM :

THE HON'BLE DR.JUSTICE VINEET KOTHARI
AND
THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.Nos.4087 and 26721 of 2019

W.P.No.4087 of 2019:

1.K.P.Moutheeswaran
2.K.K.Palanisamy .. Petitioners

-vs-

1.The District Collector,
Erode District, Erode.

2.The Authorised Officer/Chief Manager,
Bank of India,
No.1(3) J.S.Arcade, Park Avenue,
Avinashi Road Junction,
Kumar Nagar,
Tiruppur-641 603.

3.M/s.Mira Exports,
rep. by its Proprietor R.Ganthimathi
214/4, Nandhavana Thottam,
Kovai Pirivu, Alukkuli,
Gobichettipalayam-638 456. .. Respondents

W.P.No.26721 of 2019:

M/s.Bank of India
rep. by its Authorised Officer Markad Dinkar Kamath,
Assets Recovery Branch,
324, Oppanakara Street,
Coimbatore-641 001. .. Petitioner

-vs-

1.The District Collector,
Erode District, Erode.

2.R.Gandhimathi

3.M.M.Palanisamy

4.K.P.Moutheeswaran

5.K.K.Palanisamy .. Respondents

W.P.No.4087 of 2019 filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorari calling for the records of the first respondent in R.C.No.663/2017/E2 dated 12.02.2018 and to quash the order dated 12.02.2018.

W.P.No.26721 of 2019 filed under Article 226 of the Constitution of India praying for issue of Writ of Certiorarified Mandamus calling for the records relating to the impugned order passed in Na.Ka.663/2017/E2 dated 12.02.2018 on the file of the first respondent, quash the same and consequently, direct the first respondent and provide assistance under Section 14 of the SARFAESI Act to the petitioner.

For Petitioners : Mr.V.Ayyadurai
Senior Counsel
for M/s.M.Sivavarthanan
for petitioners in W.P.No.4087/2019
and respondent Nos.4 & 5 in W.P.No.26721/2019

For Respondents : Mr.S.Kamalesh Kannan, Govt Advocate,for respondent No.1 in both WPs

Mr.F.B.Benjamin George
for respondent No.2 in W.P.No.4087 of 2019
and petitioner in W.P.No.26721 of 2019

Mr.K.Doraisami
Senior Counsel
for M/s.Rajmakesh
for respondent No.3 in
W.P.No.4087 of 2019
and respondent No.2 in
W.P.No.26721 of 2019

COMMON ORDER
(Order of the Court was made by DR.VINEET KOTHARI,J.)

The common question involved in these writ petitions viz., W.P.Nos.4087 and 26721 of 2019, is as to whether the District Magistrate/District Collector while deciding application under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") can hold an enquiry in the issue whether the land in question, which is claimed to be security interest by the lender bank, is an agricultural land or not, so as to be exempted and therefore outside the ambit and scope of the provisions of SARFAESI Act by virtue of Section 31 (i) of the Act.

2. The learned District Collector in the present case has held in the impugned order on the application filed by the applicant Bank of India that the land in question belonging to the defaulting borrower M/s.Mira Exports, No.214/4, Nanthavana Thottam, Kovai Pirivu, Alukkuli (P.O), Gobichettipalayam viz., Survey No.214/4 (Old Survey No.289) of Alukuli Village, Gopi Taluk, Erode District, admeasuring an extent of 3.24 acres, was an agricultural land and therefore, no action could be taken against the said property under the SARFAESI Act. The relevant part of the order passed by the learned District Collector, Erode in this regard is quoted below for ready reference:

> "For the Respondent Tmt.R.Gandhimathi at Alukkuli A-Village, S.No.24/4A extent 1.31.02 Ares Punchai land is derived through a gift deed registered at Gopichettipalayam Sub-Registrar Office as document No.966/2011 and 967/2011 and owned and is being under the possession and enjoyment of the Respondent. In this land, a well in the western part and a deep bore well and a well in the northern portion are in existence. There are 182 yielding coconuts and 19 coconut plants are in the land. Further in the village chitta, in S.No.214/4-A, Patta No.303 is filed as an individual patta in the name of Tmt. Gandhimathi. According to the village accounts, it is understood that the land in S.No.214/4-A is an agricultural land. Further from the encumbrance Certificate

document issued by the Registration Department, it is found to be agricultural land. According to the certificate issued by the Assistant Director of Agriculture, Gopichettipalayam, it is informed that the land in Gopi Taluk, Alukkuli Village, S.No.214/4A extent 3.24 acres land was inspected and found that about 20-25 years old coconut trees are being cultivated.

Hence, on the basis of the above information it is understood that the land situated at Gopi Taluk, Alukkuli village, S.No.214/4A extent 3.24 acres is under agricultural cultivation. In this event, under Section 31 of sub-section (i) of SARFAESI Act, against the Authorised Office of the Bank of India given petition, action cannot be taken under SARFAESI Act and the same is humbly informed."

3. Aggrieved by the said order of the District Collector, Erode, the Bank of India has filed W.P.No.26721 of 2019, whereas the auction purchasers have filed W.P.No.4087 of 2019. The auction purchasers viz., K.P.Moutheeswaran and K.K.Palanisamy, came into picture because the Bank, in the meanwhile, put to auction the said security interest of the industry of the defaulting borrower M/s.Mira Exports set up on the said land under the provisions of SARFAESI Act and the auction purchasers gave the successful bid in the process and they have filed the present W.P.No.4087 of 2019 to protect their interest and secure possession of the secured assets viz., the said land and industry sold by the Bank.

4. The learned counsel for the Bank of India, Mr.F.B.Benjamin George, has heavily relied upon the decision of the Hon'ble Supreme Court in the case of ITC Limited v. Blue Coast Hotels Limited and others, reported in (2018) 15 SCC 99 and has submitted that the learned District Collector erred in holding the land in question, which was part of the security interest of the Bank, to be an agricultural land so as to fall outside the ambit and scope of SARFAESI Act with reference to Section 31(i) of the Act.

5. He submitted that an industry was set up by the borrower M/s.Mira Exports on the said land and requisite loan and security documents were executed in favour of the lender Bank of India and when the process of recovery was undertaken under the provisions of the SARFAESI Act, upon defaults, the applicant Bank approached the learned District Collector under Section 14 of the Act for securing the possession of the property in question from the defaulting borrower M/s.Mira Exports, the learned District Collector has rejected the said application holding it to be an agricultural land falling in exempted

category. He further submitted that merely on the basis of the revenue entries in the revenue records showing the said land to be an agricultural land, the learned District Collector could not have arrived at the said finding that the land in question is agricultural land ignoring the stark fact of an industry set up and existing there and which is mortgaged to the Bank. The learned District Collector cannot be permitted to defeat the recovery process in this manner.

6. The learned counsel for the Bank also submitted that the learned District Collector has not looked into the real factual situation at site and in as much as an industry was set up by the borrower M/s.Mira Exports on the said land in question, the nature of land stood altered to that of industry and, therefore, Section 14 of the SARFAESI Act was fully applicable in the facts of the case and the learned District Collector could not have refused to give aid to the recovery process under Section 14 of the Act.

7. The learned Senior Counsel for the borrower viz., M/s.Mira Exports, however, submitted that he has filed his objections before the Debts Recovery Tribunal where the proceedings are still pending in S.A.No.10 of 2018. The auction purchasers have also been impleaded as parties in the proceedings before the Debts Recovery Tribunal.

8. The learned Senior Counsel for the borrower as well as the learned Senior Counsel for the auction purchasers submitted that if the issue is remanded back to the learned District Collector, they have no objection.

9. We have heard the learned counsels.

10. The Hon'ble Supreme Court in the case of ITC Limited, (supra), has held as under:

> "37. In the present case, security interest was created in respect of several parcels of land, which were meant to be a part of single unit i.e. the five-star hotel in Goa. Some parcels of land now claimed as agricultural land were apparently purchased by the debtor from agriculturists and are entered as agricultural lands in the revenue records. The debtor applied to the Revenue Authorities for the conversion of these lands to non-agricultural lands which is pending till date due to policy decision.
>
> 38. It is undisputed that these lands were mortgaged in favour of the creditor under a deed dated 26-2-2010. Obviously, since no security interest can be created in respect of agricultural

lands and yet it was so created, goes to show that the parties did not treat the land as agricultural land and that the debtor offered the land as security on this basis. The undisputed position is that the total land on which the Goa Hotel was located admeasures 182225 sq m. Of these, 2335 sq m are used for growing vegetables, fruits, shrubs and trees for captive consumption of the hotel. There is no substantial evidence about the growing of vegetables but what seems to be on the land are some trees bearing curry leaves and coconut. This amounts to about 12.8% of the total area.

39. The Corporate Loan Agreement dated 26.2.2010 that deals with the mortgage in question in the relevant Clause 2.1, part (b) reads as follows:

> 'The borrower shall create mortgage on exclusive basis on the 'Park Hyatt Goa Resort and Spa' Hotel Property admeasuring 1, 82, 225 sq m with a built-up area of 25182 sq m situated at 263 C, Arossim, Canasaulim Goa.'

The mortgage is thus intended to cover the entire property of the Goa Hotel. Prima facie, apart from the fact that the parties themselves understood that the lands in question are not agricultural, it also appears that having regard to the use to which they are put and the purpose of such use, they are indeed not agricultural.

40. At the outset, it was argued on behalf of the debtor that Section 31(i) is beyond the legislative competence of Parliament since it is only the State Legislature which is competent to legislate on land under Entry 18 of List II. This contention appears to be completely untenable. Though Section 31(i) exempts agricultural land from the operation of the Act it is not possible to construe such a provision as a legislation on agricultural land. In fact, it is quite the contrary. Moreover, Section 31(i) is one of the provisions in the Act which has been held by this Court as referable to Entry 45 of List I, in Union of India v. Delhi High Court Bar Assn, reported in (2002) 4 SCC 275. The Court held that:

> '14. … Entry 45 of List I relates to "banking". Banking operations would, inter alia, include accepting of loans and deposits, granting of loans and recovery of

> the debts due to the bank. There can be little doubt that under Entry 45 of List I, it is Parliament alone which can enact a law with regard to the conduct of business by the banks. Recovery of dues is an essential function of any banking institution. In exercise of its legislative power relating to banking, Parliament can provide the mechanism by which monies due to the banks and financial institutions can be recovered.'

In SBI v. Santosh Gupta, reported in (2017) 2 SCC 538, this Court concluded that the Act is referable to Entries 45 and 95 of List I. It observed that:

> '43. … the entire Act, including Sections 17-A and 18-B, would in pith and substance be referable to Entries 45 and 95 of List I….'

41. The validity of Section 31(i) which in any case deals with security interest created over agricultural land and not agricultural land itself, is an integral part of the Act and cannot be questioned on the ground of legislative competence. In A.S. Krishna v. State of Madras, reported in AIR 1958 SC 297 this Court observed as follows:

> '12. … It would be quite an erroneous approach to the question to view such a statute not as an organic whole, but as a mere collection of sections, then disintegrate it into parts, examine under what heads of legislation those parts would severally fall, and by that process determine what portions thereof are intra vires, and what are not.'

Thus, this contention on behalf of the debtor must be rejected.

42. In CWT v. Officer-in-Charge (Court of Wards), reported in (1976) 3 SCC 864, this Court interpreted the definition of the term "agricultural land" with respect to Section 2(e) of the Wealth Tax Act, 1957 that excluded the said term from the definition of assets. This Court observed:

> '24. … We agree that the determination of the character of land, according to the purpose for which it is meant or set apart and can be used, is a matter which ought to be determined on the facts of each particular case. What is really required to

be shown is the connection with an agricultural purpose and user and not the mere possibility of user of land, by some possible future owner or possessor, for an agricultural purpose. It is not the mere potentiality, which will only affect its valuation as part of "assets", but its actual condition and intended user which has to be seen for purposes of exemption from wealth tax. One of the objects of the exemption seemed to be to encourage cultivation or actual utilisation of land for agricultural purposes. If there is neither anything in its condition, nor anything in evidence to indicate the intention of its owners or possessors, so as to connect it with an agricultural purpose, the land could not be "agricultural land" for the purposes of earning an exemption under the Act. Entries in revenue records are, however, good prima facie evidence.'

Similarly, in Kunjukutty Sahib v. State of Kerala, reported in (1972) 2 SCC 364, this Court held as follows:

'25. … '… We suppose that something or other can be, and often is, grown on any vacant land, but that would not necessarily make it agricultural land for our purposes. To give an example the possibility of cultivating, or even the actual cultivation of, what is essentially a building site in the heart of a town would not make it agricultural land. It is the purpose for which it is held that determines its character and the existence of a few coconut trees or a vegetable patch on the land cannot alter the fact that it is held for purposes of building and not for purposes of agriculture.'

In any event, having regard to the character of the land and the purpose for which it is set apart, we are of the view that the land in question is not an agricultural land. The High Court misdirected itself in holding that the land was an agricultural land merely because it stood as such in the revenue entries, even though the application made for such conversation lies pending till date."

11. From the said judgment, it appears that a Five Star Hotel was constructed in Goa on the land in question, some parts of which was purchased by the Company and was shown as agricultural land in the revenue records, but whereas the security interest was created in favour of the lender Bank in respect of the said property, when a defence was put up in the matter that the land, being agricultural land, was protected under Section 31(i) of the Act and the provisions of SARFAESI Act could not be applied to it, the Hon'ble Supreme Court rejected the said contention holding that merely because a portion of the land viz., 2335 sq. m. of land out of 182225 sq. m., was used for growing vegetables, fruits, shrubs and trees for captive consumption of the hotel, it cannot be held to be agricultural land so as to fall outside the scope of SARFAESI Act by virtue of Section 31(i) of the Act, nor a collateral challenge to the validity of Section 31(i) could be made by the defaulter on this ground.

12. We find considerable force in the contention raised by the learned counsel for the Bank that the District Collector could not have solely proceeded on the basis of the revenue entries in the revenue records and some coconut trees found on the land, where an industry also existed and held it to be agricultural land so as to be exempted under the provisions of SARFAESI Act without holding proper and comprehensive enquiry in the matter as to whether the security interest of the lender Bank was covered the said land also, being an industry set up on such land. These facts of industry existing there do not appear to have been taken note of by the learned District Collector, who proceeded to hold the land in question to be agricultural land merely on the basis of the claim of parties about the revenue entries in the revenue records. The said order of the District Collector, therefore, appears to be not falling within the four corners of Section 14 of the Act read in the scheme of the SARFAESI Act. Though the learned District Collector may be said to have power to determine the character of land being agricultural or not but without holding proper enquiry in the matter after looking into all the relevant facts and loan documents etc., he cannot take a one sided view and reject the application under Section 14 of the Act.

13. Section 14 of the SARFAESI Act empowers and at the same time obligates the Chief Judicial Magistrate or the District Magistrate to assist the secured creditor in taking possession of the secured asset in the process of recovery under the provisions of SARFAESI Act because the lending Financial Institutions may find themselves ill-equipped to take the possession of the assets or security interest from the borrowers

or persons in whose possession such assets may be and, therefore, the District Collector or the Chief Judicial Magistrate has been empowered to pass suitable orders in this regard on the application filed by the Banks. This provision is apparently to assist the secured creditor in the process under special law in the form of SARFAESI Act.

14. From the order impugned before us, it appears that the learned District Collector did not hold a comprehensive and proper enquiry into the matter and without looking into the facts, as they existed at site in question, where the security interest in the form of industry was established by the borrower which implied that parties themselves did not treat the land in question as an agricultural land, he has proceeded to hold it to be agricultural land merely on the basis of the assumption of the revenue entries which might have continued to show the land to be agricultural land in the revenue records even after sanction of the loan for the industry and default and recovery proceedings having been initiated by the lender Bank under the provisions of SARFAESI Act. Therefore, apparently, that cannot be the sole criteria for granting such an exemption under Section 31(i) of the Act in respect of the said land which in fact was utilised for setting up of industry or other assets thereon which might fall within the four corners of "security interest" of the lending financial institution. In the absence of any such proper enquiry held by the learned District Collector, particularly, in the light of the observations made by the Hon'ble Supreme Court in the aforesaid judgment, we feel that the matter deserves to go back to the learned District Collector for deciding the application of the lender Bank filed under Section 14 of the Act afresh in accordance with law.

15. We make it clear that this remand and direction to the learned District Collector to decide the application under Section 14 of the Act again will not come in the way of the applicant Bank of India or borrower or auction purchasers to make out their respective cases before the Debts Recovery Tribunal where proceedings are said to be pending under Section 17 of the Act in the form of S.A.No.10 of 2018.

16. The learned District Collector will hold a fresh and proper enquiry under Section 14 of the Act after affording an opportunity to the concerned parties viz., lender Bank, borrower, guarantors and auction purchasers as well as the revenue authorities, in the matter, who may adduce relevant evidence and raise their contentions before the learned District Collector. The learned District Collector will pass a fresh order in accordance with law within a period of three months from today. The parties, without any notice from the side of the learned District Collector, may appear before the learned

District Collector, Erode in the first instance on 26.09.2019.

17. With these observations, the writ petitions are disposed of. No costs. Consequently, WMP.Nos.4561, 4563, 4564 and 26107 of 2019 are closed.

Sd/-
Asst.Registrar (Insp cell)

/true copy/

Sub Asst. Registrar

bbr

To:

1.The District Collector,
Erode District, Erode.

2.The Authorised Officer/Chief Manager,
Bank of India,
No.1(3) J.S.Arcade, Park Avenue,
Avinashi Road Junction,
Kumar Nagar,
Tiruppur-641 603.

+1cc to M/S.K.Govi Ganesan, Advocate, SR.79008
+1cc to M/S.M.Sivavarthanan, Advocate, SR.78917
+3cc to M/S.S.Rajmakesh, Advocate, SR.78726

BP(CO)
CB(30/09/2019)