

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.03.2019

CORAM :

THE HON'BLE MRS.V.K.TAHILRAMANI, CHIEF JUSTICE

AND

The HON'BLE MR.JUSTICE M.DURAI SWAMY

W.P. No.30198 of 2018 and

W.M.P.No.35259 of 2018

M/s.Kotak Mahindra Bank
Regd. Office at
27BKC, C27, G Block, Bandrakurla Complex,
Bandra (E), Mumbai - 400 051
Branch Office at
1st Floor, Ceebros Centre,
No.45, Monthieth Road,
Egmore, Chennai - 600 008
rep by its Authorized Officer Felix Basil ... Petitioner

Vs.

- 1.The District Collector/District Magistrate,
Pondicherry.
- 2.Rajarajan K
- 3.Comady T
- 4.M/s.Rajarajan & sons,
rep by K.Rajarajan,
No.45-46, 3rd Cross,
Sithananda Nagar, Puducherry - 605 005.

- 5.M/s.Rajarajan Automobiles,
rep by its K.Rajarajan,
No.1-1, Jayankondam Road,
Ariyalur Post & Taluk,
Perambalur - 621 704.

- 6.M.Priyadharshini ... Respondents

Petition filed under Article 226 of the Constitution of India praying for issue of Writ of certiorarified mandamus to call for the records and to quash the order passed by the District Collector cum District Magistrate, the 1st respondent dated 22.05.2018 in No.11895/DRDN/C.3/SARFAESI/2015 and direct the 1st respondent to pass an order afresh as per provision.

For Petitioner : Mr.M.Ajmal Azzath

For Respondents : Mrs.N.Mala,
Additional Government Pleader (R1)

Mr.P.R.Pradeep (R2 to R5)

Mr.P.Raghunathan
for Mr.Pradeep Kumar (R6)

O R D E R

(ORDER OF THE COURT WAS MADE BY M.DURAI SWAMY, J.)

The petitioner has filed the above Writ Petition to issue a Writ of certiorari mandamus to call for the records and to quash the order passed by the District Collector cum District Magistrate, the 1st respondent dated 22.05.2018 and direct the 1st respondent to pass an order afresh as per provisions.

2.It is the case of the petitioner that the respondents 2 & 3 availed loan in the year 2012 from the petitioner against the property. Since the respondents 2 & 3 committed default in repaying the loan, the petitioner issued notice dated 29.01.2015 under Section 13(2) of the SARFAESI Act calling upon the respondents 2 & 3 to pay a total sum of Rs.1,73,05,304.62p as on 29.01.2015. Thereafter, the petitioner issued Section 13(4) notice dated 08.05.2015 to the respondents 2 & 3. Challenging the possession notice dated 08.05.2015, the respondents 2 & 3 filed an appeal in S.A.No.207 of 2015 on the file of the Debts Recovery Tribunal - III, Chennai and sought for an interim order.

2.2.The Debts Recovery Tribunal granted an order of interim stay on condition the petitioners paying a sum of Rs.35 lakhs in two installments. However, the respondents 2 & 3 failed to comply with the conditional order. Thereafter, in the year 2015, the petitioner filed an application before the 1st respondent under Section 14 of the SARFAESI Act for taking possession of the property.

2.3.After the filing of Section 14 application before the 1st respondent, the 6th respondent, who claimed to be a tenant under the 2nd respondent, filed a suit in O.S.No.2295 of 2016 on the file of the I Additional District Munsif Court, Puducherry for injunction restraining the 2nd respondent from disturbing or evicting her from the suit property in any manner without due process of law. The 2nd respondent appeared through counsel and he submitted to a decree. Accordingly, by judgment and decree dated 21.03.2017, the trial Court decreed the suit as prayed for.

3.The learned counsel appearing for the petitioner, in support of his contentions relied upon the following judgments:

(i) (2008) 1 Supreme Court Cases 125 [Transcore Vs. Union of India and another] wherein the Hon'ble Supreme Court held as follows:

"...

As stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred."

(ii) (2013) 9 Supreme Court Cases 620 [Standard Chartered Bank Vs. V.Noble Kumar and others] wherein the Hon'ble Supreme Court held as follows:

"...

20.In every case, where the objections raised by the borrower are rejected by the secured creditor, the secured creditor is entitled to take possession of the secured assets. In our opinion, such action - having regard to the object and scheme of the Act - could be taken directly by the secured creditor. However, visualising the possibility of resistance for such action, Parliament under Section 14 also provided for seeking the assistance of the judicial power of the State for obtaining possession of the secured asset, in those cases where the secured creditor seeks it.

21.Under the scheme of Section 14, a secured creditor who desires to seek the assistance of the State's coercive power for obtaining possession of the secured asset is required to make a request in writing to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction, the secured asset is located praying that the secured asset and other documents relating thereto may be taken possession thereof. The language of Section 14 originally enacted purportedly obliged the Magistrate receiving a request under Section 14 to take possession of the secured

asset and documents, if any, related thereto in terms of the request received by him without any further scrutiny of the matter.

...

25. The satisfaction of the Magistrate contemplated under the second proviso to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit but not the legal niceties of the transaction. It is only after recording of his satisfaction the Magistrate can pass appropriate orders regarding taking of possession of the secured asset.

...

36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:-

36.1.(i) The first method would be where the secured creditor gives the requisite notice under rule 8(1) and where he does not meet with any resistance. In that case, the authorized officer will proceed to take steps as stipulated under rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

36.2.(ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz., making application to the Magistrate. The Magistrate will scrutinize the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under section 14(1)(A) to take possession of the assets and documents. For that purpose the Magistrate may authorize the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

36.3.(iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the Act. The Magistrate will thereafter scrutinize the application as provided in Section 14, and then if satisfied, authorize a subordinate officer to take possession of the assets and documents and forwards them to the secured creditor as under Clause 36.2.(ii) above.

36.4. In any of the three situations above, after the possession is handed over to the secured creditor, the subsequent specified provisions of Rule 8

concerning the preservation, valuation and sale of the secured assets, and other subsequent rules from the Security Interest (Enforcement) Rules, 2002, shall apply.

...

38. Coming to the facts of this case, a notice under Section 13(2) was in fact served on the respondent for which the respondent did not choose to respond. Therefore, there was no occasion for the appellant to consider the objections as there was none of the respondent against the demand made in the said notice. It is brought to our notice that even while making application under Section 14 of the appellant filed an affidavit substantially providing for the necessary information contemplated under the newly introduced proviso to Section 14(1). We have already noticed that there was no statutory requirement as on the date when the application under Section 14 was made in the instant case either to give such an affidavit or regarding the content of the affidavit. Nonetheless the appellant chose to give such an affidavit, a copy of which is placed before us. We have perused the affidavit and it substantially complies with the conditions stipulated in the newly introduced proviso. Maybe the appellant did it by way of abundant caution to avoid any litigation.

39. However, the respondent submitted before us that there is nothing in the impugned order of the Magistrate which indicates that the Magistrate applied his mind to such an affidavit and satisfied that it is necessary to deliver possession of the secured asset to the appellant. No doubt that there is no material on record to show that the Magistrate applied his mind to the facts stated in the affidavit filed by the appellant. On the date of the impugned order the law did not oblige the Magistrate to undertake any such exercise. Apart from that we are satisfied on examination of the content of the affidavit that all the basic requirements necessary for granting the request of the appellant of delivery of the possession of the secured asset are asserted to have existed on the date of application. Therefore, we do not see any illegality in the impugned order. The appeal is allowed. The order of the High Court is set aside.

(iii) 2010-5-L.W.567 [Hemabushan Vs. ICICI Bank Limited, rep by its Authorized Officer, Balu Menon, DSMG, Mortgages, Arihant Insight, Plot No.24, 2nd Floor, Block No.1, Industrial Estate,

Ambattur, Chennai - 600 058 and another] wherein the Division Bench of this Court held as follows:

"...

14. Nature of powers that are exercised by the Chief Metropolitan Magistrate/District Magistrate under Sec.14 of the Act are purely executionary in nature. At the time of passing order under Sec.14 of NPA Act, the Chief Metropolitan Magistrate/District Magistrate will have to consider only two aspect. He must find out whether the secured assets fall within his territorial jurisdiction and whether notice under Sec.13(2) of NPA Act is given or not. No adjudication of any kind at that stage."

4. In spite of the fact that Section 14 application was filed before the 1st respondent as early as on 29.09.2015, the 6th respondent filed the suit only in the year 2016 and the 2nd respondent - borrower, without even filing a written statement, submitted to a decree before the trial Court. On all fairness, the 2nd respondent should have brought to the notice of the trial Court the pendency of the Section 14 application. The suppression of the pendency of Section 14 application before the trial Court by the 2nd respondent would only prove that the decree was obtained by the 6th respondent collusively with the 2nd respondent - borrower.

5. In the appeal filed in S.A.No.207 of 2015, the 2nd respondent has stated that the property which was mortgaged with the petitioner - Bank is a residential property and if the Bank is allowed to take possession of the same, the 2nd respondent and his family would be put to great hardship and also the Society would look down. Further, they have stated that the 2nd respondent has got two mentally disabled children and the petitioner - Bank should not take physical possession of the property. The 2nd respondent having taken such a stand before the Debts Recovery Tribunal in the year 2015, submitted to a decree before the trial Court in support of the 6th respondent. The averments stated in the SARFAESI Appeal would clearly establish that the stand taken by the 6th respondent is utter falsehood.

6. The 1st respondent, without considering the averments stated in the SARFAESI Appeal, has erroneously declined to evict the 2nd respondent from the property. Even otherwise, the decree passed by the trial Court is only to restrain the 2nd respondent from evicting the 6th respondent except under due process of law. No decree has been passed against the petitioner - Bank. Infact, the petitioner - Bank was not made as a party to the suit. Hence, we are of the view that the decree was obtained collusively by the 6th respondent for the advantage of the 2nd respondent.

7.The ratio laid down in the above referred judgments relied upon by the learned counsel for the petitioner applies to the facts and circumstances of the present case.

8.For the reasons stated above, the order passed by the 1st respondent dated 22.05.2018 is set aside and the matter is remitted back to the 1st respondent to pass appropriate order and to authorize a Competent Authority to take possession of the property.

9.With these observations, the Writ Petition is allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

va

To

The District Collector/District Magistrate,
Pondicherry.

+2 cc's to Mr.M.Ajmal Azzath, Advocate Sr.No.20393

+1 cc to The Government Pleader, SR.No.19915

W.P.No.30198 of 2018 and
W.M.P.No.35259 of 2018

EV(CO)
CSL/25.03.2019

सत्यमेव जयते

WEB COPY