

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.03.2020

CORAM

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE KRISHNAN RAMASAMY

C.R.P.No.790 of 2020
and C.M.P.Nos.5938 & 4227 of 2020

Canara Bank
Asset Recovery Management Branch,
Rep. by its Authorized Officer,
Mr.P.Saravanan,
2nd Floor, Circle Office,
No.563/1, Anna Salai,
Teynampet, Chennai - 600 018. Petitioner

Vs

1. M/s.Vasan Medical Centre(India) Pvt Ltd.,
Regd.Office, No.15A, Main Road,
Thillai Nagar, Trichy.
Also at
M/s.Vasan Medical Centre (India) Pvt Ltd.,
No.363,Anna Salai,
Saidapet, Chennai - 15.
2. Dr.A.M.Arun
3. Meera Arun
4. V.Dwaraganathan
5. The Chief Metropolitan Magistrate, Egmore,
Chennai - 600 008. Respondents

Prayer : Civil Revision Petition filed under Article 227 of the
Constitution of India against the order passed in S.A.No.399 of
2019 dated 04.02.2020 on the file of DRT - II, Chennai.

For Petitioner : Mr.M.L.Ganesh

For Respondents : Mr.David Tyagaraj for R1 to R4
R5 - Court

ORDER

(Order of the Court was made by M.M.SUNDRESH,J)

The petitioner before us is the Bank which sanctioned a sum of Rs.34,59,28,000/- in favour of respondents 1 to 3. The fourth respondent is the mortgagor of the property in question. As there was admittedly a default in discharging the contractual liability, the account was classified as non-performing asset followed by issuance of notice by the petitioner under Section 13(2) of the SARFAESI Act, dated 21.07.2017.

2.Since the said amount demanded was not paid, after the expiry of the statutory period, the symbolic possession of the property was taken by the authorized officer of the petitioner on 29.05.2018 by the issuance of the possession notice. It was accordingly published in the two leading newspapers one in the vernacular language and the other in English language.

3.A challenge was made by respondents 1 to 4 in S.A.No.180 of 2018 to the notice issued under Section 13(4) of the SARFAESI Act. The said petition was dismissed. Thereafter, the petitioner invoked Section 14 of the Act by filing an application before the Chief Metropolitan Magistrate being the jurisdictional authority for taking possession. In the meanwhile, respondents 1 to 3 challenged the sale notice issued by the petitioner by filing an application in S.A.No.59 of 2019. An order was obtained not to confirm the sale.

4.The Chief Metropolitan Magistrate, Egmore, Chennai disposed of CrI.M.P.No.2995 of 2019 by order dated 06.08.2019 by appointing an Advocate Commissioner to take possession of the property in question. Thereafter, S.A.No.59 of 2019 filed by respondents 1 to 3 challenging the auction notice was dismissed on 23.01.2020.

5.During the interregnum, respondents 1 to 4 filed another application in S.A.No.399 of 2019 challenging the order dated 06.08.2019 passed by the Chief Metropolitan Magistrate in CrI.M.P.No.2995 of 2019.

6.By the impugned order dated 04.02.2020, Debts Recovery Tribunal II, Chennai was pleased to allow the application filed by respondents 1 to 4 in S.A.No.399 of 2019, inter alia, holding that the procedure mandated under Clauses (i) to (ix) of the proviso to Section 14(1) of the SARFAESI Act has not been complied with by the petitioner and in any case, the practice of appointing Advocate Commissioner cannot be sustained in the eye of law for lack of legal sanctity. Reliance has been made on the judgment rendered by the Bombay High Court in W.P.(L) No.28480 of 2019 (Subir Chakravarthy & Anr. Vs. Kotak Mahindra Bank Limited and Anr.) for the aforesaid conclusion. We may note that incidentally, the Tribunal has also observed that though the power of appointing Advocate Commissioner is available to the Chief Metropolitan Magistrate that is only to be exercised for limited purpose to oversee the functions of the subordinate officer. Challenging the said order, the present Civil Revision Petition has been filed seeking to invoke Article 227 of the Constitution of India on the premise that there is not only error apparent on the face of the record but also the Tribunal exercised the jurisdiction which has not been vested in it. A further submission has also been made that it is also a case of exercise of excessive jurisdiction.

7.The learned counsel appearing for the petitioner submitted that the Tribunal committed two fundamental errors. Firstly, there is a due compliance of Clauses (i) to (ix) of the proviso to Section 14 (1) of the Act. This can be seen on a perusal of the order passed by the Chief Metropolitan Magistrate, Egmore, Chennai. Secondly, the order passed by the Division Bench of this Court in S.Chandramohan Vs. The Chief Metropolitan Magistrate (LAWS (MAD) 2014 11 462) dated 19.11.2014, which governs the field, the Court has not taken into consideration and so also the other judgments delivered. In support of the said contention, the learned counsel placed reliance upon the very provision itself which gives sufficient power to the Chief Metropolitan Magistrate to take appropriate steps for the purpose of taking possession including the using of force, if so required. To buttress his submission, learned counsel made reliance on the following decisions of this Court and other High Courts:-

- (i) S.Chandramohan Vs. The Chief Metropolitan Magistrate (LAWS (MAD) 2014 11 462) dated 19.11.2014
- (ii) W.P.(L) No.28480 of 2019 (Subir Chakravarthy & Anr. Vs. Kotak Mahindra Bank Limited and Anr.)
- (iii) W.P.(C) No.657 of 2020 & CM Appl. 1851 of 2020 dated 17.01.2020 (Rahul Chaudhary Vs. Andhra Bank and Ors)

8.The learned counsel appearing for respondents 1 to 4 would submit that there was an interim order pending disposal in SA No.59 of 2019 which factum has not been placed by the petitioner

before the Chief Metropolitan Magistrate in the application filed in Crl.M.P.No.2995 of 2019. Section 14(1A) of the Act is very clear that the authorization can only be made by the Chief Metropolitan Magistrate only to the officer subordinate to him. Therefore, the appointment of an Advocate Commissioner is one without jurisdiction. The Tribunal has rightly relied upon the Division Bench judgment of the Bombay High Court. Hence, the Civil Revision Petition will have to be dismissed.

9. There are two primary issues involved in this revision petition. One is on the compliance of Clauses (i) to (ix) of Section 14 of SARFAESI Act and the other is the interpretation of the said provision with specific reference to the appointment of Advocate Commissioner. Incidentally, the issue is on the effect of the interim order passed on the earlier occasion in S.A.No.59 of 2019.

10. Insofar as the compliance part is concerned, on a perusal of the order passed by Chief Metropolitan Magistrate, Egmore, it is clear that there appears to be an adequate compliance. We do not wish to delve much into the records. Requisite paragraphs in the order passed by the Chief Metropolitan Magistrate are extracted hereunder:

2..... While so, in view of the failure of the respondents to repay the dues in respect of the above housing loan satisfactorily as required, the account of the respondents had been classified as Non-Performing Asset (NPA) on 21.04.2017 and the petitioner bank had issued Demand notice u/s 13(2) of the Act dated 21.07.2017 calling upon the respondents to repay the dues in full to the issue of Rs.31,86,38,000/- as on 30.06.2017 within 60 days from the date of receipt of demand notice and the same was duly served on the respondents. Even after the expiry of statutory period, the respondent had neither sent any reply or any objection or any representation nor made any payment. Hence the symbolic possession of the property was taken by the authorized officer of the petitioner bank on 29.05.2018 by issuing the possession notice on the respondents, which was served and was affixed on the schedule property. The possession notice was also published in two leading newspapers, one in vernacular language viz., "The New Indian Express" and "Thinamani" on 31.05.2018. The present outstanding dues are Rs.38,33,25,261/-. As the respondents failed to settle the dues, the said amount is liable to be recovered by the sale of the secured assets. The

secured assets cannot be sold or transferred to realize the dues of the petitioner bank without taking physical possession of the same. Hence it is prayed to order for taking physical possession of the secured asset from the respondent by appointing an Advocate Commissioner and direction may be given to provide adequate protection to take physical possession. The petitioner further submits and declares that there is no stay or injunction in any other Court or Tribunal for taking physical possession of the secured assets under the provisions of SARFAESI Act.

3. The authorised officer of the petitioner bank has filed his proof affidavit in support of his petition confirming the measures taken by the petitioner before filing this petition. He has produced the copies of documents viz. application form, building agreement, sale deed, sanction letter, memorandum of deposit of title deeds. Notices u/s 13(2) & 13(4) of the Act, acknowledgment, paper publications, encumbrance certificate and general power of attorney etc., along with the petition to prove that he has taken all the measures as enumerated in Section 13 of the Act.

11. Thus the Tribunal is wrong in giving a finding to the contrary. We may note that respondents 1 to 4 have been contesting the matter all along. In fact, this is the third round of litigation before us. We are at a loss to understand as to how the very same Tribunal could pass the impugned order dated 04.02.2020 while dismissing the application filed by respondents 1 to 3 in SA No.59 of 2019 on 23.01.2020. Be that as it may, we are satisfied with the due compliance.

12. On the other issue, we are concerned with the scope and ambit of Section 14 of the SARFAESI Act. On a cursory reading, we may note that the role of the Chief Metropolitan Magistrate or a District Magistrate as the case may be is rather limited. This provision will have to be seen in the context of the object and reasons enshrined under the Act. It is more like execution part given to the enactment. Therefore, this provision is made to give effect to and strengthen the other provisions of the enactment. It is nothing but a concluding part of the enactment.

13. Section 14 of the Act mandates a District Magistrate or Chief Metropolitan Magistrate as the case may be to take possession and thereafter forward the assets and documents to the secured creditor. An application to be made has to be seen in that context alone and nothing beyond that. Therefore, the

other compliance starting from sub clauses (i) to (ix) has to be seen contextually.

14. When the onus is fixed on the Chief Metropolitan Magistrate or District Magistrate as the case may be, they have to put into effect the mechanism available before them. There is also a reason for giving this task to the Chief Metropolitan Magistrate or to the District Magistrate. If it is the purely judicial work, there need not be any inclusion of District Magistrate. This makes the position clear that the role to be played by the aforesaid two authorities.

15. Section 14 (1A) of the Act follows Section 14 (1). Under this provision, a District Magistrate or the Chief Metropolitan Magistrate may authorise an officer subordinate to him. When we speak of authorising, it would only mean authorisation of the powers conferred on them. Therefore, it is a power of delegation provided under the Act to be exercised by the District Magistrate or Chief Metropolitan Magistrate.

16. Sub section 2 speaks of compliance of sub section 1. Therefore, this provision is not an independent provision but the one which is meant to give effect to sub section 1. While executing its powers, the Chief Metropolitan Magistrate or a District Magistrate may take appropriate steps in securing the compliance of the provisions of sub-section(1) which is to take possession and hand over to the secured creditor along with documents pertaining to the assets. Sub-section(2) speaks of steps to be taken. It is of wider amplitude. What are all the steps that are required to be taken is the discretion of the District Magistrate or the Chief Metropolitan Magistrate. Appointing advocate commissioner comes within the said provision. The fact is that the Advocate Commissioner is nothing but an officer of the Court. If we read sub-section(2) as a whole, the mere fact that it also provides for usage of force would clearly indicate the extent of power that can be exercised by Chief Metropolitan Magistrate or the District Magistrate. Therefore, looking from any perspective, the order of appointing Advocate Commissioner is nothing but in aid of the compliance to be made under sub-section (1) of the Act.

17. The Division Bench of this Court in S.Chandramohan Vs. The Chief Metropolitan Magistrate (LAWS (MAD) 2014 11 462) considered the scope and ambit of Section 14(1) of the SARFAESI Act and held thus:-

9. The Advocate Commissioners appointed by the learned Chief Metropolitan Magistrate is in tune with Section 14(1-A) of the SARFAESI Act, 2002. As per

Section 14 of the Act, the secured creditors can approach the Chief Metropolitan Magistrate/District Magistrate to take possession of the assets and documents of the secured creditor. The Chief Metropolitan Magistrate, instead of personally visiting the spot to take possession of assets and documents, can very well appoint the Advocate Commissioner to visit on his behalf, as in the case of issuing of commissions under the Civil Procedure Code, as it is not possible for the Chief Metropolitan Magistrate/District Magistrate to visit personally to take possession.

10. The amendment inserted by Act 1 of 2013 viz., Section 14(1-A) is permitting the Subordinate Officers to do the above said acts and nowhere prohibits the Chief Metropolitan Magistrate from authorising an Advocate Commissioner to go on his behalf for taking possession of assets and documents and forwarding the same to the secured creditor. The amendment gives discretion to the Chief Metropolitan Magistrate/District Magistrate either to authorise or take possession of such assets and document and the word used being 'may', it is not always necessary on the part of the Chief Metropolitan Magistrate to authorise any officer subordinate to him. It is a well settled proposition of law that the observance of the word 'may' used in the statute is only directory, in the sense, non-compliance with those provisions will not render the proceedings invalid. Sometimes, the word 'shall' may also be directory and not mandatory. The Honourable Supreme Court in the decision reported in AIR 1952 SC 181 (Dattatraya Moreshwar v. State of Bombay) held thus,

"Generally speaking the provisions of a statute creating public duties are directory and those conferring private rights are imperative. When the provisions of a statute relate to the performance of a public duty and the case is such that to hold null and void acts done in neglect of this duty would work serious general inconvenience or injustice to persons who have no control over those entrusted with the duty and at the same time would not promote the main object of the legislature, it has been the practice of the Courts to hold such provisions to be directory only, the neglect of them not affecting the validity of the acts done."

In the decision reported in (2011) 6 SCC 321 (Mahadev Govind Gharge v. Special Land Acquisition Officer) the Hon'ble Supreme Court considered similar provision contained in CPC and in paragraph 37 held thus,

"37. Procedural laws, like the Code, are intended to control and regulate the procedure of judicial proceedings to achieve the objects of justice and expeditious disposal of cases. The provisions of procedural law which do not provide for penal consequences in default of their compliance should normally be construed as directory in nature and should receive liberal construction. The court should always keep in mind the object of the statute and adopt an interpretation which would further such cause in light of attendant circumstances."

In the said judgment, the earlier decision of the Supreme Court reported in AIR 1955 SC 425 (Sangram Singh v. Election Tribunal) was considered and followed.

11. The object of the amendment introduced in Act 1 of 2013 being to give assistance to the Chief Metropolitan Magistrate/District Magistrate, the Chief Metropolitan Magistrate is justified in appointing Advocate Commissioner, instead of authorising Subordinate Officers to take possession. It is well settled in law that Advocates are also Officers of the Court, though not subordinate to Chief Metropolitan Magistrate. As Officers of the Court, the Advocates can perform their duty more effectively than the Officers, subordinate to the Chief Metropolitan Magistrate in taking possession of assets and documents and in delivering the same to the Secured Creditor. Thus, in any event, the contention raised by the learned counsel appearing for the petitioner is devoid of merits.

12. In fine, the writ petition is liable to be dismissed in limine and accordingly dismissed.

18. The same ratio has also been reiterated by the other High Courts including the Delhi High Court and the Kerala High Court. The Delhi High Court in W.P.(C) No.657 of 2020 & CM Appl. 1851 of 2020 dated 17.01.2020 (Rahul Chaudhary Vs. Andhra Bank and Ors) has held as under:-

8.1. There are two ways of appreciating the provision. First, that the expression "may" relates to the choice of the subordinate officer. The other meaning that can be placed on the provision is that District Magistrate/CMM is vested with discretion to appoint officers subordinate to him to take possession of the secured asset.

8.2. The District Magistrate/CMM is obliged to take possession once an application in that behalf is preferred under sub-section (1) of Section 14 of the SARFAESI Act by the secured creditor.

8.3. It is in the exercise of such power that recourse can be taken by the District Magistrate/CMM to the provisions of sub-section (1A) of Section 14. This provision was introduced via Act 1 of 2013. Before that the District Magistrate/CMM were perhaps taking recourse to sub-section (2) of Section 14 and, thus, appointing advocates as receiver.

8.4. To my mind, after the insertion of sub-section (1A) in Section 14, the only change that has been brought about is that the District Magistrate/CMM has now the discretion to appoint even their subordinate officers as receivers.

8.5. Pertinently, sub-section (1A) of Section 14 does not bar the appointment of advocates as receivers. The same position obtains vis-a-vis Rule 8 (3) of The Security Interest (Enforcement) Rules, 2002, which has been cited in the aforementioned judgment of the Bombay High Court.

9. As was noticed in Subir Chakravarty's case, the District Magistrate and the CMMs are overburdened. The position is different in Delhi.

10. Thus, in my view, since the provision vests discretion in the District Magistrate/CMM and as long the discretion is exercised with due care and caution, the appointment of advocates as receivers cannot be faulted.

11. Therefore, I find no merit in the writ petition, the same is, accordingly dismissed."

19. A similar view, as stated, has been taken by the Kerala High Court in O.P. (DRT) No.3311 of 2013 dated 29.10.2019 (The Federal Bank Limited, Ernakulam Vs. A.V.Punnus). The following paragraph would be apposite:-

5. The power of the Magistrate to appoint an Advocate commissioner for identification of the secured assets and to take possession of the same for handing

it over to the bank has also been upheld in Muhammed Ashraf's case. The source for that OP(DRT) No.3311/2013 power can be traced to Section 14(2) of the SARFAESI Act to take such steps as are necessary (See L Sakiri Vasu Vs. State of Uttar Pradesh (2008(1) KLT 724 (SC)). It may however appear at first blush that such an Advocate Commissioner is not an officer subordinate to the District Magistrate or the Chief Judicial Magistrate. But a reference to Sections 12 and 17 of the Code of Criminal Procedure, 1973 indicates that the term District Magistrate or Chief Metropolitan Magistrate denotes the court and not the officer in person. An Advocate commissioner is certainly an officer subordinate to the court and the words employed in Section 14(1A) of the SARFAESI Act are not to be understood as meaning an officer subordinate in service. Section 284 of the Code of Criminal Procedure, 1973 in fact empowers an Advocate Commissioner to record the examination of witnesses whose personal appearance in court is dispensed with. Similar provisions can be found in Order XXVI Rule 17 of the Code of Civil Procedure, 1908 enabling the Advocate commissioner to record evidence of witnesses and Section 75(g) thereof to perform any ministerial act even. Taking over possession of the secured asset OP (DRT) No.3311 of 2013 and handing over the same to the creditor bank is nothing but a ministerial act of the Advocate commissioner on behalf of the court. The Advocate Commissioner exercising such function under Section 14(1A) of the SARFAESI act is only discharging his duty as an officer subordinate to the court presided by the Magistrate. The contention of the borrower that the Advocate commissioner is not an officer subordinate in service to the Chief Judicial Magistrate and hence incompetent is only to be rejected."

सत्यमेव जयते

20. At the cost of repetition, we may reiterate that we are concerned with Section 14(1 A) of the Act dealing with the power of delegation for the exercise of the power available under Section 14 (1) of the Act. The Division Bench of the Mumbai High Court in Subir Chakravarthy & Anr. Vs. Kotak Mahindra Bank Limited and Anr also has not considered the scope and ambit of Sections 14(1) and (2) of the Act cumulatively.

21. Section 14 of the Act does not require a borrower or a guarantor to be heard. This fact also would clearly show the nature of process required to be completed by the Chief Metropolitan Magistrate or the District Magistrate. Therefore,

the power to be exercised is primarily administrative in nature. In such an eventuality, we cannot presume it as a judicial adjudication which requires parties to be heard or the administrative order having civil consequence. However, we may add one caveat that if in the opinion of the Chief Metropolitan Magistrate or District Magistrate that a notice is required he can very well do so.

22.The Tribunal, in our considered view, ought to have taken note of the Division Bench judgment of our High Court referred above. Further, such an order, ought not to have been passed after the order passed in S.A.No.59 of 2019 dated 23.01.2020 as nothing else survives thereafter.

23.We do not find any error in the order passed in Crl.M.P.No.2995 of 2019, particularly with reference to the pendency of the interim order. The said interim order is only with respect to the confirmation of the sale alone and in any case, it is nothing but purely academic. As on today, the order passed in S.A.No.59 of 2019 dated 23.01.2020 has become final. Therefore, the sale has become confirmed. The successful bidder has also come into play. He has deposited the entire amount way back in the year 2019. Thus, looking from any perspective, we are of the view that the order passed by the Tribunal cannot be sustained in the eye of law.

24.We may also note that the Tribunal has also committed another factual error in directing the petitioner to hand over the possession when the said possession is still with the fourth respondent. Thus, there appears to be an apparent non-application of mind.

25.Though the petitioner has not filed an appeal which is provided statutorily, we are of the view that it is a fit case where the power under Article 227 of the Constitution of India requires to be exercised. We have already stated the reasons for our interference and, therefore, we do not wish to elaborate any further.

26.Accordingly, the order passed in S.A.No.399 of 2019 dated 04.02.2020 stands set aside and the Civil Revision Petition stands allowed. Consequently, we direct the Chief Metropolitan Magistrate, Egmore, Chennai to complete the process and take adequate steps to hand over the possession in tune with Section 14(1) of the Act. The needful will have to be done within a period of four weeks from the date of receipt of a copy of this

order. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(J)

//True Copy//

Sub Assistant Registrar

mmi/ssm

To

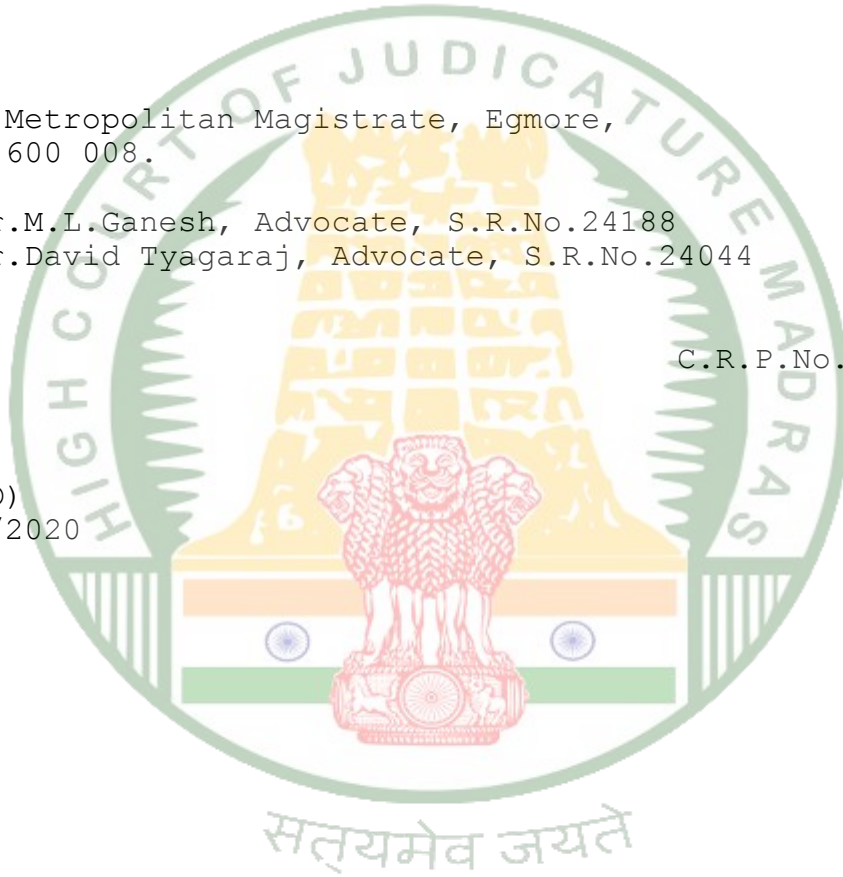
The Chief Metropolitan Magistrate, Egmore,
Chennai - 600 008.

+1cc to Mr.M.L.Ganesh, Advocate, S.R.No.24188

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C.R.P.No.790 of 2020

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