

Form No. J(2) Item No. 06

IN THE HIGH COURT AT CALCUTTA

**CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

**Present :
The Hon'ble Justice T. S. Sivagnanam
And
The Hon'ble Justice Bivas Pattanayak**

**F.M.A.67 of 2021
IA NO:CAN/1/2019 (Old No:CAN/4974/2019)**

**Tapasi Routh nee Sinha Roy
-vs-
State of West Bengal & ors.**

For the Appellant/Petitioner: Mr. D. Saha Roy, Advocate
Mr. S. N. Mitra, Advocate
Mr. Pingal Bhattacharyya, Advocate
Mr. Subhankar Das, Advocate
Mr. Neil Basu, Advocate

For the State : Mr. Amitesh Banerjee, Ld. Sr. St.
Counsel
Mr. Tarak Karan, Advocate

For the Respondent Nos. 6 & 7: Mr. R. C. Prusti, Advocate
Mr. Sanjib Das, Advocate

Heard on : 14.07.2022

Judgment on : 14.07.2022

T. S. Sivagnanam, J.:

This intra court appeal filed by the writ petitioner is directed

against the order dated 21st February, 2019 passed in W.P. No.7039 (W) of 2018. In the said writ petition, the appellant, who claimed to be in possession of the property, which is subject-matter of action under the provisions of the SARFAESI Act, 2002 at the instance of the respondent-Bank, challenged the order passed by the District Magistrate, Paschim Medinipur, dated 06.06.2017, in exercise of his power under Section 14(1) of the SARFAESI Act, 2002. The appellant is not the borrower but the 8th respondent is the borrower, who has defaulted in repayment and the respondent-Bank has rightly proceeded against him under the provisions of the SARFAESI Act, and they are armed with an order passed by the Debt Recovery Tribunal. Since, actual physical possession could not be taken up, the respondent-Bank moved the District Magistrate by filing an application under Section 14(1) of the Act to assist them and to secure actual physical possession of the property in question which has been mortgaged to the respondent-Bank. This application was disposed of by order dated 06.06.2017 and directions were issued to the police authorities to enable the respondent-Bank to obtain actual physical possession of the mortgaged property.

The appellant had challenged the order dated 06.06.2017 passed under Section 14(1) of the Act on several grounds and, in particular, that the pendency of the civil proceedings and the various orders passed by the civil court as well as the Hon'ble Division Bench of this Court were not placed before the District Magistrate and, therefore, the appellant

has been prejudiced.

The learned Single Judge by the impugned order pointed out that the District Magistrate by its order dated June 6, 2017, passed under Section 14 of the Act, has noted that the Bank has claimed that there was no Title Suit lying or pending before any court of law. After noting the said statement made in the order passed by the District Magistrate, the learned Writ Court proceeds to observe that the respondent-Bank ought to have been more careful while disclosing before the District Magistrate and it should have disclosed the pendency of the Title Suit before the learned Single Judge and the order passed therein. Though such finding was recorded, the learned Writ Court was of the opinion that non-disclosure of the civil proceedings in the facts and circumstances of the case is not fatal to the application under Section 14 of the Act. Further, the Court observes that there is no material placed on record to suggest that, had the District Magistrate been apprised of the pendency of the suit or the order passed in the suit and in the appeal, he would not have passed the order dated June 6, 2017 and with the such observations, the writ petition was dismissed.

Aggrieved by the said, the appellant is before us by way of this appeal.

As could be seen from the impugned order, learned Writ Court had accepted the fact that the respondent-Bank did not disclose about the pendency of the civil proceedings. However, learned Writ Court was of

the opinion that non-disclosure is not fatal. The correctness of the finding needs to be decided in this appeal.

Learned advocate for the respondent-Bank vehemently submits that the power under Section 14 of the Act clearly provides for the Bank to move the District Magistrate where the possession of the secured asset is required to be taken by the secured creditor and this provision was rightly invoked by the respondent-Bank and the appellant had not moved the Debt Recovery Tribunal under Section 17 of the SARFAESI Act at the relevant point of time and the writ petition itself was not maintainable. Further, it is submitted that the appellant has subsequently filed an application before the Debt Recovery Tribunal under Section 17 of the Act, which fact was not disclosed before this Court.

In the instant appeal, we are not required to consider as to what would be the nature of the order passed by the District Magistrate had the pendency of this civil proceeding be disclosed today. In such a stage, we have to see whether full material which is relevant to the application filed by the Bank was placed before the District Magistrate, the answer to this question is a definite no. The learned Single Bench has also noted that the Bank did not disclose the pendency of the civil proceeding, and the various orders passed by the civil court as well as the Division Bench of this Court.

It is not for this Court to examine as to what the District Magistrate would have done, had all the orders been placed before it. It is

up to him to take a decision, which undoubtedly should be in accordance with law. The appellant had initially obtained an order of interim injunction in O.S. No. 491 of 2010, by which the prayer for interim injunction was allowed, and the defendants which includes the respondent-Bank was directed to maintain *status quo* as regards themselves, and the plaintiff/appellant in the suit property on the date of the order as well as with regard to payment of monthly occupation charges of the rents to the defendant nos. 2, 3 and 5 till a particular date. Subsequently, the application of interim injunction was heard by the civil court and by order dated 22.06.2012, the application for temporary injunction was rejected.

Aggrieved by said order, the appellant had preferred F.M.A. 938 of 2012 and the Hon'ble Division Bench by order dated September, 12, 2022 disposed of the appeal.

The operative portion of the order reads as follows:-

“We, therefore, hold that the learned trial judge while rejecting the application for injunction did not exercise his jurisdiction erroneously.

However, we make it clear that we have not gone into the merits of the claim and the counter claim of the parties as to whether the plaintiff was a tenant in relation to the property or not as it is an issue in the suit. It will be open to the learned trial

judge to consider the issues in accordance with law uninfluenced by his order and the order of this court while disposing of the application for injunction inasmuch as the scope to consider the prayer for interim order of injunction and scope to consider the prayer for temporary injunction upon contested hearing are different.

However, we make it clear that the plaintiff shall not be evicted from the premises-in-question except in due process of law.

With the aforesaid observations, the appeal is dismissed.”

From the above order, it is seen that the order rejecting the interim injunction application was affirmed by the Division Bench. However, while doing so, the Hon’ble Division Bench has observed that the appellant/plaintiff shall not be evicted from the premises in question except in due process of law. The question would be as to what is meant by due process of law in the facts and circumstances of this case. As observed earlier, it is for the District Magistrate to decide the same, and therefore, the Bank ought to have placed the order passed by the Division Bench before the District Magistrate before he could exercise jurisdiction under Section 14(1) of the SARFAESI Act.

Therefore, we have no hesitation to hold that not placing the order passed by the Division Bench before the District Magistrate is definitely prejudicial to the interest of the appellant as the District Magistrate had no occasion to make any observation as regards the effect of such order. It is not clear as to why the respondent-Bank failed to place the order passed by the Hon'ble Division Bench before the District Magistrate. In fact, stronger observation ought to have been made against the respondent-Bank than what was made by the learned Single Bench by stating that the respondent-Bank should have been more careful while disclosing true state of affairs. The respondent-Bank being lender ought to be fair by placing all materials before the concerned authority. Non-disclosure especially when it is an order passed by the Hon'ble Division Bench of this Court is undoubtedly a very serious matter, and has to be deprecated. The learned advocate appearing for the respondent-Bank submits that the appellant has not disclosed about the pendency of the application filed by him before the Debt Recovery Tribunal under Section 17 of the Act.

In our considered view, we are called upon to consider as to the correctness of the procedure adopted by the District Magistrate before passing the order dated 06.06.2017. Thus, when there is procedural infraction and there has been violation of principles of natural justice, the Court can exercise jurisdiction under Article 227 of the Constitution

of India.

For the above reasons, the appeal is **allowed**. The order passed in the writ petition is set aside. Consequently, the order passed by the District Magistrate dated 06.06.2017 is quashed, and the matter is remanded to the District Magistrate, Paschim Medinipur and with the direction to the respondent-Bank to place all the materials including the pleadings and the orders passed by the civil court as well as the order passed by the Hon'ble Division Bench and thereafter the District Magistrate shall afford an opportunity of hearing to the respondent-Bank as well as the appellant, and take a fresh decision on merits and in accordance with the law.

We further make it clear that this order shall not prejudice the rights of the parties in the pending proceeding before the Debt Recovery Tribunal, which have been initiated by the appellant and it will be open to the respondent-Bank to raise all defences which are available to them on facts as well as on law before the Debt Recovery Tribunal.

Consequently, the connected application stands disposed of. No costs.

(T.S. Sivagnanam, J.)

(Bivas Pattanayak, J.)

AN/CHC [AR (CT)]