

IN THE HIGH COURT AT CALCUTTA

CIVIL REVISIONAL JURISDICTION

APPELLATE SIDE

Present:-

THE HON'BLE JUSTICE Kesang Doma Bhutia.

C.O. No. 1828 of 2021

With

IA No. CAN 1 of 2021

With

CAN 2 of 2021

Adams Marketing Pvt. Ltd. & Ors.

-VS-

State Bank of India & Anr.

With

C.O. 1829 of 2021

With

IA No. CAN 1 of 2021

With

CAN 2 of 2021

Adams Marketing Pvt. Ltd. & Ors.

-VS-

State Bank of India & Anr.

For the Petitioners	:	Mr. Siddhartha Banerjee, Mr. Debashis Karmakar, Mr. Arya Nandi,
For the opposite parties	:	Mr. Jishnu Saha, Mr. Shiv Mangal Singh,
Hearing concluded on	:	14.12.2021
Judgment on	:	19.01.2022

Kesang Doma Bhutia, J:- This case is an example of the plight/agonny of a financial institution in realization of its own money from a defaulter borrower, to whom financial assistance was extended in crores of rupees to run their business since 2009 till 2017. The petitioners/the defaulter borrowers not only failed to pay the loan amount as per terms and conditions of the agreement but has been challenging each and every step that has been taken by a financial institution for recovery of its own money.

Adams Marketing Private Limited and others have been accommodated different types of loan in corers of rupees during the period from 09.03.2009 till 2017 by the opposite party Bank. The borrower as a security have mortgaged their eight properties situated in the district of Howrah, three properties situated at Kharagpur in the District of West Medinipur and one property situated at Baranagar, in the District North 24 Parganas in favour of the Bank. The petitioners not only defaulted in payment of loan amount as per terms and conditions of the agreement but also made the bank to pay its income tax. Therefore, bank finding no other alternative classified the accounts of the borrowers as non-performing asset and issued notice under section 13 (2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002(herein after referred as SARFAESI Act) demanding due sum of rupees 25.65 corer on 09.11.2016. It has been alleged objection was sent against such

notice, but Bank did not bother to respond the same. The bank further issued fresh notice under Section 13 (2) SARFAESI Act, 2002 on 15.05.2017. The petitioners submitted their objection and reply was sent on 02.08.17. Then Bank took symbolic possession of those twelve secured assets on 12.10.2017 and made paper publication to that effect on 17.10.2017.

Challenging notice under Section 13(2) of the SARFAESI Act, 2002, the petitioners have filed S.A. No. 228 of 2017 u/s 17 of the SARFAESI Act, before DRT, Kolkata.

In the meantime in order to take possession of the secured assets the bank has made an application before the District Magistrate, Howrah under Section 14 of the SARFAESI Act, 2002 and District Magistrate passed an order to that effect on 02.08.2018.

Now, it is the case of the petitioners that the petitioners were never made aware of the proceeding under Section 14 of the SARFAESI Act, 2002 either by the Secured Creditor/Bank or by the District Magistrate by serving notice of the same. They have come to know about the order passed by the District Magistrate, Howrah on 02.08.2018 on 27.07.2021 when police personnel of Liluah Police Station went to take possession of the secured assets situated in Howrah.

Challenging the order passed by the District Magistrate Howrah under Section 14 of the SARFAESI Act, 2002 on 02.08.2018 the petitioners have filed an interim application being no. 1437 of 2021 in S.A. No. 228 of 2017. After hearing the petitioners learned DRT 1, Kolkata, dismissed the interim application on the ground being barred by limitation. Challenging the order dated 11.08. 2021 the petitioners have filed C.O. No. 1828 of 2021.

The petitioners have also filed a review application being I.A. interim application no. 1650 of 2021 before the learned tribunal for review of the order dated 11.08.2021 but such review application was also rejected on the ground of maintainability being barred by limitation on 1st September, 2021. Challenging such order the petitioner has filed C.O. No. 1829 of 2021. Therefore, both the CO. No. 1828 of 2021 and C.O. No. 1829 of 2021 are heard analogously.

It is admitted fact impugned orders passed by the DRT are appealable before the DRAT. However, the Hon'ble Supreme Court in a petition filed by the Bar Council of Madhya Pradesh, after transfer of Jurisdiction of DRT Jabalpur to DRT Lucknow due to huge unfilled vacancies in Tribunals and which of late have become dysfunctional and to resolve the problem for the time being, requested the High Courts to entertain the applications to be filed before DRT or DRATs under Article 226. Once tribunals are constituted, cases can be

relegated back. Such order was passed sometime in the middle of December 2021. But, the present applications under Article 227 of the Constitution of India were filed by the borrowers sometime in September 2021. Remedy under Article 226 and Article 227 are different.

However, it has been contended by learned advocate for the borrowers that even if the statutory remedy is provided under the statute, it does not take away the power of superintendence enshrined under Article 227 of the Constitution of India and if the orders under challenge *ex facie* appear to be a nullity which strikes at the root of the jurisdiction.

Be that as it may, let see whether orders impugned suffer from illegality and material irregularities.

It is the case of the petitioner that the District Magistrate, Howrah, without adhering to the principle of natural justice and in the absence of petitioner passed order under Section 14 of the SARFAESI Act, 2002 on 02.08.18 and which was never communicated to the petitioners. The petitioners have come to know about the same only when the police personnel of Liluah Police Station went to take physical possession of the same on 27.07.2021.

First let us see what is the law and steps that need to be taken by a Secured Creditors against defaulter borrowers whose account has been classified as non-performing assets.

Section 13 of the Act, deals with Enforcement of security interest and section 13(2) provides that a defaulter borrower whose account has been classified as non-performing asset then secured creditor may require the defaulter borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditors shall be entitled to exercise all or any of the rights under sub-section (4).

In the present case it is admitted position the accounts of the borrowers have been classified as non-performing assets and it is also admitted facts that Secured Creditor had issued notice u/s13(2) of the Act, not only once but twice on 09.11.2016 and on 15.05.2017 . The defaulter borrowers submitted objection on 14.01.2017, but bank did not give any reply. Again a fresh notice u/s 13(2) of the Act, dated 15.05.2017 was served and against which the borrowers have submitted objection on 19.07.17 and Bank sent reply dated 02.08.2017 to some of the borrowers/petitioners. Then bank claims to have taken symbolic possession of the secured assets by affixing notice on 12.10.2017 and made paper publication to that effect on

17.10.2017 and copy of such notice was received by borrower on 20.10.17.

On receipt of such notice the petitioners have moved DRT Kolkata and filed S.A.228 of 2017 u/s 17 of the Act, challenging the notice u/s13(2) of the Act. Filing of an application u/s 17 of Act, by the defaulter borrowers itself give rise to presumption that they were very much aware of the facts the next steps that were going to be taken against them by secured creditors, who had already taken symbolic possession of the secured assets by giving notice, by affixing the copy of the same on the secured properties and also by making publication in Newspaper.

Next Step which is available to the secured creditor is to take step under section 13(4) of the Act. More so, Section 13(2) clearly provides that if the defaulter borrower fails to pay the due and clear liabilities within sixty days from the date of receipt of notice then secured creditor is entitled to exercise its right under section 13(4) of the Act.

Once a notice is issued to the borrower under section 13(2) and if he fails to comply with the notice within the stipulated period, in view of clause (a) of sub-section (4) of section 13, the secured creditor is entitled to take possession of the secured assets of the borrowers. It can, thus, be seen that once the secured creditor is entitled to take

possession in view of the provisions of sub-section (4) of section 13, the only thing it is required to do is to make an application in writing to the District Magistrate or the Chief Metropolitan Magistrate for taking possession of the secured assets.

In the present case the Secured Creditor to take possession of the secured assets has sought help of the District Magistrate Howrah as provided under Section 14 of the Act. However, according to a proviso to sub-section (1) of Section 14 of the Act, the authorized officer of the secured creditor is required to affirm an affidavit regarding certain facts about the borrower and the secured assets. On receipt of such affidavit the District Magistrate after satisfying the contents of the affidavit, pass suitable orders for the purpose of taking possession of the secured assets within a period of thirty days from the date of application.

If the two conditions stipulated in section 14 are satisfied, then the District Magistrate has no other option but to take steps for taking possession of the secured assets and documents relating thereto and forward such assets and documents to the secured creditor.

Therefore, it is seen the nature of powers that are exercised by the District Magistrate under section 14 of the Act are purely executionary in nature in taking possession of the secured assets and delivering it to the secured creditor. At the time of passing order under

section 14 of Act, the District Magistrate will have to consider only two aspects. He must find out whether the secured assets fall within his territorial jurisdiction and whether notice under section 13(2) of the Act is given or not.

Section 14 of the SARFAESI Act is an enabling provision which is non-adjudicatory provision and executory in nature. The function of the District Magistrate under section 14 of the Act is non-adjudicatory in nature subject to examination of factual correctness of the assertions made in the affidavit filed.

The role of the District Magistrate, as the case may be, as envisaged under section 14 of the SARFAESI Act, is only with a limited jurisdiction, i.e. to see whether the property is a 'secured asset' or not. The said jurisdiction is only with regard to the assistance to be given to the party/secured creditor to take physical possession of the property, over which security interest has been created.

A perusal section 14 of the SARFAESI Act, nowhere discloses that before the District Collector pass any order in a the petition filed under section 14 of the SARFAESI Act, he need to put the borrower on notice or before taking possession of the secured assets, the District Magistrate has to hear the defaulter borrower.

In the present case the District Magistrate was pleased to forward the copy of order passed by it under Section 14 Act, on

02.08.2018 to the petitioner Adams Marketing Private Limited. It is the case of the petitioners that they never received the copy of the order dated 02.08.2018 at any point of time.

Section 14 of the Act, provides that the District Magistrate has to see that notice under Section 13(2) of the Act, has been duly served upon the defaulter borrower and objection or representation in-reply to the notice from the borrower has been considered by the secured creditor and reason for non-acceptance of such objection or representation has been communicated to the borrower. The borrower has failed to repay the due in spite of notice. The jurisdiction of the District Magistrate under Section 14 of the Act, is only with a limited jurisdiction that is to see whether the property is secured asset or not and executionary in nature. Therefore, District Magistrate cannot take role of a DRT and put borrower a notice before passing any order under Section 14 of the Act. Section 14(3) clearly provides no Act of Chief Metropolitan Magistrate or Chief Judicial Magistrate or District Magistrate can be challenged in any Court or before any authority. Section 17(1) clearly provides any person being aggrieved by any measure taken under Section 13(4) by the secured creditor or his authorized officer has to file an application to the DRT having jurisdiction in the matter within 45 days from the date which such measure has been taken.

In the present case the petitioner has filed I.A. No. 1437 of 2021 on 29.07.2021 in S.A. No. 228 of 2017 before DRT Kolkata, challenging the order passed by the District Magistrate, Howrah under Section 14 of the SARFAESI Act, 2002 on 02.08.2018 and the same was rejected by the DRT, Kolkata being bared by limitation and having been filed beyond the period of 45 days on 11.08.2021. The petitioner has also filed I.A. No. 1650 of 2021 for review of the above order dated 11.08.2021 and Learned DRT refused to review its order dated 11.08.2021 and took the same view the petition of the petitioners challenging the order of the District Magistrate, Howrah passed under Section 14 of the Act to be barred by limitation on 01.09.2021.

Section 14(3) of the Act, clearly provides that no Act of the District Magistrate or any officer authorized by the District Magistrate done in pursuance of this section shall be called in question in any court or before any authority. From the discussion made above it is clear that no duty is cast upon the District Magistrate to put the defaulter borrower on notice before passing any order under the section 14 of the Act. Therefore, question of violation of Principle of Natural Justice by the District Magistrate in a proceeding under Section 14 of the Act or the order is bad being passed behind the borrower does not arise. This court does not find any illegality in the order passed by the District Magistrate on 02.08.18 and in view of

Section 14(3) the same is barred from being challenged in any Court of law. Therefore, the question of the petitions of the petitioners being bared by limitation as held by DRT, Kolkata also does not arise.

This court does not find any merit in both the applications of the defaulter borrowers filed under Article 227 of the Constitution. Rather just to protract the litigation and to avoid the liabilities, the borrowers who have duly received the notice u/s13(2) of the Act and have filed an application u/s 17 of the Act challenging such notice and who were aware of taking symbolic possession of the secured assets by the Creditors, cannot be permitted to challenge the step taken by the District Magistrate u/s14 of the Act as stipulated by section 14(3) of the Act.

Accordingly, **C.O. 1828 of 2021 and C.O.1829 of 2021** are dismissed. Connected applications, if any, stand dismissed.

Interim order, if any, stands discharged.

There will be no order as to costs.

In view of the order made above affidavits are not invited. Allegations made shall be deemed to be denied.

All parties shall act in terms of the copy of the order downloaded from the official website of this Court.

Urgent Xerox certified photocopies of this judgment, if applied for be given to the parties upon compliance of the requisite formalities.

(Kesang Doma Bhutia,

Later

The learned Advocate for the petitioners pray for stay of the operation of this Judgement passed by this Court and to which the learned Advocate for the opposite parties raise objection.

This Court is not inclined to stay its own order and the prayer is refused.

(Kesang Doma Bhutia, J.)