

AFR

IN THE HIGH COURT OF ORISSA AT CUTTACK

(In the matter of an application under Articles 226 and 227
of the Constitution of India)

1. W.P.(C) No.26500 of 2021

***M/s. Maa Kalika Bhandar and
Others***

Petitioners

-Versus-

***The Collector and District
Magistrate, Khordha and
Others***

.... Opposite Parties

2. W.P.(C) No.27775 of 2021

***M/s. Dwarikamayee Bhandar
and another***

Petitioners

-Versus-

***The Collector and District
Magistrate, Khordha and
Others***

.... Opposite Parties

Advocates appeared in both the cases through Hybrid Mode:

For Petitioners

**: Mr. S.P. Misra, Senior Advocate
with Mr. Soumya Mishra, Advocate
(in both the writ petitions)**

For Opposite Parties : Mr. L. Samantaray, AGA
(for O.P. No.1/D.M., Khordha)
Mr. Anjan Kumar Biswal, Advocate
(O.P. Nos.2,3 & 5/Bank)
(In both the writ petitions)
Mr. Pradipta Kumar Mohanty,
Senior Advocate with Mr. Pranaya
Mohanty, Advocate
(for O.P. No.4/Auction Purchaser)
(in W.P.(C) No.26500 of 2021)
Mr. Manoj Kumar Mohanty, Advocate
with Mr. Tutu Pradhan, Advocate
(for O.P. No.6/Auction Purchaser)
(In W.P.(C) No.27775 of 2021)

CORAM:

JUSTICE JASWANT SINGH
JUSTICE M.S. RAMAN

Date of Hearing: 12.05.2022 Date of Judgment: 29.06.2022

Jaswant Singh, J.

1. This common order shall dispose of both the aforementioned writ petitions as they involve similar facts and identical questions of law.
2. The Writ Petitions numbered W.P.(C) No.27775 of 2021 and W.P.(C) No.26500 of 2021 are taken up together as they involve a common question and prayer i.e. an opportunity must have been provided by the DM/Collector while taking possession of

the mortgaged property under Section 14 of the SARFAESI Act, 2002 (Hereinafter, "**Act, 2002**").

W.P.(C) No.26500 of 2021

3. The relevant facts of the Writ Petition numbered W.P.(C) No.26500 of 2021 is set out in brief hereunder. The Petitioner No.1 i.e. M/s. Maa Kalika Bhandar availed a cash credit loan of Rs. 22.50 crores from the Opposite Party No. 5/ Punjab National Bank on 25.06.2016. The said loan was availed by mortgaging an immovable property under the ownership of Petitioner No. 3 i.e. Jay Kumar Jajodia. Due to financial indiscipline, the said loan account was declared NPA on 31.01.2018. A demand notice under Section 13 (2) of the SARFAESI Act, 2002 was issued on 13.02.2018 recalling outstanding liability of Rs.22,14,25,096.45/- (Twenty Two Crores Fourteen Lacs Twenty Five Thousand Ninety Six Fourty Five Paise) and symbolic possession of the property was taken vide a notice dated 17.04.2018 under Section 13 (4) of the Act, 2002. Further, the property was auctioned on 12.03.2019 wherein the Opposite Party No.4/Auction purchaser i.e. MGM Minerals Pvt. Ltd. was declared as the highest bidder and

consequently, sale certificate has been issued in its favour owing to complete deposit of the whole bidding amount. Consequently, a challenge was laid to the said auction vide S.A No.41 of 2019 in the DRT by the petitioner, which has been admitted. Further, the 2nd Additional Civil Judge (Senior Division), Bhubaneswar and the Civil Judge (Senior Division), Bhubaneswar have passed an interim order to maintain status-quo over the disputed property. The dispute arose when the Opposite Party No. 1/ DM/Collector in Bank Misc. Case No.78 of 2018 passed an order dated 19.08.2021 on the application filed by the Opposite Party/Bank instructing the Police to help in acquiring the physical possession of the mortgaged property.

W.P.(C) No.27775 of 2021

4. The brief facts of W.P. (C) No.27775 of 2021 are that the petitioner No.1 i.e. M/s. Dwarikamayee Bhandar availed a Cash Credit Facility of Rs.470 lakhs from the Opposite Party No.5/Punjab National Bank on 25.08.2015 which was further enhanced to Rs.950 lakhs on 10.09.2016 by mortgaging various immovable properties standing in the name of the Petitioner No.2 i.e. Pawan Kumar Jajodia. The petitioner No.2 stood as a

guarantor. Moreover, the petitioner No.2 is also the partner in the petitioner No.1 i.e. M/s. Dwarikamayee Bhandar. Due to financial indiscipline, the said loan account was declared NPA on 31.01.2018. A demand notice under Section 13(2) of the Act, 2002 was issued to the petitioner on 03.02.2018 recalling outstanding liability of Rs.9,23,56,545.85/- (Nine Crores Twenty Three Lacs Fifty Six Thousands Five Hundred Fourty Five Eighty Five Paise). Further, the symbolic possession of the property was taken over on 17.04.2018. It is also pertinent to note that the auction with respect to two of the immovable properties has been successful and the auction purchasers have deposited the entire amount within the stipulated period. The Civil Judge (Senior Division), Bhubaneswar vide C.S. No.518 of 2019 passed an order dated 25.04.2019 to maintain status-quo over the disputed property. In the meantime, opposite party No.5/ Punjab National Bank approached opposite party No. 1 - DM by filing an application U/s 14 of the 2002, on 13.06.2018 vide Bank Misc. Case No.77 of 2018 seeking to take physical possession the property in possession. The bank, preferred W.P.(C) No.1404 of 2019 before this Court, seeking disposal of

its application filed U/s 14 before the District Magistrate, on an early date. The said petition, was disposed off on 21.01.2019 by this Court directing District Magistrate to pass appropriate orders on the aforesaid application, after granting opportunity of hearing to the parties.

Arguments

5. It is the claim of the Petitioners in both the cases that no opportunity of personal hearing was afforded to them by the Opposite Party No.1/Collector-cum-District Magistrate, Khordha before passing order(s) dated 19.08.2021 under Section 14 of the Act, 2002 and thereby violating the principles of natural justice. It is further contended that the District Magistrate, Khordha failed to appreciate that the property in question could not be treated to be a secured asset, on account of the same having been attached by the Income Tax Department prior to the mortgage in favour of the bank on 28.06.2016, whereas, the said property had already been attached by the Income Tax department in proceedings initiated under Income Tax Act on 31.12.2015. Consequently, the mortgage transaction is void in terms of the Section 281 of the Income Tax Act, 1961.

6. Per Contra, Opposite Party / Punjab National Bank (PNB) in both the cases have contended that pursuant to the judgment of ***Bajaj Finance Ltd. v. M/s Ali Agency & others***¹ ***W.P.(C).No.11425/2019***, decided on 10.01.2022, the Petitioners have an alternative remedy to approach the DRT under section 17 of the Act, 2002 and thereby this writ petitions are not maintainable.
7. Learned counsel for Opposite Party/ Punjab National Bank (PNB) raises a preliminary objection regarding maintainability on the ground that the impugned order(s) dated 19.08.2021 has been passed by the District Magistrate, Khordha in exercise of its powers under Section 14 of the Act, 2002 and the same amounts to an action under Section 13(4) and hence in view of the judgment of Hon'ble Supreme Court in ***Kanhaiya Lalchand Sachdev V/s State of Maharashtra***² and ***United Bank of India Vs. Satyawati Tondon***³ the remedy available to the petitioners is to approach Debts Recovery Tribunal (DRT) under Section 17 of the Act, 2002 and hence present petition is not maintainable. He further places

¹ 2022 (1) OLR 521

² 2011 (2) SCC 782

³ 2010 (8) SCC 110

reliance on judgment of Hon'ble Supreme Court in the case of **Authorised officer, Indian Bank Vs. D.Visalakshi and another**⁴ to contend that power to be exercised under Section 14 of the Act, 2002 by the District Magistrate, by its very nature is non-judicial and administrative in nature and consequently no opportunity of hearing is to be granted by the District Magistrate before passing of an order under Section 14.

8. In rebuttal, Ld. Counsel for the petitioner relies upon judgment of Hon'ble Supreme Court the **Harshad Govardhan Sondagar Vs. International Assets Reconstruction Company Ltd. and others**⁵ (Para No.22 and 29), to contend that an order of the District Magistrate U/s 14 could be assailed by filing of writ petition under Article 226/227 of Constitution of India. He further places reliance on **Radhakrishnan Industries Vs. State of Himachal Pradesh**⁶, **M/s Dharampal Satypal Ltd. Vs. Deputy Commissioner of Central Excise, Gauhati another**⁷, **Kumkum Tentiwal Vs. State of UP**⁸ Writ (C) No.38578 of 2018 decided on 11.12.2018 by Allahabad High

⁴ 2019 (20) SCC 47

⁵ 2014 (6) SCC1

⁶ 2021 SCC Online SC 334

⁷ 2015 (8) SCC 519

⁸ 2019(134) ALR 103

Court to contend that inspite of alternative remedy, writ petition is maintainable and principles of Natural Justice are required to be complied with even if there is no provision within the statute. He further places reliance upon ***United Bank of India Vs. State of West Bengal***⁹ decided by Calcutta High Court to contend that the secured creditor could not have applied under Section 14 to the District Magistrate for taking possession of an immovable property after execution and registration of a conveyance deed of the property sold by the bank under Rule 8 of Security Interest (Enforcement) Rules, 2002.

Analysis

9. This court has heard the arguments advanced by both the sides and carefully perused the records. Keeping in view the preliminary objection raised by the opposite parties following preliminary issues would arise for consideration of this court.
 - i. Whether the District Magistrate is required to grant an opportunity of hearing to the petitioners while examining application filed by the secured creditor under Section 14 of the Act, 2002.

⁹ 2017 140 CLA 95

- ii. Whether the present petition is maintainable in view of alternative statutory remedy available to the petitioner under Section 17 of the Act, 2002.

Issue No.1

10. Before proceeding further, it would be imperative to examine Section 14 and Section 17 of the Act, 2002 which reads as under:-

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.

- (1) Where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor.

[Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that-

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above.

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a nonperforming asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13, demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall 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]:-

[Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.]

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.]

[(1A) The District Magistrate or the Chief Metropolitan Magistrate may authorize any officer subordinate to him,-

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.]

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate [any officer authorised by the Chief Metropolitan Magistrate or District Magistrate] done in pursuance of this section shall be called in question in any Court or before any authority.

17. [Application against measures to recover secured debts.]–

(1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed,] to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:

[Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.]

[Explanation–For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under this sub-section.]

[(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction–

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by

the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.]

[(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession, of the secured assets to the borrower or other aggrieved person, it may, by order,-

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of section 13.]

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

[(4A) Where-

(i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act, 1882; or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause (i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.]

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.

A perusal of the aforesaid statutory provisions would reveal that if any person is aggrieved of any action taken by the secured creditor under Section 13(4), the remedy available to such person is to file an application before the DRT under Section 17.

Still further, as per Section 34 of SARFAESI Act, 2002 the jurisdiction of the civil court is barred which clearly indicates the intention of the legislature is to avoid conferring of parallel jurisdiction to other courts/authorities. Reading of Section 14 nowhere permits conferring of any power of adjudication or entitlement to determine inter-se rights upon the District Magistrate while examining application under Section 14. Therefore, as far as statutory provisions are concerned, they clearly do not support the contention of the petitioner that the District Magistrate should have afforded an opportunity of hearing especially when neither any adjudicatory functions are to be performed nor any right inter-se the parties are to be determined by the District Magistrate. The only remedy available with the petitioners is to challenge the action of the bank by filing of an application before the DRT under section 17 of the Act, 2002.

- 11.** The aforesaid issue, has been considered by the Hon'ble Supreme Court in the case of **Authorised Officer, Indian Bank V/s V. Visalakshi**¹⁰ where in it has been held as under:-

¹⁰ 2019 (20) SCC 47

“44. Be it noted that Section 14 of the 2002 Act is not a provision dealing with the jurisdiction of the Court as such. It is a remedial measure available to the secured creditor, who intends to take assistance of the authorised officer for taking possession of the secured asset in furtherance of enforcement of security furnished by the borrower. The authorised officer essentially exercises administrative or executive functions, to provide assistance to the secured creditor in terms of State's coercive power to effectuate the underlying legislative intent of speeding the recovery of the outstanding dues receivable by the secured creditor. At best, the exercise of power by the authorised officer may partake the colour of quasi-judicial function, which can be discharged even by the Executive Magistrate. **The authorised officer is not expected to adjudicate the contentious issues raised by the concerned parties but only verify the compliances referred to in the first proviso of Section 14; and being satisfied in that behalf, proceed to pass an order to facilitate taking over possession of the secured assets.**”

[Emphasis supplied]

A careful perusal of the entire judgment makes it apparent that the use of word “Authorised Officer” is actually a reference to either the District Magistrate or the Chief Metropolitan Magistrate within whose jurisdiction the Secured Asset is located and before whom the Secured Creditor/Bank makes an application under Section 14 of the Act, 2002 for seeking the assistance of the “State’s coercive power” to obtain the actual physical possession of the Secured Asset. It is also laid down that the authority after receiving such request under Section 14 of the Act, 2002 is not expected to do any further scrutiny of the matter except to verify from the Secured Creditor whether a notice under Section 13(2) of the Act, 2002 has already been given or not and whether the Secured Asset is located within his jurisdiction or not, and after the amendment inserting the

first proviso therein, the designated authority has to satisfy itself only with regard to the matters mentioned in Clauses (i) to (ix) as per the affidavit filed by the Secured Creditor. There is no adjudication of any kind at that stage.

12. Even a Division Bench of Punjab and Haryana High Court in the case of **Allahabad Bank V/s District Magistrate, Ludhiana**¹¹ (in which one of us J. Jaswant Singh was a member) has in para 28 and 30 held as under :-

“ 28. It therefore becomes necessary to examine the scope of functions to be discharged by the District Magistrate under Section 14 of the Act, 2002. A bare perusal of the said provision reveals that it provides a lawful mechanism to take physical possession of the secured assets which is required to complete the process of transfer as noticed above. The District Magistrate is therefore obligated to provide requisite assistance to the secured creditor on such application having been filed by the secured creditor claiming physical possession of the secured asset subject to the secured creditor filing the 9-point affidavit as has been provided by the proviso inserted to Section 14 by the Act 1 of 2013 w.e.f. 15.01.2013. Section 14 further provides that the District Magistrate is required to record his satisfaction on such application and then proceed to pass suitable orders for taking possession of the secured asset. Such recording of satisfaction is only to be restricted with regard to the factual correctness of the affidavit filed by the secured creditor and cannot be stretched to include any quasi- judicial or an adjudicatory function. Hon'ble Supreme Court in **Standard Chartered Bank v. Noble Kumar**¹² held as under :-

" 26. An analysis of the 9 sub-clauses of the proviso which deal with the information that is required to

¹¹ (2021) Vol.203 PLR 690

¹² 2013 (9) SCC 620

be furnished in the affidavit filed by the secured creditor indicates in substance that (i) there was a loan transaction under which a borrower is liable to repay the loan amount with interest, (ii) there is a security interest created in a secured asset belonging to the borrower, (iii) that the borrower committed default in the repayment, (iv) that a notice contemplated under Section 13(2) was in fact issued, (v) in spite of such a notice, the borrower did not make the repayment, (vi) the objections of the borrower had in fact been considered and rejected, (vii) the reasons for such rejection had been communicated to the borrower etc.

27. 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. "

[Emphasis supplied]

30.....**It thus clear, that the District Magistrate does not assume any adjudicatory function while examining the application of the secured creditor under Section 14 of the Act, 2002. For the same reason, we find that it would amount to no illegality if an order is passed without effective service upon the borrowers being in the nature of execution process pursuant to statutory notices served under Section 13(2) and (4) as envisaged under the scheme of the Act, 2002. Though, it would be desirable that before proceeding to take actual physical possession by the officer so deputed by the District Magistrate, a reasonable notice of say 15 days be served on the occupant so that they are not taken by surprise.** It is also to be noticed that in case, a person who is aggrieved of such order, is not remediless as an order under Section 14, has been held to be an action under Section 13(4) of the Act, 2002 and any person aggrieved of the same, shall have a cause of action to

challenge the same by filing an application under Section 17 of the Act, 2002. [refer to Para 20 of the judgment of Hon'ble Supreme Court in **Kaniyalal Lalchand Sachdev v. State of Maharashtra¹³**]. Similarly, we find that in case if the secured creditor is aggrieved of any action of the District Magistrate or the manner and mode of its enforcement, not involving adjudication of rights of any other secured creditor, the remedy under writ jurisdiction would be available to such a secured creditor. This is because, Section 17 of the Act, 2002 can be invoked only in case, if the applicant is aggrieved of the action of the secured creditor, while in the instant case, the grievance of the secured creditor is against the non-implementation of its rights under Section 14 of the Act, 2002.”

[Emphasis supplied]

- 13.** Ld. Counsel for the Petitioners though have relied upon various judgments to contend that principles of natural justice are attracted even to the administrative proceedings including the one before District Magistrate. We have carefully examined the said judgments and are of the view that the same would not be applicable to present case. In **Radhakrishnan Industries¹⁴**, Hon'ble Supreme Court had considered a situation where an order of provisional attachment passed by Joint Commissioner while exercising the powers of the Commissioner which was held to be ultra-vires of Section 83 of the Himachal Pradesh Goods and Service Tax Act, 2017 (hereinafter referred to as “Act,

¹³ 2011 (2) SCC 782

¹⁴ Supra 6

2017”). It was further held that the Joint Commissioner was acting as a delegate of the powers of the Commissioner and consequently remedy of appeal against the order of Joint Commissioner would not be available under section 107(1) of the Act, 2017 and hence writ petition was held to be maintainable. However, in the instant case order passed by the District Magistrate is apparently neither beyond nor contrary to Section 14 of the Act, 2002 and hence appeal before DRT is available as held by Hon’ble Supreme Court in **Kanaiyalal Lalchand Sachdev**¹⁵ wherein it has been held as under:-

“20. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT.”

[Emphasis supplied]

14. The next judgment relied upon by the petitioners is **Dharampal Satyapal Ltd. V/s Deputy Commissioner of Central Excise, Gauhati**¹⁶ wherein it was held that even administrative

¹⁵ Supra 2

¹⁶ (2015) 8 SCC 519

decisions of State authorities which results into civil consequences, would require of compliance of principles of natural justice. The said judgement would not be applicable because in the cited case, the Inquiring Authority was competent to determine rights inter-se the parties and hence hearing was held to be necessary. Whereas in the present District Magistrate is not empowered to adjudicate or determine any inter-se rights and hence question of opportunity of hearing or resultant prejudice does not arise. Further, the said order is appealable before DRT and therefore it cannot be said that principles of natural justice have been violated or any prejudice has been caused to the petitioner on account of passing of the aforesaid order by the District Magistrate. Therefore, the said judgement would not apply to the present case.

15. The next judgement relied upon by the petitioners is ***United Bank of India***¹⁷ by High Court of Calcutta wherein in para. 22 it has been held that a secured creditor cannot apply to the District Magistrate for seeking assistance to take physical possession under Section 14 after conducting sale in favor of auction purchaser. We do not agree with this view because in

¹⁷ Supra 3

the subsequent judgement of Hon'ble Supreme Court in the case of **ITC Ltd V/s Blue Coast Hotels Limited**¹⁸ it has been held as under :-

“50. In this case, the creditor did not have actual possession of the secured asset but only a constructive or symbolic possession. The transfer of the secured asset by the creditor therefore cannot be construed to be a complete transfer as contemplated by section 8 of the Transfer of Property Act. The creditor nevertheless had a right to take actual possession of the secured assets and must therefore be held to be a secured creditor even after the limited transfer to the auction purchaser under the agreement. **Thus, the entire interest in the property not having been passed on to the creditor in the first place, the creditor in turn could not pass on the entire interest to the auction purchaser and thus remained a secured creditor in the Act.**”

[Emphasis supplied]

It has thus been authoritatively held that secured creditor is entitled to maintain an application before the District Magistrate even after the sale, as the transfer by the secured creditor shall remain incomplete till complete transfer is effected in favour of the auction purchaser which includes transfer of possession as well. The judgment does not support the case of petitioners.

- 16.** The next judgement relied upon by the counsel for the petitioner is **Kumkum Tentiwal vs State Of U.P.**¹⁹ by Allahabad High Court wherein it has been held that the District Magistrate is

¹⁸ 2018 (15) SCC 99

¹⁹ 2019(134) ALR 103

required to comply with principles of natural justice while examining application under Section 14 of the Act, 2002. We respectfully do not agree with the aforesaid view. Firstly, reliance placed in the aforesaid judgement upon the judgement of Hon'ble Supreme Court in the case of **Harshad Govardhan Sondagar**²⁰ which pertained to petition filed by tenant contending that since he had not availed of any credit facility, he has not been served with any notice under Section 13 and therefore, Supreme Court permitted the tenant to make submissions before the District Magistrate while examining application of the bank under Section 14. Further, unamended Section 17 which existed at that point of time did not provide for any specific remedy for the tenant to file an application under Section 17 before the DRT. However, subsequently Section 17 (4-A) was added by way of amendment w.e.f. 01/09/2016 and remedy of filing an application by a tenant before the DRT was specifically provided for. Secondly, Hon'ble Supreme Court in **Authorised Officer Indian Bank (supra)** has held that District Magistrate has no power of adjudication while entertaining an application under Section 14 of the Act, 2002.

²⁰ Supra 5

Therefore, the said judgement would not advance the case of the petitioners.

17. As regards the contention of the petitioners that in the earlier round of litigation i.e. **WP (C) No. 1404 of 2019** this Court while disposing of the petition vide order dated 21/01/2019 had directed the District Magistrate to pass an order after affording an opportunity of hearing to all the parties, it is to be noted that since District Magistrate, as noticed above, does not perform any adjudicatory function no prejudice is suffered by the petitioners on account of not having been granted opportunity of hearing before the District Magistrate. The petitioners if aggrieved, have remedy under section 17 before the DRT. Consequently, this argument is rejected

18. In view of above, the question of law is answered in negative and it is held that the petitioners were not entitled for opportunity of hearing before the District Magistrate before passing of the impugned order under Section 14 of the Act, 2002. We hasten to add that before taking actual physical possession the duty officer would be bound to serve and affix notice of 15 days intimating the date when physical possession

is scheduled to be taken as held by this Court in ***Bajaj Finance V/s Ali Agency***²¹.

Issue No. 2

- 19.** Ld. counsel for the respondent has raised a preliminary objection regarding the maintainability of the present petition which lays challenge the order passed by the District Magistrate under Section 14 and consequently there is an alternative statutory remedy available to the petitioner by filing of an application before the DRT under section 17 of the Act, 2002.
- 20.** On the other hand, Ld. counsel for the petitioner has relied upon the judgement of Hon'ble Supreme Court in the case of ***Harshad Govardhan Sondagar***²² to contend that writ petition is maintainable against the order passed by the District Magistrate under Section 14 of the Act, 2002.
- 21.** As noticed above, Hon'ble Supreme Court in ***Kanaiyalal Lalchand Sachdev V/s State of Maharashtra***²³ has held that order passed by the District Magistrate under Section 14 would amount to an action under Section 13 (4) of the Act, 2002 and

²¹ Supra 1

²² Supra 5

²³ Supra 2

consequently can be challenged before the DRT under Section 17 of the Act, 2002.

22. As regards the judgement of Hon'ble Supreme Court in the case of **Harshad Govardhan Sondagar**²⁴ is concerned, it has been held by the Hon'ble Supreme Court in para 29 as under :-

"29. Sub-section (3) of section 14 of the SARFAESI Act provides that no act of the Chief Metropolitan Magistrate or the District Magistrate or any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of Section 14 shall be called in question in any court or before any authority. The SARFAESI Act, therefore, attaches finality to the decision of the Chief Metropolitan Magistrate or the District Magistrate and this decision cannot be challenged before any court or any authority. But this Court has repeatedly held that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or Court to examine such a decision will not be a bar for the High Court or this Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by the Constitution. To quote, the observations of this Court in *Columbia Sportswear Company v. Director of Income Tax, Bangalore* [(2012) 11 SCC 224]:

"17. Considering the settled position of law that the powers of this Court under Article 136 of the Constitution and the powers of the High Court under Articles 226 and 227 of the Constitution could not be affected by the provisions made in a statute by the Legislature making the decision of the tribunal final or conclusive, we hold that sub-section (1) of Section 245S of the Act, insofar as, it makes the advance ruling of the Authority binding on the applicant, in respect of the transaction and on the Commissioner and income-tax authorities

²⁴ Supra 5

subordinate to him, does not bar the jurisdiction of this Court under Article 136 of the Constitution or the jurisdiction of the High Court under Articles 226 and 227 of the Constitution to entertain a challenge to the advance ruling of the Authority."

In our view, therefore, the decision of the Chief Metropolitan Magistrate or the District Magistrate can be challenged before the High Court under Articles 226 and 227 of the Constitution by any aggrieved party and if such a challenge is made, the High Court can examine the decision of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, in accordance with the settled principles of law."

[Emphasis supplied]

It is to be noticed that under un-amended Section 17 (as it then was) there was no specific remedy available for the tenant to challenge the action of secured creditor to take possession, before the DRT. The tenant not being a borrower was also not served with any prior notice under Section 13. In these circumstances, Supreme Court permitted tenant to raise submissions before the District Magistrate in proceedings under Section 14. However, subsequently after the aforesaid judgment, Section 17 (4-A) was added by virtue of amendment w.e.f. 01.09.2016 and remedy of filing application before DRT was specifically conferred upon the tenant. The judgment therefore cannot be applied post amendment of the statute to contend that hearing before the District Magistrate is called for, moreso

when the said case pertained to a tenant as opposed to the present case, where none of the petitioners claim themselves to be tenants and are actually borrower/guarantor. Further, subsequently Hon'ble Supreme Court in **Authorised Officer Indian Bank Vs. D. Visalakhi**²⁵ has held that District Magistrate has no power of adjudication. Therefore, the said judgment is also of no help the petitioners.

- 23.** Still further, it is to be noticed that Hon'ble Supreme Court in **Kanhaiya Lal Chand Sachdev**²⁶ has already held that an order passed by the District Magistrate is an order U/s 13(4) and consequently, appealable before DRT. The Judgment of **Harshad Govardhan Sondagar**²⁷, has not taken into consideration the previous judgment of **Kanhaiya Lal Chand Sachdev**²⁸. The conflicting views of both these co-ordinate bench judgments were considered by a Division Bench of Punjab and Haryana High Court in **Punjab Chemicals Vs. District Magistrate-cum-Deputy Commissioner, Ludhiana**²⁹ wherein in para 3,7 to 10 it was held as under:-

²⁵ (2019) 20 SCC 47

²⁶ Supra 2

²⁷ Supra 5

²⁸ Supra 2

²⁹ 2014 (51) RCR 438

“3. The petitioner has an alternative remedy of approaching the Debts Recovery Tribunal against the order passed by the District Magistrate in terms of Section 17(1) of the Act. In **Kanaiyalal Lal Chand Sachdev v. State of Maharashtra, (2011) 2 SCC 782**, the Court held that against an action taken under Section 14, the remedy lies to move an application to the Tribunal. The Court observed:-

"22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT. 23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act. It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person."

XXX

संयुक्त न्याये

XXXXX

7. The action under Section 14 by the District Magistrate is to give effect to the action of the Bank to take possession of the secured asset. The order of the District Magistrate is to aid the effort of the Bank to realise secured assets. It has no independent existence but an order analogous to execution proceedings. Therefore, in terms of the judgments referred to above, the order of District Magistrate would be appealable before the Debt Recovery Tribunal.

8. It may be noticed that recently the Hon'ble Supreme Court in **Harshad Govardhan Sondagar v.**

International Assets Reconstruction,³⁰ has observed that the remedy under Section 17 of the Act, is not available to a lessee in the case of his dispossession by the secured creditor. The lessee has a liberty to challenge the order passed by the District Magistrate in accordance with power conferred under Article 226 of the Constitution before the High Court. However, the judgments in three quoted reports were not brought to the notice of the Court. The Court observed as:-

"32. When we read sub-section (1) of section 17 of the SRFAESI Act, we find that under the said sub-section "any person (including borrower)", aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under the chapter, may apply to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken. We agree with Mr Vikas Singh that the words "any person" are wide enough to include a lessee also. It is also possible to take a view that within 45 days from the date on which a possession notice is delivered or affixed or published under sub-rules (1) and (2) of Rule 8 of the Security Interest (Enforcement) Rules, 2002, a lessee may file an application before the Debts Recovery Tribunal having jurisdiction in the matter for restoration of possession in case he is dispossessed of the secured asset. But when we read sub-section (3) of section 17 of the SRFAESI Act, we find that the Debts Recovery Tribunal has powers to restore possession of the secured asset to the borrower only and not to any person such as a lessee. Hence, even if the Debts Recovery Tribunal comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor are not in accordance with the provisions of the Act, it cannot restore possession of the secured asset to the lessee. Where, therefore, the Debts Recovery Tribunal considers the application of the lessee and comes to the conclusion that the lease in favour of the lessee was made prior to the creation of mortgage or the lease though made after the creation of mortgage is

³⁰2014(6) SCC 1

in accordance with the requirements of Section 65A of the Transfer of Property Act and the lease was valid and binding on the mortgagee and the lease is yet to be determined, the Debts Recovery Tribunal will not have the power to restore possession of the secured asset to the lessee. In our considered opinion, therefore, there is no remedy available under section 17 of the SRFAESI Act to the lessee to protect his lawful possession under a valid lease."

9. Thus, there is apparent conflict between the Coordinate Benches of the Hon'ble Supreme Court. A Full Bench of this Court in ***M/s Indo Swiss Time Limited Dundahera v. Umrao and others***,³¹ has examined the issue as to which of the contradictory judgments passed by the coordinate Bench of the Superior Court, is to be followed. It was held that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The Court held as under:-

"23. When judgments of the Superior Court are of co-equal Benches and therefore of matching authority then their weight inevitably must be considered by the rationale and the logic thereof and not by the mere fortuitous circumstances of the time and date on which they were rendered. It is manifest that when two directly conflicting judgments of the superior Courts and of equal authority are extent then both of them cannot be binding on the Courts below. Inevitably a choice though a difficult one, has to be made in such a situation. On principle it appears to me that the High Court must follow the judgment which appears to it to lay down the law more elaborately and accurately. The mere incidence of time whether the judgments of co-equal Benches of the Superior Court are earlier or later is a consideration which appears to me as hardly relevant."

10. After hearing learned counsel for the petitioner, we find that the petitioner has an effective alternative remedy to approach the Debts Recovery Tribunal,

³¹ 1981 PLR 335

under Section 17 of the Act, in terms of the judgments referred to above.

11. In view of the contradictory judgments of the Coordinate Benches of the Hon'ble Supreme Court, we are more inclined to follow the earlier judgments of the Hon'ble Supreme Court, which provide a remedy to the borrower/lessee against an action of the District Magistrate under Section 14 of the Act. **Such course provides a remedy to the lessee including the borrower, whereas in the absence of such course, the remedy would be to approach this Court, wherein it will not be appropriate to decide the questions of fact and/or mixed questions of law and facts. It would also lead to confusion amongst the borrowers and/or the lease as to which forum they should invoke. It would be in interest of justice that all actions of the secured creditors or of the District Magistrate are firstly challenged under Section 17 of the Act before the Tribunal."**

[Emphasis supplied]

24. As regards the contentions of the petitioner that property was already attached by the Income Tax Department, before the same was mortgaged we find that the said issue cannot be adjudicated in the present proceedings for the reason that firstly, it is a disputed question of fact as regard the date of mortgage and the date when the property was attached; as also whether such attachment actually lead to creation of a charge in terms of the section 100 of the Transfer of Property Act, 1882 or not as has been extensively dealt with by a Division Bench of Punjab and

Haryana High Court in **Kamla Engg. And Steel Industries V/s Punjab National Bank**³² (Para 22). Secondly, the argument that District Magistrate was required to adjudicate regarding the enforceability of the charge of mortgage by the secured creditor is untenable in view of the judgment of Hon'ble Supreme Court in **Standard Chartered Bank V/s V. Noble Kumar**³³ wherein it has been held that 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. Therefore, District Magistrate could not have determined the issue of enforceability of charge of the bank nor could have considered the argument of the petitioner that the transaction was void in terms of Section 281 of the Income Tax Act, 1961. Thirdly, this issue cannot be adjudicated in absence of Income Tax Department, which is seen to be contesting party but not impleaded in the present petition. Consequently, for the aforesaid two reasons we refrain ourselves from commenting on the

³² 2020 (4) PLR 669

³³ Supra 12

merits of this issue and leave it open to the petitioner to raise the same before DRT under Section 17 of the Act, 2002.

25. It is true that that a rule of discretion by exercise of self-restraint is evolved by the court in exercise of the discretionary equitable writ jurisdiction (See **Vetindia Pharmaceuticals Limited v. State of Uttar Pradesh**³⁴) and in appropriate cases the Courts may intervene in exercise of its jurisdiction under Article 226 of the Constitution of India but keeping in view the disputed questions of facts and the inter-se rights of the parties which are yet to be examined as canvassed in the present petition, we do not deem it appropriate to invoke our equitable jurisdiction under Article 226 of the Constitution of India and leave the parties to avail alternative remedies available under the Statute.

26. Accordingly, Issue No. 2 is answered in negative and it is held that the present petition(s) is/are not maintainable as the petitioners have efficacious alternative statutory remedy under Section 17 of the Act, 2002.

³⁴ 2021 (1) SCC 804)

CONCLUSION

27. In view of above, preliminary objection of the Opposite Parties/Punjab National Bank (PNB) is sustained and both writ petitions are accordingly dismissed being not maintainable. The petitioners in both the cases are relegated to avail the alternative statutory remedy under Section 17 of the Act, 2002 in accordance with law.

(Jaswant Singh)
Judge

M.S. Raman, J. I agree

(M. S. Raman)
Judge

Orissa High Court, Cuttack

The 29th June, 2022/Basudev