IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.888 OF 2022

SANJAY PARSHURAM JADHAV)...PETITIONER

VS.

STATE OF MAHARASHTRA & ORS.)...RESPONDENTS

Mr. S.M. Gorwadkar, Senior Advocate i/b. Mr. Niranjan A. Mogre, Advocate for the Petitioner.

Ms. Reena A. Salunkhe, AGP for the Respondent-State.

Mr. Vishal Kanade a/w. Mr. Nikhil Rajani a/w. Ms. Apoorva Kulkarni a/w. Mr. Rupak Swanyikar i/b. V. Deshpande & Co., Advocate for Respondent No.3.

CORAM: DIPANKAR DATTA, CJ &
V. G. BISHT, J.

DATE : FEBRUARY 2, 2022

P.C.:

1. Order dated 12th January 2021 was passed by the District Magistrate cum District Collector, Pune, under section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter "the SARFAESI Act" for short) on an application being made by the respondent no.3 (hereafter "the bank", for short) appointing the Executive Magistrate cum Resident Naib Tahsildar, Haveli (Pune) to take possession of the secured asset and to deliver the same to the bank. On the basis of such order of the district magistrate, the magistrate cum

tahsildar issued a notice of possession dated 28th October 2021 notifying that possession of the secured asset would be taken over and delivered to the bank on 9th December 2021 at 9.00 a.m.

2. In this writ petition, the said possession notice 28th October 2021 is under challenge. It is claimed that since the petitioners did not have access to the order of the district magistrate dated 12th January 2021, the same could not be challenged in this writ petition. However, such order of the district magistrate having since been obtained, a draft amendment is moved on behalf of the petitioner seeking to lay a challenge thereto. The draft amendment is allowed. During the course of the day, amendments in terms of the draft be incorporated in the writ petition.

3. Although we are of the view that the petitioner has a remedy before the Debts Recovery Tribunal under section 17 of the SARFAESI Act against the order of the district magistrate as well as the notice of possession issued in pursuance thereof, we are inclined to entertain this writ petition because it has been contended on behalf of the petitioner that a jurisdictional error has been committed by the district magistrate while allowing the application of the bank under section 14 of the SARFAESI Act. We propose to examine such contention in the course of the following discussion.

4. There is a serious dispute in this case as to whether the demand notice under section 13(2) of the SARFAESI Act was at all served on the petitioner.

5. Documents have been brought to our notice by Mr. Kanade, learned counsel for the bank, that the demand notice was duly dispatched by registered post to the petitioner's address as available with the bank and that the tracking report would also show that the envelope had not been returned to the bank; therefore, he contends that it ought to be presumed that the envelope containing the demand notice was duly served on the petitioner. That apart, Mr. Kanade submits that as and by way of an abundant caution, the demand notice was published in two newspapers having wide publication in the State of Maharashtra and, therefore, the petitioner must be held to have constructive notice of the action taken by the bank under section 13(2) of the SARFAESI Act. Mr. Kanade also invites our attention to page no.110 of the paperbook (Exhibit E), which is part of the affidavit-in-reply of the bank, to contend that the petitioner in writing had admitted receipt of the demand notice. It is, therefore, his contention that the claim raised on behalf of the petitioner that he did not receive the demand notice is absolutely incorrect and an afterthought to avoid the rigours of the SARFAESI Act.

6. Mr. Gorwadkar, learned senior counsel appearing for the petitioner, however, vehemently opposes the claim of the bank and submits that the petitioner never received the demand notice. Our attention has been invited to paragraph 4-A of the writ petition in this behalf. It is his further contention that the tracking report does not show that the envelope reached the addressee. Referring to the publication of the demand notice in the newspapers, Mr. Gorwadkar contends that it is not a measure envisaged in section 13 of the SARFAESI Act; therefore, the very act of the bank in seeking to publish the demand notice in the newspapers is sufficient indication that the bank itself was not sure of service of the demand notice on the petitioner. Mr. Gorwadkar further invites our attention to the order in vernacular passed by the district magistrate under section 14 of the SARFAESI Act and contends that he has not recorded a satisfaction that the demand notice was duly served on the petitioner. Mr. Gorwadkar has also brought to our notice that although the alleged letter containing admission (at page no. 110 of the paperbook) bears the signature of the petitioner, the contents thereof are in the handwriting of some other individual. According to him, at the time of sanction of the loan, the bank had obtained signatures of the petitioner on certain blank papers and he alleges that one such blank paper might well have been utilized by the bank for the purpose of preparing such letter. He, thus, submits that the petitioner cannot be bound by such letter which is disputed.

7. We need not enter into the arena of dispute urged by Mr. Kanade based on the letter at page no. 110 of the paperbook, since the same does not find reference in the order of the district magistrate. We, however, find the submissions advanced by Mr. Gorwadkar to be of substance.

8. In terms of the provisions of section 14 of the SARFAESI Act, the District Magistrate, Pune was under an obligation to satisfy himself, *inter alia*, that the requirements of section 13

of the SARFAESI Act have been complied with by the bank being the secured creditor. These requirements would, *inter alia*, include service of the demand notice under Section 13(2) of the SARFAESI Act on the borrower (the petitioner). Without service of such demand notice, the secured creditor cannot set the ball to roll under Chapter III of the SARFAESI Act to enforce a security interest. A categorical submission has been advanced on behalf of the petitioner by Mr. Gorwadkar, referring to the statement made in paragraph 4-A of the writ petition, that he had not received such notice. The presumption of due dispatch of the demand notice to the petitioner by registered post having been rebutted, it was the duty of the bank to produce clinching evidence in support of its claim. There is no clinching evidence on record to establish that the demand notice, dispatched by the bank by registered post, was actually received by the petitioner; hence, we are constrained to hold on facts and in the circumstances that the requisite compliance of the statutory provisions had not been made by the bank for which there was no occasion for it to approach the District Magistrate, Pune under section 14 of the SARFAESI Act or for the district magistrate to pass an order allowing the application of the bank by appointing the magistrate cum tahsildar to take possession of the secured asset. Also, Mr. Gorwadkar has rightly pointed out that the district magistrate did not return a positive finding that the demand notice was served on the petitioner. The District Magistrate, Pune having committed an error of a jurisdictional fact, the writ petition is well-nigh maintainable despite the availability of the alternative remedy to the petitioner under section 17 of the SARFAESI Act. It is on this short point that we are inclined to interfere.

9. In the result, the order under section 14 of the SARFAESI Act dated 12^{th} January 2021 stands set aside. As a consequence thereof, the possession notice would also stand set aside. This order shall, however, not preclude the bank to proceed afresh by issuing demand notice under section 13(2) of the SARFAESI Act in accordance with law.

10. Nothing contained in this order shall also preclude the petitioner from approaching the secured creditor with a proposal for one-time settlement of dues, within a fortnight from date. If such an approach is made, the bank may decide the proposal within a further period of a fortnight thereafter.

11. Needless to observe, if the proposal of the petitioner for one-time settlement of the dues is accepted by the bank, it may set such terms, as it deems fit, for compliance by the petitioner to clear his liability.

12. All contentions, except that which has been decided by this order, are kept open.

(V. G. BISHT, J.) **(CHIEF JUSTICE)**

AVK