

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CWP-435-2022

Reserved on: 20.07.2022

Date of Decision: 03.08.2022

Kotak Mahindra Bank Ltd.

. . . . Petitioner

Vs.

The District Magistrate and another

. . . . Respondents

CORAM: HON'BLE MR JUSTICE M.S. RAMACHANDRA RAO
HON'BLE MR JUSTICE H.S. MADAAN

Present: - Mr.Manish Jain, Advocate, Mr. Mayur Kanwar, Advocate, and
Mr.Siddhant Jain, Advocate, for the petitioner.

Mr.Vaibhav Sharma, Advocate, for respondents No.2(ii) & 2(iv).

Mr.Sandeep Vermani, Addl. A.G., Punjab.

M.S. RAMACHANDRA RAO, J.

Backgrounds of the case

This Writ Petition is filed by the petitioner-Bank to quash the order dt.15.12.2021 passed by the District Magistrate, Ludhiana (respondent No.1) rejecting petitioner's request to pass orders under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [for short 'the SARFAESI Act'] for delivery of possession of a secured asset owned by respondent No.2 and also mortgaged by him to the petitioner-Bank.

M/s Oswal Spinning and Weaving Mills limited (for short 'the Company') had been granted certain credit facilities by UCO Bank and other financial institutions. In order to secure the credit facilities sanctioned, the Company created security interest by way of creation of mortgage in favor of the lenders on it's moveable and immoveable assets. The said financial

facilities were also secured by the Personal guarantees of respondent No.2 *Raj Pal Oswal* and 2 others.

On account of continuous defaults made by the Company/Guarantors/Mortgagors to discharge the dues, the lenders classified the account of the Company as NPA.

The petitioner Bank acquired the debts/debentures of the lenders under 6 deeds of assignment/transfer dt.6.11.2007 and these assignments were confirmed by the Company and the Guarantors vide Letter of Acceptance dt.26.12.2007.

Pursuant to the assignment of debts/transfer, the petitioner also extended financial facilities to the Company and the Company created a charge on it's moveable and immoveable properties for securing the financial facilities assigned in favor of the petitioner Bank. The said financial facilities were also secured additionally by personal guarantees of respondent No.2 and others.

But on 17.12.2013, the accounts of the Company were declared as NPA by petitioner. So it issued notice dt.4.4.2014 under Section 13(2) of the SARFAESI Act to the Company and guarantors including respondent No.2. calling upon them to pay ` 63,42,83,420.68 as on 04.04.2014 together with interest on contractual rates from 05.04.2014 till payment and/or realization.

Objections to the said notice were filed by the Company and Raj Pal Oswal (respondent No.2) on 29.05.2014 and were also replied by the petitioner on 16.06.2014/25.8.2014 and the amount claimed was modified as Rs.63,37,21,410/-.

The Company filed CWP-10957-2014 before this Court to set aside the notice dt.04.04.2014 issued to it under Section 13(2) of the SARFAESI Act. The said Writ Petition was dismissed as withdrawn on 23.03.2015 with liberty to submit a representation. It then filed a Review application No.160 of 2015 which was also dismissed on 01.04.2015.

The Company again filed CWP-13888-2015 challenging the initiation of proceedings under the SARFAESI Act against the petitioner but the same was dismissed on 11.04.2016 and Review Application No.256 of 2016 seeking review of the said order was also rejected on 16.09.2016. SLP (Civil) No.7124/7125 of 2017 filed by the Company before the Supreme Court was also withdrawn.

Thereafter, the petitioner filed an application on 2.5.2016 under Section 14 of the SARFAESI Act before respondent No.1 seeking its assistance to take over the secured asset belonging to respondent No.2 vide Annexure P13.

Respondent No.2 filed a reply/objections in August 2016 to the said application vide Annexure P14.

Respondent No.1 rejected the application under Section 14 filed by the petitioner on 17.05.2017 on the ground that the petitioner failed to produce the statement of account and there was no material available with him to record his satisfaction to pass an order of possession.

Petitioner challenged it in CWP-18174-2017, which was allowed on 23.04.2021 and a direction was given to respondent No.1 to decide the application under Section 14 of the SARFAESI Act within one week. This order will be discussed more in detail later in this order.

Thereafter respondent No.2 died on 04.05.2021.

Application dt.17.05.2021 (P20) was filed before respondent No.1 on behalf of respondent No.2 by one Ram Parshad Sharma informing respondent No.1 that respondent No.2 died on account of Covid 19 infection, that on account of Covid-19, this High court had stayed dispossession from residential assets by secured creditors in CWP-PIL-77-2021 till 30.6.2021 and the Bank should be directed to proceed in accordance with law.

The petitioner then informed respondent No.1 by way of an affidavit that notice be issued to Ashok Oswal, the son of the deceased-respondent No.2, who had been pursuing this litigation against the bank before respondent No.1 and also this High Court.

Thereafter, Ashok Oswal filed an affidavit stating that the widow and other sons of the deceased/respondent No.2 are also legal heirs and all of them be impleaded and heard in the proceedings before respondent No.1.

Accordingly an application dt.4.8.2021 was moved by the petitioner for the impleadment of all the legal heirs of respondent No.2 i.e. his wife and other children.

This application for bringing on record legal heirs of deceased/respondent No.2 before respondent No.1 was opposed on 22.9.2021 by Ashok Oswal, the son of respondent No.2, contending that the application filed under Section 14 of the SARFAESI Act before respondent No.1 had become infructuous on account of the death of respondent No.2 and the petitioner-Bank has to again start the entire process under the SARFAESI Act afresh by issuing demand notice under Section 13(2) of the SARFAESI Act to all the legal heirs before the proceedings further.

The impugned order dt.15.12.2021 of respondent No.1

This plea was accepted in the impugned order (P1) by respondent No.1 on 15.12.2021.

The respondent No.1 held that after the death of respondent No.2 Rajpal Oswal, his heirs come under the definition of '*debtor*' as per Section 2 of the SARFAESI Act; in view of certain decisions rendered by the Andhra Pradesh High Court (in **G. Manohar Vs. Indian Bank**¹) and Madras High Court (in **S. Suhaina Banu and others Vs. Indian Bank**²), a fresh notice must be given to the heirs under Section 13(2) of the SARFAESI Act; so no action need be taken on the application of the Bank under Section 14 of the SARFAESI Act filed on 04.08.2021; and the Bank may re-file it after complying the necessary proceedings under the SARFAESI Act.

This is impugned in the Writ Petition by the Bank.

Contentions of counsel for petitioner

Counsel for the petitioner contended that there is no necessity to issue a notice under Section 13(2) of the SARFAESI Act afresh to all the legal heirs of the deceased/respondent No.2 and respondent No.1 erred in taking such a view.

It is pointed out that the deceased/respondent No.2 was a guarantor to the loan granted to the Company and during his life time notice under Section 13(2) of the SARFAESI Act had been served on him and he had replied to it by filing objections which were also considered and rejected; that thereafter, the application under Section 14 of the SARFAESI Act had been filed on 02.05.2016 which was kept pending by respondent No.1 for ten months and ultimately rejected on the ground that the account statement was

¹ 2010 (1) Bank J 352 = MANU/AP/0262/2009 = 2009(5) ALD 532

VIVEK PAHWA² 2011 (1) CWC 448= MANU/TN/3149/2010
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not placed on record. But the said order also was set aside in CWP-18174-2017 on 23.04.2021 and a direction was given to respondent No.1 to decide the same afresh; and respondent No.1 has again erroneously rejected it by passing the impugned order.

Counsel for the petitioner placed reliance on the following judgments:

1. *Authorised Officer Tamil Nadu Mercantile Bank Ltd. Vs. Devi Prasad*³
2. *Shri Rajan Gupta and others Vs. Bank of India and another*⁴
3. *Kamal Gupta Vs. Bank of India*⁵
4. *Housing Development Finance Corporation Ltd. Vs. Government of Kerala and others*⁶.

Contentions of legal heirs of respondent No.2

Counsel for the legal heirs of respondent No.2/deceased supported the order passed by respondent No.1 and reiterated their submission that a fresh notice under Section 13(2) of the SARFAESI Act should be issued to all the legal heirs. He placed reliance on the following judgments: -

1. *S. Suhaina Banu and others Vs. Indian Bank and others (2 supra)*
2. *Nileshkumar N. Kotak and others Vs. Union of India*⁷
3. *Sapna Awasthi Vs. Bank of Maharashtra*⁸

The questions for consideration

In view of the rival submissions, the questions to be considered are:

- (i) *Whether it is necessary for a secured creditor to issue a fresh notice under Section 13(2) of the SARFAESI Act to the*

³ (Kerala High Court) (W.A. No.1754 of 2017)

⁴ (Delhi High Court) (WP(c) No.1508 of 2007)

⁵ 2007 SCC Online Del 1473

⁶ 2013 SCC Online Ker 24249

⁷ 2015 GH (2) 459

⁸ II (2017) BC65 (DRAT)

legal heirs of a deceased guarantor or a borrower if the guarantor or borrower dies after initiation of proceedings of the secured creditor against them under Section 14 of the SARFAESI Act?; and

(ii) Whether the proceedings already initiated under Section 14 of the SARFAESI Act prior to a guarantor's/borrower's death automatically abate and they cannot be continued against his legal heirs on the basis of the notice under Section 13(2) of the SARFAESI Act issued to the deceased guarantor/borrower during his life time?

CONSIDERATION BY THE COURT

From the facts narrated above, it is clear that the petitioner-Bank during the life time of respondent No.2/guarantor had issued notice under Section 13(2) of the SARFAESI Act to him and also the Company vide Annexure P2 dt. 04.04.2014 to which he and the Company had replied on 29.05.2014, and on 16.06.2014 the petitioner considered these objections and later issued revised notice 25.08.2014 to him and to the Company enclosing a revised account statement and slightly reducing it's claim to `63,37,21,410/-.

It is also not in dispute that the Company challenged it in the CWP-10975-2014 but it was withdrawn on 23.03.2015.

As per the decision of the Supreme Court in **Standard Chartered bank v. Noble Kumar**⁹ it is not mandatory for a secured creditor to first issue a notice under Sec. 13 (4) of the SARFAESI Act and try to take possession and only on it's failure approach the District magistrate/Chief

General magistrate under Sec.14 of the SARFAESI Act. The Supreme Court had held:

“26. It is in the abovementioned background of the legal frame of Sections 13 and 14, we are required to examine the correctness of the conclusions recorded by the High Court. Having regard to the scheme of Sections 13 and 14 and the object of the enactment, we do not see any warrant to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under Section 13(4) and on facing resistance, he may still approach the Magistrate under Section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under Section 14. The submission that such a construction would deprive the borrower of a remedy under Section 17 is rooted in a misconception of the scope of Section 17.

... ..

36. Thus, there will be three methods for the secured creditor to take possession of the secured assets:

36.1. (i) The first method would be where the secured creditor gives the requisite notice under Rule 8(1) and where he does not meet with any resistance. In that case, the authorised officer will proceed to take steps as stipulated under Rule 8(2) onwards to take possession and thereafter for sale of the secured assets to realise the amounts that are claimed by the secured creditor.

36.2. (ii) The second situation will arise where the secured creditor meets with resistance from the borrower after the notice under Rule 8(1) is given. In that case he will take recourse to the mechanism provided under Section 14 of the Act viz. making application to the Magistrate. The Magistrate will scrutinise the application as provided in Section 14, and then if satisfied, appoint an officer subordinate to him as provided under Section 14(1-A) to take possession of the assets and documents. For that purpose the Magistrate may authorise the officer concerned to use such force as may be necessary. After the possession is taken the assets and documents will be forwarded to the secured creditor.

36.3. (iii) The third situation will be one where the secured creditor approaches the Magistrate concerned directly under Section 14 of the

Act. The Magistrate will thereafter scrutinise the application as provided in Section 14, and then if satisfied, authorise a subordinate officer to take possession of the assets and documents and forward them to the secured creditor as under clause 36.2.(ii) above.” (emphasis supplied)

So without issuing any notice under Sec14 of the SARFAESI Act,2002, it was open to the petitioner Bank to approach the respondent No.1 seeking restoration of possession of the secured asset owned by the respondent No.2.

It is also not in dispute that a petition under Section 7 of the Insolvency and Bankruptcy Code, 2016 against the principal borrower i.e. Company was admitted by the NCLT, Chandigarh in CP(IB) 136/Chd/PB/2017 and Corporate Insolvency Resolution Process was initiated on 13.10.2018 by virtue of an order of the NCLT. It is also not in dispute that no resolution plan was received and on 13.12.2019 and the NCLT had passed an order liquidating the Company/principal borrower.

Section 2(f) of the SARFAESI Act defines the terms ‘borrower’ as under: -

2(f) “borrower” means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a [asset reconstruction company] consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance [or who has raised funds through issue of debt securities].”

By virtue of the above definition even a guarantor would fall within the definition of the term “borrower” as defined in Sec.2(f) of the SARFAESI Act.

Thus a guarantor like the deceased-respondent No.2 would also fall within the definition of term “*borrower*”.

The question as to whether the provisions of the SARFAESI ACT can be invoked against the legal heirs of a deceased borrower was considered by the Division Bench of the Andhra Pradesh High Court in **G. Manohar (1 supra)**.

The Andhra Pradesh High Court in **G. Manohar (1 supra)** held that the definition of the term “*borrower*” in the SARFAESI Act has to be understood in the light of the object of the Act rather than a literal reading of the said definition; that it is well settled that a literal construction which is opposed to intentions of the legislature cannot prevail and the definition has to be given a meaning which will carry further the objects of the Act; if the said definition is literally read, it will result in an absurd conclusion that the remedy under the Act is available only against the original borrower so long as he lives and that after his death under the said Act, the remedy would not be available; that such a construction would completely defeat the purpose for which the Act was enacted; that under Sec. 2(2) of the SARFAESI Act, words and expressions used and not defined in SARFAESI Act but defined in Indian Contract Act, 1872 or the Transfer of Property Act, 1882 would have the meanings respectively assigned to them in those Acts; and the term ‘mortgager’ and ‘mortgagee’ are dealt with by Sec. 58(a) of the Transfer of Property Act, 1882 and as per Sec.59A *those terms would include the persons deriving title from them and would also include legal representatives who succeed the mortgager by devolution of the property to them.* It held that the legal representatives cannot say that they are not covered by the definition of “*borrower*” because Section 2(2) of the SARFAESI Act provides a reference

that the definition and expressions under the Transfer of Property Act are expressly applicable, and a “*borrower*” being admittedly the mortgager, his liability under the SARFAESI Act cannot be said to have been wiped off on account of his death and his legal representatives are equally bound and stand covered by the definition of the “*borrower*” under the SARFAESI Act.

In **Shri Rajan Gupta and others** (4 Supra), it was again contended that the term “borrower” used in Sec.13(2) of the SARFAESI Act does not include the legal heirs of the borrowers and that the said term defined in Sec.2(f) of the Act cannot extend and does not extend to include legal representatives of the original borrower. The Delhi High Court rejected this plea and held that the word “borrower” used in Section 13(2) of the SARFAESI Act is further qualified by the words ‘*who is under a liability to a secure creditor under a security agreement*’; therefore, the guarantor, who created a mortgage by deposit of title deeds with the secured creditor, would fall within the said expression of the term “*borrower*”; that under Section 2(2) of the SARFAESI Act words and expressions used and not defined in the SARFAESI Act but defined in the Transfer of Property Act or the Contract Act would have the same meanings respectively assigned to them in those Acts; by virtue of Section 59A of the Transfer of Property Act, 1882, the term “mortgager” would be deemed to include reference to persons deriving title from a *mortgagor*; and therefore, with regard to an equitable mortgage created by guarantor his or her legal heirs would also be deemed to be *mortgagors*.

Similar view was also taken in a **Kamal Gupta** (5 Supra) by the Delhi High Court.

The Kerala High Court in **Authorised Officer Tamil Nadu Mercantile Bank Ltd (3 Supra)** considered the question whether proceedings against legal heirs of the borrowers have to be started afresh if he dies after Sec.13(4) proceedings are received by him *before* his death. In that case, the son of a deceased borrower had filed a Writ Petition in the High Court alleging that his father died on 14.6.2014, that the Bank has to initiate afresh proceedings under Sec.13(2) of the SARFAESI Act against all the legal heirs despite such notice having been issued earlier to the deceased during his life time. He sought quashing of a notice issued by an Advocate Commissioner appointed by the Chief General Magistrate in proceedings under Sec.14 of the SARFAESI Act asking the petitioner and other legal heirs to deliver possession of the property to him for handing them over to the secured creditor. A learned single Judge of the Kerala High Court accepted the plea of the petitioner. But a Division Bench of the High Court set aside his order. It held that since the original borrower/mortgagor had submitted objections to the notice under Sec.13(2) during his life time and the same was considered and rejected by the Bank and it had also issued notice under Sec.13(4) thereafter, there is no necessity to issue fresh proceedings to the legal heirs. It held that the proceedings initiated against the original borrowers for enforcement of security interest stand concluded by virtue of intimation served upon them with respect to taking over possession under Sec.13(4) of the SARFAESI Act; and the death of the original borrower occurring at that stage of the proceedings will not result in abatement of the entire steps already taken.

But in **S. Suhaina Banu (2 Supra)** relied upon by the legal heirs of respondent No.2, the Madras High Court had taken a contrary view. In that

case, notice under Section 13(2) of the SARFAESI Act was issued during the life of the *borrower* but before notice under Section 13(4) of the SARFAESI Act was affixed on the property, the *guarantor* had died. Thereafter proceedings under Section 14 of the SARFAESI Act were initiated and the Chief Metropolitan Magistrate passed an order appointed an Advocate Commissioner to take possession of the property but the legal heirs of the deceased were not parties before the Magistrate. It has held that the proceedings initiated against a person while he was alive would automatically stand abated immediately after his or her demise and it was necessary for a secured creditor to again initiate proceedings by issuing a fresh notice under Rule 3 of the Security Interest (Enforcement) Rules, 2002 [for short ‘the Rules’] to the Legal Heirs to the borrower as the legal heir of the borrower would have an opportunity to discharge the liability in 60 days. The Madras High Court took the view that since the object of provisions of sub-section (2) of Sec.13 is to require the borrower/guarantor by notice in writing to discharge in full his liabilities to the secured creditor within 60 days from date of notice, failing which the secured creditor is entitled to exercise all or any of the rights under Sec.13(4) of the Act, the proceedings initiated against the person while he was alive would automatically stand abated immediately after his demise.

In **S. Suhaina Banu (2 Supra)**, notice under Sec.13(2) was issued on 20.9.2008 and was served on the deceased guarantor/mortgagor. She did not file any objections within the 60 days period which would end on 20.10.2008. She died on 23.11.2008, a month later. If she did not file objections within the time provided, and died one month after the time fixed for filing objections, we do not see why her legal representatives (who under

Sec.59A of the Transfer of Property Act,1882 would fall within the definition of the 'mortgagor' as they derive title from her) should again be given another opportunity and further time of 60 days to file objections. The Madras High Court has obviously not noticed that references to 'mortgagors' would include persons claiming through them under Sec59A of the Transfer of Property Act,1882. The legal representatives cannot have a better defence than what she had and so they cannot seek a fresh start to the proceedings.

The instant case is even a better one because the deceased/respondent No.2/guarantor had in fact replied to the notice under Section 13(2) of the SARFAESI Act and his objections had been considered by the Bank and a revised notice issued by the Bank and thereafter proceedings under Section 14 of the SARFAESI Act were initiated. Once the objections of the deceased mortgagor/guarantor had been considered by the Bank, there is no necessity for the Bank to give the legal heirs a fresh opportunity to file objections and give them 60 more days for the said purpose.

The decision in **Nilesh Kumar N.Kotak** (7 supra) cited by the legal heirs of respondent no.2 also cannot be of any assistance to them as in that case, it was held that if notice under Sec.13(2) was issued against a dead person, then his legal heirs must be given such a notice afresh. Such is not the situation in the instant case because the notice under Sec.13(2) was issued to respondent No.2 during his lifetime, he replied /objected to it and the those objections/replies were also considered by the petitioner during his life time.

The decision in **Sapna Awasthi** (8 supra) , the Debt Recovery Appellate Tribunal has taken a view that all legal heirs are entitled to fresh notice under Sec.13(2) of the Act and service of notice on only one legal heir

is not valid. But as noted above, in the instant case such is not the situation since the notice under Sec.13(2) was issued to respondent No.2 during his lifetime, he replied /objected to it and the those objections/replies were also considered by the petitioner during his life time.

Once the legal heirs of the deceased respondent No.2 are impleaded as parties in the proceedings under Section 14 of the SARFAESI Act whatever defences the law permits them to take, they are entitled to take.

As held in **Standard Chartered Bank (9 Supra)**, it is the duty of the secured creditor to furnish an affidavit containing the information required to be furnished to the Magistrate under the proviso to Section 14 of the SARFAESI Act, and the duty of the Magistrate is merely to examine the factual correctness of the assertions made therein and he is not entitled to go into the *legal niceties* of the transactions.

The Supreme Court held that after the Magistrate passes an order after satisfying himself to the factual correctness of the assertions made in the affidavit, he would record his satisfaction and pass appropriate orders regarding taking of possession of the secured asset and thereafter the borrower can avail the remedy under Section 17 of the SARFAESI Act.

This judgment was reiterated in **The Authorised Officer, Indian Bank Vs. D. Visalakshi and another¹⁰** and the Court held that the enquiry by the Magistrate is not one which should result in adjudication of *inter se* rights of the parties in respect of the subject property.

In fact in the order passed on 23.4.2021 inter parties in CWP-18174-2017, the Division Bench has held that if the Magistrate finds that all the information is given in the application under Section 14 of the

SARFAESI Act, then he has no other option but to pass an order allowing the application under Section 14 of the SARFAESI Act and that **the Magistrate has no power to adjudicate and decide the correctness or otherwise of the information which is given in the application.** The Division Bench observed thus: -

“Similarly in Kotak Mahindra Bank Limited’s case (supra), which was decided on 03.05.2018, the Division Bench of the Bombay High Court again had an occasion to consider the provisions of Section 14 of the SARFAESI Act, wherein it was concluded that the Chief Metropolitan Magistrate/District Magistrate is not expected to enter into the aspect relating to the validity of a mortgage or indulge in adjudication of the amount/debt claimed by the bank or a financial institution as this would tantamount to resort to adjudication, which can only be within the jurisdiction of the Debts Recovery Tribunal. It was further held that the Magistrate is required to ascertain where the statements are made by the bank under the 9 clauses below Section 14 (1) of the SARFAESI Act and once he is satisfied that the statements as required in those 9 clauses have been made by the bank in its affidavit, the District Magistrate would proceed to grant the application under Section 14 (3) of the SARFAESI Act.

The Division Bench also held that in the order dt.17.05.2017 passed by the District Magistrate, he had proceeded to embark upon an adjudicatory process of determining the due amount and thus usurped the jurisdiction of the Debt Recovery Tribunal to decide such issues which were beyond his jurisdiction.

So a District Magistrate/Chief Judicial magistrate while exercising jurisdiction under Sec.14 of the SARFAESI Act has a very limited jurisdiction and has no adjudicatory powers.

In our view, even the question of ‘abatement’ of proceedings initiated by the Bank under Sec.14 of the SARFAESI Act against the

deceased guarantor/ mortgagor fall in the arena of ‘adjudication’, which the respondent No.1 had no power or jurisdiction to go into.

Accordingly, the impugned order (P1) dt. 15.12.2021 passed by respondent No.1 is set aside, and the matter is remitted back to him for passing fresh orders within 4 weeks from date of receipt of copy of this order. He shall confine himself to the limits of his jurisdiction as laid down in **Standard Chartered Bank (9 Supra)**, and the order dt. 23.04.2021 in CWP-18174-2017 passed by this Court.

(M.S. Ramachandra Rao)
Judge

03.08.2022
Vivek

(H.S. Madaan)
Judge

- | | |
|-------------------------------|--------|
| 1. Whether speaking/reasoned? | Yes/No |
| 2. Whether reportable? | Yes/No |