

25th July,
2023
(AK)
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W.P.A 16237 of 2023

Kotak Mahindra Bank Limited
Vs.
The State of West bengal and others

Mr. Syed E. Huda
Mr. Soumya Nag
Ms. Niharika Singh
Ms. Shubhangini Singh
Mr. Ashok Kr. Singh

...for the petitioner.

Mr. Jayanta Samanta
Mr. Indumouli Banerjee

...for the State.

Mr. Amitabha Ghosh

...for the respondent no.5.

Ms. Soma Ghosh

...for the respondent nos.6, 7 & 9.

Mr. Subhasis Sen

...for the respondent nos.8 & 10.

Learned counsel for the State, at the outset, contends that this court does not have determination to hear the matter, since it pertains to police inaction.

However, such contention cannot be accepted, since entertaining such an objection would unnecessarily force the litigant to run from one court to another.

More importantly, the allegation made in the writ petition is that the police authorities are not complying with a specific order passed by the District Magistrate,

South 24 parganas under Section 14 of the SARFAESI Act, 2002.

Hence, the allegation is one of violation on the part of the police of a statutory mandate and not mere inaction on the complaint lodged by a complainant.

Hence, strictly speaking, the present grievance pertains to violation of the SARFAESI Act, 2002 by the police authorities and not a mere case of police inaction simpliciter.

Hence, the matter is entertained, since the roster vests determination on this court to hear residuary matters other than those pertaining to police inaction.

Learned counsel for the petitioner submits that the petitioner instituted a proceeding under Section 14 of the 2002 Act and obtained an order from the District Magistrate under the said provision on October 12, 2020.

Thereafter, a plea was taken that the respondent nos.8 and 10 herein filed a civil suit before a competent civil court, where they obtained an injunction restraining the men and agents of the defendants therein from alienating, transferring or disposing of the suit property to any other person or create any sort of third party interest in the schedule property, as well as from changing the nature and character of the suit property.

On such premise, the police authorities are not rendering assistance to implement the specific order of the District Magistrate dated October 12, 2020.

Apart from the fact that the schedule of the property is clearly mentioned in the order under Section 14, the same has also been mentioned in the order to belong to the guarantor, who is not a party to the suit.

That apart, it is contended that the injunction order does not bind the Bank, since the Bank initially made an application for addition of party to the suit but subsequently did not press the same.

It is also submitted that the police authorities are duty-bound under the law to implement the order of the District Magistrate, irrespective of the order of the civil court.

Learned counsel appearing for the respondent nos. 8 and 10 objects to the prayers made in the writ petition and submits that the subsistence of the suit at the behest of the said respondents, who are co-sharers in respect of the property, will be adversely affected, without being a party to the loan or the mortgage transaction with the Bank.

It is, thus, submitted that in the event the order under Section 14 is implemented, the rights of the respondent nos. 8 and 10 will be unduly affected, without

the said respondents being heard in the proceeding before the Magistrate.

That apart, the said respondent insists upon the subsistence of the injunction order, which is still prevailing.

Learned counsel for the respondent/borrower contends that the borrower will be held liable by his co-sharers in the event the Section 14 order is implemented with regard to the entire property.

It is specifically contended by the borrower that the schedule of the property itself indicates that the entire property has been sought to be taken possession of, even in the absence of any demarcation of such property by metes and bounds between the co-sharers, which will be unlawful.

That apart, it is argued that the co-sharers' rights cannot be affected by way of the order passed by the Magistrate under Section 14 and, as such, the same cannot be implemented, particularly in the teeth of the prevailing injunction order.

Learned counsel also places reliance on a previous writ petition, filed on self-same cause of action before the coordinate Bench, which was dismissed initially by an order dated April 10, 2023 by the said court, on the ground of suppression of material facts relating to the civil suit before the said court.

Subsequently, on April 19, 2023, the present writ petitioner, who had preferred the said writ petition as well, had the matter withdrawn, thereby seeking to avoid the effect of the order of dismissal dated April 10, 2023.

It is argued that in view of the previous dismissal of the writ petition on the self-same ground, the present writ petition also ought to be rejected.

Upon hearing learned counsel for the parties, the first consideration which is to be taken up is whether the present writ petition is barred by the previous rejection of a writ petition on self-same cause of action.

It is evident from the orders annexed to the writ petition and the pleadings of the present writ petition that the petitioner has not suppressed any material fact, including the outcome of the previous writ petition and/or the pendency of the suit and subsistence of injunction in connection therewith, in the pleadings and the annexures of the present writ petition.

Hence, the writ petitioner cannot be labelled as guilty of suppression of any material fact in the present writ petition.

Even if we take the highest contention of the respondent/borrower, the previous writ petition would have stood dismissed on April 10, 2023 on the ground of suppression of material facts of the pendency of the civil suit.

It was recorded by the coordinate Bench in the said order that the factum of the petitioner impleading itself in a civil suit was not brought to the notice of the court.

There was a *prima facie* evidence of suppression of material facts before the court, it was observed, for which the matter was directed to go out of the list.

In the subsequent order dated April 19, 2023 the matter came up before the same Bench for correction and it was recorded that the parties agreed that the court had actually directed dismissal of the writ petition.

It was further observed that counsel for the petitioner submitted that the petitioner sought to withdraw the writ petition.

Reserving such leave as prayed for by learned counsel for the petitioner, the said writ petition was dismissed as withdrawn.

Hence, it is clear that the learned Single Judge, while passing the order dated April 19, 2023 was fully aware of the previous intention of the same Bench to dismiss the writ petition, that is, WPA 4472 of 2022, on the ground of suppression. Despite having knowledge of the same, the learned co-ordinate Bench, in its wisdom, permitted the writ petition to be withdrawn and the same was dismissed reserving the petitioner's right to pursue other remedies available in law.

In any event, the petitioner subsequently chose not to press its prayer for being impleaded in the suit, which was the premise of the allegation of suppression of facts before the co-ordinate Bench.

The present writ petition, which has been filed upon disclosing all material facts, including the previous orders of the coordinate Bench, does not reek of any suppression of material fact and, as such, in the absence of any previous adjudication on merits, it cannot be said that the writ petition ought to be rejected at the threshold.

Hence, the said objection of the borrower is turned down.

Insofar as the merits of the writ petition are concerned, it is beyond the scope of the writ court to entertain the points urged by the alleged co-sharers, that is, respondent nos. 8 and 10, on merits.

The said alleged co-sharers have ventilated their grievance before a competent civil court against the borrower and other defendants and have obtained an injunction against the defendants therein.

However, since the Bank chose not to press its application for addition of party in the said suit, it cannot be said that the Bank is also bound by any order of injunction passed therein.

The issues urged by the alleged co-sharers, that is, respondent nos.8 and 10, are required to be agitated

before the concerned Debts Recovery Tribunal within the contemplation of Section 17 of the SARFAESI Act, 2002.

The jurisdiction of the civil court is clearly barred under the said statute itself, in situations where the tribunal has jurisdiction.

Hence, in any event, the civil court did not have any jurisdiction to bind the writ petitioner on any order, *de hors* the scope of operation of the 2002 Act.

That apart, the injunction granted by the civil court merely restrained the defendants therein from alienating, transferring or disposing of the suit property to third parties and/or creating any third party interest and/or from changing the nature and character of the suit property, none of which operates as an order of stay of the Section 14 proceeding before the District Judge or as injunction against the writ petitioner-Bank in respect of any proceeding under the SARFAESI Act, 2002.

Even apart from the aforesaid circumstances, the borrower does not have any *locus standi* to object to the order passed by the District Magistrate under Section 14, which was duly passed under the provisions of the 2002 Act.

In the event the borrower and/or the co-sharers have any relief, their remedy lies before the Debts Recovery Tribunal under Section 17 of the SARFAESI Act, 2002 and not in the civil court or before this court,

insofar as the rights of the Bank under the 2002 Act are concerned.

Lastly, it has been rightly pointed out by the Bank that, at least *prima facie*, the property in dispute belonged to the guarantor Bidyut Bala Bhandari. Hence, the contention of the borrower, regarding the borrower's interest and the co-sharers' interest being affected, cannot be accepted.

Thus, there is nothing so irregular in the order dated October 12, 2020 of the District Magistrate that would render it null and void.

Thus, the writ petitioner is fully within its rights to prefer the writ petition on the allegation that the police authorities are not complying with the order of the District Magistrate.

Accordingly, WPA 16237 of 2023 is allowed, thereby directing the respondent no.2, that is, the Officer-in-Charge of the Kasba Police Station to take immediate steps for compliance with the order dated October 12, 2020, passed by the District Magistrate, South 24 Parganas.

In the event the respondent no.2 is of the opinion that some further formality in that regard has to be complied with by the petitioner within the contemplation of law, such as payment of police help costs, the

respondent no.2 shall communicate in writing such formality to the petitioner within July 28, 2023.

Upon compliance of such formality by the petitioner-Bank, the respondent no.2 shall grant adequate police assistance and ensure the compliance of the order passed by the District Magistrate under Section 14 of the SARFAESI Act, 2002, as referred to above.

It will be open to the petitioner, in the event the respondent no.2 does not implement the order of the District Magistrate, to approach the respondent nos.3 and 4 who, upon such approach being made by the petitioner-Bank, shall immediately ensure that the respondent no.2 follows the specific directions of this court.

All parties shall act on a server copy of this order, without insisting upon prior production of a certified copy.

Nothing in this order shall preclude the borrower and/or the private respondent nos. 8 and 10 to approach the concerned tribunal under Section 17 of the SARFAESI Act, 2002 to ventilate their respective grievances with regard to the action taken under the SARFAESI Act.

There will be no order as to costs.

Urgent photostat copies of this order, if applied for, be given to the parties upon compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)