IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.6805 OF 2023

Kotak Mahindra Bank Ltd & Anr. .. Petitioners

Versus

State of Maharashtra & Ors. .. Respondents

Mr.Prathamesh Kamat *a/w Nikhil Rajani, Nakul Jain, Apoorva Kulkarni i/b M/s. V. Deshpande & Co., Advocates for the Petitioners.*

Mr.R.S. Pawar, AGP *Advocate for State-Respondent.*

CORAM : B. P. COLABAWALLA &
RAJESH S. PATIL, JJ.

DATE : JUNE 30, 2023

P. C.

1. Rule. With the consent of the parties, rule made returnable forthwith and heard finally.

2. The learned AGP appearing on behalf of Respondent Nos. 1 to 4 waives notice.

3. The above Writ Petition is filed *inter alia* seeking a direction to Respondent Nos. 1 and 2 to forthwith restore possession of their secured assets as described in Exhibit-A to the Petition to the authorized officer of the Petitioner with the aid and assistance of Respondent Nos. 3 and 4, if necessary. This relief is sought in the peculiar facts set out in the Petition.

4. The facts of this case reveal that One Karvy Financial Services Ltd., had originally advanced credit facilities to the tune of Rs.1,16,30,456/- to one Mr. Vishwanath Fakkad Jadhav, Mr. Fakkad Kashinath Jadhav and Mr. Bhama Jadhav (for short "**the borrowers**"). As per the terms of the sanction, the said facilities was repayable in 120 EMI's of Rs.1,87,640/- each, and was payable with interest. The aforesaid credit facilities were secured, inter alia, by way of a mortgage of an immovable property viz: All that piece and parcel of property admeasuring 186.05 sq. mtrs, with construction thereon admeasuring 508.95 sq. mtr, situated at survey no.41/5/1/1 at Plot No.40, village Wadgaonsheri, Tal-Haveli, Dist-Pune 411014 (for short "**the secured asset**").

5. After creation of this mortgage, the said Karvy Financial Services Ltd., vide a Business Transfer Agreement dated 1st August 2017, transferred its entire business in favour of Mape Finserve Pvt Ltd which subsequently was known as Small Business Fincredit India Pvt Ltd. Since there were defaults committed by the borrowers, their account was classified as a Non-Performing Asset ("**NPA**") on 5th June 2018 in the books of Small Business Fincredit India Pvt Ltd. This was done in accordance with the guidelines of the Reserve Bank of India. In the meanwhile, the Small Business Fincredit India Pvt Ltd also invoked the Arbitration Clause contained in the loan/security documents and initiated Arbitration proceedings against the borrowers under the provisions of the Arbitration and Conciliation Act, 1996. These Arbitration proceedings finally culminated in an Award dated 23rd June 2017.

6. Be that as it may, by a Deed of Assignment dated 14th March 2019, the said Small Business Fincredit India Pvt Ltd assigned all their rights, title and interest in the aforesaid credit facilities along with its underlying securities in favour of the Petitioner Bank. Upon the debts being assigned, the Petitioner Bank issued a notice dated 12th October 2019 under section 13(2) of the SARFAESI Act, 2002 *inter alia* calling upon the borrowers to pay to it a sum of Rs.1,32,49,923/- due as on 12th October, 2019 along with further interest as stated therein. Despite receipt of the said notice the borrowers failed to comply with the demand. In these circumstances, the Petitioner Bank took symbolic possession of the secured assets on 29th January 2020 under Section 13(4) of the SARFAESI Act, 2002. After this, the Petitioners also filed an Application before the District Magistrate seeking physical possession of the secured asset. The said Application was allowed by the District Magistrate by order dated 30th September 2020 and directed Respondent No.2 (being an executing authority) to take possession of the secured asset and handover the same to the Authorized Officer of the Petitioner Bank. This was duly done, and possession of the secured asset was handed over to the Petitioner Bank on 27th December 2022. After possession was handed over to the Petitioner, it issued a sale notice putting up the secured asset for sale by public auction on 14th March, 2023. The said public auction was successful and the sale has also been confirmed in favour of highest bidder.

7. Despite these orders passed by the District Magistrate, it is the case of the Petitioner that on 13th March, 2023 at about 4.00 a.m. the borrowers have illegally entered the secured asset and abused and assaulted the security guard and broke opened the lock and seal affixed on the secured asset and resumed possession of the said secured asset.

8. Since the borrowers have illegally trespassed on the secured asset, a Miscellaneous Application was filed by the Petitioner Bank before the District Magistrate seeking assistance for re-executing the order dated 30th September 2020 r/w the order dated 17th December 2021 passed by the said District Magistrate. In other words, they once again approached the District Magistrate to take repossession of the secured asset and handover same to the Authorized Officer of the Petitioner under the provisions of the SARFAESI Act. The said Miscellaneous Application came to be rejected by the Additional District Magistrate, Pune by Letter dated 11th April, 2023 wherein the Petitioner was intimated that once the possession of the secured asset is taken by the office of the District Magistrate through Respondent No.2 it is the Petitioner's responsibility to secure and safeguard the said secured asset and there is no provision in the SARFAESI Act to once again take possession and handover re-possession to the Authorized Officer of the Petitioner. It is in these circumstances that the Petitioner has approached this Court under Article 226 of the Constitution of India seeking the reliefs more particularly set out in the writ petition.

9. In this factual backdrop Mr. Kamat, the learned counsel appearing on behalf of the Petitioner submitted that after possession was taken under Section 14 of the SARFAESI Act, 2002 by the Magistrate and the same was handed over to the Petitioner, the borrowers, on 13th March 2023 at about 4.00 a.m. illegally entered the secured asset and abused and assaulted the security guard and broke open the lock and seal affixed on the secured asset and resumed possession thereof. He submitted that in such circumstances, the District Magistrate was wholly unjustified in not entertaining the Application filed by the Petitioner for re-executing his own order dated 30th September 2020 read with the order dated 17th December 2021. Mr. Kamat, in support of his submission, relied upon a decision of a Division Bench of this Court (Aurangabad Bench) in the case of ***The Nashik Merchant Co-operative Bank V/S The District Collector, Jalna & Ors.*** **[Writ Petition No.10069/2022 decided on 28th February 2023]**. Relying upon this decision Mr. Kamat submitted that a Division Bench of this Court has clearly held that there is no prohibition for the District Magistrate or his delegate to re-exercise the powers to execute the orders passed under Section 14. He therefore submitted that this writ petition be allowed in terms of prayer clauses set out in therein.

10. On the other hand, the learned AGP appearing on behalf of the Respondents, submitted that the order passed by the District Magistrate under Section 14 of the SARFAESI Act, 2002 was already executed and actual possession of the secured asset was delivered to the Petitioner on 27th December 2022. He submitted that once this was done, the District Magistrate was rendered *functus officio* and could not once again exercise powers under Section 14 of the SARFAESI Act, 2002. He submitted that there was no provision under the said Act that provides for restoration of possession of the secured asset to the secured creditor that has been lost by him after the execution of the orders passed under Section 14 of the SARFAESI Act, 2002. Consequently, he submitted that there is no merit in the above writ petition, and it be dismissed with liberty to the Petitioners to adopt appropriate legal remedies that may be available in law.

11. We have heard the learned counsel for the parties at length. We have also perused the papers and proceedings in the above writ petition. The issue raised in this writ petition lies in a very narrow compass. In the facts of the present case, it is not in dispute that an order has been passed under Section 14 dated 30th September 2020 read with the order dated 17th December 2021 under which possession of the secured asset was directed to be handed over to the Petitioner Bank. These orders have been executed on 27th December 2022 and possession of the secured asset was given to the Authorized Officer of the Petitioner Bank. Once this was done, the borrowers, on 13th March 2023 at 4.00 a.m., have entered the secured asset and abused and assaulted the security guard and have broken open the lock and seal affixed on the secured asset and resumed possession thereof. The question therefore that arises in this writ petition is whether any direction can be given to the District Magistrate and/or the Tahsildar to re-execute the order passed under Section 14 and handover the secured asset to the secured creditor.

12. We find that this issue is no longer *res integra* and is covered by a decision of a Division Bench of this Court in the case of ***The Nashik Merchant Co-operative Bank (supra)***. In fact, the argument canvassed by the learned AGP before us was identical to the argument canvassed before the Division Bench in the case of ***The Nashik Merchant Co-operative Bank (supra)***. The Division

Bench, after considering the aforesaid submissions, came to the conclusion that they did not find any prohibition under the scheme of the SARFAESI Act, 2002 that came in the way of District Magistrate or his delegate to re-exercise his powers to execute the orders passed by him under Section 14. Accordingly, the Division Bench directed the Tahsildar to re-execute the order passed by the District Collector and restitute the possession of the secured asset to the Petitioner within 30 days from the date of the said order. For the sake of convenience, the relevant portions of this decision reproduced herein:-

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> 7. The respondent No.2 in his reply affidavit states that the order passed under Section 14 of the SARFAESI Act by the respondent No.1/District Collector, was already executed. The actual possession of the secured assets was delivered to the petitioner on 06-08-2022. The respondent Nos. 1 and 2 stood discharged from their obligation under the statutory scheme prescribed under the SARFAESI Act. No provision under the Act provides for restoration of the possession to secured creditor that has been lost by him after execution of orders U/S 14 of SARFAESI Act.
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> 10. Mr. S.B. Yawalkar, learned AGP would submit that the scheme under the SARFAESI Act provides for action in terms of section 14 regarding handing over possession to the secured creditors. Once the execution of order under section 14(2) is undertaken by the District Collector or his delegate and possession of the secured asset is handed over to the secured creditors, the District Magistrate

becomes functus officio and no further indulgence would be expected to him. He would further submit that after receiving the possession as per panchanama dated 06-08-2022, it was the petitioner's responsibility to secure and protect his possession by taking necessary measures. The statutory obligation on the State machinery cannot be enlarged with further duty to protect the possession of secured creditors.

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15. The petitioner bank had exercised its right under the SARFAESI Act and took recourse to the procedure prescribed under section 13(2), 13(4) and section 14 of the Act while taking possession of the secured assets under the order dated 21-11-2020 passed by the District Collector, Jalna. The petitioner bank was put into the possession under panchanama dated 06-08-2022. It appears that the petitioner bank had taken sufficient care to protect the secured property by deploying guards. The respondent Nos. 5 and 6 overpowered the guards by taking law in their hands, forcibly broke open the shutter lock of the shop, entered into the secured property and took forceable possession. The bank officers took immediate steps to prevent unlawful act of respondent Nos.5 and 6. They had rightly approached the Police authorities. The FIR was lodged promptly against respondent Nos. 5 and 6 for offences punishable under sections 447, 506 read with 34 of the IPC. They have approached respondent No.2/Tahsildar for protection/preservation of their possession of the secured assets.

16. At this stage, a reference can be made to the order passed by Division Bench of this Court in Writ Petition No.8674/2021 in the matter of **Bank of Baroda Vs. The State of Maharashtra and Ors. dated 24-02-2022** wherein, in similar set of facts, the directions were given against the District Magistrate to entertain the second

application of the petitioner filed under section 14 of the SARFAESI Act.

17. Mr. S.V. Adwant, learned advocate appearing for the petitioner also places reliance on the Judgment delivered by the Division Bench of High Court of Andhra Pradesh in case of **M/s. Sri.Balaji Centrifugal Castings Vs. M/s ICICI Bank Limited. reported in (2018) SCC Online Hyd 368**, wherein, it is held that there is no bar to secured creditor maintaining more than single application under section 14(1) of the SARFAESI Act for securing the possession of the very same secured assets.

18. The similar view has been reiterated by the High Court of Kerala in the matter of **A.A. Kumaran Vs. Superintendent of Police, Thrissur and Ors. in WP (C) No.5875 of 2022 dated 18-05-2022** wherein the court observed thus:-

> 21. Further, the present case reveals an instance where a person has taken the law into his hands by force and thereafter seeks the benefit of legal principles. If such actions are permitted to be perpetrated, rule of law will suffer immeasurably. The purport of the Act is to divest the owner of a property in the enforcement of security interest and initiate measures to wipe off the liability by resorting to measures including sale. If measures taken for dispossession and consequent sale are inter-meddled by persons like respondents 4 and 5, it would result in a mockery of the rule of law. The will of the people reflected through the legislation will be seriously infringed, if the court remains a mute spectator.

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20. The uncontroverted factual aspects in present matter depict that the respondent Nos.5 and 6 have devised novel, unimaginable and unsustainable modus operandi to defeat ends of justice and fair play. It is not only the matter

of physical altercation, but would tantamount to assault on the law and statute. They have the audacity to overrule the law. The growing tendency of overpowering the law cannot be tolerated. In peculiar facts and circumstances of this case, we are inclined to exercise powers under Article 226 of the Constitution of India to protect the rule of law and deprecate rising tendency of using criminal force against recovery proceeding undertaken by the financial institutions in terms of SARFAESI Act. We do not find any prohibition under the scheme of the SARFAESI Act that comes in the way of District Magistrate or his delegate to re-exercise the powers to execute the orders passed under section 14.

21. After considering the factual and legal aspects of the matter, we are of the considered view that this is a fit case to exercise of our jurisdiction under Article 226 of the Constitution of India and allow the writ petition in terms of prayer clause (B) of the writ petition and award cost against respondent No 5 & 6. Accordingly, we pass the following order:-

ORDER

(A) The Writ Petition is partly allowed

(B) The Respondent No.2/The Tahsildar, Jalna is directed to execute the order passed by the respondent No.1/The District Collector, Jalna and restitute the possession of the secured assets to the petitioner within a period of thirty (30) days from the date of this order.

(C) The respondent No. 5 & 6 shall deposit the cost of Rs.25000/- within 30 days of this order in this Court failing which those shall be recovered as land revenue.”

13. Considering the law laid down by the Division Bench of this Court and referred to by us above, we are unable to agree with the submission made by the learned AGP that the District Magistrate does not have the power to re-execute his own order or that he has become *functus officio*. If we were to take the view as propounded by the learned AGP it would lead to a complete chaos. We have no hesitation in stating that the borrowers have devised a novel, unimaginable and unsustainable *modus operandi* to defeat the ends of justice. It is not only the matter of physical altercation by assaulting the security guard appointed by the Petitioner Bank and breaking open the lock and seal affixed on the secured asset which is wholly illegal, but the same would also tantamount to an assault on the law and the statute itself. If, after orders are passed under section 14 for dispossession of the borrower, and the same are inter-meddled with by any person including the borrower, the same would result in a mockery of the rule of law. In such a situation the court cannot and should not remain a mute spectator and allow the illegality to continue. The tendency of trying to overreach the law as well as the orders passed by Judicial Authorities has to be nipped in the bud right away, lest the rule of law shall suffer.

14. After considering the facts and circumstances of the case as well as the law on the subject as held in the case of ***Nashik Merchant Cooperative Bank (supra),*** we are of the considered view that this is a fit case to exercise our extraordinary equitable jurisdiction under Article 226 of the Constitution of India and allow the writ petition.

15. In these circumstances, the following order is passed:-

ORDER

(i) Considering the findings that we have given above, the order passed by the District Magistrate on 11th April 2023 is hereby quashed and set aside.

(ii) The writ petition is allowed in terms of prayer clause (a) which reads thus:-

> *"(a) this Hon'ble Court be pleased to issue a Writ of Mandamus or any other Writ of the like nature thereby directing the Respondent No. 1 and 2 to forthwith and or within such time as this Court may deem fit and proper to render necessary assistance with the aid and assistance of Respondent No.3 and 4 for restoration of their secured assets as described in Exhibit "A" hereto in the hands of their Authorised Officer of the Petitioner appointed under the provisions of SARFAESI Act;"*

(iii) Respondent No.2 shall take physical possession of the secured asset on 17th July 2023 at 12.00 p.m. and dispossess and/or vacate any person found therein and thereafter handover the same to the Authorized Officer of the Petitioner Bank. The Authorized Officer of the Bank shall remain present on 17th July 2023 at 12.00 p.m. to take physical possession of the secured asset from Respondent No.2.

(iv) The local Police Station (Chandan Nagar Police Station) shall give all necessary assistance to Respondent No.2 (including deputing adequate number of police personnel) to ensure that Respondent No.2 is able to take physical possession of the secured asset from whoever is found therein, failing which the Senior Police Inspector of the said Police Station shall be held liable for contempt.

16. Rule is made absolute in the aforesaid terms and the writ petition is also disposed of in terms thereof.

17. Though we have disposed of the above writ petition, we direct that the same be placed on board on 19th July 2023 to report compliance.

18. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[RAJESH S. PATIL, J.] **[B. P. COLABAWALLA, J.]**