

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

113+282

CWP No.27121 OF 2022(O&M)
Date of Decision: 10.05.2023

KOTAK MAHINDRA BANK LIMITED

..... Petitioner

Versus

DISTRICT MAGISTRATE GURUGRAM AND OTHERS

..... Respondents

**CORAM: HON'BLE MR. JUSTICE G.S. SANDHAWALIA
HON'BLE MR. JUSTICE GURBIR SINGH**

Present: Mr. Akshay Bhan, Senior Advocate with
Mr. Aman Bansal, Advocate for petitioner.

Mr. Aman Bahri, Addl. AG, Haryana.

Mr. Karan Nehra, Advocate for respondent Nos. 3 to 5.

G.S. SANDHAWALIA, J (ORAL)

1. The present petition was filed for seeking physical possession of mortgaged property in a time bound manner keeping in view the order dated 20.11.2020 (Annexure P-2) passed under Section 14 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'the Act'), which was not executed in favour of the Bank. On 27.04.2023, the following order was passed:-

“During the course of the proceedings, it transpires that notice under Section 13 (4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 dated 24.09.2020 (Annexure P-4) was also subject matter of challenge in SA No.27 of 2021, but in spite of that the same was dismissed on 29.09.2022 (Annexure P-6) by

the Presiding Officer of DRT-II, Chandigarh by observing as under:-

“This SA was directed against possession notice dated 24.09.2021 (sic. 24.09.2020) and it has been brought to the notice of this Tribunal that in pursuance of that possession notice, possession was never taken. It is also brought to the notice of this Tribunal that as on date, no proceeding of taking physical possession of the property in question is in progress. In these circumstances, as on date there is no proceeding under Section 13 (4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 which is sine qua non for the proceedings under Section 17 (1) of the Act. Therefore, it is beyond comprehension how this SA can survive. Therefore, this SA warrants to be dismissed as infructuous and it is ordered accordingly. File be consigned to the record room after due compliance.”

Prima facie we are of the considered opinion that the order is patently illegal as the SA was directed against the possession notice dated 24.09.2020, which would be clear from the body of the said SA, which was also appended as Annexure A-25 therein. A perusal of the possession notice would also go on to show that symbolic possession had been duly taken under Section 13 (4) read with Rule 8 on 24.09.2020 and, therefore, the learned Presiding Officer of the Tribunal was totally re-miss in holding to the contrary.

The Apex Court in M/s Hindon Forge Pvt. Ltd. and another Vs. State of Uttar Pradesh through District Magistrate Ghaziabad and another, 2018 AIR SC 5383 had thrashed out the provisions of the 2002 Act and come to the conclusion that the possession under Section 13 (4) would mean physical possession or symbolic possession. In the said case an argument was raised that the possession of the secured asset would continue to be with the borrower when only symbolic possession was taken. The said argument was rejected by noticing that under Section 13(4)(a) there is a right to transfer the property by way of lease and also by way of assignment or sale for releasing the secured asset when possession is taken under Rule 8 (1) and (2) of the Security Interest (Enforcement)

Rules, 2002 and even if no actual physical possession is taken there is a right of transfer the secured asset. Relevant portion of the said judgment reads as under:-

“18. Another argument that was raised by learned senior counsel for the respondents is that the taking of possession under section 13(4)(a) must mean actual physical possession or otherwise, no transfer by way of lease can be made as possession of the secured asset would continue to be with the borrower when only symbolic possession is taken. This argument also must be rejected for the reason that what is referred to in section 13(4)(a) is the right to transfer by way of lease for realising the secured asset. One way of realising the secured asset is when physical possession is taken over and a lease of the same is made to a third party. When possession is taken under rule 8(1) and 8(2), the asset can be realised by way of assignment or sale, as has been held by us hereinabove. This being the case, it is clear that the right to transfer could be by way of lease, assignment or sale, depending upon which mode of transfer the secured creditor chooses for realising the secured asset. Also, the right to transfer by way of assignment or sale can only be exercised in accordance with rules 8 and 9 of the 2002 Rules which require various pre-conditions to be met before sale or assignment can be effected. Equally, transfer by way of lease can be done in future in cases where actual physical possession is taken of the secured asset after possession is taken under rule 8(1) and 8(2) at a future point in time. If no such actual physical possession is taken, the right to transfer by way of assignment or sale for realising the secured asset continues. This argument must also, therefore, be rejected.”

We have also gone through the affidavit dated 13.10.2020 (Annexure R-3/26) and it transpires that due compliance of Section 14 of SARFAESI Act has been done by the authorized officer. The District Magistrate, Gurugram in its order dated 28.03.2023 (Annexure P-9) has also recorded his satisfaction regarding this aspect.

Thus, in our considered opinion the reasoning given by the Presiding Officer of the Tribunal is against the settled principles of law and the statute. It has been time and again held by the Apex Court that the power under Section 14 of the 2002 Act is a ministerial act to assist the secured creditor in obtaining the possession and reliance can be placed upon the

judgment passed in M/s R.D. Jain and Co. Vs. Capital First LTd. and others' 2002 AIR (SC) 4820. The same was view followed in Balkrishna Rama Tarle Dead Thr. LRs. and another Vs. Phoenix ARC Private Limited and others, AIR 2002 (SC) 4756.

It has now been brought to our notice that thereafter SA No.61 of 2023 was filed on 27.03.2023, in which interim protection was declined to the private respondent-loanee.

In such circumstances, we direct the District Magistrate, Gurugram to ensure that the order passed under Section 14 is complied with immediately, since there are huge outstandings over `12.5 crores as on 20.05.2020, as per notice dated 03.06.2020 (Annexure P-3).

Mr. Nehra shall place on record the interim order passed in SA No.61 of 2023.

To come up on 10.05.2023, for compliance.”

2. Affidavit of the Naib Tehsildar-cum-Executive Magistrate Kadipur Gurugram has now been filed that the physical possession has been handed over on 08.05.2023. The same is taken on record.

3. It is not disputed that respondents No.3 to 5 have preferred SLP against the order dated 27.04.2023 vide Diary No. 19437/2023. The mentioning was also allowed by the Hon'ble Chief Justice of India on 08.05.2023 and the matter is likely to come up on 15.05.2023.

4. Learned counsel for the petitioner has submitted that since the possession has now been delivered in pursuance of the interim order, the present writ petition has been rendered infructuous and the same may accordingly be disposed of.

5. However, Mr. Karan Nehra, Advocate for respondents No.3 to 5 has opposed the disposal of such writ petition as infructuous.

6. Keeping in view the fact that we have already passed the detailed order and also in view of the submissions made by the counsel for

the petitioner, we are of the considered opinion that the relief to the petitioner-Bank has been granted and therefore, no useful purpose to be served in keeping the present writ petition on Board anymore. The petitioner has already availed his remedy and the interim order as such merges in the final order by disposing of the writ petition for the reasons given in the earlier order.

7. Petition stands disposed of. All miscellaneous applications are disposed of in view of the above-said order.

(G.S. SANDHAWALIA)
JUDGE

(GURBIR SINGH)
JUDGE

10.05.2023
renu

Whether speaking/reasoned : YES/NO
Whether reportable : YES/NO