(2018) 10 BOM CK 0095

In the Bombay High Court

Case No : Writ Petition No. 11729 Of 2018

Corporation Bank Through The Chief Manager — APPELLANT

Vs

Hon'ble Chief Metropolitan Magistrate At Esplanade At Mumbai And Anr. — RESPONDENT

Date of Decision : 22-10-2018

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 — Section 13(2), 14, 17, 34, 35
Code of Civil Procedure, 1908 — Order 39 Rule 1, Order 39 Rule 2

Citation : (2018) 10 BOM CK 0095

Hon'ble Judges : K. K. Tated, J;N.J.Jamadar, J

Bench : Division Bench

Advocate : Vinaya Chavan, Vinaya Chavan, A.A. Alaspurkar

Final Decision : Allowed

Judgement

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N.J.Jamadar,J

1.Â Heard learned Counsel for the petitioner and learned AGP.

2 This Writ Petition is filed under Articles 226 and 227 of the Constitution of India seeking a writ, order or direction to the learned Chief Metropolitan

Magistrate, at Esplanade Court, Mumbai and the Senior Inspector of Police, Pant Nagar Police Station, Ghatkopar, Mumbai (the respondents) to

immediately take physical possession of secured assets mentioned in Schedule â??Aâ? to the petition and handover the same to the Authorised

Officer of the petitioner Bank (â??The Bankâ??) The brief facts which led to this petition can be summarized as under:

(a)Â The Bank had advanced loan/extended credit facilities to M/s. Ankur Iron India Private Limited (M/s. Ankur). As M/s. Ankur committed

default in repayment, the Bank initiated proceeding under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of

Securities Interest Act, 2002 (hereinafter referred to as â??the SARFAESI Actâ?) before the learned Chief Metropolitan Magistrate. Vide order

dated 14th June 2018, in Case No. 36/SA/2018, the Chief Metropolitan Magistrate allowed the Application under Section 14 of the Act and the

Authorised Officer of the Bank Mr. R.P. Sivaram was permitted to take over possession of the secured assets, on behalf of the Bank. The learned

Chief Metropolitan Magistrate passed an elaborate order and, inter alia, appointed Advocate Chetna Dattaram Khedekar as Court Commissioner to

take over possession of the secured assets. The jurisdictional police were also directed to provide police aid to the Court Commissioner, if required.

(b)Â The Court Commissioner, armed with the order of the learned Chief Metropolitan Magistrate, issued a notice on 24th Â July 2018 and thereby

fixed 08th August 2018 as the date for taking physical possession of the secured assets. The concerned Police Station was requested to provide

necessary police aid.

(c)Â In the meanwhile, one Mr. Tanvir Ahmed Mir and another instituted a suit for declaration and injunction against Mr. Kiran P. Mehta, Director

of Ankur Iron India Pvt. Ltd. and Mrs. Pradnya K. Mehta, Partner of Ankur Steel Corporation and the petitioner, inter alia, asserting that they were

working as Sales Managers in the Anantnag Branch office of M/s. Ankur Iron Steel Corporation and M/s. Ankur Iron India Pvt. Ltd. and their wages

to the tune of Rs.3,60,000/Â remained unpaid. It was averred that the defendants, instead of releasing their salaries, were bent upon to create third

party interest in the property i.e. Flat No. 403 and Flat No.404 (secured assets). It appears that on 01st August 2018, the Principal District Judge,

Anantnag passed an order on an application under Order XXXIX Rules 1 and 2 of the Code of Civil Procedure, 1908 and directed that notices be

issued to the defendants and â??.... to maintain status quo on spot with respect to the suit property and also with respect to the status of the

Applicants/Plaintiffs till next date of hearingâ??.

(d)Â The borrowers Mr. Kiran Mehta and Mrs. Pradnya Mehta and Ankur Steel

Corporation, thereafter, moved an application being Case No.

2511/MISC/2015 dated 10th August 2018 before the learned Chief Metropolitan Magistrate to direct Ms. Chetna Dattaram Khedekar, Advocate

Commissioner not to take any steps in furtherance of notice dated 24th July 2018 till such period the order of status quo passed by the learned

Principal District Judge, Anantnag dated 01st August 2018 read with 07th August 2018 is in operation. The learned Chief Metropolitan Magistrate,

after recording adequate reasons, was persuaded to reject the said application being Case No. 2511/MISC/2018 by order dated 04th September 2018

with costs. The learned Chief Metropolitan Magistrate was of the view that in the backdrop of the provisions contained in Sections 34 and 35 of

SARFAESI Act, the learned Principal District Judge, Anantnag had no jurisdiction to pass an order of status quo, which has the effect of interfering

with the order passed by the learned Chief Metropolitan Magistrate in respect of secured assets.

(e)Â The Court Commissioner, vide notice dated 08th September 2018, fixed 03rd October 2018 as the date for taking over possession of the secured

assets. The Court Commissioner requested the jurisdictional police to render the necessary police aid. However, the police refused to provide the

necessary aid as learned Principal District Judge, Anantnag passed another order on 13th September 2018 and directed the police inspector to

implement the order dated 01st August 2018. The Bank moved the learned Chief Metropolitan Magistrate with a prayer to direct the Senior Police

Inspector, Pant Nagar Police Station to provide police aid to Court Commissioner on 03rd October 2018.

(f)Â The learned Chief Metropolitan Magistrate considering the application and submissions in support of the prayer, passed an order on 01.10.2018,

whereby the learned Chief Metropolitan Magistrate reiterated the legal position that the order passed under Section 14 cannot be brought to a naught

by a civil court and the remedy was to challenge the same before the Debt Recovery Tribunal or invoke the writ jurisdiction. However, the learned

Chief Metropolitan Magistrate did not pass any effective order and filed the application of the bank.

4 The concluding portion of the order of the learned Chief Metropolitan Magistrate reads as under:

â??(5) However, there are two conflicting orders by two different Courts. Law Officer Modirgi submits that appearance of Corporation Bank is

marked before the Court of Hon'ble PDJ, Anantnag. Therefore, it is necessary to seek appropriate directions from the Court of Hon'ble PDJ,

Anantnag or to seek verification from proper forum. Hence, application is filedâ??

5Â Mrs. Vinaya Chavan, learned Counsel for the petitioner urged that the learned Chief Metropolitan Magistrate, having recorded categorical

observations that Civil Court had no jurisdiction to pass orders which had the effect of overriding the orders passed by the learned Chief Metropolitan

Magistrate under Section 14 of the SARFAESI Act, ought not to have restrained himself from directing the police to render the necessary assistance

for enforcement of the order of taking over the possession of the secured assets. Amplifying the submission, the learned Counsel for the petitioner

would urge that the learned Chief Metropolitan Magistrate left the petitioner in lurch by simply filing the application vide the aforesaid order. The

indirect result of the failure to exercise the jurisdiction by the learned Chief Metropolitan Magistrate is depriving the secured creditor of the possession

of the secured assets, despite the default on the part of the borrower.

6 The learned Counsel for the petitioner submitted that in view of the provisions contained in Sections 34 and 35 of the SARFAESI Act and the

exposition of law as regards ouster of jurisdiction of Civil Court, the orders passed by the learned Principal District Judge, Anantnag are non est. Such

orders ought not to have restrained the learned Chief Metropolitan Magistrate from enforcing the orders passed under Section 14 of the SARFAESI

Act.

7Â The learned AGP submitted that the police have submitted a report to the effect that in view of conflicting orders passed by the learned Chief

Metropolitan Magistrate and learned Principal District Judge, Anantnag, they are in a delima as to which order should be implemented. The

predicament in which the Senior Police Inspector, Pant Nagar Police Station found herself is understandable.

8 The chronology of events indicates that the process of taking possession of the secured assets under Section 14 of the SARFAESI Act was sought

to be interjected firstly on the basis of the order dated 01st August 2018 passed by the learned Principal District Judge, Anantnag whereby the parties were directed â??to maintain status quo on spot with respect to the suit propertyâ??. The learned Chief Metropolitan Magistrate, however, rejected the application preferred by the borrowers seeking to stay the order dated 14th June 2018 passed under Section 14 of the SARFAESI Act, on the premise that said order did not bind the learned Chief Metropolitan Magistrate.

9Â The Order dated 13th September 2018 passed by the learned Principal Judge, Anantnag whereby the Senior Inspector of Police, Pant Nagar Police Station, Ghatkopar was directed to ensure that the order of the said Court dated 01st August, 2018 was implemented in its letter and spirit, however, prevailed upon the Senior Inspector, Pant Nagar Police Station to decline to provide police assistance. When the matter was reported to the learned Chief Metropolitan Magistrate by the Bank, the learned Chief Metropolitan Magistrate, despite reiterating his view that the Civil Court at Anantnag had no jurisdiction to interfere with the process of taking over possession, felt constrained from passing an effective order.

10 The legal position as regards the ouster of jurisdiction of the Civil Court is no longer resÂintegra. By a catena of judicial pronouncements, it is now crystallized that Section 34 of the SARFAESI Act ousts the jurisdiction of Civil Court in respect of any action taken or to be taken in pursuance of any power conferred by or under the SARFAESI Act.

11Â Â AÂ usefulÂ reference,Â inÂ thisÂ context,Â canÂ beÂ madeÂ toÂ a Â pronouncement of the Supreme Court in the case of Jagdish Singh V/s. Heeralal and others (2014) I SCC 479 Â wherein, after considering the provisions of the Act and the previous pronouncements, the Supreme Court enunciated the legal position as under:

â?? 22. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, subÂ section (4) of Section 13 envisages various measures to secure the borrowerâ??s debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing the secured assets. Any person aggrieved by any of the â??measuresâ? referred to in subÂsection (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding â??in respect of any matterâ? which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The

expression â??in respect of any matterâ?? referred to in Section 34 would take in the â??measuresâ? provided under subÂsection (4) of Section 13

of the Securitisation Act. Consequently if any aggrieved person has got any grievance against any â??measuresâ? taken by the borrower under

subÂsection (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. Civil Court in such

circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under subÂsection (4) of Section 13 of the

Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation

Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well.

23.Â We are of the view that the civil court jurisdiction is completely barred, so far as the â??measureâ? taken by a secured creditor under subÂ?

section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal.

To determine as to whether there has been any illegality in the â??measuresâ? taken. The bank, in the instant case, has proceeded only against

secured assets of the borrowers on which no rights of Respondent Nos.6 to 8 have been crystalised, before creating security interest in respect of the

secured assets. In such circumstances, we are of the view that the High Court was in error in holding that only civil court has jurisdiction to examine

as to whether the â??measuresâ? taken by the secured creditor under subÂsection (4) of Section 13 of the Securitisation Act were legal or not. In

such circumstances, the appeal is allowed and the judgment of the High Court is set aside. There shall be no order as to costs.â??

12Â The aforesaid pronouncement was relied upon by the Supreme Court in a recent judgment in the case of M/s. Sree Anandhakumar Mills Ltd.

v/s. M/s. Indian Overseas Bank and Ors in Civil Appeal No(s). 7214Â7216 of 2012 decided on 3rd May, 2018. The relevant part of para 4 reads as

under:

â??4. The matter need not engage the Court in any great detail as in view of the law laid down by this Court in Jagdish Singh vs. Heeralal and others it would clear and evident that the suit filed by the second respondent (i.e. O.S. No. 106 of 2009) is not maintainable. In Jagdish Singh (supra) this

Court after an elaborate consideration of the provisions of the SARFAESI Act, particularly, Section 2(zf), 2(zc), 13(1), 17, 18 and 34, took the view,

on almost similar facts, that a suit for partition would not be maintainable in a situation where proceedings under the SARFAESI Act had been

initiated. It was also held that the remedy of any person aggrieved by the initiation of proceedings under the SARFAESI Act lies under Section 17

which provides for an efficacious and adequate remedy to a party aggrieved.â??

13Â The learned Counsel for the Petitioner drew our attention to a judgment of a Division Bench of this Court in Central Bank of India v/s. M/s.

VHCL Industries Limited dated 03rd July 2018 in Writ Petition (ST) No. 17974 of 2018 with Writ Petition (ST) No. 17978 of 2018 wherein, this Court

had noticed that the Court has been coming across suits instituted with a design to frustrate the object of the SARFAESI Act. The relevant part of

para No.9 of the said judgment reads as under:

â??9.We have come across such suits dime and dozen times. What however is disturbing in the present case is the casual manner in which interim

injunctions are granted in both the suits making the provisions of the SARFAESI Act nugatory. It appears that the interim injunctions are granted even

without reading the prayers in the Application for interim relief.â??

14Â In view of aforesaid judicial pronouncements, the nature of the claim in the suit instituted in the court of learned Principal District Judge,

Anantnag is required to be examined. From the perusal of the order dated 01st August 2018 passed by the learned Principal District Judge, Anantnag

(whereby status quo was directed to be maintained) it becomes abundantly clear that the plaintiffs claim to be the employees of borrowers. The suit is

for unpaid wages to the tune of Rs.3,60,000/Â. In the light of this claim, it is pertinent to note that, it was averred in the said suit that defendants

therein (borrowers) were, instead of paying the unpaid wages of the plaintiffs, trying to create third party interest in the suit property(the secured

assets). In the facts of the case, we are of the prima facie view that, at best, the enforcement of the claim for unpaid wages against the property of

the defendants (borrowers) can only be with the intervention and order of the Court and not at the first instance.

15Â The attendant circumstances also throw light on the nature of the claim and the object of the said proceeding. It is pertinent to note that the

borrowers filed an application bearing Case No. 2511/MISC/2018 for staying the execution of the order dated 14th June 2018 passed by the learned

Chief Metropolitan Magistrate, after the order dated 01st August 2018 was passed by the learned Principal District Judge, Anantnag. The plaintiffs

therein, who were the apparent beneficiaries of the said order, did not move the learned Chief Metropolitan Magistrate. This betrays a desperate

attempt on the part of the defendants (borrowers) in the said suit to avoid the consequences of the order of taking possession of the secured assets.

To add to this, it must be noted that vide notice dated 08th August 2017 under Section 13(2) of the SARFAESI Act, a demand of Rs.16,27,22,181.49

was made as the outstanding amount. In contrast, the claim of the alleged employees of the borrowers in the suit before the learned Principal District

Judge, Anantnag is Rs.3,60,000/Â. We cannot be oblivious to these facts and allow the purpose of the SARFAESI Act to be defeated on the basis of

the claim which is yet unsubstantiated and for a relatively meager amount. It is trite that a thing which cannot be done directly cannot also be done

indirectly.

16Â We are mindful of our jurisdictional limitations in commenting upon and dealing with the legality, propriety and correctness of the orders dated

01st August 2018 and 13th September 2018 passed by the learned Principal District Judge, Anantnag. However, we can certainly interfere with the

order passed by the learned Chief Metropolitan Magistrate on 01st October, 2018 whereby the learned Chief Metropolitan Magistrate declined to

exercise the powers statutorily vested in him for giving effect to the provision of the SARFAESI Act. Thus, we do not find ourselves constrained in

passing an effective order for enforcing the provisions of the SARFAESI Act.

17Â The aforesaid legal position and the attendant facts and circumstances persuade us to allow the Writ Petition.

18Â Hence, following order:

(a)Â The Writ Petition stands allowed.

(b)Â The Senior Police Inspector, Pant Nagar Police Station and/or other jurisdictional police are directed to provide the necessary police assistance

to the Petitioner on payment of charges, if any, for taking possession of the secured assets, as per the order dated 14th June, 2018 passed by the

learned Chief Metropolitan Magistrate or request made by the Court Commissioner appointed by the learned Chief Metropolitan Magistrate.

(c)Â The Registry is directed to forward immediately copy of this order to the Principal District Judge, Anantnag, Jammu and Kashmir, before whom

the suit between Tanveer Ahmed Mir and Ors. V/s. Kiran P. Mehta & Ors., is shown to be pending.

(d)Â In the circumstances, there shall be no order as to costs.

