
(2013) 02 CAL CK 0023
In the Calcutta High Court
Case No : Writ Petition No. 27120 (W) of 2012

Dinesh Kumar Agarwal

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 01-02-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(4), 14, 17

Citation : (2013) 1 CHN 671

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : Srijib Chakraborty and Sirsanya Bandopadhyay, for the
Appellant; Kolimuddin Mondal for State and Sovan Siddhanta for Bank, for the
Respondent

Final Decision : Allowed

Judgement

Dipankar Datta, J.—For enforcing its security interest, the respondent bank approached the Chief Judicial Magistrate, Barasat, North 24-Parganas (hereafter the said Magistrate) with an application u/s 14 of the Securitization and Reconstruction of the Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the Act). The application was registered as M.P. Case No. 169/2011. An order was passed on 16th September, 2011 by the said Magistrate directing the Officer-in-Charge, Baguihati Police Station "to take actual possession of the immovable property/secured assets mentioned in the schedule of the petition along with Title Deeds and other documents i.c.w. the said assets from the O.P. and deliver the same to the authorized representative of the applicant/Bank....." It was further observed in the order that should there be resistance from any quarter, the officer-in-charge shall be at liberty to use so much force that is necessary for the purpose of taking possession of the secured asset. For the purpose of submission of report, the application was made returnable on 9th December, 2012. On the returnable date i.e. 9th December,

2012, the said Magistrate recorded that the petitioner has not taken steps and directed the M.P. Case No. 169/2011 to be dropped.

2. Despite termination of proceedings initiated purportedly u/s 14 of the Act, the authorized officer of the bank with the assistance of the said officer-in-charge took over possession of the secured asset on 6th November, 2012.

3. It is not in dispute that the bank had deposited police costs amounting to Rs. 35,149/- pursuant to which assistance was extended for the purpose of taking over possession of the secured asset. Document to this effect has been produced by the learned counsel for the bank, which shall be retained with the records.

4. The basic contention raised by the petitioners is that the application u/s 14 of the Act was not maintainable before the said Magistrate.

5. Mr. Chakraborty, learned counsel for the petitioners, refers to section 14 of the Act, which empowers the District Magistrate to exercise power of the nature specified therein. He has placed reliance on the decision of the Bombay High Court reported in *IndusInd Bank Ltd., (formerly known as Ashok Leyland Finance Ltd.) Vs. The State of Maharashtra*, in support of his submission that the said Magistrate had no jurisdiction to entertain the application.

6. It is next contended by Mr. Chakraborty that even it is assumed that the said Magistrate had jurisdiction, possession of the secured asset could not have been taken on 6th November, 2012 with the assistance of the police since the application u/s 14 of the Act, registered as M.P. Case No. 169/2011, did not survive after 9th December, 2012.

7. He has, accordingly, prayed for an order on the bank to restore possession of the secured asset in favour of the petitioners.

8. Learned counsel for the bank has raised two points while opposing the writ petition.

9. According to him, possession of the secured asset having been taken over by the bank, remedy of the petitioners now lies in approaching the Debts Recovery Tribunal having jurisdiction in terms of section 17 of the said Act and this writ petition ought not to be entertained. In support of his submission, he has relied on the decision of the Supreme Court reported in *Transcore Vs. Union of India (UOI)* and *Another, .* Reliance has also been placed by him on another decision of the Supreme Court of recent origin reported in *United Bank of India Vs. Satyawati Tondon and Others*,

10. Next, it is submitted that the said Magistrate had the jurisdiction to entertain the application u/s 14 of the said Act. In support of such contention, reliance has been placed by learned counsel on a decision of the Kerala High Court reported in [*Solaris System Pvt. Ltd. Vs. Oriental Bank of Commerce*, According to him, the bank had proceeded to approach the said Magistrate on the authority of the decision in *Solaris Systems (supra)* and, therefore, its action is unexceptionable.

11. I have heard learned counsel for the parties.

12. It would be necessary to first deal with the objection of availability of an alternative remedy to the petitioners. It is settled law that mere existence of an alternative remedy does not oust the jurisdiction of the writ Court. In view of the decision of the Supreme Court reported in Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, , at least in four situations a Court of writ would be justified in entertaining a writ petition despite availability of an alternative remedy. One of such situations is when the action impugned in the writ petition is without jurisdiction. The basic contention of Mr. Chakraborty, as noticed above, is one relating to total lack of jurisdiction on the part of the bank in proceeding to take possession of the secured asset in the manner it did.

13. It may be noted that even in the decision in Satyawati Tondon (supra), the Supreme Court had observed that the High Courts ought to exercise the discretion with greater caution, care and circumspection. Paragraph 44 of the reported decision recognizes that the powers conferred upon the High Court under Article 226 of the Constitution to issue writs for the purpose of enforcement of the rights conferred by Part-III of the Constitution or for any other purpose are very wide and there is no express limitation on the exercise of that power, but that the rules of self-imposed restraint evolved by the Supreme Court, which every High Court is bound to keep in view while exercising power under Article 226, must be borne in mind.

14. The rule of exhaustion of alternative remedy being a rule of discretion rather than a rule of law, in an appropriate case the Court would be justified in exercising its discretion and having regard to the facts and circumstances of the present case, I am of the view that it is one such case where the action of the bank is without jurisdiction and hence indefensible. I, therefore, do not propose to relegate the petitioners to the alternative remedy provided by section 17 of the Act.

15. The decisions in Solaris Systems (supra) and Indusind Bank (supra) were considered by me while disposing of A.S.T. 1337 of 2011 (Ronit Nirman Pvt. Ltd. vs. State Bank of India & Ors.) on 18th October, 2011. I had disagreed with the decision in Solaris Systems (supra) and concurred with Indusind Bank (supra) for the following reasons:-

Section 14 of the Act does not refer to the Chief Judicial Magistrate as an authority who is empowered to direct assistance, if approached by a secured creditor. On a plain reading of the statute it is clear that in so far as a non-metropolitan area is concerned, the concerned District Magistrate has to be approached. The decision in Solaris System Pvt. Ltd. (supra) does not take into consideration the fact that for a non-metropolitan areas, the District Magistrate has been vested with the jurisdiction to extend assistance. Once an authority has been named for the purpose of rendering assistance, the Court cannot confer jurisdiction on an authority who has not been named in the statutory provision

for exercising such power. That would amount to usurping legislative function.

It is settled law that a statutory authority can exercise powers to the extent the same is conferred on it whereas a natural person has the power to do every such act unless the same is curbed by a statutory provision [See *Maniruddin Bepari Vs. The Chairman of the Municipal Commissioners, Dacca Municipality*, and 1994(2) CLJ 450 *Bipadtaran Patra vs. State of West Bengal & Ors.*]. The learned Judge of the Kerala High Court appears to have proceeded by posing a wrong question i.e. whether the Act debars the Chief Judicial Magistrate to exercise section 14 powers or not. The question that ought to have been framed is whether the Act empowers the Chief Judicial Magistrate to exercise section 14 powers or not. The answer to such question would have obviously been in the negative. While respectfully disagreeing with the learned Judge of the Kerala High Court, I record my concurrence with the view expressed by the Bombay High Court and hold that the Chief Judicial Magistrate, Barasat acted without jurisdiction in entertaining the application u/s 14 of the Act.

16. The unreported decision dated 18th October, 2011 was made over to the learned counsel for the bank to advance his submission. Be it recorded that he could not persuade me to take a different view.

17. In the result, I hold that the approach of the bank u/s 14 of the said Act before the said Magistrate was absolutely contrary to law and the said Magistrate acted wholly without jurisdiction in passing the order dated 16th September, 2011. This is apart from the fact that the application itself stood terminated by the subsequent order dated 9th December, 2011. Since possession of the secured asset has been taken over by the bank illegally and contrary to the provisions of the Act, it shall restore its possession in favour of the petitioner as early as possible but not later than three days from date of receipt of an authenticated copy of this order. After possession is restored, it shall be open to the bank to enforce its security interest either by proceeding u/s 13(4) of the said Act or by filing an application afresh u/s 14 before the District Magistrate, North 24-Parganas, as it may be advised.

18. The writ petition stands allowed. However, in the circumstances, there shall be no order as to costs. Urgent photostat copy of this order, if applied for, be given to the parties on the usual understandings.