

(2017) 02 GUJ CK 0178
In the Gujarat High Court
Case No : 436 of 2017

GRUH FINANCE LIMITED

APPELLANT

Vs

THE DISTRICT MAGISTRATE & ORS

RESPONDENT

Date of Decision : 09-02-2017

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 14, Section 13, Section 17 - Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset. - Enforcement of security interest - Right to appeal

Citation : (2017) 02 GUJ CK 0178

Hon'ble Judges : N.V.Anjaria

Bench : Single Bench

Advocate : HARSHADRAY A DAVE, JIGAR G GADHAVI

Judgement

1. Heard learned advocate Mr. Harshadray Dave for the petitioner and learned advocate Mr. Jigar Gadhavi for the second and third respondents. The first respondent is District Magistrate for whom none appeared, though served with the notice of this Court.

2. The petitioner Gruh Finance Limited challenges orders dated 04.05.2016 passed by the first respondent- District Magistrate, Mehsana whereby the application of the petitioner under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 came to be rejected and the first respondent refused to render assistance for taking possession of the secured asset.

3. As the private respondents herein failed to pay the dues of the petitioner, the recovery proceedings under the SARFAESI Act were initiated by the petitioner against them. Notice under Section 13(2) was issued and thereafter, notice under Section 13(4) was also issued. As the possession was resisted, the petitioner filed an application under Section 14 of the Act seeking assistance from the first

respondent which was rejected.

4. Looking at the contents of the impugned order whereby the District Magistrate has rejected the application under Section 14, it is viewed and stated by the Magistrate that the Bank had not approached with clean hands as certain criminal proceedings were pending before the court of Chief Judicial Magistrate, Mehsana and the details about the said proceedings were not disclosed. It was next recorded that in Criminal Inquiry No.3 of 2015 pending before the court of Judicial Magistrate, First Class, Kadi, a report under Section 202 of the Code of Criminal Procedure was submitted and in that report, it was stated that the complainant had paid the amount and that no amount was due. The learned District Magistrate reasoned that the dispute was sub-judice in that way. On the ground that the dispute between the parties being sub-judice, the Magistrate refused to exercise the power and rejected the application of the petitioner. It is evident that the District Magistrate in his reasoning and approach while passing the impugned order, drifted into the adjudicatory arena of the dispute. This was not the function to be discharged by the District Magistrate under Section 14 of the Act, nor such adjudicatory exercise was within his ambit of jurisdiction. The order was based upon such exercise.

5. The question about the kind and nature of powers exercised by the District Magistrate under Section 14 and the order which may be passed upon such application, is no longer res integra. 5.1 Following observations are noticed from the decision of the Apex Court in *United Bank of India vs. Satyawati Tondon* [(2010) 8 SCC 110],

"In terms of Section 14, the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor." (Para 21)

5.2 The observation applied by the Supreme Court is that the District Magistrate is obliged to take possession. This Court in *Bank of India vs. Pankaj Dilipbhai Hemani* [2007 (2) GLH 326] considered the scope of powers exercisable under Section 14 and it was stated that the role assigned to the District Magistrate is of a ministerial kind in rendering assistance. It was observed and held as under inter alia that adjudicatory powers are conferred on the Tribunal functioning under Section 17 and the District Magistrate cannot enter into that arena,

"On a plain reading it is apparent that the said provision is a procedural provision whereunder the Chief Metropolitan Magistrate or the District Magistrate, (the Authority) as the case may be, shall, on a request being made to him (a) take possession of such asset and documents relating to the assets; AND (b) forward such assets and documents to the secured creditor. Under sub-section (2) of

Section 14 of the Securitisation Act the authority is empowered to take such steps and use such force as may be necessary for taking possession of the secured assets and the documents relatable thereto. Under sub-section (3) of Section 14 of the Securitisation Act, such act of the authority is protected and the action shall not be questioned in any Court or before any authority. Thus, it is apparent that the role envisaged by the legislature in so far as the Authority is concerned, is a ministerial role in the form of rendering assistance and exercising powers by virtue of the authority vested in the District Magistrate or the Chief Metropolitan Magistrate including use of force as may be necessary. The said Authority, namely, the Chief Metropolitan Magistrate or the District Magistrate is not vested with any adjudicatory powers. There is no other provision under the Securitisation Act in exercise of which the said Authority, who is approached by a secured creditor, can undertake adjudication of any dispute between the secured creditor and the debtor or the person whose property is the secured asset of which possession is to be taken. If such adjudicatory powers were to be vested in the Authority, the Securitisation Act would have made a specific provision in this regard." (Para 6)

5.2.1 It was thereafter stated,

"Section 13(4) of the Securitisation Act provides for various measures a secured creditor may take to recover the secured debt; one of such measures is to take possession of the secured asset. A person aggrieved by any of the measures referred to in sub-section (4) of Section 13 of the Securitisation Act is granted a right to make an application to the Debts Recovery Tribunal (the Tribunal) within the prescribed period under Section 17(1) of the Securitisation Act. Under subsections (2), (3) and (4) of Section 17 of the Securitisation Act the statute has provided a complete code, including the powers to the Tribunal to declare any of the measures taken by the secured creditor under Section 13(4) of the Securitisation Act invalid and consequential restoration of possession to the person from whom the possession was taken. A person aggrieved by any order made by the Tribunal under Section 17 of the Securitisation Act has a statutory right of appeal under Section 18 of the Securitisation Act. Therefore, under the guise of acting under Section 14 of the Securitisation Act the Authority cannot be permitted to usurp statutory powers vested in the Tribunal." (Para 7)

5.2.2 It was finally observed,

"Hence, the Authority who is called upon to act under Section 14 of the Securitisation Act can only assist, nay, is bound to assist the secured creditor in taking possession of the secured asset. Any dispute between the parties regarding the secured asset raised before the Authority cannot be gone into by the Authority; the Authority has to relegate the aggrieved person to seek statutory remedy under the Securitisation Act after taking possession and handing over to the secured creditor. The Authority cannot be permitted to read anything beyond this is Section 14 of the Securitisation Act. (Para 9)

5.3 In *Bharatbhai Ramniklal Sata vs. Collector and District Magistrate* [2010 (2) GLR 985], after relying on the decision of the Supreme Court in *Transcore vs. Union of India* [(2008) 1 SCC 125] observed as under,

"From the aforesaid provisions of law and the decision of the Supreme Court, it will be clear that for taking possession, one of the measures for recovery of secured debts under subsection (4) to Section 13 of the Act includes the measures taken by secured creditor under Section 14 and therefore, if any order is passed under Section 14, though it cannot be challenged before any Court of law in view of sub-section (3) to Section 14, but one can raise the legality and propriety of such measures of taking possession under Section 17, if such measure is against the Securitisation Act or Rules framed thereunder." (Para 11)

5.4 Similar view was reiterated in *Canara Bank vs. Sulay Traders through Bipin Kantilal Vakta* [2010 (1) GLR 770],

"After the aforesaid details are submitted, the learned Magistrate would be required to examine the same and verify the aspects being condition precedent for exercise of the power under Section 13(4) of the Act. If the learned Magistrate has any doubt about the genuineness of the statement or the reliability of the statement made, or about the compliance of any condition precedent for exercise of the power under Section 13(4) of the Securitisation Act, he has two options; one is that, he may call upon the Bank itself to supply the necessary details on any aspects, if he is not satisfied about the condition precedent for exercise of the power under Section 13(4) of the Securitisation Act; the second is that he may issue the notice to the borrower for verification of the existence of any fact which is required to be verified by him. Thereafter, he may proceed for exercise of the power under Section 14 of the Securitisation Act.

Be it noted that the Magistrate while exercising power under Section 14 of the Securitisation Act is required to verify the existence of the facts attracting power under Section 13(4) of the Securitisation Act, and he is not required to examine or adjudicate the rights of the parties, if it is demonstrated before him that certain facts do exist. It is the only factual verification to be made by the learned Magistrate. For example, the existence of equitable mortgage wherein he will be required to verify whether there is a document of equitable mortgage and whether the original Title Deeds are deposited with the Bank or not. Similarly, whether notice under Section 13(2) of the Securitisation Act has been served upon the person concerned or not, whether any reply or objection is raised or not and if yes, whether decision is taken or not and whether such decision is communicated or not and whether any payment is made or not after the notice under Section 13(2) of the Securitisation Act and if yes, any amount outstanding, etc. There cannot be any exhaustive list of the verification of facts, but suffice it to state that he would only be required to verify the existence of the fact which are relevant to have condition precedent for exercise of the power under Section 13(4) of the Securitisation Act. But he will not be required to adjudicate on the aspects of illegality and validity of such facts or the rights flowing

therefrom." (Para 7 & 8)

5.5 In *I.D.B.I. Bank Ltd. vs. Hytaisun Magnetics Ltd.* [2011 (2) GLH 1438], the same issue was addressed by the Division Bench and in the context various decisions on the point were surveyed. In that case, the borrowers had not disputed the fact of having taken financial assistance, however a plea was taken that the Bank was not holding any original title deeds of the property and therefore had no security interest which was essential for enforcement of the mortgage under the Securitisation Act. The District Magistrate dismissed the application of the Bank under Section 14 of the Act. The Division Bench while setting aside the order proceeded to lay down the following principles, reproducing those relevant to the subject matter issue here,

"(a) Only when the secured creditor finds difficulty to take possession of the secured asset, it may take assistance of the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the Act.

(b) The measures taken under Section 14 amounts to measures taken under Section 13(4) of the Act.

(c) As the measures taken under Section 14 amount to measures taken under Section 13(4) of the Act, under Section 14(3) such measures cannot be called in question before any Court or Tribunal.

(d) If such measures taken under Section 14 which amount to measures taken under Section 13(4) is not in accordance with the Securitization Act or the Rules framed thereunder, including the objection, if any, raised that the asset is not a secured asset to be taken under Section 13(4), the aggrieved person has a remedy under Section 17 before the Debts Recovery Tribunal to show that the measures taken are against the Act [Section 13(4)] or the Rules framed thereunder.

(e) All such determination is to be made by the Debts Recovery Tribunal including the question whether the asset is a secured asset or not and the Chief Metropolitan Magistrate or the District Magistrate has not been empowered to adjudicate such dispute, but is directed only to assist the secured creditor in taking possession of the secured asset. If they are not empowered to adjudicate the dispute, they cannot also call for the secured creditor to produce any document to decide whether the asset is secured asset or not, which will be futile exercise in absence of power to adjudicate such issue." (Para 20)

5.6 In yet another decision of the Division Bench in *Mansa Synthetic Private Limited vs. Union of India* being Special Civil Application No.1829 of 2012, the principle was reiterated that the Magistrate is bound upon an application made, to assist the secured creditor in taking possession of the secured assets and is not empowered to decide the question of legality and propriety of any of the actions taken by the secured creditor under Section 13(4) of the Act. The proposition of law was followed and reiterated in *Consumer Protection and*

Analytic Committee vs. State of Gujarat [2013 (4) GLR 3642]. The other decision on the same line is in Gruh Finance Limited vs. District Magistrate & Collector [2012 (2) GCD 1288]. The reiterative pronouncements in Kotak Mahindra Bank vs. District Magistrate decided by the Division Bench on 25.08.2011 being Special Civil Application No.8326 of 2011, in Kotak Mahindra Bank vs. District Magistrate decided on 18.06.2015 being Special Civil Application No.7512 of 2014 and in Gruh Finance Limited Vs District Magistrate decided on 03.07.2015 being Special Civil Application No.4838 of 2015, the later two decisions being by learned Single Judge.

5.7 In Gruh Finance Limited Vs District Magistrate, Surat being Special Civil Application No.18551 of 2015 decided on 25.11.2016, this Court held and observed in respect of scope of powers under Section 14 of the SARFAESI Act as under,

"The powers and the jurisdiction under Section 14 of the Act exercisable by the District Magistrate is not adjudicatory in nature. What are the rights of the parties in the civil realm, are not required to be gone into by the District Magistrate, nor the District Magistrate has powers to pronounce upon the rights of the parties in the context of any other law while entertaining the application under Section 14 of the Act. The function is anything but adjudicatory. The claims in respect of rights over the property cannot be considered at all. The powers are executory nature. What the Magistrate is supposed to see is whether ingredients of Section 14 of the Act are satisfied or not. The power is described as ministerial where the District Magistrate would turn line his adjudicatory eye. No rights are determined for the parties in Section 14 proceedings, as for that the Legislature has provided a special remedy before the Debt Recovery Tribunal who exercises the adjudicatory powers in respect of the disputes which may arise between the Bank and borrower and other aggrieved persons in course of the steps under the SARFAESI Act, 2002." (Para 6.1)

6. The case of the respondents about payment of amount was disputed by the petitioner. In any view, said aspect may be a defence for the respondents in the proceedings which may be initiated by the petitioner, but it does not constitute a ground for the District Magistrate to exercise powers under Section 14 of the Act.

7. For the foregoing discussion and reason, the present petition is required to be allowed. The order dated 04.05.2016 passed by the District Magistrate, Mehsana rejecting the application of the petitioner under Section 14 of the SARFAESI Act, 2002 is hereby set aside. The District Magistrate shall pass a fresh order in accordance with law within ten days from the date of receipt of the writ of this order for rendering the assistance to the petitioner for taking possession of the mortgaged properties/secured assets.

8. It is needless to state that this Court has not expressed anything on merits on the rights and contentions of the parties which they may agitate in accordance with law before the appropriate forum. Such rights and remedies are open and

available for the parties.

9. Petition stands allowed in the aforesaid terms with no order as to costs. Direct service is permitted.