

**(2018) 05 BOM CK 0038**

**In the Bombay High Court**

**Case No : WRIT PETITION NO. 1273, 2233 OF 2017**

HDFC BANK LIMITED

APPELLANT

Vs

BANARASILAL GURUDASRAM MADAN S.

RESPONDENT

**Date of Decision : 03-05-2018**

**Acts Referred:**

Securitisation And Reconstitution Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 14, 14(1)(b)(i), (ix), 14(1), 17, 14(3), 13, 13(2), 13(1), 13(3), 13(3A), 13(4)  
Transfer of Property Act, 1882 — Section 69, 69A  
Limitation Act, 1963 — Article 136, 62

**Citation : (2018) 05 BOM CK 0038**

**Hon'ble Judges : A. A. SAYED, RAVINDRA V. GHUGE**

**Bench : Division Bench**

**Advocate :** Rohit Gupta, Jyoti Sanap, Nikhil Rajani, Yusuf Iqbal, Ashish Ved, Neville Majra, Pankti Haria, Shaista Pathan, Meghnath Navlani, Girish Thanvi, Rajiv Mane, Mayur Khandeparkar, Priyanka Fadia, Shashank N, Tushad Cooper, Siddharth Samantray,

**Final Decision : Dismissed**

## Judgement

Ravindra V. Ghuge, J.

1.We have heard the learned Advocates appearing for the respective sides in these matters in extenso. With their consent, we have taken up both these matters for adjudication together, considering the common issue of law, involved.

WRIT PETITION NO. 1273 OF 2017

2.In the first Petition, the Petitioner-Kotak Mahindra Bank Ltd has impugned the order dated 10.04.2017 passed by the learned Chief Metropolitan

Magistrate, Mumbai, (in short CMM) rejecting the application under Section 14 of the Securitisation and Reconstruction of Financial Assets and

Enforcement of Securities Interest Act, 2002. For the sake of clarity, prayer clause 26(a) put forth by the Petitioner is reproduced as under:

â??26(a) this Hon'ble Court be pleased to call for the record and proceeding of the Application No. 278/SA/2013 from the office of the Ld. Chief

Metropolitan Magistrate and on perusal of the same, be pleased to issue a Writ of Certiorari or any other Writ of a like nature and set aside and quash

the Order dated 10th April 2017 being Exhibit 'A' passed by the Ld. Chief Metropolitan Magistrate, Mumbai and also be pleased to issue a Writ of

Mandamus or any other writ of like nature directing the Ld. Chief Metropolitan Magistrate to take physical possession of the Mortgaged Properties

and hand over the same to the Petitioner within a period of four weeks from the date of the order or any other such period as this Hon'ble Court may

deem fit and proper;â??

WRIT PETITION NO. 2233 OF 2017

3. In the second Petition, the Petitioner-HDFC Bank Ltd. has sought to challenge the order dated 23.05.2017 passed by the Chief Metropolitan

Magistrate by which the application filed under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Securities

Interest Act, 2002 has been rejected. For the sake of clarity, prayer clauses 29(a) and 29(b) put forth by the Petitioner are reproduced as under:

â??29(a) this Hon'ble Court be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction

of this Hon'ble Court calling for the records arising out of the Securitization Application bearing no. 261/SA/2015 before the Chief Metropolitan

Magistrate Court, Esplanade leading to the Impugned Order dated 23rd May 2017 and after examining the legality, validity and propriety thereof be

pleased to quash and set aside the same; 29(b) pending the hearing and final disposal of the Petition, this Hon'ble Court by temporary order and

injunction be pleased to stay the effect, operation and purport of the Impugned Order dated 23rd May 2017 and restrain the Respondents (whether by

themselves or through their agents, servants, representatives or subordinates) from in any manner taking any steps or any action in furtherance of the

Impugned Order dated 23rd May 2017 or in any manner dealing with, encumbering or creating third party rights in respect of the Subject Property i.e.

Flat No. 701, 7th floor, Santacruz Saryu premises Co-operative Society Ltd.

situate at Plot No.64-B, F.P. No.107, CST No.567, Linking Road,  
Santacruz (West), Mumbai 400 054.â??

4. There is no dispute that, in both these matters in between the banks, who are secured creditors and the Respondents, the issue of exercise of power by the District Magistrate (DM) or by the Chief Metropolitan Magistrate (CMM), under Section 14 (1) (b) (i) to (ix) of the SARFAESI Act has been raised by the parties.

5. Considering the extensive submissions canvassed by the learned Advocates for the respective sides and keeping in view the issues raised in both these petitions, we are not required to advert to the entire submissions put forth, which we have summarised hereunder. Suffice it to say that, the Petitioner-Banks in both these cases have strenuously canvassed a law point that the learned CMM or the District Magistrate, as the case may be, did not have the scope and power to consider every aspect of the affidavit filed by the respective banks, by going into the legalities, as is done by the Civil Courts while deciding Civil Suits.

6. In support of their contentions, the litigating sides have relied upon the following Judgments:

- (a) Judgments cited by the Petitioners in Writ Petition No. 1273 and 2233 of 2017
  - (1) Trade Well Vs. Indian Bank 2007 Cri.L.J. 2544 (Bom)
  - (2) Union Bank of India Vs. State of Maharashtra (2010) 5 Mh.L.J. 270
  - (3) International Asset Reconstruction Co. Vs. Union of India 2011 Vol 113 (5) Bom. L.R. 3080
  - (4) Kanaiyalal Lalchand Sachdev Vs. State of Maharashtra 2011 2 SCC 782
  - (5) Standard Chartered Bank Vs. V. Noble Kumar (2013) 9 SCC 620
  - (6) M/s. Hari Trading Corporation Vs. Bank of Baroda (2015) 3 BC 284
  - (7) Blue Coast Hotels Ltd. Vs. IFCI & Ors. 2016 (3) ABR 769
  - (8) Vijaya Bank Vs. Prithvi Bricks & Mortar Pvt. Ltd. & Ors. (2017) 2 Mh.L.J. 341
  - (9) Bank of Maharashtra Vs. Additional District Magistrate (2017) AIR (Bom) 92
  - (10) B. R. Kadbhane Vs. A.R.C.I.L. (WP No. 6491 of 2015)
  - (11) Capital First Ltd. Vs. State of Maharashtra (WP No. 1961 of 2017 decided on 22.12.2017)
  - (12) R Parthasarathy, Asstt. Collector Vs. Dipsi Chemicals Pvt. Ltd. 1987 Mh.L.J.

(b) Judgments cited by Respondent No.4 in Writ Petition No. 1273 of 2017

(1) Blue Coast Hotels Ltd. Vs. IFCI Ltd. & Ors. Bombay High Court Writ Petition No. 222 of 2015 and connected matters.

(2) Harshad Govardhan Sondagar Vs. International Asset Reconstruction Co. Ltd. & Ors. (2014) 6 SCC

(3) Vishal N. Kalsaria Vs. Bank of India & Ors. Supreme Court of India Criminal Appeal No. 52 of 2016 (Arising out of SLP (Cri) No. 8060 of 2015)

(4) Indian Bank, Overseas Branch Vs. Punjab National Bank Madras High Court MANU/TN/1743/2009

(5) Shoklingam Kappuswami Mudliyar Vs. Indian Bank & Ors. Gujarat High Court II (2008) BC 637

(6) S. P. Chengalvaraya Vs. Jagannath Supreme Court of India, AIR 1994 SC 853

(7) M/s. Sheelvik Agencies Vs. The Maharashtra Housing Area Development Authority (MHADA) Bombay High Court Writ Petition (L) No.2286 of 2008.

(c) Judgments cited by Respondent No.1 in Writ Petition No. 2233 of 2017

(1) Salim S. H. Vs. Axis Bank 2016 Supreme Court Ker 29970

(2) Harsora Hotels Pvt Ltd. Vs. Kotak Mahindra Bank Ltd. 2014 SCC Guj 9203

(3) M. Mahalingam Vs. Shriram Housing Finance Ltd. WP 33417 of 2017 and WP 36903 of 2017 of Madras High Court

(4) Charan Lal Sharma Vs. Allahabad Bank AIR 2015 ALLAHABAD 136

(5) Housing Development Finance Corp. Ltd. Vs. Govt. of Kerala 2013 SCC Ker 24249

(6) Canara Bank Vs. Sulay Traders AIR 2010 Gujarat 91

(7) Padma Nair Vs. The Deputy Collector Valuation & Stamp Duty AIR 1994 Bombay 160

(8) Yeshvir Singh Tomar Vs. Dr. O. P. Kohli 222 (2015) Delhi High Court

(9) Pathan Mohammed Hussein & Mohammed Akbar Bhai Vs. Kirtikumar Parsottamdas Shah High Court of Gujarat, Second Appeal No. 282 of 2017

(10) Suraj Lamp & Industries (P) Ltd. Vs. State of Haryana & Ors. (2012) SCC 656

(11) S. Kaladevi Vs. V. R. Somasundaram & Ors. (2010) 5 SCC 401

(12)Jetu Jazques Taru Lalvani Vs. Shreeji Mineral Water (p) Ltd. & Ors. 2006 (1) AIR Nom R 827

(13)Smt. Sunitra Devi Vs. Kamal Kumar Tamrakar Madhya Pradesh High Court WP 11892/2015

(14)Rattan Chand Vs. Piar Chand Himachal Pradesh High Court RSA 455 of 2017

(15)The Greater Bombay Co-op. Bank Ltd. Vs. M/s. Nagraj Ganeshmal Jain & Ors. Supreme Court Civil Appeal Nos.009777-009778 of 2017

(16)Akula Sangappa Vs. Bandam Siddappa Andhra High Court Second Appeal No. 106 of 2011

(17)T. Arthi Vs. Anand Reddy & Ors. AIR 2006 AP 335, 2006(5) ALD1

(18)Jetu Jacqus Taru Lalwani Vs. Solestrap Industries (P) Ltd. 2006(1) Mh.L.J. 21

(19)M/s. Magma Fincorp Ltd. Vs. Makrand V. Naik & Anr. Bombay High Court Case No. 30700/70712 of 2013

(20)Digambar Warty Vs. District Registrar Bangalore Karnataka High Court Writ Appeal No. 885/2008 & 2062-2106/2008

(21)M/s. Kamalshi Builders Vs. M/s. Ambedkar Educational Society Supreme Court of India Appeal (Civil) 6345 of 2000

(22)Smt. Gomtibai (dead) Vs. Mattulal (Dead) (1996) 11 SCC 681

7.The contentions of the Petitioners in the two Petitions can be summarized as under:

(a)The CMM has ignored the law laid down by the Honâ??ble Apex Court in the matter of Noble Kumar (supra) and the decisions rendered by the

learned Division Bench of this Court in the matter of Hari Trading (supra) and in the matter of Bank of Maharashtra Vs. Additional D.M. & Ors.

(supra).

(b)In Hari Trading (supra), the Division Bench of this Court has considered the law laid down in the matter of Mardia Chemicals Ltd. and Noble

Kumar (supra) and has held that the Magistrate cannot adjudicate and decide the correctness or otherwise of the information which is given in the

application/affidavit.

(c)It is also held in Hari Trading (supra) that the Magistrate can consider as to whether the measures taken by the Bank are in accordance with

Section 14 and that the borrower will have no right to be heard before passing any order.

(d) It is further held that Section 14 is not a stage for adjudication of the rights and the liabilities between the parties before the Magistrate.

(e) It was concluded by the learned Division Bench in the matter of Bank of Maharashtra (supra) that considering the law laid down in Noble Kumar

(supra), the District Magistrate (or the CMM as the case may be) has to verify the contents in the affidavit tendered by the bank and is to scrutinize

whether assertions made in the affidavit are to his satisfaction. Thereafter, he has to pass an appropriate order regarding taking of the possession of

the secured assets.

(f) In Noble Kumar (supra), the Honâ??ble Apex Court has observed in paragraph 25 that the satisfaction of the Magistrate under the second proviso

to Section 14(1) necessarily requires the Magistrate to examine the factual correctness of the assertions made in such an affidavit, but not the legal

niceties.

(g) It is concluded in paragraphs 27 and 28 in Noble Kumar (supra) that, by whatever manner the secured creditors obtain possession either through

the process contemplated under Section 14 or without resorting to such a process, obtaining of the possession of a secured assets is always a measure

against which a remedy under Section 17 is available.

(h) When the Honâ??ble Apex Court has concluded in Noble Kumar (supra) that the Appeal under Section 17 is available to the borrowers only after

losing possession of the secured assets, it would indicate that all contentions of the borrower/guarantor as against the order passed under Section

14(3), would be considered by the Competent Tribunal under Section 17.

(i) There cannot be a double adjudication on the contents of the affidavit of the bank, under Section 14 as well as under Section 17. (j) The Magistrate

only has to satisfy himself under Section 14 that the contents of the affidavit are factually correct.

(k) The Tribunal while dealing with the Appeal under Section 17 can consider the challenge to the order passed under Section 14(3) and whether the

said order is perverse or erroneous and whether it is legally unsustainable.

(l) If there is an adjudication upon each and every statement set out in the affidavit filed by the bank, under Section 14, the Tribunal will be entering into

a second adjudication while dealing with the Appeal filed under Section 17 of the Act.

8.Per contra, the learned Advocates for the Respondentsborrowers/guarantors have canvassed that though the CMM/DM may not have the

jurisdiction to adjudicate upon each of the aspects as are required to be set out in the affidavit, such authorities were obliged to and were duty bound to

see the correctness of the contents of the affidavit as these authorities are duty bound to pass 'suitable orders' as is prescribed in the 2nd proviso

below Section 14(1) (b) (i-ix) of the Act.

9.The learned Advocates for the borrowers/guarantors further submit that the CMM/DM is not merely required to go through the contents of the

affidavit as if he is considering the affidavit as a 'check list'. It is not a clerical job. He has to be satisfied that the contents of the affidavit are

factually correct and for which, he has to independently apply his mind to every clause in the affidavit keeping in view the nine clauses (i) to (ix) under

Section 14(1). He cannot ignore an incorrect or false statement if so made in the affidavit. The language used in the second proviso is that he has to

be satisfied about the contents of the affidavit. He can derive this satisfaction only after he considers each statement in the affidavit as regards its

factual correctness and only then can he pass an order granting possession.

10.In the first Petition, the Petitioner-Bank is aggrieved by the order dated 10.04.2017 passed by the Chief Metropolitan Magistrate, Mumbai in Case

No. 278/SA/2013. The learned Magistrate, after considering the provisions of Section 14 of the SARFAESI Act, has gone through the affidavit filed

by the Petitioner-Bank and the documents in support thereof. During the scrutiny and verification of the documents, the original title deeds of the

secured assets were not produced by the Bank. It was pointed out to the authorized Officer of the bank that these documents have not been

produced on record.

11.In the above backdrop, the authorized officer filed an additional affidavit stating that the mortgage was created on the basis of the certified copies

of the title deeds of the secured assets which would indicate that the assignor bank, which is State Bank of India, had not obtained the original title

deeds from the borrowers. The learned CMM, therefore concluded in paragraph 5 that the assignee bank, which is the Petitioner in the first Petition,

before taking the assignment of the loan, should have asked the assignor bank (SBI) to produce the original title deeds. It was concluded by the

learned CMM that the secured creditors would not be entitled to take possession of the secured assets pursuant to the measures to be taken under

Section 13 of the Act.

12.The learned CMM further noted from the record that the assignor bank SBI sanctioned various credit facilities to the borrowers in 1994 which

were further enhanced in 1998. The SBI sanctioned financial assistance of Rs.618.82 lakhs to the borrowers. In order to secure such loan facilities,

the borrowers executed a mortgage by way of two memorandums dated 02.11.1998 and 18.04.1998. As the borrowers defaulted, the loan account

was classified as ‘non performing assets’ (NPA) on 30.06.1998.

13.The learned CMM, therefore concluded that by virtue of Article 62 of the Limitation Act, 1963, the Petitioner-Bank was obliged to initiate

measures for the recovery of the loan amounts within 12 years when the amount became due. Such measures should have been taken against the

borrowers till 02.11.2010. However, the Petitioner-Bank filed the application under Section 14 on 01.08.2013, which was therefore barred by

limitation. As such, in the light of insufficiency of original title deed documents and on account of limitation, the learned CMM passed the impugned

order dated 10.04.2017 and disposed of the application filed by the Petitioner-Bank.

14.The Petitioner contends on the basis of the Judgment delivered in the case of B. R. Kadbhane Vs. A. R. C. I. L. (WP No. 6491 of 2015) that

enforcement of a recovery certificate by invoking Section 13 and 14 of the Act is possible only after such recovery certificate is issued. When the

recovery certificate was issued by DRT, Ahmedabad on 20.05.2009, the Petitioner would get the right to invoke Sections 13 and 14 within 12 years

under Article 136 of the Limitation Act. The CMM does not have the authority to go into the legality of the recovery certificate by scrutinizing

whether it was legally granted or not. The contention of the Respondent that the recovery certificate was illegally granted, would not fall within the

jurisdiction of the Magistrate to undertake any adjudication unless such a certificate is challenged before a competent forum.

15.He further submits that based on the recovery certificate, a notice under Section 13(2) was issued on 25.04.2013. Keeping in view the law laid

down by the Hon’ble Apex Court in Noble Kumar (supra) and by the Division



Bench of this Court in Hari Trading (supra) and Bank of

Maharashtra (supra), the Magistrate is only required to ascertain as to whether there was a Recovery Certificate.

16. It is then submitted that there cannot be a double adjudication upon the statements made by the bank in its affidavit under the amended portion of

Section 14(1). If the contention of the Respondent that the Magistrate must fully satisfy itself about the correctness of all the nine clauses to be set

out in the affidavit is to be accepted, a second adjudication would occur on the same premise after the borrower/guarantor prefers an appeal under

Section 17 for challenging the order under Section 14(3). The legislature never intended to provide for such a double adjudicatory process.

17. We find that two Division Benches of this Court have considered the law laid down in the Noble Kumar's judgment in Hari Trading (supra)

and Bank of Maharashtra (supra). In both these Judgments, this Court had concluded that the aggrieved person would be at liberty to prefer a

proceeding under Section 17 so as to challenge the order under Section 14(3). It is further held that the Magistrate is only required to satisfy himself

that the statements made in the nine clauses under Section 14(1) are correct. Once this has been done, the Magistrate is required to pass an order

under Section 14(3) for taking the actual physical possession of the mortgaged assets. This Court, in Hari Trading (supra) after considering Noble

Kumar (supra) has concluded in paragraphs 15 and 16 as under:

15. The words in italic therefore were not there before section 14 was amended in 2013. In our view, amendment to Section 14 has not changed the

character of the application which is made by the secured creditor, seeking assistance of the Magistrate in getting possession of the secured assets.

The amendment only seeks to impose further obligation on the Bank (I) to file an application which is duly affirmed by the authorized Officer and (ii)

to give the relevant information as provided in clauses (i) to (ix) of the proviso and all that the Magistrate is called upon to do is to check whether this

information is supplied or not. In the event, the Magistrate finds that all the information is given in the application under Section 14 then he has no other

option but to pass an order allowing the application under Section 14 and in the event he finds that some information is not provided then he has to

return the application to the secured creditor and only after all the information is

provided final order under section 14 will be passed. Much emphasis has been laid on the words "after satisfying the contents of the affidavit" which are found in the amended provision. We are afraid that we are unable to accept the contention raised by the learned Counsels appearing on behalf of the Petitioners viz (i) that the inclusion of these words indicate that the Magistrate has now to adjudicate and decide the correctness or otherwise of the information which is given in the application and (ii) that by virtue of inclusion of these clauses, principal borrower gets right of taking part in these proceedings for the purpose of assisting the Magistrate. It is also not possible to accept the submission that since the section 14(3) contemplates a finality to the orders passed by the Magistrate, the principal borrower does not get any right to point out that the decision of the Bank of declaring the Account of the borrower as nonperforming asset is not correct or the measures taken by the Bank are not in accordance with law and, therefore, under Section 14 alone the borrower would get a right to point out to the Magistrate that these measures not being taken properly, the order directing that the possession should be taken cannot be passed without giving hearing to him.

16. It will be necessary to briefly see the scheme of the SARFAESI Act. The objects and reasons of the Act clearly reveal that when the legislature found that the Recovery of Debts due to Banks and Financial Institutions Act, 1993 did not serve the purpose of making quick recovery of secured assets from the borrowers/guarantors, the SARFAESI Act was passed. The Act therefore gives right to the Bank to take possession of the secured assets upon there being default in payment of secured debt or any installment thereof and if his Account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor can give notice in writing to the borrower to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor will have right to exercise all or any other rights under subsection (4) of Section 13 of the SARFAESI, Act; one of which includes taking possession of the secured asset. The relevant provisions of section 13 of SARFAESI Act viz section 13(1), 13(2), 13(3), 13(3A), 13(4) read as under:- "13. Enforcement of security interest.- (1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act,

1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2)Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or

any instalment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor

may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing

which the secured creditor shall be entitled to exercise all or any of the rights under subsection (4). (3)The notice referred to in sub-section (2) shall

give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-

payment of secured debts by the borrower.

[(3A) If, on receipt of the notice under subsection (2), the borrower makes any representation or raises any objection, the secured creditor shall

consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or

tenable, he shall communicate [within fifteen days] of receipt of such representation or objection the reasons for non-acceptance of the representation

or objection to the borrower: Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of

reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal under section 17 or the Court of District

Judge under section 17A.]

(4)In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to

one or more of the following measures to recover his secured debt, namely :-

(a)take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured

asset;

[(b)take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the

secured asset; Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business

of the borrower is held as security for the debt: Provided further that where the management of whole, of the business or part of the business is

severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;]

(c)appoint any person (hereinafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d)require at any time by notice in writing , any person who has acquired any of the secured assets from the borrower and from whom any money is

due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt

(5)â?¡.....

(6)â?¡.....

(7)â?¡.....

(8)â?¡.....

(9).....

(10).....â??

Sub-section (3A) to Section 13 was inserted by the Act 30 of 2004 with effect from 11-11-2004. The procedure, therefore, which is contemplated

under Section 13 is that the secured creditor can give a notice in writing to the borrower to discharge in full his liability if (i) he makes any default in

payment of secured debt or any installment thereof and (ii) his Account in respect of such debt is classified by the secured creditor as non-performing

asset. Sub-section (3) of Section 13 provides that the notice referred to in sub-section (2) shall give details of the amount payable by the borrower and

the secured assets intended to be enforced by the secured creditor in the event of nonpayment of secured debts by the borrower. By virtue of

insertion of Section (3A), right has been given to the borrower to make a representation or raise an objection and if such a representation is made, the

secured creditor has to consider such representation or objection and if he finds that such representation or objection is not acceptable, he has to

communicate within fifteen days of receipt of such representation the reasons for non-acceptance of the representation. Proviso to sub-section (3A)

clearly provides that upon the secured creditor rejecting the representation of

the borrower, no right would confer upon the borrower to prefer an application to the Debts Recovery Tribunal under section.

17. Sub-section (4) of Section 13 gives a right to the secured creditor to take possession of the secured assets of the borrower if he fails to discharge

his liability within a period specified in sub-section (2). It is obvious therefore that right of the secured creditor to take possession flows from section

13(4) and not from Section 14 of the SARFAESI Act. Section 14 clearly contemplates that Chief Metropolitan Magistrate or District Magistrate can

pass an order under Section 14 so as to assist the secured creditor to take possession of the secured assets and, if necessary, with the police help.

Section 14 therefore is not a stage for adjudication of rights and liabilities between the parties before the Magistrate. Prior to the said amendment, it

was a settled position in law that borrower did not have any locus when application under section 14 was filed by secured creditor in the Court of the

Chief Metropolitan Magistrate or before the District Magistrate. Even after amendment to Section 14, no such right, therefore, can be read into the

said provision merely because the words "after satisfying the contents of the affidavit" have been used in the proviso to Section 14 after

amendment in 2013. We are in agreement with the view taken by this Court in Hari Trading (supra).

18. In the matter of R Parthasarathy (supra), it is held that when a view taken by the Hon'ble Apex Court is cited before the High Court and a

view is then taken by the High Court after appreciating the law laid down by the Hon'ble Apex Court, the said view of the High Court would be

binding upon all co-ordinate benches of the said High Court. So also, in the Judgment delivered by the Division Bench of this Court recently in Capital

First Ltd. (supra), this Court, while considering Noble Kumar (supra) has concluded that the CMM/DM is not expected to enter into the aspect

relating to the legality or validity of a mortgage or indulge in adjudication of the amount/debt claimed by the bank or a financial institution as this would

tantamount to resorting to adjudication which can only be within the jurisdiction of the DRT.

19. We are therefore of the view that the Magistrate is required to ascertain whether the statements are made by the bank under the nine clauses

below Section 14(1) and once he is satisfied that the statements as required in

those nine clauses have been made by the bank in its affidavit, the Magistrate/DM would proceed to grant the application under Section 14(3).

20. Considering the law laid down by the Honâ??ble Apex Court and which was relied upon by the three benches of this Court, we find that the

Magistrate has travelled beyond its jurisdiction in this case in going into the limitation aspects under Sections 14(1) and 14(3). Once a recovery

certificate was issued, the bank would derive its authority to recover the said amount within 12 years. The Magistrate, while exercising jurisdiction

under Section 14(1), was only required to verify whether there was a mortgage keeping in view the second proviso below Section 14(1) by which the

CMM/DM has to satisfy itself as regards the contents of the affidavit being in tune with the declarations required to be made by the bank in the nine

clauses below the first proviso and whether the secured assets are located within his jurisdiction (See. Trade Well Vs. Indian Bank (supra)).

21. In the light of the above, we find that the CMM was not required to go into whether the claim of the bank was barred by limitation or not since the

first as well as the second proviso and the nine clauses introduced by the amendment dated 15.01.2013 to Section 14(1), did not invest this jurisdiction

with the said authority. The impugned order dated 10.04.2017 is therefore unsustainable.

22. In the second Writ Petition, wherein HDFC Bank is the Petitioner, the learned CMM has rejected the application Case No. 261/SA/2015 filed by

the Petitioner-Bank under Section 14 of the Act. The learned CMM has observed that he perused the application, affidavit and the documents placed

before him by the Bank while seeking an order under Section 14(3) of the Act. He noted that the borrower had obtained the loan from the bank

though he did not have an exclusive right, title and interest in the secured assets. Respondent No.2-Borrower had executed various agreements on

behalf of the Respondent No.1 including loan agreement, indemnity bond etc. as a borrower and owner of the secured assets. The CMM had

therefore directed the bank, by order dated 18.10.2016, to clarify whether the bank had verified the documents placed before it while granting loan on

the concerned assets and as to whether Respondent No.2 had the right, title and interest in the said immovable property (flat).

23. After hearing all the sides in the above backdrop, the learned CMM observed

in the impugned order that the basis of the grant of loan was an agreement for sale executed on 15.06.1979. It was not a registered document. There was nothing placed before the learned CMM by which he could be satisfied that Respondent No.2 had acquired a right, title and interest in the secured assets by which he could offer the flat as a mortgage for obtaining loan.

24.Considering our view expressed on the common law point involved in these both cases as above, we find in the second case as well that the CMM, while scrutinizing the affidavit of the Petitioner-HDFC Bank, has gone into the aspect of whether Banarasilal had any right or title or interest in the secured assets. The CMM was not adjudicating upon a civil Suit so as to assess whether any right, title or interest was created in favour of Banarasilal. It was not dealing with a suit in which a Plaintiff was seeking a declaration of his right, title or interest.

25.Keeping in view the law laid down in Noble Kumar (supra), Hari Trading (supra), Capital First (supra) and Bank of Maharashtra (supra), the CMM was empowered to ascertain whether all the declarations under the nine clauses of Section 14(1) had been made or not and whether such statements/declarations are supported with documents.

26.The Gujarat High Court in the matter of Shoklingam (supra) has held that the principal requirement of Section 13 of the Act is that the bank is required to establish that the security interest was created in favour of the bank. In the absence of any security interest, there can be no question of enforcement of any security interest under the said Act.

27.These aspects, in our view, have not been considered by the CMM.In a cryptic order, the CMM has focused only on the issue that the agreement to sell dated 15.06.1979 is not duly registered and would not create a secured asset. The housing society had issued a share certificate in favour of

Banarasilal on 28.08.1983. The Society issued a no objection certificate on 07.07.2006 for creating a mortgage of the said flat owned by Banarasilal.

A letter was issued by the society on 26.05.2006 confirming that Banarasilal is the sole owner of the flat. It was based on these documents that the

bank extended its loan. The said loan account was classified as NPA on 30.06.2009 and hence the bank issued a notice under Section 13(2) on

25.09.2009 which is within three months after classifying the loan account as

NPA. The Respondent had challenged this notice under Section 17 vide

S.A. No. 218 of 2010 before DRT-III. By order dated 01.12.2009, the DRT directed the Petitioner-Bank to take the symbolic possession of the flat

which was taken by the Petitioner-Bank. The said order was vacated subsequently.

28.The Petitioner then approached the CMM in Case No. 313/M/2010 under Section 14. By order dated 15.01.2013, the said application was allowed

by the CMM. The Respondent preferred Writ Petition No. 3109 of 2014 and by order dated 25.09.2014, the order of the CMM was set aside and S.

A. No. 281 of 2010 was directed to be decided expeditiously. The said S. A. was dismissed by the Judgment of DRT-III on 20.11.2014. The

Respondent preferred M.A. 165 of 2015 in Appeal No. 84 of 2015 before the DRAT. By order dated 24.03.2017, the M.A. was dismissed for being

devoid of merit and the Appeal was dismissed for non compliance of the interlocutory order dated 11.09.2013 by which the original applicants were

directed to deposit Rs.35,00,000/-.

29.In the above backdrop, the CMM, while passing the impugned order, appears to have lost sight of all these aspects and has focused only on the

agreement to sell dated 15.06.1979 concluding that Banarasilal had no legal right or title or interest in the secured asset. In our view, the impugned

order deserves to be quashed and set aside.

30.In the light of the above, both these Petitions are allowed. The impugned orders are quashed and set aside. We therefore remit both the

applications filed by both these banks to the Chief Metropolitan Magistrate, Mumbai in Case No. 278/SA/2013 and Case No.261/SA/2015 for a re-

hearing.

31.We make it clear that the learned CMM/Additional CMM would follow the law laid down by the Honâ??ble Apex Court in the matter of Noble

Kumar (supra) and the view expressed by the three Division Benches of this Court in the matters of Hari Trading (supra), Bank of Maharashtra

(supra) and Capital First (supra) as also in the present case while deciding the said applications.

32.Mr. Cooper, learned Counsel for the Respondents seeks stay of this order. The request is opposed by Mr. Khandeparkar, learned Counsel for the

Petitioner. We not inclined to grant stay. The application for stay shall, therefore,



rejected.