
(2015) 10 BOM CK 0114

In the Bombay High Court

Case No : Writ Petition (L) No. 2634 of 2015 and Writ Petition Nos. 640, 398 and 1776 of 2015 & Writ Petition (L) No. 2634 of 2015, Writ Petition Nos. 640, 398 and 1776 of 2015

Kishan Lal Bishnoi and Others

APPELLANT

Vs

The Authorised Officer and Others

RESPONDENT

Date of Decision : 28-10-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 16, 17, 19(3), 6, 8
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 13(4), 14
Transfer of Property Act, 1882 — Section 13(3), 13(3A), 69, 69A

Citation : (2015) 10 BOM CK 0114

Hon'ble Judges : S.C. Dharmadhikari and B.P. Colabawalla, JJ.

Bench : Division Bench

Advocate : Rohan Cama, Prathmesh Kamat, Sapna Raichure and T.N. Tripathi i/b T.N. Tripathi and Co., for the Appellant; Sandhya Nambidi i/b Law Focus, for the Respondent

Final Decision : Dismissed

Judgement

B.P. Colabawalla, J.—By these Petitions under Article 226 of the Constitution of India, the Petitioners challenge the orders passed by the In-charge Chief Metropolitan Magistrate, Mumbai, under the provisions of section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the "SARFAESI Act").

2. In all these Petitions, the issue raised before us is that all these orders passed under section 14 by the In-charge Chief Metropolitan Magistrate, are a nullity on the ground that he had no authority and/or power to pass the impugned orders. In other words, it is the contention of the Petitioners in all these Petitions, that an Application under section 14 of the SARFAESI Act can be made only to the Chief Metropolitan Magistrate, and therefore, the orders passed by the In-charge

Chief Metropolitan Magistrate are bad in law and ought to be set aside by us, in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India. Since this is the only point canvassed and which requires our consideration, we are not setting out the facts in each of the above Writ Petitions. For the sake of completeness of this judgment, we will refer to the facts in Writ Petition (L) No. 2634 of 2015.

3. In this Writ Petition, it is the case of the Petitioners that the Respondent Bank had sanctioned certain credit facilities to Respondent No. 4 (Sharavan Bishnoi, Proprietor of M/s. Ganpat Steel). In respect of the aforesaid facilities, the Respondent Bank claims a mortgage over Flat No. 15, 6th Floor, Building No. 2, Navjeevan Co-operative Housing Society, Dr. D.V. Marg, Lamington Road, Mumbai, 400 008 (hereinafter referred to as "mortgage property"). Since Respondent No. 4 defaulted in repayment of the credit facilities granted to him, a Demand Notice dated 20th February, 2013 was issued under section 13(2) of the SARFAESI Act. After the issuance of the aforesaid Demand Notice and since it was not complied with, the Respondent Bank took possession of the mortgaged property under section 13(4) of the SARFAESI Act.

4. To challenge the aforesaid action, on 20th September, 2013, the Petitioners filed Securitization Application No. 62 of 2015, inter alia, challenging the 13(2) Notice as well as the measures taken by the Respondent Bank under section 13(4) of the SARFAESI Act. Since the Respondent Bank was unable to get physical possession of the mortgaged property, it filed an Application under section 14 of the SARFAESI Act in the Court of the Chief Metropolitan Magistrate (being case No. 192/SA/2013) requesting him to take possession of the mortgaged property and hand over the same to the Respondent Bank. This Application under section 14 came to be allowed on 15th October, 2013 by the In-charge Chief Metropolitan Magistrate.

5. This order dated 15th October, 2013 of the In-charge Chief Metropolitan Magistrate, was sought to be challenged by the Petitioners before the Debts Recovery Tribunal (DRT), by seeking amendments to Securitization Application No. 62 of 2014. In view of the fact that the Applicants therein (Petitioners herein) were ready and willing to pay the outstanding debts of the Respondent bank and offered to deposit (i) a sum of Rs. 50,00,000/- within one week from the date of the said order; (ii) a further a sum of Rs. 50,00,000/- by the following week; and (iii) the balance outstanding debt with interest, within six months from 28th July 2015, the DRT -II, Mumbai, directed the Petitioners to deposit the aforesaid amounts as per the aforementioned time schedule, failing which, the Securitization Application was to stand dismissed.

6. It is the case of the Petitioners that due to financial constraints as well as non co-operation of the borrower (Respondent No. 4 herein), the Petitioners could not comply with the aforesaid order of deposit. In view thereof, Securitization Application No. 62 of 2014 was dismissed by the DRT - II, Mumbai, on 26th August, 2015. Being aggrieved thereby, the Petitioners filed Appeal (L) No. 302

of 2015 before the Debts Recovery Appellate Tribunal (DRAT). Whilst this Appeal was pending, on 3rd September, 2015 the Petitioner received a Notice dated 7th August, 2015 issued by the Assistant Registrar (attached to the CMM), to take possession of the mortgaged property on 9th September, 2015. In view thereof, on 4th September, 2015, the Petitioner moved a praecipe before the DRAT and prayed for urgent circulation for ad-interim relief, which circulation was denied to the Petitioners. It is in these circumstances that the Petitioners are before us.

7. In this background, Mr. Cama, learned counsel appearing on behalf of the Petitioners, contended that the orders passed by the In-charge Chief Metropolitan Magistrate were without jurisdiction and ultra-vires the provisions of the SARFAESI Act. According to Mr. Cama, as per section 14 of the SARFAESI Act, only the Chief Metropolitan Magistrate (in Metropolitan Cities) and the District Magistrate (outside the Metropolitan Cities), alone have jurisdiction to entertain and pass orders under section 14 of the SARFAESI Act. He submitted that in the present case, the orders under section 14 of the SARFAESI Act had been passed by the In-charge Chief Metropolitan Magistrate and absent a Notification authorizing him to entertain and hear Applications under section 14, the In-charge Chief Metropolitan Magistrate had no authority and/or jurisdiction to do so. In support of the aforesaid argument, Mr. Cama relied upon the following three judgments:--

"(i) Arjun Urban Co-operative Bank Ltd. v. Chief Judicial Magistrate & Ors. 2009 (5) Mh.L.J. 380;

(ii) K. Arockiyaraj Vs. The Chief Judicial Magistrate, Srivilliputhur and The Housing Development Finance Corporation Limited, ;

(iii) Manjudevi R. Somani Vs. Union of India and Others, ."

Therefore, according to Mr. Cama, the orders passed by the In-charge Chief Metropolitan Magistrate and which are impugned in these Writ Petitions, ought to be quashed and set aside by us, in our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India.

8. On the other hand, the learned counsel appearing on behalf of the Respondent Banks, supported the orders passed by the In-charge Chief Metropolitan Magistrate on all counts. It was the submission of the Respondent Banks that in all these cases, the Application under section 14 of the SARFAESI Act was admittedly filed in the Court of the Chief Metropolitan Magistrate. In these Applications, orders were passed by the In-charge Chief Metropolitan Magistrate only because the Chief Metropolitan Magistrate was absent. It is in these circumstances, that the In-charge Chief Metropolitan Magistrate was acting as the Chief Metropolitan Magistrate, and therefore, there was nothing incorrect and/or illegal about the orders passed by the In-charge Chief Metropolitan Magistrate under section 14 of the SARFAESI Act. The learned counsel appearing for the respective Respondent Banks also contended that even assuming that the In-charge Chief Metropolitan Magistrate had no authority to pass the orders

impugned in these Writ Petitions, the "de-facto doctrine" would apply and on this count also the orders passed by the In-charge Chief Metropolitan Magistrate cannot be termed as illegal requiring any interference under Article 226 of the Constitution of India. In support of the aforesaid proposition, the Respondent Banks relied upon a decision of the Supreme Court in the case of Gokaraju Rangaraju Vs. State of Andhra Pradesh, .

9. With the help of the learned counsel, we have perused the papers and proceedings in the above mentioned Writ Petitions, along with the orders passed by the In-charge Chief Metropolitan Magistrate and which have been impugned herein. Before we deal with the present controversy, we must mention here that though several other grounds have been raised in these Writ Petitions, none have been argued before us. The only point canvassed in these Writ Petitions was that the orders passed by the In-charge Chief Metropolitan Magistrate under section 14 of the SARFAESI Act, are a nullity as he is not the authority who can entertain and decide an Application under the provisions of section 14 . In this view of the matter, we have not dealt with any other argument/ground that has been set out in the above Writ Petitions.

10. Having said this, we shall now deal with the rival contentions. To understand the above controversy, we would have to refer to certain provisions of the SARFAESI Act as well as the Code of Criminal Procedure, 1973 (for short, "the CrPC, 1973").

11. The SARFAESI Act was brought into force to regulate the securitization and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. The statements of object and reasons indicate that the financial sector, being one of the key drivers in India's efforts to achieve success in rapidly developing its economy, did not have a level playing field as compared to other participants in the financial markets in the World. There was no legal provision for facilitating securitisation of financial assets of banks and financial institutions, and unlike international banks, the banks and financial institutions in India did not have the power to take possession of securities and sell them. The Legislature felt that our existing legal framework had not kept pace with the changing commercial practices and financial sector reforms, which resulted in delays in recovery of defaulting loans. This in turn had the effect of mounting levels of non-performing assets of banks and financial institutions. In order to bring the Indian Banking Sector on par with the International Standards, the Government set up two Narasimhan Committees and the Andhyarujina Committee for the purposes of examining banking sector reforms. These Committees inter alia suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court. Accepting these recommendations, the SARFAESI Act was brought into force with w.r.e.f. 21-06-2002. This is really the genesis of the SARFAESI Act.

12. Chapter III of the SARFAESI Act deals with the enforcement of security

interest and consists of sections 13 to 19 respectively. Section 13(1) stipulates that notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such secured creditor in accordance with the provisions of this Act. Section 13(2) contemplates that where the borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of the secured debt or any installment thereof, and his account in respect of such debt is classified as non-performing asset (NPA), 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 the notice, failing which the secured creditor shall be entitled to exercise all or any of the measures under section 13(4) thereof. Section 13(3) and 13(3A) deal with the contents of the 13(2) notice as well as the procedure to be followed before any measures are taken under section 13(4) . Thereafter, section 13(4) inter alia provides that in case the borrower fails to discharge his liability in full within the period specified in the 13(2) notice, the secured creditor may take recourse to one or more measures [as set out in section 13(4)] to recover his secured debt. Section 13(4) of the SARFAESI Act reads as under:--

"(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 for the debt;

(c) appoint any person (hereafter 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."

There are several other sub-sections to section 13 but they are not really germane to the controversy in the present case.

13. Thereafter, comes section 14 which stipulates that a secured creditor, in order to take possession of the secured assets, may take assistance of the Chief Metropolitan Magistrate or the District Magistrate, as the case may be. Section 14 of the SARFAESI Act (after its amendment w.e.f. 15-01-2013), reads thus:--

"14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.--(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him-

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor:

Provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorised officer of the secured creditor, declaring that-

(i) the aggregate amount of financial assistance granted and the total claim of the Bank as on the date of filing the application;

(ii) the borrower has created security interest over various properties and that the Bank or Financial Institution is holding a valid and subsisting security interest over such properties and the claim of the Bank or Financial Institution is within the limitation period;

(iii) the borrower has created security interest over various properties giving the details of properties referred to in sub-clause (ii) above;

(iv) the borrower has committed default in repayment of the financial assistance granted aggregating the specified amount;

(v) consequent upon such default in repayment of the financial assistance the account of the borrower has been classified as a non-performing asset;

(vi) affirming that the period of sixty days notice as required by the provisions of sub-section (2) of section 13 , demanding payment of the defaulted financial assistance has been served on the borrower;

(vii) the objection or representation in reply to the notice received from the borrower has been considered by the secured creditor and reasons for non-acceptance of such objection or representation had been communicated to the borrower;

(viii) the borrower has not made any repayment of the financial assistance in spite of the above notice and the Authorised Officer is, therefore, entitled to take possession of the secured assets under the provisions of sub-section (4) of section 13 read with section 14 of the principal Act;

(ix) that the provisions of this Act and the rules made thereunder had been complied with:

Provided further that on receipt of the affidavit from the Authorised Officer, the District Magistrate or the Chief Metropolitan Magistrate, as the case may be, shall after satisfying the contents of the affidavit pass suitable orders for the purpose of taking possession of the secured assets:

Provided also that the requirement of filing affidavit stated in the first proviso shall not apply to proceeding pending before any District Magistrate or the Chief Metropolitan Magistrate, as the case may be, on the date of commencement of this Act.

(1-A) The District Magistrate or the Chief Metropolitan Magistrate may authorise any officer subordinate to him,-

(i) to take possession of such assets and documents relating thereto; and

(ii) to forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate any officer authorised by the Chief Metropolitan Magistrate or District Magistrate done in pursuance of this section shall be called in question in any court or before any authority."

(emphasis supplied)

14. Thereafter, section 17 of the SARFAESI Act inter alia provides that any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorized officer under Chapter-III, may make an Application along with such fee as may be prescribed to the DRT having jurisdiction in the matter, within 45 days from the date on which such measures had been taken. How the said Application has to be dealt with is also set out in the said section.

15. As can be seen from the aforesaid provisions, wide powers have been given to banks and financial institutions to recover their secured debts by enforcing their security without the intervention of the Court. In order to gain possession of the secured assets, banks and financial institutions are also empowered to approach the Chief Metropolitan Magistrate or the District Magistrate, to take

their assistance in that regard. All these provisions have been enacted keeping in mind the object and purpose of quick and efficacious recovery of secured debts due to banks and financial institutions who play a very vital role in our country's economic growth.

16. Having noted the provisions of the SARFAESI Act and the purpose sought to be achieved thereby, we shall now make a brief reference to the provisions of the CrPC, 1973. The CrPC, 1973 is an Act to consolidate and amend the law relating to criminal procedure. Section 6 of the CrPC, 1973 deal with the classes of Criminal Courts and stipulates that besides the High Courts and the Courts constituted under any law, other than this Code, there shall be, in every State, the following classes of Criminal Courts, namely, (i) Courts of Session; (ii) Judicial Magistrates of the first class and, in any metropolitan area, the Metropolitan Magistrate; (iii) Judicial Magistrates of the second class; and (iv) Executive Magistrates. Thereafter, section 8 talks about metropolitan areas and stipulates that the State Government may, by notification, declare that as from such date as may be specified in the notification, any area in the State comprising a city or town whose population exceeds one million, shall be a metropolitan area for the purposes of the CrPC, 1973. Section 16 deals with the Courts of Metropolitan Magistrates and stipulates that in every metropolitan area, there shall be established as many Courts of Metropolitan Magistrates, and at such places, as the State Government may, after consultation with the High Court, by notification, specify. Section 16 further provides that the Presiding Officers of such Courts shall be appointed by the High Court and the jurisdiction and powers of every Metropolitan Magistrate shall extend throughout the metropolitan area. Thereafter, section 17 deals with the appointment of the Chief Metropolitan Magistrate and the Additional Chief Metropolitan Magistrate. It reads thus:--

"17. Chief Metropolitan Magistrate and Additional Chief Metropolitan Magistrate.--

(1) The High Court shall, in relation to every metropolitan area within its local jurisdiction, appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for such metropolitan area.

(2) The High Court may appoint any Metropolitan Magistrate to be an Additional Chief Metropolitan Magistrate, and such Magistrate shall have all or any of the powers of a Chief Metropolitan Magistrate under this Code or under any other law for the time being in force as the High Court may direct."

(emphasis supplied)

17. Section 17 therefore empowers the High Court to appointment the Chief Metropolitan Magistrate for every metropolitan area within its jurisdiction. Additionally, in relation to every metropolitan area within its local jurisdiction, the High Court is empowered to appoint any Metropolitan Magistrate to be an Additional Chief Metropolitan Magistrate and such Magistrate would have all or any of the powers of a Chief Metropolitan Magistrate under the CrPC, 1973 or

under any other law for time being in force, as the High Court may direct.

18. Section 19 deals with subordination of Metropolitan Magistrates and reads thus:--

"19. Subordination of Metropolitan Magistrates.--(1) The Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge; and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate.

(2) The High Court may, for the purposes of this Code, define the extent of the subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate.

(3) The Chief Metropolitan Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business among the Metropolitan Magistrates and as to the allocation of business to an Additional Chief Metropolitan Magistrate."

19. Section 19(1) stipulates that the Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge and every other Metropolitan Magistrate shall, subject to the general control of the Sessions Judge, be subordinate to the Chief Metropolitan Magistrate. Section 19(2) provides that the High Court may, for the purposes of this Code, define the extent of the subordination, if any, of the Additional Chief Metropolitan Magistrates to the Chief Metropolitan Magistrate. Section 19(3) provides that the Chief Metropolitan Magistrate may from time to time make rules or give special orders, consistent with this Code, as to the distribution of business among the Metropolitan Magistrates and as to the allocation of business to an Additional Chief Metropolitan Magistrate.

20. What can be discerned from the aforesaid provisions is that the Court of the Chief Metropolitan Magistrate as well as that of the Additional Chief Metropolitan Magistrate are courts constituted under the CrPC, 1973 and exercise powers as stipulated therein. Section 14 of the SARFAESI Act stipulates that where the bank or financial institution seeks to take possession of the secured assets, it may approach the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, for his assistance. Therefore, under section 14 of the SARFAESI Act, the bank/financial institution is to approach a pre-existing court already constituted under the provisions of the CrPC, 1973. It is well settled that the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, whilst deciding an Application under section 14 of the SARFAESI Act, acts in a very limited jurisdiction and does not adjudicate any lis between the bank and the borrower. His jurisdiction is invoked only for the limited purpose of seeking his assistance in taking the possession of the secured assets. This assistance would be rendered to the banks/financial institutions subject to them complying with the conditions and stipulations set out in section 14 .

21. In the facts before us all the Applications filed by the Respondent Banks were instituted in the Court of the Chief Metropolitan Magistrate. Since the Chief Metropolitan Magistrate was absent, the In-charge Chief Metropolitan Magistrate entertained the aforesaid Applications and passed orders under section 14 of the SARFAESI Act. It is to be noted that in all these cases, the Application under section 14 was filed before the Court of the Chief Metropolitan Magistrate and not before any other authority, and therefore, the Respondent Banks had approached the correct forum as stipulated in section 14 of the SARFAESI Act. The Respondent Banks, having filed their Applications under section 14 before the correct forum/authority, were entitled to presume that the In-charge Chief Metropolitan Magistrate had the power and/or authority to hear and decide their Applications. It is not as if the Respondent Banks were aware of the authority/power, or the lack thereof, of the In-charge Chief Metropolitan Magistrate who disposed of their Applications under section 14 of the SARFAESI Act. Furthermore, it is not as if the In-charge Chief Metropolitan Magistrate was a usurper and/or an intruder who had assumed jurisdiction of an office/title he was not entitled to in law. The law does not contemplate that when a judicial officer is absent, a vacuum is created in the process. In these circumstances we do not think that the Petitioners can today question the authority of the said In-charge Chief Metropolitan Magistrate to pass the orders impugned herein and thereby thwart the securitization proceedings initiated by the Respondent Banks. We, therefore, find that the argument canvassed on behalf of the Petitioners that the In-charge Chief Metropolitan Magistrate had no jurisdiction to entertain the Applications filed by the Respondent Banks under section 14, is wholly without merit.

22. Equally without merit, we find the argument canvassed by Mr. Cama that absent a Notification authorizing the In-charge Chief Metropolitan Magistrate to entertain and hear Applications under section 14, he had no authority and/or jurisdiction to do so. We find that in the present case the principles of the "de-facto" doctrine would apply, and therefore, the orders passed by the In-charge Chief Metropolitan Magistrate cannot be assailed by the Petitioners. This doctrine, which is now well established, propounds that the acts of officers "de-facto" performed by them within the scope of their assumed official authority, in the interest of public or third persons and not for their own benefit, are generally as valid and binding, as if they were the acts of officers "de-jure". This doctrine is founded on good sense, sound policy and practical expedience. It is aimed at the prevention of public and private mischief and the protection of public and private interest. It avoids unnecessary confusion and needless chaos. Even though an illegal appointment may be set aside and a proper appointment may be made, but the acts of those who hold office "de-facto" are not so easily undone and may have lasting repercussions and confusing sequels, if attempted to be undone.

23. It is keeping this larger public interest in mind that this "de-facto" doctrine has been evolved. Though this doctrine is well settled, it would be apposite to refer to the decision of the Supreme Court in the case of Gokaraju Rangaraju Vs.

State of Andhra Pradesh, in this regard. After reviewing the law on the subject, including American Law and English Law, the Supreme Court at paragraph 17 held as under:--

"17. A judge, de facto, therefore, is one who is not a mere intruder or usurper but one who holds office, under colour of lawful authority, though his appointment is defective and may later be found to be defective. Whatever be the defect of his title to the office, judgments pronounced by him and acts done by him when he was clothed with the powers and functions of the office, albeit unlawfully, have the same efficacy as judgments pronounced and acts done by a judge de jure. Such is the de facto doctrine, born of necessity and public policy to prevent needless confusion and endless mischief. There is yet another rule also based on public policy. The defective appointment of a de facto judge may be questioned directly in a proceeding to which he be a party but it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the judge except as a judge. Two litigants litigating their private titles cannot be permitted to bring in issue and litigate upon the title of a judge to his office. Otherwise so soon as a judge pronounces a judgment a litigation may be commenced for a declaration that the judgment is void because the judge is no judge. A judge's title to his office cannot be brought into jeopardy in that fashion. Hence the rule against collateral attack on validity of judicial appointments. To question a judge's appointment in an appeal against his judgment is, of course, such a collateral attack."

(emphasis supplied)

24. We find that in the facts of the present case, this judgment will apply with full force. It is not as if the In-charge Chief Metropolitan Magistrate is an intruder or usurper as set out in the aforesaid Supreme Court decision, but is one who holds the office under the color of lawful authority. Even if this doctrine is not strictly applied in the facts of this case, the impugned orders cannot be assailed. To assume that the Presiding Officer entered upon or took office unlawfully or illegally is not correct. It is pertinent to note that the Presiding Officer passing the impugned order was presiding over the Court of the Chief Metropolitan Magistrate. He was the chosen one being next in seniority to the Chief Metropolitan Magistrate demitting office or on leave temporarily. Thus, an officer duly appointed as an Additional Chief Metropolitan Magistrate and functioning as such took charge as a Chief Metropolitan Magistrate on the orders and directions of his superiors and in terms of a settled official practice. Thus, a Judge of an existing Court presided over his immediate senior's Court in the absence of such senior. None can question this process much less a litigant like the Petitioners for they suffer no prejudice. As far as the Banks are concerned, they proceeded with the matters bonafide and have no control over such affairs. In any event, the judgments pronounced by him and the acts done by him when he was clothed with the powers and functions of office, have the same efficacy as a judgment pronounced, and acts done by him de-jure. It is important to note that the

Supreme Court has categorically stated that though a defective appointment of a "de-facto" Judge may be questioned directly in a proceeding to which he is a party, it cannot be permitted to be questioned in a litigation between two private litigants, a litigation which is of no concern or consequence to the Judge except as a Judge. The two litigants litigating their private disputes cannot be permitted to bring in issue and litigate upon the authority and/or title of the Judge to his office. Otherwise, as soon as the Judge pronounces a judgment, a litigation may be commenced for a declaration that the judgment is void because the Judge is not a Judge. This is exactly the case before us. Hence, the rule against collateral attack on the validity of judicial appointments cannot be permitted in such a fashion. We, therefore, find that even assuming that the In-charge Chief Metropolitan Magistrate did not have the actual authority, or was not clothed with the powers to entertain an Application under section 14 of the SARFAESI Act, by applying the "de-facto" doctrine, it would make no difference in the present case.

25. Even otherwise, we find that in pursuance of section 17(2) of the CrPC, 1973, by a Notification No. A-3902/2015 dated 21st October, 2015 the High Court has empowered the Additional Chief Metropolitan Magistrate who holds charge of the Chief Metropolitan Magistrate in the latter's absence, to entertain and decide Applications filed under Section 14 of the SARFAESI Act. The said Notification reads as under:--

"In pursuance of Sub-section (2) of Section 17 of the Code of Criminal Procedure the High Court empowers the Additional Chief Metropolitan Magistrate who hold the charge of the Chief Metropolitan Magistrate in latter's absence, to entertain and decide the applications filed under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002."

26. In this view of the matter and considering the fact that a specific Notification has now been issued, it would be an exercise in futility to accept the submissions made on behalf of the Petitioners and set aside the impugned orders and remand the matter back to the Court of the Chief Metropolitan Magistrate for fresh consideration.

27. In all these Petitions, the Petitioners are borrowers as understood under the provisions of the SARFAESI Act and owe huge amounts to the Respondent Banks. We do not think that justice lies on the side of the Petitioners for us to exercise our extraordinary, equitable and discretionary jurisdiction under Article 226 of the Constitution of India and allow the Petitioners to set up such a collateral attack on the powers and jurisdiction of the In-charge Chief Metropolitan Magistrate to somehow delay and thwart the securitization proceedings initiated against them. On this aspect of the matter, it would be apposite to refer to the observations of a Division Bench [M.C. Chagla, C.J. and S.T. Desai J] of this Court in the case of the The State of Bombay Vs. Morarji Cooverji, reads as under:--

"But it is not sufficient that a party should come to this Court and make out a

case that a particular requisition order is not valid. In order to get that relief from the Court on a writ petition, not only must he come with clean hands, not only must he not suppress any material facts, not only must he show the utmost good faith, but he must also satisfy the Court that the making of the order will do justice and that justice lies on his side."

(emphasis supplied)

28. Having held so, we shall now deal with the judgments relied upon by Mr. Cama, learned counsel appearing on behalf of the Petitioners. The first judgment relied upon by Mr. Cama is a judgment of this Court in the case of Arjun Urban Co-operative Bank Ltd. 2009 (5) Mh.L.J. 380 The facts of this case reveal that one Hindmata Cloth Emporium (borrower), had availed of cash credit facilities from the Petitioner and offered security by mortgaging a flat. Since the said borrower had failed and neglected to repay the debts due to the Petitioner, it initiated action under the SARFAESI Act and after following the necessary procedure approached the Chief Judicial Magistrate, Solapur, under section 14 of the SARFAESI Act for securing his assistance in taking possession of the secured assets. It is in these facts that the Division Bench held that section 14 of the SARFAESI Act was clearly worded and that the secured creditor, for taking possession of the secured assets, has to approach the Chief Metropolitan Magistrate or the District Magistrate. Since the Petitioner had chosen a wrong forum and had approached the Chief Judicial Magistrate, the Chief Judicial Magistrate could not have entertained the Application filed under section 14 . Clearly, this judgment has no application to the facts of the present case. In the case of Arjun Urban Co-Operative Bank Ltd. 2009 (5) Mh.L.J. 380, the Petitioner had approached the wrong authority which was not at all empowered to entertain and decide Applications filed under section 14 of the SARFAESI Act. It is in these circumstances that the findings given in the aforesaid judgment have to be considered and read. In the facts before us such is not the case. In the present case, admittedly, the Applications (under section 14 of the SARFAESI Act) were filed in the Court of the Chief Metropolitan Magistrate which is admittedly the authority named in section 14 of the SARFESI Act. Since the Chief Metropolitan Magistrate was absent that the orders came to be passed by the In-charge Chief Metropolitan Magistrate under section 14 of the Act. We, therefore, find that this judgment has absolutely no application to the facts of the present case and would not carry the case of the Petitioners any further.

29. The next judgment relied upon by Mr. Cama is the judgment of the Madras High Court in the case of K. Arockiyaraj Vs. The Chief Judicial Magistrate, Srivilliputhur and The Housing Development Finance Corporation Limited, Here also we find that the Application under section 14 of the SARFAESI Act was made to the Chief Judicial Magistrate as was done in the case of Arjun Urban Co-operative Bank Ltd. 2009 (5) Mh.L.J. 380 We, therefore, find that for the same reason this decision also would have no application to the facts of the present case.

30. The last judgment relied upon by Mr. Cama was the judgment of the Gujarat High Court in the case of *Manjudevi R. Somani Vs. Union of India and Others*, . We have carefully gone through the aforesaid decision. We find that in this case the Petitioner, who was a debtor of Union Bank of India, called into question the legality, validity and propriety of the order dated 17th July, 2012 passed by the Additional Chief Metropolitan Magistrate in exercise of powers under section 14 of the SARFAESI Act. The Petitioner also called into question the legality, validity and propriety of the office order issued by the Chief Metropolitan Magistrate dated 4th February, 2012 in exercise of his powers under section 19(3) of the CrPC, 1973 by which Applications under the provisions of the SARFAESI Act, arising within the limits of the Ahmedabad Municipal Corporation were ordered to be filed in the Court of the Additional Chief Metropolitan Magistrate, Ahmedabad. The Gujarat High Court after analyzing the provisions of the CrPC, 1973 as well as the SARFAESI Act, came to the conclusion that the allocation of the business to the Additional Chief Metropolitan Magistrate as contemplated under section 19(3) of the Code of Criminal Procedure must be consistent with the jurisdiction conferred upon him by the High Court in exercise of powers under section 17(2) thereof. In this view of the matter, the Gujarat High Court set aside the office order issued by the Chief Metropolitan Magistrate dated 4th February, 2012 and consequently the order passed by the Additional Chief Metropolitan Magistrate dated 17th July, 2012 on the ground that the same was without jurisdiction, and therefore, void ab-initio. With great respect to the Gujarat High Court, we are unable to agree with the aforesaid decision. We find that the Gujarat High Court has come to this conclusion without taking into consideration the "de-facto doctrine" that has been well settled and very succinctly set out in the decision of the Supreme Court in the case of *Gokaraju Rangaraju Vs. State of Andhra Pradesh*, . According to us, even if the Chief Metropolitan Magistrate's order of 4th February, 2012 was held to be in excess of exercise of its powers, the orders passed pursuant thereto by the Additional Chief Metropolitan Magistrate ought not to have been set aside in view of the "de-facto" doctrine that has now been well settled and evolved in larger public interest. We, therefore, with great humility, find ourselves unable to agree with the decision of the Gujarat High Court in the case of *Manjudevi R. Somani Vs. Union of India and Others*, .

31. In view of our discussion earlier in this judgment, we find no merit in these Writ Petitions. They are accordingly dismissed. All interim orders passed therein, if any, stand vacated forth with. However, in the facts and circumstances of this case, we leave the parties to bear their own costs.

At this stage, Mr. Kamat prays for continuation of the ad-interim order for a period of four weeks to enable the Petitioners to challenge this judgment in a higher court. This request is opposed by the advocates appearing for the banks in all the Writ Petitions. Some of the Petitioners were required to deposit certain amounts to show their bonafides. Even this condition in the ad-interim order has not been complied with. In such circumstances, the request is refused.