

(2013) 04 GUJ CK 0109

In the Gujarat High Court

Case No : Special Civil Application No. 10556 of 2012

Manjudevi R. Somani

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 22-04-2013

Acts Referred:

Constitution of India, 1950 — Article 226
Criminal Procedure Code, 1973 (CrPC) — Section 15, 17, 18, 19, 202
Penal Code, 1860 (IPC) — Section 191, 192, 193
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 14, 17, 19, 6(a)

Citation : AIR 2013 Guj 242 : (2013) 4 BC 694

Hon'ble Judges : Bhaskar Bhattacharya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : Ravindra Shah and Mrs. Kanan R. Shah, for the Appellant; Anshin H. Desai, Bharat Jani and G.M. Joshi, for the Respondent

Final Decision : Allowed

Judgement

J.B. Pardiwala, J.—By way of this petition under Article 226 of the Constitution of India, the petitioner, a debtor of the Union Bank of India, calls in question the legality, validity and propriety of the order dated 17th July, 2012 passed by the learned Additional Chief Metropolitan Magistrate, Ahmedabad, in Miscellaneous Application No. 73 of 2012 being Exhibit 1 in exercise of powers u/s 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 by which the learned Additional Chief Metropolitan Magistrate, Ahmedabad directed the local police to assist the secured creditor, namely, the Union Bank of India to take over the possession of the secured assets mortgaged by the petitioner at the time of availing of the loan facility. The petitioner also calls in question the legality, validity and propriety of the office order bearing No. A(VI) 40/2012 issued by the Chief Metropolitan Magistrate, Ahmedabad dated 4th February, 2012 in exercise of his powers u/s 19, Clause (3) of the Code of Criminal Procedure, 1973 by which the 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 Additional Chief Metropolitan Magistrate, Ahmedabad.

2. The case of the petitioner may be summed up thus:

3. The petitioner is a woman entrepreneur and is engaged in the business of dress materials. The petitioner is a proprietor of a proprietary concern, namely, Messrs Murli Manohar Somani. The petitioner is suffering from cancer due to which the petitioner and her husband decided to stay for some time at their native State-Rajasthan. It is the case of the petitioner that since she left for Rajasthan she requested two nephews of her husband named Mr. Yogesh Somani and Mr. Muktesh Somani to take care of her business. However, instead of taking care of the business, the two nephews defalcated and siphoned away a huge sum of money of the petitioner and for such acts the petitioner had to file a criminal complaint before the Court of the learned Metropolitan Magistrate, Court No.4 at Ahmedabad, who in turn took cognizance and ordered a Magisterial inquiry u/s 202 of the Code of Criminal Procedure, 1973. The petitioner had availed of a cash credit hypothecation facility on 29th May, 2006 from the Union Bank of India to the tune of Rs. 23 lac in her capacity as the proprietor of Messrs Murli Manohar Somani. The cash credit hypothecation limit was enhanced from Rs. 23 lac to Rs. 35 lac on 11th August, 2009 and in March 2010 to Rs. 1.50 crore and lastly to Rs. 1.65 crore in March 2011.

4. As the two nephews who were requested to look after the business cheated the petitioner by siphoning off a huge amount of money, the petitioner faced financial constraints, as a result of which she was unable to make the payment of the financial liability in time advanced by the bank. It appears that the residential flat of the petitioner bearing No. B/43, Fourth Floor, Ishita Towers, Navrangpura, Ahmedabad, was offered as a security to the bank for availing of the cash credit hypothecation facility. The bank alleged that the financial facility of Rs. 1.65 crore which was extended in favour of the petitioner had become a Non Performing Asset (NPA) on 4th July, 2011, and for the said reason, the bank issued a notice u/s 13, Clause (2) of the SARFAESI Act 2002.

5. It is the case of the petitioner that she tried to explain her difficulties to the Deputy General Manager of the bank and after the receipt of the notice she made payment of Rs. 6.92 lac on 23rd September, 2011 and, thereafter, a sum of Rs. 3.69 lac was paid in the auto loan account with the bank. According to the petitioner, she deposited a sum of Rs. 10.61 lac and settled both the accounts. Over and above that, on 29th September, 2011, the petitioner made a payment of Rs. 4.03 lac in the cash credit hypothecation account with the bank, and thereafter, on 2nd November, 2011 deposited a further sum of Rs. 6 lac in the said account with the respondent bank. Thereafter, the petitioner preferred a representation to the respondent bank making a request that she was ready and willing to pay the principal amount of the loan advanced and the bank may consider waiver of the interest accrued in the said account in view of financial

constraints of the petitioner. The petitioner also requested the bank not to proceed ahead with the proceedings under the SARFAESI Act. However, the bank did not give any reply to the representation of the petitioner.

6. It is the case of the petitioner that she requested the bank to give her some breathing time but the bank issued a notice u/s 13, Clause (4) of the SARFAESI Act 2002 dated 26th November, 2011, informing the petitioner that the possession of her flat would be taken over by the bank on 8th December, 2011.

7. It appears that the petitioner refused to hand over the physical possession of the flat to the respondent bank, and therefore, the bank filed a Miscellaneous Application No. 33 of 2012 dated 24th January, 2012 u/s 14 of the SARFAESI Act, 2002 in the Court of learned Chief Metropolitan Magistrate at Ahmedabad, which was later on renumbered as Miscellaneous Application No. 73 of 2012. In the said application, the bank prayed that necessary order be passed to take over the possession of the secured asset as described in the application and deliver the possession of the same to the bank for the purpose of enforcing the security interest and to release the secured debt or part thereof by effecting sealing of the secured asset. The bank also prayed in the application that necessary steps be taken including breaking open of the locks and to provide for police force for the purpose of taking over the possession of the secured asset without any further hindrance or obstruction.

8. It appears that the petitioner raised a preliminary objection as regards the maintainability of the application filed by the bank before the learned Chief Metropolitan Magistrate, Ahmedabad. At a later stage, the said application was transferred by the Chief Metropolitan Magistrate, Ahmedabad, to the Court of learned Additional Chief Metropolitan Magistrate. The petitioner filed written submissions on 14th March, 2012 against such Miscellaneous Application. The main ground raised by the petitioner in the objection was that the Additional Chief Metropolitan Magistrate had no power to decide the application filed by the bank u/s 14 of the SARFAESI Act 2002. It also appears that on 14th March, 2012, the petitioner filed an application at Exhibit 7 in Miscellaneous Application No. 73 of 2012 for taking action under Sections 191 to 193 of the Indian Penal Code against the officers of the bank for filing a false affidavit. Thereafter, on 1st May, 2012 the petitioner filed an application at Exhibit 10 in Miscellaneous Application No. 73 of 2012 for initiating the proceedings against the officers of the bank under the Contempt of Courts Act.

9. The Additional Chief Metropolitan Magistrate, Ahmedabad, heard all the three applications analogously and vide a common order dated 17th July, 2012 allowed the application Exhibit 1 i.e. Miscellaneous Application No. 73 of 2012 filed by the bank u/s 14 of the SARFAESI Act, 2002 and ordered that necessary police protection be given to the bank for the purpose of taking over the possession of the secured asset and while passing such order rejected the other two applications filed by the petitioner i.e. Exhibit 7 and Exhibit 10.

10. Being dissatisfied by such order passed by the Additional Chief Metropolitan Magistrate, Ahmedabad, the petitioner has come up with this writ application.

11. Submissions on behalf of the petitioner.

11.1 Mr. Ravindra Shah, the learned counsel appearing for the petitioner vehemently submitted that the order impugned is without jurisdiction as there is nothing to suggest that the Additional Chief Metropolitan Magistrate, Ahmedabad, has been conferred with any powers under sub-section (2) of Section 17 of the Code of Criminal Procedure, of a Chief Metropolitan Magistrate, so far as the SARFAESI Act, 2002 is concerned. Mr. Shah submitted that in such circumstances the office order dated 4th February, 2012 passed by the Chief Metropolitan Magistrate, Ahmedabad, in exercise of his powers u/s 19, Clause (3) of the Code of Criminal Procedure read with Rule 10, Clause (1) of Chapter XXXII of the Criminal Manual, 1977 empowering the Additional Chief Metropolitan Magistrate, Ahmedabad, to deal with the applications filed u/s 14 of the SARFAESI Act, 2002 would also be without jurisdiction.

11.2 Mr. Shah laid much stress on the words, "the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured assets or documents relating thereto may be situated or found...." as appearing in Section 14, Clause (1) of the SARFAESI Act, 2002. According to Mr. Shah, the legislature has consciously used the words "the Chief Metropolitan Magistrate", and therefore, the Additional Chief Metropolitan Magistrate does not have the jurisdiction to adjudicate and decide the application filed by the bank u/s 14 of the SARFAESI Act, 2002, although the Chief Metropolitan Magistrate, Ahmedabad, by his office order dated 4th February, 2012 has empowered him to accept the applications under the SARFAESI Act and decide the same. According to Mr. Shah, had the legislature while enacting the SARFAESI Act, 2002 intended to empower the Chief Metropolitan Magistrate or the District Magistrate for delegating said powers u/s 14 to any subordinate officer, it would have provided the same at the time of enactment of the Act in the year 2002 itself and the recent amendment, which now empowers the Chief Metropolitan Magistrate to authorize any officer subordinate to him to take possession of such assets and documents relating thereto, would not have been necessitated.

11.3 Thus, according to Mr. Shah, the bank is not entitled to take over the possession of the secured assets on the strength of the order dated 17th July, 2012 passed by the Additional Chief Metropolitan Magistrate, Ahmedabad, as the same is void ab initio.

11.4 In such circumstances, Mr. Shah prays that the order impugned may be set aside and the petition may be allowed.

12. Submissions on behalf of respondent No. 3-Union Bank of India.

12.1 Mr. Bharat Jani, the learned counsel appearing for the bank vehemently opposed the petition and submitted that the present petition is nothing but an

abuse of process of law at the end of a debtor. It is submitted by Mr. Jani that the contention of the learned counsel appearing on behalf of the petitioner as regards the legality and validity of the order impugned is without any foundation and such contention deserves to be outright rejected.

12.2 Mr. Jani submitted that the petitioner owes the bank a sum of more than Rs. 1 crore and a debtor should not be permitted to invoke the discretionary jurisdiction of this Court under Article 226 of the Constitution of India.

12.3 Mr. Jani lastly submitted that this petition may not be entertained as the petitioner has an efficacious alternative remedy of filing an application in the form of an appeal u/s 17 of the SARFAESI Act, 2002.

12.4 In such circumstances, Mr. Jani prays that there being no merit in this petition, the same may be dismissed with costs.

13. Mr. Anshin H. Desai, the learned Standing Counsel appearing for the Union of India adopted the submissions canvassed on behalf of the bank and prayed that there being no merit in this petition, the same may be dismissed.

14. Having heard the learned counsel for the respective parties and having gone through the materials on record, the only question that falls for our consideration in this petition is whether the learned Additional Chief Metropolitan Magistrate, Ahmedabad, committed any error in passing the order impugned.

15. The question which we have posed for our consideration arises in the backdrop of the vociferous submission canvassed on behalf of the petitioner that Section 14 of the SARFAESI Act, 2002 empowers only the Chief Metropolitan Magistrate within whose jurisdiction any secured asset is situated or found, to take possession thereof and the Additional Chief Metropolitan Magistrate has no jurisdiction to take possession unless authorized by the High Court to have all or any of the powers of a Chief Metropolitan Magistrate under the Criminal Procedure Code or under any other law for the time being in force.

16. In the aforesaid context, it will be expedient for better adjudication of the controversy to look into the few relevant provisions of the SARFAESI Act, 2002 as well as the Code of Criminal Procedure. Section 14 of the SARFAESI Act, 2002 as it stood on the date when the order impugned was passed reads as under;

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.--(1) Where the possession of any secured asset 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 asset, 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 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 done in pursuance of this section shall be called in question in any Court or before any authority.

16.1 Section 17 of the Code of Criminal Procedure 1973 reads as under:

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.

16.2 Section 19 of the Code of Criminal Procedure, 1973 reads as under:

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.

17. Section 17 of the Criminal Procedure Code corresponds to Section 18, Clause (1) and Clause (4) of the Old Code. Section 17 empowers the High Court to appoint a Metropolitan Magistrate to be the Chief Metropolitan Magistrate for the area. Sub-section (2) empowers the High Court to appoint an Additional Chief Metropolitan Magistrate and provides that he should have all or any of the powers of the Chief Metropolitan Magistrate under the Criminal Procedure Code or under any other law for the time being in force. The scope of the powers

conferred under sub-section (2) extends to all the powers which the Metropolitan Magistrate is competent to exercise on the date of notification. In our opinion, the object of Section 17, Clause (2) of the Criminal Procedure Code is only to relieve the pressure of work on the shoulders of the Chief Metropolitan Magistrate in the course of performance of his normal duties under the Code of Criminal Procedure or under any other ordinary law. The Additional Metropolitan Magistrate, who is invested with the powers of the Chief Metropolitan Magistrate, does not thereby attain the status of the Chief Metropolitan Magistrate as Section 19, Clause (2) of the Code makes it clear.

18. Section 19, Clause (2) lays down that the Chief Metropolitan Magistrate and every Additional Chief Metropolitan Magistrate shall be subordinate to the Sessions Judge and all Metropolitan Magistrates, subject to the general control of Sessions Judge, be subordinate to the Chief Metropolitan Magistrate. The subordination of the Metropolitan Magistrates to the Chief Metropolitan Magistrate shall be deemed to be of the same kind and extent as that of Judicial Magistrates u/s 15.

19. Sub-section (3) to Section 19 of the Code provides that the Chief Metropolitan Magistrate may from time to time make Rules consistent with the Code as to distribution of business among Metropolitan Magistrates and as to allocation of business to the Additional Chief Metropolitan Magistrates.

20. Thus, in our opinion, the words "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" themselves imply that a notification by the State Government on the recommendation of the High Court for conferment of the broad powers on the Additional Chief Metropolitan Magistrate is necessary. In such circumstances, we directed the registry of this High Court to produce the order in terms of Section 17, Clause (2) of the Code of Criminal Procedure while creating the post of Additional Chief Metropolitan Magistrate, Ahmedabad.

21. The registry placed before us various notifications regarding creation of post of Additional Chief Metropolitan Magistrate, Ahmedabad, and also conferment of power of Additional Chief Metropolitan Magistrate upon all the Metropolitan Magistrates. So far the creation of the Court of Additional Chief Metropolitan Magistrate, Ahmedabad is concerned, it appears that in the year 1986 in exercise of powers conferred under sub-section (2) of Section 17 of the Code of Criminal Procedure 1973, this High Court was pleased to appoint Mr. B. N. Doctor, Metropolitan Magistrate, Ahmedabad, to be Additional Chief Metropolitan Magistrate, Ahmedabad, in the post created under Government Resolution, Legal Department No. SPC1079/2155/B dated 27th May, 1986 exclusively for trial of economic offences for the Metropolitan area of the city of Ahmedabad.

22. It was also brought to our notice that recently a fresh notification dated 6th February, 2013 has been issued by the Registrar General of this Court in exercise

of powers conferred under sub-section (2) of Section 17 of the Code of Criminal Procedure 1973, by which all the Metropolitan Magistrates at Ahmedabad have been appointed as Additional Chief Metropolitan Magistrates with a clear stipulation that they should exercise all judicial powers exercisable by a Chief Metropolitan Magistrate under the Code of Criminal Procedure 1973, except those u/s 19 of the Code for hearing of criminal cases arising out from the area under the jurisdiction of the respective Courts.

23. In the aforesaid context, it may not be out of place to mention here that u/s 17, Clause (2) of the Code of Criminal Procedure 1973, 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 the Code or under any other law for the time being in force as the High Court may direct. From the above two notifications placed before us by Mr. G.M. Joshi, the learned Standing Counsel for the High Court, it is clear that at the time of creation of the post of Additional Chief Metropolitan Magistrate, Ahmedabad, either by virtue of notification of 1986 or by the latest notification of 2013, the power under any other law for the time being in force apart from the Code of Criminal Procedure 1973 has not been given.

24. The SARFAESI Act was passed in the year 2002, and by virtue of Section 14 of the Act, the Chief Metropolitan Magistrates are vested with the powers to give possession under the circumstances mentioned in the said Section. The said Section does not refer to Additional Chief Metropolitan Magistrates, whereas in the case before us, it is the Additional Chief Metropolitan Magistrate, Ahmedabad, who has passed the order for facilitating handing over the possession with the help of the local police.

25. By our order dated 15th March, 2013, we directed the registry to report to us whether any notification after the enactment of the SARFAESI Act, 2002 has been issued authorizing the Additional Chief Metropolitan Magistrate, Ahmedabad, to exercise powers u/s 14 of the SARFAESI Act, 2002. The registry vide report dated 19th March, 2013 brought to our notice that no separate notification has been issued by this High Court authorizing the Additional Chief Metropolitan Magistrate, Ahmedabad, to exercise powers u/s 14 of the SARFAESI Act, 2002.

26. We are of the opinion that in such circumstances the Chief Metropolitan Magistrate, Ahmedabad, by virtue of his authority u/s 19, Clause (3) of the Code of Criminal Procedure, 1973 could not have entrusted the Additional Chief Metropolitan Magistrate with his own determination and the allocation of business to an Additional Metropolitan Magistrate must be in tune with the jurisdiction conferred upon him by the High Court in exercise of powers u/s 17, Clause (2) of the Act. It is a well settled position of law that special orders to be made by the Chief Metropolitan Magistrate as to "distribution of business" must be consistent with the Code. Unless an Additional Chief Metropolitan Magistrate was expressly

conferred the power by way of a notification to entertain an application u/s 14 of the SARFAESI Act, 2002, he would have no jurisdiction to deal with such a proceeding. To say that Section 17, Clause (2) of the Code is expressed in disjunctive form, and therefore, as a matter of plain language that the words "as the High Court may direct" can qualify only the words "any of the powers of a Chief Metropolitan Magistrate under this Code or under any other law for the time being in force" cannot be read as qualifying the words "all the powers of a Chief Metropolitan Magistrate under this Code or under any law for the time being in force" will amount to causing violence to the object of the very Section itself. We are not impressed by the submission of Mr. Jani, the learned counsel appearing for the bank that to read those words as qualifying the latter words would result in a construction which is not even grammatical in form. If such a construction is accepted then the very power of the High Court to restrict those powers u/s 17, Clause (2) of the Code and to confer only some or particular powers upon the Additional Chief Metropolitan Magistrate would be rendered nugatory. In such circumstances, we are left with no other option but to hold that the office order dated 4th February, 2012 issued by the Chief Metropolitan Magistrate, Ahmedabad, in exercise of his powers u/s 19, Clause (3) of the Code of Criminal Procedure, 1974 read with Rule 10, Clause (1) of Chapter XXXII of the Criminal Manual, 1977 regarding the distribution of business amongst the Metropolitan Magistrates, Ahmedabad, thereby empowering the Additional Chief Metropolitan Magistrate, Ahmedabad, to accept and decide cases under the provisions of the SARFAESI Act, 2002 arising within the limits of Ahmedabad Municipal Corporation is without jurisdiction and consequently the order passed by the Additional Chief Metropolitan Magistrate, Ahmedabad, below Exhibit X in Miscellaneous Application No. 73 of 2012 dated 17th July, 2012 would also be without jurisdiction, and therefore, void ab initio.

27. Although Mr. Jani, the learned counsel appearing for the bank strenuously tried to convince us that we should not entertain this petition and relegate the petitioner to avail the alternative remedy of filing an appeal u/s 17 of the SARFAESI Act, 2002 before the Debts Recovery Tribunal, however, we are not impressed by such submission of Mr. Jani. It is true that power of the High Court to issue prerogative writs under Article 226 of the Constitution of India is plenary in nature and cannot be curtailed by other provisions of the Constitution of India or a statute but the High Courts have imposed upon themselves certain restrictions on the exercise of such power. One of such restrictions is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction under Article 226 of the Constitution of India. But again, this rule of exclusion of writ jurisdiction on account of availability of an alternative remedy does not operate as an absolute bar to entertain a writ petition but is a discretion to be exercised depending on the facts of each case.

28. In an appropriate case, in spite of availability of alternative remedy, the High Court may still exercise its writ jurisdiction in at least three contingencies; (i) where the writ petition seeks enforcement of any of the fundamental rights, (ii)

where there is failure of principles of natural justice or (iii) where the orders or proceedings are wholly without jurisdiction or vires of an Act is challenged.

29. We are not impressed by the submission of Mr. Jani as regards the alternative remedy available for two reasons, first that the order passed by the Additional Chief Metropolitan Magistrate, Ahmedabad, is wholly without jurisdiction, and, secondly it could not be said strictly that there is an alternative remedy available to the petitioner in the form of an appeal u/s 17 of the SARFAESI Act, 2002. Assuming for the moment that Section 14 proceedings could be considered as a step in the aid of Section 13, Clause (4) proceedings so as to give a right of appeal u/s 17 of the Act 2002, we are still of the opinion having regard to the view taken by us as regards jurisdiction of the Additional Chief Metropolitan Magistrate, Ahmedabad, to pass the order impugned that the petition should not be rejected on the ground of alternative remedy.

30. Mr. Jani also vociferously submitted that the present petition is at the instance of a debtor and the remedy under Article 226 of the Constitution of India being discretionary in nature, even if some action or order challenged in the petition is found to be illegal and invalid, this Court while exercising its extraordinary jurisdiction should refuse to upset it with a view to doing substantial justice between the parties. We are not impressed even with this submission of Mr. Jani. It is true that Article 226 of the Constitution of India grants an extraordinary remedy, it is essentially discretionary, although founded on a legal injury. Courts of equity may and frequently do, go much further both to give and withhold relief in furtherance of the public interest than they are accustomed to go where only private interests are involved. However, in the present case, we should not be unmindful of the fact that Section 14 of the SARFAESI Act, 2002 is one of the most drastic measures provided by the legislature in aid of a secured creditor for the purpose of taking over of the possession of a secured asset. Such being the position, it becomes the duty of the Court to see that a secured creditor takes over the possession of the secured asset within the bounds of the law. On the face of it if the order passed by an authority to take over the possession of a property with the aid of police force is without jurisdiction then in such circumstances the principle which Mr. Jani has asked us to apply, as referred to above, would not be applicable.

31. Our view stands fortified even by the recent amendment which has been carried out so far as Section 14 of the SARFAESI Act, 2002 is concerned. By Act 1 of 2013, Section 6(a) (w.e.f. 15.1.2003 vide S.O.171(E) dated 15.1.2003), the following amendment has been brought about in Section 14, which reads as under:

[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.]

[(1A) 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.]

32. It is very manifest that the legislature having realized the drastic nature of

the provision has now provided that any application by the secured creditor shall be accompanied by an affidavit duly affirmed by the authorized officer of the secured creditor as regards the details contained in (i) to (ix) of the proviso to Section 14 of the Act.

33. For the foregoing reasons, this petition succeeds and the same is allowed. The office order dated 4th February, 2012 issued by the Chief Metropolitan Magistrate, Ahmedabad, in exercise of his powers u/s 19, Clause (3) of the Code of Criminal Procedure, 1974 read with Rule 10, Clause (1) of Chapter XXXII of the Criminal Manual 1977 regarding the distribution of business amongst the Metropolitan Magistrates, Ahmedabad, thereby empowering the Additional Chief Metropolitan Magistrate, Ahmedabad, to accept and decide cases under the provisions of the SARFAESI Act, 2002 arising within the limits of Ahmedabad Municipal Corporation as well as the order dated 17th July, 2012 passed by the Additional Chief Metropolitan Magistrate, Ahmedabad, below Exhibit 1 in Miscellaneous Application No. 73 of 2012 are hereby quashed and set aside. It is clarified that it shall be open for the respondent No. 3 bank to file a fresh application in terms of Section 14 of the SARFAESI Act, 2002 in the Court of the Chief Metropolitan Magistrate, Ahmedabad, and if such an application is preferred then the Chief Metropolitan Magistrate, Ahmedabad shall decide the same in accordance with law within a period of one week from the date of filing of such application without being influenced in any manner by any of the observations made by this Court in this judgment and order.