

(2024) 12 BOM CK 0034

In the Bombay High Court

Case No : Criminal Writ Petition No. 1685 Of 2023

M/s Shailesh Traders Through its proprietor, Sanjay
Harishchandra Ghar

APPELLANT

Vs

Union Bank of India

RESPONDENT

Date of Decision : 13-12-2024

Acts Referred:

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2), 13(4), 14, 17

Citation : (2024) 12 BOM CK 0034

Hon'ble Judges : Y. G. Khobragade, J

Bench : Single Bench

Advocate : N.P. Patil Jamalpurkar, Atul A. Mishra

Final Decision : Dismissed

Judgement

Y. G. Khobragade, J

1. Rule. Rule made returnable forthwith. With the consent of both the sides it is heard finally at the stage of admission.

2. By the present petition, the Petitioners take exception to the order dated 03.11.2023 passed by the learned Chief Judicial Magistrate, Latur below Exh.21 in Criminal Misc. Application No.621 of 2023, thereby prayer of the Petitioners for supply of copies of application, its affidavit and copy of notice under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short the 'SARFAESI Act') has been declined.

3. Mr. Jamalpurkar, the learned counsel appearing for the Petitioners vehemently canvassed that Petitioner No.1 is the Proprietorship Firm and running the business of trading of food grains in Market Yard, Latur. On 01.02.2016, Petitioner No.1 approached the Respondent/Bank for sanction of Rs.250.00/- lakhs as OCC Limit (Open Cash Credit). Accordingly, the Respondent/Bank

sanctioned the said loan facility. The Petitioner Nos.2 to 6 stood as guarantors to the said loan transaction. Considering the timely repayment of the loan and need of the Petitioner Firm, the Respondent/Bank time to time enhanced Open Cash Credit Limit. The Petitioner No.1/Proprietorship Firm is the loan borrower. The Petitioner Nos.2 to 6 have mortgaged their non-agricultural and residential properties while securing loan in favour of the Respondent Bank.

4. It is the contention of the Petitioners that, though the loan amount was regularly paid but the Respondent/Bank illegally classified their loan account as Non-Performing Assets (N.P.A.) Thereafter, the Respondent Bank issued a notice under Section 13(2) and Section 13(4) of the SARFAESI Act on 19.04.2021 and 07.06.2021 for taking possession of the secured properties. Therefore, the Petitioner No.1 - M/s Shailesh Traders had filed (S.A) Securitization Application No.128 of 2021 before the learned Debts Recovery Tribunal, Aurangabad (D.R.T).

5. On 17.10.2022, the learned Presiding Officer, D.R.T disposed off the Securitization Application No.128 of 2021 as the Respondent Bank has withdrawn the notice under Section 13(2) of the SARFAESI Act and granted liberty to avail of appropriate remedy. In spite of the said fact, the Respondent/Bank approached before the District Magistrate, Latur under Section 14 of the Securitization Act, 2002. On 27.03.2023, the learned District Magistrate passed an order and disposed of the said application holding that the Respondent/Bank failed to comply with deficiencies in the application and without complying with the order of the District Magistrate, the Respondent Bank filed an application bearing Criminal Misc. Application No.621 of 2023 under Section 14 of the SARFAESI Act and prayed for physical possession of the secured property.

6. The learned Counsel for the Petitioners canvassed that the Respondent/Bank already availed remedy before the District Magistrate by filing an Application under Section 14 of the SARFAESI Act but the Respondent/Bank failed to comply with the deficiencies and filed the application u/s 14 of the SARFAESI Act before the learned Chief Judicial Magistrate without compliance of order dated 27.03.2023 passed by the learned District Magistrate. Therefore, second application under Section 14 of the SARFAESI Act before the Chief Judicial Magistrate, Latur, is not maintainable and is liable to be dismissed.

7. The learned counsel for the Petitioners further canvassed that as per Sec. 14 of the SARFAESI Act, it is mandatory on the part of the authorised person of the Respondent/Bank to file an application on affidavit/solemn affirmation, the application u/s 14 of the Act is not supported by affidavit/solemn affirmation but it is only for verification. Therefore, the Petitioners have filed an Application below Exh.21 and prayed for issuance of directions against the Respondent/Bank to supply the copies of application, its affidavit and copy of notice under Section 13(2) of the SARFAESI Act. However, on 03.11.2023, the learned Chief Judicial Magistrate passed the impugned order and rejected the same without considering the mandatory provisions of Section 13(2) of the SARFAESI Act.

8. It is further canvassed that the Respondent/Bank failed to follow the provisions of Section 3A of the SARFAESI Act. So also, earlier notice issued by the Respondent/Bank under Section 13(2) of the SARFAESI Act was already withdrawn by the Respondent/Bank but no fresh notice u/s. 13(2) of the Act was served upon the Petitioners/Borrower. Therefore, in absence of service of mandatory notice, the application u/s 14 of the Act is maintainable. However, the learned Chief Judicial Magistrate, Latur failed to consider the same and passed the impugned order. Therefore, it is illegal, bad in law.

9. Mr. A. D. Baviskar, the Authorized Officer of the Respondent/Bank filed its affidavit in reply and strongly resisted the petition.

10. The learned counsel for the Respondent canvassed in vehemence that the Petitioners approached the Respondent/Bank for loan facilities and after execution of necessary documents, the Respondent/Bank sanctioned various loan facilities in favour of the Petitioner No.1 - Firm. The Petitioner Nos. 2 to 6 stood as guarantors. The Petitioners mortgaged their landed properties which is secured assets. Since, the Petitioner failed to repay the loan, the loan account was declared as Non-Performing Assets on 31.03.2021. Thereafter, on 19.04.2021, the Respondent/Bank had issued notice under Section 13(2) of the SARFAESI Act to the Petitioners, which was challenged by the Petitioners before the learned Debts Recovery Tribunal in Securitization Application No.128 of 2021. However, the Respondent/Bank withdrew the said notice, hence, said proceeding came to be disposed off on 17.10.2022 with liberty to avail of appropriate remedy.

11. Thereafter, on 14.09.2022, the Respondent/Bank issued notice to the Petitioners under Section 13(2) which has been served upon Petitioner No.1 on 15.09.2022. The Petitioners neither raised objection to the said notice nor they challenged it before the Competent Authority nor they replied the notice. Therefore, on 04.12.2022, the Respondent/Bank took symbolic possession of the secured assets. The Petitioners have not challenged the symbolic possession of the Respondent/Bank. Thereafter, the Respondent/Bank approached before the Chief Judicial Magistrate, Latur under Section 14 of the SARFAESI Act.

12. After appearance, the Petitioners filed an Application below Exh. 21 and prayed for issuance of directions against the Respondent/Bank to supply copy of application u/s 14 of the Act, Affidavit and copy of Notice under Section 13(2) of the SARFAESI Act. The Respondent/ Bank filed its say and strongly opposed the Application below Exh.21. The Respondent/Bank contended that fresh notice under Section 13(2) of the SARFAESI Act has already been served upon the Petitioners and complied with mandatory provision, hence, prayed for rejection of the application.

13. On 03.11.2023, the learned Chief Judicial Magistrate, Latur passed the impugned order taking into consideration the law laid down in cases of Trade Well & Anr. Vs. Indian Bank & Anr. 2007(1) Bom.C.R. (Cri.) 783, and the Judgment

dated 26.09.2022 passed by the Hon'ble Supreme Court in Special Leave Petition 16013 of 2022 in the case of Balkrishna Rama Tarle fead Thr. LRS & Anr. Vs. Phoenix ARC Private Limited & Ors.,(2023)1 SCC 662 holding that the CMM/DM acting under Section 14 of the Act is not required to give notice either to the borrower or to the third party. However, it has to only verify from the bank or financial institution whether notice under Section 13(2) of the SARFAESI Act is given or not and whether the secured assets fall within his jurisdiction.

14. In support of these submissions, the learned counsel for the Respondent/Bank placed reliance on the following case laws:

(i) Balkrishna Rama Tarle Dead Thr. LRS & Anr. Vs. Phoenix ARC Private Limited & Ors.,(2023)1 SCC 662;

(ii) Trade Well & Anr. Vs. Indian Bank & Anr. 2007(1) Bom.C.R.(Cri.) 783,

(iii) R.D. Jain & CO. Vs. Capital First LTD. & Ors. (2023)1 SCC 675.

15. It is not in dispute that, initially, the Petitioner No.1- Firm availed loan facilities/OCC limit to the extent of Rs.250 lakhs and agreed to repay the same at rate of interest 12.25% per annum with monthly interest. The Petitioner Nos. 2 to 6 are guarantors to said loan facility. While availing the loan, the Petitioners executed following security documents in favour of bank which are as under:

i) Demand Promissory Note. (RF 211) 11.02.2016;

ii) Composite Agreement Dt.11.02.2016;

iii) Consent letter Dt. 11.02.2016;

iv) Document of Annexure 2 as a supplement to the composite agreement Dt. 11.02.2016;

v) Letter of undertaking Annexure I Dt.11.02.2016;

vi) General Form of Guarantee Dt. 11.02.2016;

vii) Consent letter from Guarantor dt. 11.02.2016;

viii) Simple Mortgage Deed Bearing Day Book No.484/2016 Dt.10.02.2016.

16. Needless to say that again on 20.07.2017, the Respondent/Bank enhanced the cash credit facility (OCC) to the extent of Rs.325.00/- lakhs @ interest 11.20% per annum monthly interest. The Petitioners executed following security documents in favour of Bank which are as under:

i) Demand Promissory Note. (RF 211) 30.08.2017;

ii) Composite Agreement Dt.30.08.2017;

iii) General Form of Guarantee Dt.30.08.2017;

iv) Letter of undertaking Annexure I Dt.30.08.2017;

v) Simple Mortgage Deed Bearing Day Book No.3045/2017 Dt.19.08.2017.

17. Again on 31.10.2019, the Respondent/Bank enhanced the Cash Credit Facility to the extent of Rs.500.00/- lakhs on the request of the Petitioners. The Petitioners executed following security documents in favour of Bank which are as under:

i) Demand Promissory Note. (RF 211) 06.11.2019;

ii) Composite Agreement Dt. 06.11.2019;

iii) Consent letter Borrower Dt. 06.11.2019;

iv) Letter of consent as a supplementary to the Loan documents Dt. 06.11.2019;

v) General Form of Guarantee Dt. 06.11.2019;

vi) Consent letter from Guarantor Dt. 06.11.2019;

vii) Simple Mortgage Deed Bearing Day Book No.7972/2019 Dt.07.11.2019.

18. It is a matter of record that on 22.09.2020, the Respondent/Bank sanctioned the loan facility for the purpose of conversion of accumulated accrued interest charged/applied to working capital facilities for availment of COVID relief limit of Rs.25,48,922/- on the request of the Petitioners. Accordingly, the Petitioners have executed following security documents:

i) Term Loan Agreement SD-19 Dt. 28.09.2020;

ii) Demand Promissory Note 28.09.2020;

iii) Document of lien and set off. (AD 02A) 28.09.2020;

iv) Letter of continuity (AD09M) 28.09.2020;

v) Letter of undertaking from borrower for disclosure to civil 28.09.2020;

vi) Letter of undertaking from Guarantors for disclosure to civil 28.09.2020;

vii) Letter of Guarantee (SD 01) 28.09.2020;

viii) Debit balance confirmation Dtd.28.09.2020.

19. It is undisputed fact that the Petitioners failed to repay the loan. Ultimately, on 31.03.2021, the Respondent Bank declared the loan account of the Petitioners being Non-Performing Assets (N.P.A.). It is a matter of record that, on 19.04.2021, the Respondent/Bank issued a notice under Section 13(2) to the Petitioners and also published a notice in the local newspaper on 07.06.2021. No doubt, the Petitioners challenged the said Notice dated 19.04.2021 before the learned Debts Recovery Tribunal, Aurangabad in Securitization Application No.128 of 2021. It is not in dispute that, on 17.10.2022, the learned Debts Recovery Tribunal, Aurangabad, passed the order and disposed of the said application because the Respondent/Bank withdrew the said notice, however,

liberty was granted to the Respondent/Bank for availing appropriate legal remedies.

20. Thereafter, on 14.09.2022, the Respondent/Bank issued a notice under Section 13(2) of the SARFAESI Act to the Petitioners which was duly served upon the Petitioner No.1 on 15.09.2022 as per endorsement appearing on postal acknowledgment. It is not the case of the Petitioners that they challenged subsequent notice u/s 13 (2) of the Act before the competent authority or they ever objected said notice. Needless to say that, the Petitioners never replied said notice but concealed the fact of service notice on 15.09.2022. Therefore, on 04.12.2022, the Respondent/Bank took symbolic possession of the secured assets. Thereafter, the Respondent/Bank approached before the District Magistrate under Section 14 of the SARFAESI Act.

21. Indeed, on 27.03.2023, the learned District Magistrate disposed of the application u/s 14 of the SARFAESI Act because the Respondent/Bank failed to comply with certain deficiencies but provisions of Sec. 14 of the Act does not put any embargo for approaching the Financial Institution before the learned Chief Judicial Magistrate, if the District Magistrate disposed off the application due to non removal of deficiencies.

22. It is an undisputed fact that the Respondent/Bank filed an Application under Section 14 of the SARFAESI Act before the Chief Judicial Magistrate, Latur and prayed for permission to take possession of the secured assets as described in prayer clause A (1 to 9).

23. No doubt, after appearance, the Petitioners filed Exh.21 an application and prayed for issuance of directions against the Respondent/Bank for supply of copy of application u/s 13 (2) of the Act, Affidavit and copy of notice issued u/s 13(2) of the SARFAESI Act.

24. Section 14 of the SARFAESI Act, provides 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 assets is required to be taken by the secured creditor or if any of the secured assets 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 2[within a period of thirty days from the date of application:]

[Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.]

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.]

(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 1[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."

25. In the case of Trade Well and Another cited (supra), this Court held as under:

"The Chief Judicial L Magistrate acting under Section 14 of SARFAESI Act is not required to give notice either to borrower or third party. It is held that "It (Legislature) purposely did not make provision for notice or hearing being given to the borrower or third party at the stage of Section 14. Looking to the scheme of the NPA Act, we are of the opinion that notice or hearing to the borrower or third party is excluded at the stage of Section 14 by necessary implication." Further it is held that "In our opinion, at the time of passing order under Section 14 of the NPA Act, the CMM/DM will have to consider only two aspects. He must find out whether the secured asset falls within his territorial jurisdiction and whether notice under Section 13(2) of NPA Act is given or not. No adjudication of any kind is contemplated at that stage."

26. In the case of Balkrishna Rama Tarle cited (supra), the Hon'ble Supreme Court held as under:

"Thus, the powers exercisable by CMM/DM under Section 14 of the SARFAESI Act are ministerial step and Section 14 does not involve any adjudicatory process qua points raised by the borrowers against the secured creditor taking possession of the secured assets. In that view of the matter once all the requirements under Section 14 of the SARFAESI Act are complied with/satisfied by the secured creditor, it is the duty cast upon the CMM/DM to assist the secured creditor in obtaining the possession as well as the documents related to the secured assets even with the help of any officer subordinate to him and/or with the help of an advocate appointed as Advocate Commissioner. At that stage, the CMM/DM is not required to adjudicate the dispute between the borrower and the secured creditor and/or between any other third party and the secured creditor with respect to the secured assets and the aggrieved party to be

relegated to raise objections in the proceedings under Section 17 of the SARFAESI Act, before Debts Recovery Tribunal."

27. In the case of R. D. Jain and Company, cited (supra), the Hon'ble Supreme Court held that the powers initiated by the DM/CMM under Section 14 of the SARFAESI Act is of ministerial nature and while disposing of application under Section 14, no element of quasi-judicial function or adjudication is attracted, however, the DM/CMM has to adjudicate and decide correctness of information given in application and nothing more.

28. In the case in hand, the Petitioners have not denied about service of notice dated 14.09.2022 issued by the Respondent/Bank under Section 13(2) of the SARFAESI Act. No doubt, as per the Provisions of Section 14, the details of the transaction and secured assets are required to be submitted on affidavit. On perusal of the record, it appears that Mr. Anilkumar Shrivastava, the Authorized Officer of the Respondent/Bank submitted all transactions history between the Petitioners and the Respondent/Bank on verification which is based on the documentary evidence. The Respondent/Bank has also given detailed description of secured assets. The Petitioners have not disputed about description of secured assets. Therefore, merely solemn affirmation/affidavit is not furnished with the application under Section 14 of the SARFAESI Act, it may be called as a procedural defect, which can be cured by filing additional affidavit.

29. Since, the Respondent/Bank complied with the provisions of Section 14 of the SARFAESI Act as per view taken by the Hon'ble Apex Court as well as by this Court in the cited case laws, the notice is not required to be given to the borrower or the third party. Nonetheless, the Petitioners are already served notice dated 14.09.2022 issued by the Respondent/Bank under Section 13(2) of the SARFAESI Act but neither the Petitioners replied the same nor they challenged the said notice before the competent authority. Further, the Petitioners have concealed the fact of service notice on 15.09.2022. Therefore, to my mind, filing an application below Exh.21 is itself killing the time.

30. In view of above discussion, I do not find any substance to disturb the findings of the learned Trial Court, hence, the Writ Petition is dismissed. Accordingly, Rule is discharged.