

(2017) 12 MP CK 0028
In the Madhya Pradesh High Court
Case No : 489 of 2016

OMPRAKASH PANDEY & OTHERS

APPELLANT

Vs

SANDHYA & OTHERS

RESPONDENT

Date of Decision : 21-12-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Securitisation an

Citation : (2017) 12 MP CK 0028

Hon'ble Judges : P.K. Jaiswal, Virender Singh

Bench : Single Bench

Advocate : A. M. Mathur, A. P. Dhanodkar, Romesh Dave, Vijay Assudani

Judgement

1. This intra-court appeal has been filed by the writ petitioner against the order dated 18.10.2016 passed in W. P. No.6131/2016 by which learned Writ Court relying on the decision of Kanhaiyalal Lalchand Sachdev & others vs. State of Maharashtra & others reported in 2011 (2) SCC 782 has held that an action under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short "the SARFAESI Act ") constitutes an action taken after the stage of Section 13(4) and, therefore, the same would fall within the ambit of Section 17(1) of the SARFAESI Act and dismissed the writ petition as not maintainable with liberty to the appellant to approach the Debts Recovery Tribunal (DRT) under Section 17 of the SARFAESI Act.

2. The appellant is a company incorporated under the Companies Act, 1956 and registered as Securitization and Asset Reconstruction Company pursuant to Section 3 of the SARFAESI Act. The respondent Nos.4 to 10 are borrower and guarantor and due to default in payment of such loan by them, the Dena Bank has initiated proceedings under the SARFAESI Act and has assigned the due debts from the respondent Nos.4 to 10 arising out of financial assistance

provided by the Dena Bank to the respondent Nos.4 to 10 in favour of the appellant.

3. The Dena Bank assigned its debt to the appellant vide assignment deed dated 21.02.2011 and the appellant stepped into the shoes of Dena Bank. The assignor of Dena Bank through their Authorised Officer issued a demand notice for Rs.12,02,02,764.38 exercising the powers under Section 13(2) of the SARFAESI Act and directed the respondent Nos.4 to 10 to deposit the entire amount as per above mentioned provision within 60 days but the respondent Nos.4 to 10 did not deposit the aforesaid amount within 60 days or till date. Further, notice dated 16.09.2004 under Section 13(4) of the SARFAESI Act was issued and the respondent Nos.4 to 10 were directed to deliver the possession of the property mortgaged by the respondent Nos.4 to 10, but they did not deliver the possession of the property.

4. The assignor of the Dena Bank has taken symbolic possession of the property on 21.09.2004 exercising the powers under Section 13(4) of the SARFAESI Act.

5. The appellant filed an application under Section 14 of the SARFAESI Act before the respondent No.2 which was assigned to the respondent No.3 for hearing and passing an appropriate order. The respondent No.3 has passed an order dated 15.07.2016 and dismissed the application of the appellant under Section 14 of the SARFAESI Act merely on the ground that Company Petition No.8/1981 is pending before the Company Court, Bench at Indore.

6. The appellant challenged the order dated 15.07.2016 passed by the respondent No.3 by filing W. P. No.6131/2016. Learned Writ Court relying on the decision of the Apex Court in the case of Kanhaiyalal Lalchand Sachdev (supra) has held that the order dismissing the application under Section 14 of the SARFAESI Act can be challenged before the DRT by filing an application under Section 17 of the SARFAESI Act.

7. It is this order, which has been impugned in this intro-court appeal.

8. Learned Senior Counsel for the appellant has submitted that the impugned order has been passed by the learned Writ Court without application of mind and without a bare reading of Section 17 of the SARFAESI Act which clearly provides that "any person (including borrower)", aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by secured creditor or his Authorized Officer under this chapter...." which clearly means that if any person is aggrieved by taking possession under Section 13(4) or passing of order of possession under Section 14 and pursuant to the order, possession taken by secured creditor or its Authorised Officer, may challenge the action before learned DRT under Section 17 of the SARFAESI Act.

9. He has further submitted that in the case in hand, the appellant himself is a secured creditor and is aggrieved by action of the respondent No.3 of not granting the assistance as provided by the statute under Section 14 hence, do

not have remedy to approach the learned DRT in the light of Section 17 of the SARFAESI Act..

10. Section 14 of SARFAESI Act 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 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. (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.

11. Shri A. M. Mathur, learned Senior Counsel for the appellant has submitted that the term "shall" has been used in the statute which clearly reflects the intention of legislature which mandates or impose a duty upon the District Magistrate or Chief Metropolitan Magistrate to provide the assistance in taking possession of the secured asset to the secured creditor in the event, an application is

made under Section 14 of the SARFAESI Act.

12. He has also submitted that Section 14(3) of the SARFAESI Act provides that order passed in an application under Section 14 would be a final order and would not be subjected to challenge before any Court or authority thus, the statute itself provides a bare on challenging the order passed in an application under Section 14 of the SARFAESI Act. He has heavily placed reliance on the decision of the Apex Court in the case of Harshad Govardhan Sondagar vs. International Assets Reconstruction Company Ltd. reported in 2014 (6) SCC 1 and submitted that statutory provisions attaching finality to the decision of an authority excluding the power of any other authority or Court to examine such a decision will not be a bar for the High Court to exercise jurisdiction vested by the Constitution because a statutory provision cannot take away a power vested by

the Constitution and submitted that the decision of the District Magistrate can be challenged before the High Court under Article 226 /227 of the Constitution of India by any aggrieved party and if such a challenge is made, then this Court can examine the decision of the District Magistrate as the case may be, in accordance with the settled principles of law.

13. He further submitted that this question was considered in the case of M/s Sri Ambika Solvex Ltd. vs. State Bank of India & others reported in 2016 SCC Online MP 5772, whereby learned Writ Court after appreciating the judgement in the case of Harshad Govardhan Sondagar (supra) and Kanhaiyalal Lalchand Sachdev (supra), has held that the statutory finality attached to a decision of authority does not exclude the power under Section 226 of the Constitution. This order has been upheld by the Division Bench in the case of Sri Ambika Solvex Ltd. (supra) passed on 04.02.2016. With the aforesaid, he prayed that the impugned order be set aside and the matter be remitted to the learned Writ Court to decide it on merit, in accordance with law.

14. Per contra, Shri Vijay Assudani, learned counsel for the respondent Nos.4 to 10 has submitted that the appellant has alternative remedy to approach the DRT against the order passed by the District Magistrate in terms of Section 17(1) of the SARFAESI Act. In the case of Kanhaiyalal Lalchand Sachdev (supra), the Apex Court has held that against the action taken under Section 14 of the SARFAESI Act, remedy lies to move an application before the DRT. In such circumstances, the view taken by the learned Writ Court is correct view and submitted that if there is a conflict between the Coordinate Bench of the Hon'ble Supreme Court, then the court may follow the judgement which appears to read more elaborately and accurate and prayed for dismissal of the appeal.

15. In the case of Kanhaiyalal Lalchand Sachdev & others V/s. State of Maharashtra & others (supra), the Apex Court held that against an action taken under Section 14 of the SARFAESI Act, the remedy lies to move an application to the tribunal. The court observed thus :- "22.We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act constitutes an action taken after the stage of Section 13(4).and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for an appeal before the DRT.

23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants under Section 17 of the Act.It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person."

16. In the case of United Bank of India V/s. Satyawati Tondon, reported as (2010) 8 SCC 110 the Supreme Court held that the expression "any person" in

Section 17 would include borrowers, guarantors or any other person. It observed in para 42 which reads as under:- "42. There is another reason why the impugned order should be set aside. If Respondent 1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1). The expression "any person". used in Section 17(1) is of wide import. It takes within its fold, not DALBIR SINGH 2014 08 12 12:07 I attest to the accuracy of this document High Court Chandigarh CWP No.15324 of 2014 (O&M) [3]. only the borrower but also the guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective."

17. In another case Jagdish Singh V/s. Heeralal & Others, reported as 2014 (1) SCC 479 the Apex Court held that the jurisdiction of Civil Court is barred in respect of an action under Section 13(4) of the SARFAESI Act, the remedy being only under Section 17 of the SARFAESI Act. It observed in para 24 and 25 as under :- "24. Statutory interest is being created in favour of the secured creditor on the secured assets and when the secured creditor proposes to proceed against the secured assets, sub-section (4) of Section 13 envisages various measures to secure the borrower's debt. One of the measures provided by the statute is to take possession of secured assets of the borrowers, including the right to transfer by way of lease, assignment or realizing the secured assets. Any person aggrieved by any of the "measures" referred to in sub-section (4) of Section 13 has got a statutory right of appeal to the DRT under Section 17. The opening portion of Section 34 clearly states that no civil court shall have jurisdiction to entertain any suit or proceeding "in respect of any matter" which a DRT or an Appellate Tribunal is empowered by or under the Securitisation Act to determine. The expression "in respect of any matter" referred to in Section 34 would take in the "measures" provided under sub-section (4) of Section 13 of the Securitisation Act. Consequently if any aggrieved person has got any grievance against any "measures" taken by the borrower under sub-section (4) of Section 13, the remedy open to him is to approach the DRT or the Appellate Tribunal and not the civil court. Civil Court in such circumstances has no jurisdiction to entertain any suit or proceedings in respect of those matters which fall under sub-section (4) of Section 13 of the Securitisation Act because those matters fell within the jurisdiction of the DRT and the Appellate Tribunal. Further, Section 35 says, the Securitisation Act overrides other laws, if they are inconsistent with the provisions of that Act, which takes in Section 9 CPC as well."

25. We are of the view that the civil court jurisdiction is completely barred, so far as the "measure" taken by a secured creditor under sub-section (4) of Section 13 of the Securitisation Act, against which an aggrieved person has a right of appeal before the DRT or the Appellate Tribunal. to determine as to whether

there has been any illegality in the "measures" taken. The bank, in the instant case, has proceeded only against secured assets of the borrowers on which no rights of Respondent Nos.6 to 8 have been crystallised, before creating security interest in respect of the secured assets. In such circumstances, we are of the view that the High Court was in error in holding that only civil court has jurisdiction to examine as to whether the "measures" taken by the secured creditor under sub-section (4) of Section 13 of the Securitisation Act were legal or not. In such circumstances, the appeal is allowed and the judgment of the High Court is set aside. There shall be no order as to costs."

18. In the case of Harshad Goverdhan Sondagar (supra), the Apex Court in para 29 observed that the remedy under Section 17 of the SARFAESI Act is not available to the lessee in the case of his dispossession by

the Secured Creditor. The lessee has a liberty to challenge the order passed by the District Magistrate in accordance with power conferred under Article 226 of the Constitution before the High Court.

19. In the case of Jabalpur Bus Operators Association & Others V/s. State of M.P. & Another, reported as 2003 (1) M.P.L.J. 513, the five Judges Bench of this court has held that in case of conflict between the two decisions of the Apex court, Benches comprising of equal number of Judges, decision of earlier Bench is binding unless explained by the latter Bench of equal strength, in which case later decision is binding.

20. In the case of State Of M.P. And Others V/s. Balveer Singh & Others reported as 2001(2) MPLJ 644, the Full Bench has held that if there is conflict of view between the co-equal Benches of the Apex Court, the High Court has to follow the judgment, which appears to it to state the law more elaborately and more accurately and in conformity with the scheme of the Act.

21. In the case of M/s. Ambika Solvex Ltd. V/s. State Bank of India, (supra) we have not considered the decisions passed in United Bank of India V/s. Satyawati Tondon (supra) and Jagdish Singh V/s. Heeralal & Others (supra), since the same were not brought to the notice of the Division Bench. Even otherwise, the writ petition of M/s. Ambika Solvex Ltd

(supra), was dismissed. The Division bench in para 15 has upheld the view taken by the learned writ court by holding that the writ petition is entertainable against the order passed under Section 14 of the SARFAESI Act by the District Judge.

22. On due consideration of the aforesaid and the law laid down by the Five Judges Bench of this court in the case of Jabalpur Bus Operators Association & Others (supra), so also the fact that judgment of United Bank of India (supra), Jagdish Singh V/s. Heeralal & Others (supra), were not considered while upholding the view taken in the matter of M/s. Ambika Solvex Ltd (supra), we are more incline to follow the earlier judgment of the Hon'ble Supreme Court where the question of maintainability of writ petition has been considered in

great detail, we find that the appellant has an effective alternative remedy to approach the Debt Recovery Tribunal under Section 17 of the SARFAESI Act, the writ appeal filed by the appellant has no merit and is accordingly, dismissed with a liberty to the appellant to avail the remedy of appeal under Section 17 of the SARFAESI Act, in accordance with law. No costs.