(2018) 01 MP CK 0199

In the Madhya Pradesh High Court

Case No : 13189 of 2017

R. S. Company & Ors — APPELLANT

Vs

Commissioner of Central Excise — RESPONDENT

Date of Decision : 05-01-2018

Acts Referred:

Code of Criminal Procedure, 1973, Section 23, Section 20 - Subordination of Executive Magistrates - Executive Magistrates

<a href=6972>Securitisation and Reconstruction of Financial Asset

Citation : (2018) 01 MP CK 0199

Hon'ble Judges : Vandana Kasrekar

Bench : Single Bench

Advocate : Rajesh Maindiretta, Ankit Agrawal, A.C. Thakur

Judgement

1. The petitioner has filed the present writ petition challenging the orders dated 10/07/2017 and 22/08/2017 passed by respondents No.1 and 2

respectively.

2. The petitioner is the proprietor of M/s Thakur Warehouse and for the purpose of construction of a warehouse, he approached to respondent

No.3-bank. Respondent No.3-bank accordingly granted/sanctioned a term loan of Rs.1,06,39,000/- to the petitioner. For securing due

repayment of the aforesaid term loan, guarantee agreements were executed by shri Govind Singh Thakur, Shri Amit Singh Thakur , Shri Aditya

Singh Thakur and Shri Arjun Singh Thakur. In addition to the aforesaid, equitable mortgage of house property and also the land over which the

warehouse is constructed was mortgaged. The said finance was availed by the petitioner under the Rural Godown Scheme of NABARD wherein

33% of the loan amount to be reimbursed by way of subsidy. However, the respondent-bank did not submit proper documents for claiming

subsidy from NABARD. The subsidy was not timely claimed by the respondent-bank. On account of nonappropriation of the subsidy amount

timely by the respondent-bank, the loan amount of the petitioner became irregularly and classified as non-performing assets by the respondent-

bank.

3. The respondent-bank initiated proceedings under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest

Act, 2002 (hereinafter referred to as ''the Act of 2002'') by issuing demand notice under Section 13(2) of the Act of 2002 and the Rules framed

thereunder on 01/07/2016. The petitioner has raised an objection to the said demand notice which was replied by the respondent-bank. Thereafter

the respondent-bank has proceeded to take action under Section 13(4) of the Act of 2002 which action was assailed by the petitioner by filing a

securitisation application before the Debts Recovery Tribunal, Jabalpur which is subject matter of S.A. No.14/2017. Respondent No.3-bank

thereafter filed application under Section 14 of the Act of 2002 for taking physical possession of the secured asset. The petitioner submitted his

reply to the said application. Thereafter respondent No.1 has passed the impugned order dated 10/07/2017 for taking the physical possession of

the property. Being aggrieved by the said order, the petitioner has filed the present writ petition.

4. Learned counsel for the petitioner argues that the order passed by respondent No.1 is without jurisdiction. He submits that under Section 14 of

the Act of 2002, Chief Metropolitan Magistrate or District Magistrate is required to assist the secured creditor in taking the physical possession of

the secured asset. Learned counsel for the petitioner also submits that the orders impugned are passed by the Additional District Magistrate who

has no jurisdiction to pass order under the Act of 2002. He further submits that Section 14(1) of the Act of 2002 provides that the Chief

Metropolitan Magistrate or District Magistrate are required to assist the secured creditor in taking possession of secured assets. By way of

amendment, Section 14 of the Act is amended and the first proviso to sub-section provides for filing of an affidavit containing nine declarations by

the secured creditor. Second proviso to the said section further provides that suitable orders shall be passed by the Chief Metropolitan Magistrate

or the District Magistrate, as the case may be, after satisfying the contents of the affidavit. Section 1 (A) has been inserted by which the District

Magistrate or the Chief Metropolitan Magistrate has been conferred power to authorize any officer subordinate to him to take possession of the

assets after passing of the order under Section 14(1) of the Act of 2002. He also submits that Section 20 (1) of the Code of Criminal Procedure,

1973 provides that the State Government may appoint as many persons as it thinks fit to be the Executive Magistrate and shall appoint one of them

to be the District Magistrate. Further Sub-section (2) of Section 20 of Cr.P.C. Provides that State Government may appoint any Executive

Magistrate to be an Additional District Magistrate and such Magistrate shall have such of the powers of a District Magistrate under the Code of

Criminal Procedure or under any other law for the time being in force as may be directed by the State Government.

5. Learned counsel argues that the conjoint reading of Section 20(1) and 20(2) of Cr.P.C. clearly provides that the District Magistrate and the

Additional District Magistrate are separate and distinct authorities and the Additional District Magistrate is empowered to exercise all powers

which are conferred on the District Magistrate under the Code of Criminal Procedure or as directed by the State Government. He further argues

that in the present case, there is no authorization by the State Government to the Additional District Magistrate for exercising the powers under

Section 14 of the Act of 2002. Section 23 of the Cr.P.C. further provides that all the Executive Magistrate other than Additional District

Magistrate shall be subordinate to the District Magistrate but merely the fact that the Additional District Magistrate is not subordinate to the District

Magistrate would not mean that he can exercise the powers specifically conferred on the District Magistrate under Section 14 of the Act of 2002.

However, sub-section (2) of the said section provides that the District Magistrate to distribute the business among the Executive Magistrates

subordinate to him and also allocate the business to an Additional District Magistrate. This again clearly shows that both the authorities are

different, therefore, the Additional District Magistrate cannot exercise powers conferred on the District Magistrate under Section 14 of the Act of

2002. Thus, the order s impugned are absolutely illegal and liable to be set aside. For the said purpose, learned counsel for the petitioner relied

upon the following judgments :

a) Harish Chand Agrawal Vs. The Batala Engineering Co. Ltd and others, reported in AIR 1969 SC 483 ;

b) Ajaib Singh Vs. Gurbachan Singh and others, reported in AIR 965 SC 1619;

c) State of Karnataka and another Vs. Dr. Praveen Bhai Thogadia, reported in (2004) 4 SCC 684 ;

d) A.A.R. Malik Vs. A.N. Roy, reported in (2005) 2 Bom. CR (Cri) 206;

e) Suresh Sham Singh and others Vs. Shri A.N. Roy Commissioner of Polie and others, reported in (2005) 2 Bom CR (Cri) 513;

f) Imran Shah Khan Vs. State of UP & others, reported in (2009) 5 All LJ 748;

g) Vashistha Narain Karvaria Vs. State of Uttar Pradesh and others, reported in (1981) Cri LJ 1526;

h) Swadesh Chandra Saha Vs. State of West Bengal, reported in (2017) SCC Online Cal 7283;

i) Sri Priolal Sarkar and another Vs. The State of West Bengal and others, reported in (2017) SCC Online Cal 8053;

j) Sri Kartick Chandra Dhar Vs. The State of West Bengal and others, reported in (2017) SCC Online Cal 7155;

k) State of Maharashtra and others Vs. Mohammed Salim Khan and others, reported in (1991) 1 SCC 550;

l) T.C. Ramadoss & another Vs. State Bank of India and others, reported in IV (2015) BC 217 (DB) Mad.);

m) Manjudevi R. Somani Vs. Union of India and others reported in IV (2013) BC 694 (DB) (Guj);

n) K. Arockiyaraj & others Vs. Chief Judicial Magistrate and another, reported in 1 (2014) BC 6 (FB) (Mad.);

o) Arupeswar Chatterjee and others Vs. Bank of Baroda and others, reported in 1 (2016) BC 279 (Cal.);

q) Jawahar Singh Vs. United Bank of India, reported in 1 (2016) BC 3 (Cal.);

r) Shyam Sunder Vs. Indusind Bank, reported in 2017 (4) MPLJ 214; and

s) Standard Chartered Bank Vs. V. Noble Kumar, reported in (2013) 9 SCC 620.

6. Respondent No.3-bank has filed reply and in the said reply, respondent No.3-

bank has stated that the bank had sent letters dated 30/03/2014

and 01/07/2015 to the Zonal Office, NABARD, Bhopal in connection with the eligibility of the petitioner''s firm for claiming 33.33% subsidy from

NABARD. Respondent No.3-bank itself received the subsidy amount for the first time from NABARD on 04/08/2016 despite making attempts

from 30/03/2014. It has further been submitted that the subsidy was claimed by M/s Thakur Warehouse and not by the petitioner in her personal

capacity whereas this writ petition has been filed by the petitioner in her personal capacity. Therefore, the petitioner cannot make claims regarding

any alleged wrong done to M/s Thakur Warehouse by way of this petition. The account was classified as non-performing asset in terms of the

prudential norms of the Reserve Bank of India and the alleged nonreceipt of the subsidy amount does not have anything to do with the classification

of the account as NPA. The petitioner has already raised all the grounds in the securitisation application which is pending before DRT. The

petitionerfirm failed to repay the loan amount, therefore, action has been taken by the respondent-bank by issuing notice under Section 13(2) of

the Act of 2002 and thereafter an application was moved before the Additional District Magistrate who pass the impugned order dated

10/07/2017. It has further been submitted that after amendment, the Additional District Magistrate is empower to take action under Section 14 of

the Act of 2002 after amendment in the said section on 15/01/2013. It is further submitted that the District Magistrate has authorised Additional

District Magistrate to take action under Section 14(3) of the Act of 2002. In view of aforesaid submissions, it is submitted that the impugned

orders passed by the Additional District Magistrate is in accordance with law.

7. Learned counsel for the respondents further submits that the Additional District Magistrate has jurisdiction to pass the impugned orders. He

submits that prior to amendment in Section 14 of the Act of 2002 i.e. before amendment of Section 14(1A) of the Act of 2002, only Chief

Metropolitan Magistrate or District Magistrate could pass the order under Section 14 of the Act of 2002. Thereafter vide amendment dated

15/01/2013 in Section 14 of the Act of 2002, the Chief Metropolitan Magistrate or District Magistrate, as the case may be, has been authorized to

delegate the powers under Section 14 of the Act of 2002 to any officer subordinate to him. Any officer would not have been mentioned in the

amended provision had the intention been otherwise. On perusal of provisions of Section 14(1) and 14(1A) of the Act of 2002, it will be evident

that the duty of the Chief Metropolitan Magistrate or District Magistrate, as per Section 14(1) or any subordinate officer authorized by them as per

Section 14(1A) of the Act of 2002, is the same i.e. (a) take possession of such assets and documents relating thereto; and (b) forward such assets

and documents to the secured creditor. Before amendment on 15/01/2013, the execution of the order passed by the District Magistrate was being

done by the Tehsildar/SDM. It confirms that sub-section (1A)was inserted to reduce the load of District Magistrate or Chief Metropolitan

Magistrate by allowing them to authorize any officer to pass order under Section 14 of the Act of 2002. However, it is argued that on perusal of

Section 23(1) and (2) of Cr.P.C., it will be evident that all the Executive Magistrates other than Additional District Magistrate shall be subordinate

to District Magistrate. In terms of the same, passing of the order by Additional District Magistrate cannot be treated as delegation of authority. In

terms of Section 17 of the M.P. Land Revenue Code, Additional District Magistrate shall exercise such powers and discharge such duties

conferred and imposed on a District Magistrate. As per Section 35 of the Act of 2002, it is having override effect over the other Acts. The

Principal Secretary and OSD-cum-Commissioner, Institutional Finance vide circular dated 03/07/2014 had brought it to the knowledge of the

Collectors that in view of amendment, District Magistrate can authorize any officer subordinate to him for the purpose of exercising powers under

Section 14 of the Act of 2002. In pursuance of the said circular, the District Magistrate, vide notification dated 23/03/2017 had authorized Shri

Chhote Singh, Additional District Magistrate, Smt. Harshika Singh, Additional District Magistrate and Shri Anand Kopariha, Additional District

Magistrate to pass any order under Section 14 of the Act of 2002. The District Magistrate has distributed the work amongst himself as well as

Additional District Magistrates vide work allotment orders dated 19/07/2016, 25/11/2016, 06/01/2017, 13/01/2017, 23/03/2017, 10/07/2017

and 13/07/2017 from which it is evident that Shri Anand Kopriha, Additional District Magistrate was allotted the work in connection with the Act of 2002.

8. Heard learned counsel for the parties. The only ground is raised by learned counsel for the petitioner regarding to the jurisdiction of the

Additional District Magistrate in passing the order under Section 14 of the Act of 2002. As per Section 13 of the Act of 2002, if any borrower

fails to repay the loan, then the bank can proceed to recover that amount under Section 13 of the Act of 2002. Sub-section (2) of the said section

provides that initially a notice is required to be issued under Section 13(2) of the Act of 2002 directing the borrower to deposit the amount within

60 days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). Sub-

section (4) of Section 13 of the Act of 2002 provides that 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 methods which includes taking possession of the secured assets of

the borrower. For taking possession of the secured assets, provisions have been made under Section 14 of the Act of 2002.

9. Section 14 of the Act of 2002 provides that whenever the possession of any secured asset is to be taken by the secured creditor, then an

application is required to be made in writing to the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such

secure asset or other documents relating thereto may be situated or found. Upon such request being made, the District Magistrate shall take

possession of such asset and documents relating thereto and forward such asset and documents to the secured creditor. Thus, as per this section,

for taking possession of the secured asset, application is required to be made to the District Magistrate in the District. Sub-section (1A) has been

incorporated by the Act 1 of 2013 which provides that the District Magistrate or the Chief Metropolitan Magistrate may authorise any officer

subordinate to him to take possession of such assets and documents relating thereto and to forward such assets and documents to the secured

creditor. Thus, in light of the aforesaid position of law, the question arises whether any Executive Magistrate other than the Chief Metropolitan

Magistrate or the District Magistrate would be empower to pass an order under Section 14 of the Act of 2002. Section 20 of the Code of

Criminal Procedure provides for appointment of Executive Magistrate. Section 20 of Cr.P.C., reads as under :

20. Executive Magistrates.

(1) In every district and in every metropolitan area, the State Government may appoint as many persons as it thinks fit to be Executive Magistrates

and shall appoint one of them to be the District Magistrate.

(2) The State Government may appoint any Executive Magistrate to be an Additional District Magistrate, and such Magistrate shall have such of

the powers of a District Magistrate under this Code or under any other law for the time being in force [as may be directed by the State

Government].

(3) Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the executive

administration of the district, such officer shall, pending the orders of he State Government, exercise all the powers and perform all the duties

respectively conferred and imposed by this Code on the District Magistrate.

(4) The State Government may place an Executive Magistrate in charge of a subdivision and may relieve him of the charge as occasion requires;

and the Magistrate so placed in charge of a subdivision shall be called the Subdivisional Magistrate.

(4A) The State Government may, by general or special order and subject to such control and directions as it may deem fit to impose, delegate its

powers under sub-section (4) to the District Magistrate.

(5) Nothing in this section shall preclude the State Government from conferring under any law for the time being in force, on a Commissioner of

Police, all or any of the powers of an Executive Magistrate in relation to a metropolitan area.

As per this section, the State Government may appoint as many persons as it think fit to be Executive Magistrates and shall apoint one of them to

be the District Magistrate. Further sub-section (2) of Section 20 provides that the State Government may appoint any Executive Magistrate to be

an Additional District Magistrate and such Magistrate shall have such of the powers of a District Magistrate under this Code or any other law for

the time being in force as may be directed by the State Government. Thus, as per this section, Additional District Magistrate is empowered to exercise all the powers which are conferred over the District Magistrate under the Code of Criminal Procedure as directed by the State

Government.

10. Section 23 of the Code of Criminal Procedure reads as under :

23. Subordination of Executive Magistrates.- (1)All Executive Magistrates, other than the Additional District Magistrate, shall be subordinate to

the District Magistrate, and every Executive Magistrate (other than the Sub-divisional Magistrate) exercising powers in a sub-division shall also be

subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate.

(2) The District Magistrate may, from time to time, make rules or give special orders, consistent with this Code, as to the distribution of business

among the Executive Magistrates subordinate to him and as to the allocation of business to an Additional District Magistrate.

A bare reading of the above section would mean that the Additional District Magistrate is not subordinate to the District Magistrate. In other word

all the Executive Magistrates except Additional District Magistrate are subordinate to the District Magistrate. Sub-section (2) of Section 23 of the

Code clarifies that the District Magistrate may, from time to time, allocate the business to the Additional District Magistrate which he empowers to

perform. The legislature has specifically used the word ''distribute'' for other Executive Magistrate and ''allocate'' for the Additional District

Magistrate. Once, any specific work is allocated to the Additional District Magistrate, his competence and authority to perform the same cannot be

questioned.

11. As per the above legal provisions, the Additional District Magistrate is empowered to exercise the powers under the Act of 2002 if he is

authorised to do so by the District Magistrate. In the present case, the District Magistrate by issuing an order dated 7th July, 2016 has authorised

Additional District Magistrate to perform the power under the Act of 2002. Thus, there is an authorization in favour of the Additional District

Magistrate to exercise the powers given under the Act of 2002. Most of the judgments which are relied upon by learned counsel for the petitioner

are prior to Amendment Act of 2013. Prior to amendment only District Magistrate or the Chief Metropolitan Magistrate, as the case may be, is entitled to exercise the powers under Section 14 of the Act of 2002. However, after amendment, sub-section (1A) has been inserted and by the

said subsection District Magistrate or the Chief Metropolitan Magistrate is empowered to authorise any officer subordinate to them. In the present

case, by exercising the said power, the District Magistrate has authorise the Additional District Magistrate to exercise the powers under Section 14

of the Act.

12. This Court in the case of Ram Singh Vs. State of M.P., 2013(1) MPLJ 117, has held that the Additional District Judge has power to exercise

the jurisdiction under Section 14 of the Act of 2002. The said judgment has been upheld by the Division Bench of this Court. Similar view has also

been taken by the Coordinate Bench of this Court in W.P. No.1828/2016 (Sachin Patidar Vs. State of M.P.) decided on 15/03/2016.

13. Allahabad High Court in the case of Lakshya Consosts Private Limited Vs. Bank of Baroda, reported in AIR 2017 All 172 in para-11 has

held as under :

11. Placing reliance upon the use of word ''order'' in the proviso to Section 14 of the Act, it has been submitted that authorities specified in

Section 14 exercise judicial function while providing assistance to the secured creditor and, thus, the same cannot be entrusted to Additional

District Magistrate. In our considered opinion, Section 14 of the Act is procedural in nature and only empowers the authorities to assess the

secured creditor in taking over possession of the secured assets as per the procedure contemplated therein. The Section does not empower the

authorities specified therein with any power to adjudicate in respect of any dispute pertaining to the secured assets. Power exercised by the

authorities specified in Section 14, since is only an administrative power, authorising any authority to exercise the same, will not amount to

delegation of power.

As per the said judgment, under Section 14 of the Act authorities exercise their administrative power and, therefore, authorising any authority to

exercise the same will not amount to delegation of power.

14. Similar view was taken by the Division Bench of Allahabad High Court in the case of Rich Field Industries Pvt. Ltd. Vs. State Bank of India,

reported in 2016 (10) ADJ 192. Relevant para of the said judgment reads as under :

It has been a considered legal position that the power exercised under Section 14 of the SARFAESI Act by the Collector/District Magistrate is

only an administrative power and thus authorising any authority to exercise these powers does not amount to the delegation of the power and, in

view of the Full Bench decision of the Supreme Court and the Division Bench judgment of Allahabad High Court, referred to above, this Court

finds no illegality in the order that has been passed under Section 14 of the SARFAESI Act by the Additional District Magistrate.

Thus, in light of the aforesaid discussion, the powers exercise under Section 14 of the Act of 2002 by the District Magistrate is only an

administrative power and not adjudicatory in nature and, thus, authorizing Additional District Magistrate or Executive Magistrate will not amount to

any delegation of power and, there exists no illegality in exercise of powers under the said section by an Additional District Magistrate. In view of

aforesaid discussion, there is no error of jurisdiction in entertaining the application under Section 14 of the Act of 2002 by Additional District

Magistrate and the order passed by him cannot be said illegal or without jurisdiction.

15. Resultantly, in light of the aforesaid discussion, the said writ petition is dismissed without any order as to cost.