**(2012) 11 MP CK 0059**

**In the Madhya Pradesh High Court**

**Case No :** Writ Petition No. 5675 of 2012

Ram Singh APPELLANT

Vs

State of Madhya Pradesh and Others RESPONDENT

**Date of Decision :** 09-11-2012

**Acts Referred:**

Constitution of India, 1950 — Article 226, 227
Madhya Pradesh Land Revenue Code, 1959 — Section 146, 147, 16, 17, 17(2)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4), 14, 17, 17(1), 18

**Citation :** AIR 2013 MP 67 : (2012) ILR (MP) 2987 : (2013) 2 MPHT 79 : (2013) 1 MPJR 90 : (2013) 1 MPLJ 117

**Hon'ble Judges :** Sujoy Paul, J

**Bench :** Single Bench

**Advocate :** Balwant Singh, for the Appellant; R.P. Rathi, Government Advocate for the Respondent No. 1/State and Shri Praveen N. Surange, Advocate for the Respondents Nos. 2 and 3, for the Respondent

# Judgement

Hon. Shri Justice Sujoy Paul

1. By invoking the jurisdiction of this Court under Article 226 of the Constitution, the petitioner has challenged the order Annexure P-1 dated 18.07.2012, whereby the Additional Collector by exercising powers u/s 14 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (herein after referred to "SARFAESI Act") passed the order against the petitioner directing him to hand over the possession to the bank, failing which the Sub Divisional Officer (SDO) is directed to take possession from the petitioner and provide it to the bank. Shri Balwant Singh, learned counsel for the petitioner, submits that the provisions of the SARFAESI Act were not applicable in the present case, and therefore, petitioner cannot be relegated to avail the alternative remedy u/s 17 of the SARFAESI Act. It is relevant to mention the following points raised by the petitioner in his petition:-

(I) Residential house of the petitioner was exempted from attachment and sale and, therefore, as per Section 31(g) of the SARFAESI Act, the proceedings are void ab-initio.

(II) u/s 17 of the SARFAESI Act, the appeal can be preferred only by financial institutions and bank and such appeal cannot be filed by "any other person" (para 6.3 of writ petition).

(III) Respondent-bank is barred by law of limitation as the proceedings for initiation recovery was filed beyond 3 years.

(IV) The bank has not followed the procedure prescribed under the Security Interest (Enforcement) Rules, 2002 and hence entire proceedings are bad in law.

(V) Respondent-bank has no power and authority to directly attach and sale the property of guarantor. It is prohibited by section 146 and 147 of Madhya Pradesh Land Revenue Code (MPLRC).

(VI) No notice of auction is served on the petitioner under the SARFAESI Act.

(VII) No efforts are made for making recovery of dues from principal borrower Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, the recovery is impermissible. Ashok Mahajan Vs. State of U.P. and Others, is also relied upon for this purpose.

(VIII) The property in question is agriculture land and hence SARFAESI Act is not applicable.

(IX) The Additional Collector/Additional District Magistrate is not competent u/s 14 of the SARFAESI Act.

2. Per Contra, Shri Praveen N. Surange, learned counsel for the Bank and Shri R.P. Rathi, Government Advocate for the State, supported the order passed by the court below.

3. In the return of the bank, it is stated that the petitioner had given his personal guarantee to repay the loan amount together with interest and other charges jointly and severally with the borrower. The petitioner had signed deed of guarantee in favour of respondent-bank and taken the liability to repay the entire loan amount together with interest with borrower. The loan account was turned bad and notice was duly served on the borrower and the petitioner/guarantor. One, such notice is filed as Annexure R-3 dated 13.03.2006, it is stated that the petitioner had received the said notice on 20.01.2009 (Annexure R-4). Another notice dated 23.04.2010 (Annexure R-5) was returned with endorsement refused. The notices were also duly published in two news papers "Raj Express and Nai Duniya". Thus, it is stated that action is well within limitation. Shri Surange relied on various judgments in support of his submissions.

4. I have heard the learned counsel for the parties and perused the record.

5. The basic question is whether SARFAESI Act is applicable on the petitioner or not. However, I deem it proper to deal with the contentions of the petitioner

point wise:-

Point No. (I) The petitioner has heavily relied on Section 31(g) of the SARFAESI Act. However, the burden was on the petitioner to show that the property in question was not liable to attachment or sale. There is no material on record to support the aforesaid contention. On the contrary, being guarantor it is a liability of the petitioner to repay the loan, and therefore, Section 31(g) of SARFAESI Act has no application in the present case.

Point No. (II) The contention that the petitioner u/s 17 of the SARFAESI Act can be preferred only by the bank or financial institution and it cannot be entertained on behalf of any other person is misconceived and runs contrary to settled legal position. It is relevant to add here that appeal is entertainable even against the proceedings u/s 14 of the SARFAESI Act by the Debts Recovery Tribunal (DRT). It is held by the Supreme Court in Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, in para 22 as under:-

22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action u/s 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 u/s 13(4) of the Act, by providing for an appeal before the DRT.

In United Bank of India Vs. Satyawati Tondon and Others, the Apex Court held as under in para 17:-

17. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued u/s 13(4) or action taken u/s 14, then she could have availed remedy by filing an application u/s 17(1). The expressive ''any person'' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken u/s 13(4) or Section 14.

The same view is taken by the Division Bench of Delhi High Court in Letters Patent Appeal No. 814/2010 (Triton Corporation Limited Vs. Karanataka Bank Limited). It is opined as under:-

42. There is another reason why the impugned order should be set aside. If respondent No. 1 had any tangible grievance against the notice issued u/s 13(4) or action taken u/s 14, then she could have availed remedy by filing an application u/s 17(1). The expression "any person" used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also the guarantor or any other person who may be affected by the action taken u/s 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.

The Division Bench of Bombay High Court in the case of Trade Well Vs. Indian Bank, held as under:-

82. Sub-section (3) is proceeded by Subsection (2) under which for securing compliance of Sub-section (1), that is for taking possession, the CMM/DM can take such steps and use or cause to be used, such force, as may in his opinion, be necessary. Sub-section 3 grants immunity to the CMM/DM as regards steps taken by him or force allowed to be used by him for providing assistance for taking possession. Since as stated by us adjudication of rival claims is absent at that stage, there is no question of his dealing with rival claims and giving a reasoned judgment as regards the merits of the case and obviously there is no question of such a reasoning assuming finality. In any event, if a party has any grievance as regards contents of that order, his remedy would be to voice them in the application u/s 17 before the DRT after measures u/s 13(4) are taken.

90. Following conclusions emerge from the above discussion:

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2. CMM/DM acting u/s 14 of the NPA Act is not required to give notice either to the borrower or to the 3rd party.

3. He has to only verify from the bank or financial institution whether notice u/s 13(2) of the NPA Act is given or not an whether the secured assets fall within his jurisdiction. There is no adjudication of.

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5. Remedy provided u/s 17 of the NPA Act is available to the borrower as well as well as the third party.

6. Remedy provided u/s 17 is an efficacious alternative remedy available to the third party as well as to the borrower where all grievances can be raised.

7. In view of the fact that efficacious alternative remedy is available to the borrower as well as to the third party, ordinarily, writ petition under Article 226 and 227 of the Constitution of India should not be entertained.

The Andhra Pradesh High Court took the same view in W.P. No. 26837/2003 Ashok Sharda Vs. Small Industries Development Bank of India and Others, . Thus, the contention of the petitioner that appeal is not tenable on behalf of any other person runs contrary to settled legal position.

The aforesaid reproduction of judgments further shows that appeal is also available against the order passed u/s 14 of the SARFAESI Act.

Point No. (III) The contention of the petitioner is that the matter was barred by limitation. Although petitioner can raise this issue also before the DRT, prima facie it appears that this contention is also misconceived. The notices were served on the petitioner within the period of limitation and, therefore, this contention also cannot be accepted.

Point No. (IV) The aforesaid judgments further show that even in cases of alleged violation of the rules, the proper remedy is to file an appeal.

Point No. (V) The SARFAESI Act is a special Act and it is not in derogation of any other existing provision of law. Thus, this contention is also misconceived and is rejected. Section 34 of SARFAESI Act makes it clear that it has over riding effect on other laws.

Point No. (VI) The petitioner can raise this point in appeal being a question of fact.

Point No. (VII) The petitioner is at liberty to raise this point before the appellate authority and this cannot be gone into in the present proceedings.

Point No. (VIII) Prima facie the contention of the petitioner that the land in question is agriculture land appears to be incorrect as per his own revision (Annexure P-18), wherein the petitioner himself stated as under:-

Thus, this contention is also without any basis and contrary to petitioner''s own documents.

Point No. (IX) Section 17 of the MPLRC reads as under:-

17. Power to appoint Additional Collectors.-

(1) The State Government may appoint one or more Additional Collector in a district.

(2) An Additional Collector shall exercise such powers and discharge such duties conferred and imposed on a Collector by or under this Code or by or under any other enactment for the time being in force, in such cases or class of cases as the State Government may, by a general order, notify or as the Collector of the district may, subject to any general or special restrictions imposed by the State Government, by an order in writing direct.

(3) This Code and every other enactment for the time being in force and any rule made under this Code or any such other enactment shall, except where expressly directed otherwise, apply to the Additional Collector, when exercising any powers or discharging any duties under sub-section (2), as if the were the Collector of the district.

A Division Bench of this Court in 1988 RN 61 (Shanti Lal Jain Vs. M.L. Patel) held that u/s 17 of the MPLRC, the appellate powers of the Collector can be exercised by the Additional Collector. The same is followed in ( Kaushal Prasad Kashyap Vs. State of M.P. and Others, . It is opined as under:-

The collector is an holder of an office under the M.P. Land Revenue Code and, therefore, recourse can be taken to the provisions of the Code. Section 16 of the

 

M.P. Land Revenue Code contains powers to appoint Collector. Section 17 of the Code provides appointment of ''Additional Collectors'' and sub-section (2) thereof provides that ''Additional Collectors'' shall exercise such powers and discharge such duties conferred and imposed on a ''Collector'' by or under this Code or under any other enactment for the time being in force. Sub-section (3) provides that while so exercising powers under the Code or any other enactment the ''Additional Collector'' shall be deemed to be ''Collector''. In the notification of delegation the State Government has delegated the power to the ''Collector'' and the word ''Collector'' has to be understood from the provisions of the Code. In relation to provision of the Code and also in relation of any other enactment ''Collector'' would include ''Additional Collector'' as provided in section 17(2), (3) of the Code. It cannot, therefore, be said that under the notification of delegation the Collector has made any further delegation itself, the word ''Collector'' would include ''Additional Collector'', in accordance with the work distribution memo, issued u/s 17 of the Code.

6. Apart from this, since the SARFAESI Act is a special Act, the judgments cited by Shri Balwant Singh, learned counsel for the petitioner, have no application, which are judgments dealing with different statutory provision. As per the aforesaid analysis, it is clear that the contention of the petitioner that the SARFAESI Act is not applicable is without any foundation and basis. Accordingly, it cannot be held that the remedy available u/s 17 of SARFAESI Act cannot be availed by the petitioner. The Allahabad High Court while considering the analogous provision like Section 17 of MPLRC in their statute of U.P. Land Revenue Act, 1901 held that Additional Collector has the same power of Collector to proceed u/s 14 of the SARFAESI Act. This is held in Irshad Husain Vs. District Magistrate and Others, . In this view of the matter, I am unable to hold that the SARFAESI Act is not applicable in the facts and circumstances of the present case. Accordingly, petitioner has statutory and efficacious remedy to prefer an appeal u/s 17 of the Act. Because of availability of said remedy, this petition is not entertained. It is made clear that if petitioner prefers an appeal within 15 days from today, the appellate authority/tribunal shall consider the appeal of the petitioner on merits and impediment of delay will not come in the way of the petitioner. Ad-interim order granted by this Court stands vacated.

Petition stands disposed of. No costs.

 