
(2016) 08 AHC CK 0107
In the Allahabad High Court
Case No : Writ C No. 26826 of 2016

Rich Field Industries Pvt. Ltd.

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 31-08-2016

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 14

Citation : (2016) 10 ADJ 192 : (2017) 172 AIC 947 : (2016) 6 AILJ 389 : (2017) 120 ALR 37 : (2017) 1 DRTC 506 : (2017) 134 RD 455 : (2017) 1 RJ 351

Hon'ble Judges : Tarun Agarwala and Vipin Sinha, JJ.

Bench : Division Bench

Advocate : Siddharth Khare, Senior Advocate, for the Petitioner; C.S.C, Satish Chaturvedi, Advocate, for the Respondents

Final Decision : Dismissed

Judgement

1. Heard Sri Ashok Khare, the learned Senior Advocate assisted by Sri Prateek Chandra, the learned counsel for the petitioner and Sri Satish Chaturvedi, the learned counsel appearing for the respondent bank.

2. The present writ petition has been filed by the petitioner with the claim that the petitioner is neither a borrower nor a guarantor and in fact is a lessee in pursuance of a valid lease deed executed by the borrower - respondent no.2. The relief sought by the petitioner in the present writ petition is to the effect that the impugned order dated 1.1.2016 be quashed as it has been passed by the Additional District Magistrate purportedly in exercise of power under Section 14 of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act"). The petitioner has also made the following prayer in the writ petition:

"II. Issue a writ, order or direction in the nature of Mandamus directing the Respondent No. 1 to refrain from interfering with the possession of the property of the petitioner;

III. Issue a writ, order or direction in the nature of Certiorari or any other order or direction declaring the e-auction notice issued by the Respondent No. 1 that was published in the newspaper on 16.1.2016 as null and void and restraining the Respondent No. 1 from proceeding with the auction sale or taking any action.

IV. ?

V. ..."

3. Sri Ashok Khare, the learned Senior Counsel appearing for the petitioner has raised three basic contention while attacking the impugned order dated 1.1.2016 (Annexure No. 1 to the writ petition); (a) that the order passed under Section 14 of the Act could not have been passed by the Additional District Magistrate as he is not the competent authority as the same being Collector/District Magistrate and in this regard reliance has been placed upon Section 14 of the Act, relevant portion of which 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 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 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 its 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.

(1-A) 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 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."

(b) that the Additional District Magistrate has not at all referred to the contention/objection raised by the petitioner in its objection filed in response to the application of the Bank under Section 14 of the SARFAESI Act;

and (c) that the petitioner is a lessee under a validly executed lease deed.

4. Thus, the petitioner cannot be evicted except in accordance with law from the premises in dispute. The learned senior counsel has relied upon a judgment of the Supreme Court rendered in *Harshad Govardhan Sondagar v. International Assets Reconstruction Company Limited and others*, 2014 (6) SCC 1 to contend that it was incumbent upon the authority prescribed under Section 14 of the SARFAESI Act to adjudicate upon the status of the petitioner as a lessee under a validly executed lease deed. The relevant extracts are quoted herein below:

"As per the mandate of Section 107 TPA if the lessee of the mortgagor claims that it is entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relied on an unregistered instrument or oral agreement accompanied by delivery of possession, the CMM or the DM, as the case may be will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than a year from the date of the instrument or from the date of delivery of possession in his favour by the landlord.

? If the lessee surrenders possession, the lease, even if valid, gets determined in accordance with clause (f) of Section 111 of the Transfer of Property Act, but if he resists the attempt of the secured creditor to take possession, the authorised officer cannot evict the lessee by force but has to file an application before the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the SARFAESI Act and state in the affidavit accompanying the application, the name and address of the person claiming to be the lessee. When such an application is filed, the Chief Metropolitan Magistrate or the District Magistrate will have to give a notice and give an opportunity of hearing to the person claiming to be the lessee as well as to the secured creditor consistent with the principles of natural justice and then take a decision.

We may now consider the contention of the respondents that some of the appellants have not produced any document to prove that they are bona fide lessees of the secured assets. We find that in the cases before us, the appellants have relied on the written instruments or rent receipts issued by the landlord to the tenant. Section 107 of the Transfer of Property Act provides that a lease of immoveable property from year to year, or for any term exceeding one year or reserving a yearly rent, can be made ?only by a registered instrument? and all other leases of immoveable property may be made either by a registered instrument or by oral agreement accompanied by delivery of possession. Hence, if any of the appellants claim that they are entitled to possession of a secured asset for any term exceeding one year from the date of the lease made in his favour, he has to produce proof of execution of a registered instrument in his favour by the lessor. Where he does not produce proof of execution of a registered instrument in his favour and instead relies on an unregistered instrument or oral agreement accompanied by delivery of possession, the Chief

Metropolitan Magistrate or the District Magistrate, as the case may be, will have to come to the conclusion that he is not entitled to the possession of the secured asset for more than an year from the date of the instrument or from the date of delivery of possession in his favour by the landlord. "

5. The learned Senior Counsel further relied upon a judgment of the Apex Court rendered in the case of Hari Chand Aggarwal v. Batala Engineering Co. Ltd., Civil Appeal No. 681 of 1966, decided on 24.9.1968 and also upon a judgment of Allahabad High Court rendered in Virendra Kumar Agarwal v. M.L. Kulshreshtha and others, Civil Misc. Writ No. 3721 of 1973, decided on 19.7.1973 in support of his contention that the Additional District Magistrate could not have exercised the power of District Magistrate in exercise of power under Section 14 of the SARFAESI Act. However, as far as the case of Hari Chand (Supra) is concerned, the same is with regard to the power under the Code of Criminal Procedure. In the said case it has been observed that the District Magistrate and the Additional District Magistrate are two different and distinct authorities and even though the latter may be empowered under Subsection (2) to exercise all or any of the powers of a District Magistrate but by no stretch of reasoning can an Additional District Magistrate be called the District Magistrate which are the words employed in Sub-section (1) of Section 10. As far as second case Virendra Kumar (Supra) is concerned, the same is with regard to the power of the Central Government to delegate the power to the District Magistrate and, thus, it is contended that District Magistrate could not have sub delegated the power. A perusal of the said two judgment shows that the facts and circumstances of the aforesaid cases do not apply to the facts and circumstances of the present case.

6. 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 judgment 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.

7. Sri Satish Chaturvedi, the learned counsel for the respondent bank has placed strong reliance upon a Full Bench judgment of Hyderabad High Court rendered in M/s. T.R. Jewellery and another v. M/s. State Bank of India and another, AIR 2016 Hyderabad 125 to contend in support of his contention that the term District Magistrate will include the Additional District Magistrate or Additional Collector. The relevant extract of the said judgment is quoted herein below:

"27. Relying upon the word order used in the proviso to Section 14, it has been urged, that the Chief Metropolitan Magistrate is exercising judicial function while assisting the secured creditor and the same cannot be entrusted to Chief Judicial Magistrate in non-metropolitan area when the Legislature never contemplated the same. It has been further urged that if really the intention of the Legislature

was to give such power to Chief Judicial Magistrate, it would have referred to it at least in the amendment brought to Section 14 in the year 2013. It is true that Section 14 of the Act refers only to Chief Metropolitan Magistrate and District Magistrate. But, if really the proceedings before the Chief Metropolitan Magistrate are judicial in nature, the Legislature would not have allowed the District Magistrate or the Chief Metropolitan Magistrate to authorise any Officer subordinate to them to take possession of such assets and documents relating there to and forward such assets and documents to the secured creditor. At this stage, an argument was sought to be advanced, stating that delegation as referred to in Section 14(1A) is only with regard to execution of the order by an Officer subordinate to Chief Metropolitan Magistrate or District Magistrate and not passing of the order. The same cannot be accepted. It is to be noted that Section 14(1)(a)(b) which deal with assistance by Chief Metropolitan Magistrate and District Magistrate also refers to taking possession of such assets and documents and forwarding them to the secured creditor.

28. Dealing with the word possession in Sections 13, 17 and the Rules made under SARFAESI Act, the Apex Court in *Transcore v. Union of India (UOI)* and another, held as under :

68. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/tribunals.

29. In *Union Bank of India v. The State of Maharashtra through the Office of the Government Pleader, Public Works Department and others*, the Bombay High Court held that Section 14 of the SARFAESI Act is procedural in nature and that the procedure stipulated therein enables the secured creditor to take the assistance of Chief Metropolitan Magistrate or District Magistrate in taking possession of the secured assets. It was also held that Section 14 only empowers the authorities to assist the secured creditor in taking possession of the secured assets as per the procedure contemplated under Section 14, but does not clothe the District Magistrate with the power to adjudicate in respect of any dispute pertaining to any secured asset. Further, it has been held that proviso to Section 14 of the Act does not vest District Magistrate with the jurisdiction to adjudicate and decide any dispute regarding the secured assets. Similar view was taken by a Division Bench of Bombay High Court in *International Asset Reconstruction Company Private Limited through its Authorised Representative of the Constituted Attorney Shri Tushar B. Patel v. Union of India (UOI)*, through the

District Magistrate and others. In *Mansa Synthetic Pvt. Ltd. and others v. Union of India* and another, a Division Bench of the Gujarat High Court held that the District Magistrate or Chief Metropolitan Magistrate is bound to assist secured creditor in taking possession of secured asset and is not empowered to decide question of legality or propriety of any action taken by the secured creditor under Section 14 of the Act."

8. He further placed reliance upon Division Bench judgment of this Court rendered in *Irshad Husain v. District Magistrate Moradabad and others*, 2009 (3) ADJ 81 wherein the Division Bench has taken a specific view and has held herein as under:

"According to us, when the above Act is subjective in nature, the Act below is the procedural in nature. Upon going through Section 14-A of the U.P. Land Revenue Act, 1901 we find that the Additional Collector has the similar power as of Collector, thereby the Collector includes the Additional Collector. Section 14-A of such Act is also quoted hereunder:

"14-A. Appointment, powers and duties of Additional Collectors. - (1) The State Government may appoint an Additional Collector in a district or in two or more districts combined.

(2) An Additional Collector shall hold his office during the pleasure of State Government.

(3) An Additional Collector shall exercise such powers and discharge such duties of a Collector in such cases or classes of cases as the Collector concerned may direct.

(4) This Act and every other law for the time being applicable to a Collector shall apply to every Additional Collector, when exercising any powers or discharging any duties under subsection (3), as if he were the Collector of the district."

9. Reference may also be made to a judgment of the Calcutta High Court rendered in *Sk. Akbr Ali v. State of West Bengal and others*, AIR 2012 Calcutta 90, wherein it has been categorically held that there is no dispute that an Additional District Magistrate even if the State Government duly confers on him all or any of the powers of the District Magistrate does not become a District Magistrate. He still remains an Additional District Magistrate holding a position below the District Magistrate. This, however, does not lead to the conclusion that if a power of the District Magistrate on being duly conferred on him is exercised by an Additional District Magistrate, it will not be a valid exercise of power. Once the power is duly conferred on an Additional District Magistrate, such Additional District Magistrate is competent to decide an application under Section 14 of the SARFAESI Act. It is not necessary that the power has to be exercised by the District Magistrate.

10. Learned counsel for the respondent bank has also placed reliance upon Section 14 (1-A) of the SARFAESI Act.

11. It has further been contended by the learned counsel for respondent bank that as far as question of lease deed is concerned, it may be appreciated that the Bank had issued a notice under Section 13(2) of the SARFAESI Act on 17.5.2014 for recovery of the amount due against the borrower, namely, respondent no.2 - M/s. Zync Global Pvt. Ltd. which was to the tune of Rs.67,00,26,840/- including the accrued interest up to 1.10.2013 and that as per the notice/application under Section 14 of the SARFAESI Act apart from the liability of the State Bank of India running to Rs.67,00,26,840/- there is further liability of Punjab National Bank running to Rs.75,48,38,788.78/-. The contention of the respondent bank is that respondent no.2 knowing fully well that there is huge liability against him, in order to derail the entire recovery proceeding had executed an unregistered lease deed in favour of the petitioner on 9.9.2014 for a period of three years. The further contention of the respondent bank is that it is an admitted position on record that the lease deed was executed after the notice under Section 13(2) of the SARFAESI Act has been given.

11-A. Further reliance has been placed by the counsel for respondent bank upon a specific clause contained in the notice issued under Section 13(2) of the SARFAESI Act, which reads as under:

"You are also put on notice that in terms of subsection 13 of section 13 you shall not transfer by sale, lease or otherwise the said secured assets detailed in Schedule "C" of this notice without obtaining written consent of the Bank."

12. The learned counsel for the respondent bank has also drawn attention of the Court to section 13(13) of the SARFAESI Act, which reads as under:

"13. Enforcement of security interest. - (1) ?

(2) ?

(3) ...

(4) ?

(5) ?

(6) ?

(7) ?

(8) ?

(9) ?

(10) ...

(11) ?

(12) ?

(13) No borrower shall, after receipt of notice referred to in sub-section (2),

transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor."

13. Relying upon the aforesaid contentions, learned counsel for the respondent bank submitted that the petitioner cannot be granted any indulgence whatsoever in exercise of equitable jurisdiction of this Court under Article 226 of the Constitution.

14. It is apparent from the record that respondent no.2, who happens to be the borrower has very complacently executed a lease deed after the receipt of the notice under Section 13(2) of the SARFAESI Act with the sole intention of playing fraud with the Bank. His dishonest intention is writ large on the face of the record. Respondent no. 2 after setting up the petitioner in the forefront has very calmly chosen to stay away from the litigation and is cooling his heels sitting at home. It is apparent from the fact that the benefit of the lease deed cannot be extended to the petitioner in view of the fact that firstly it is an unregistered document and secondly it was executed after the service of notice under Section 13 (2) of the SARFAESI Act and this Court feels that no person can be permitted to reap the harvest of his own wrongdoing. Further, the petitioner admits that the lease is an unregistered document.

15. It has also been submitted that upon default in payment of financial assistance, the account of borrower has been notified as "non-performing asset" by State Bank of India on 28.1.2014 and by Punjab National Bank on 31.12.2013 and thus it is apparent that respondent no.2 was well aware that the account has been notified as "non-performing asset". There is apparently a huge liability against respondent no.2 and it was under these circumstances and in order to hoodwink the Bank, a frivolous lease deed was executed surreptitiously by respondent no. 2 in favour of the petitioner.

16. Sri Chaturvedi has placed reliance upon the reply filed by the Bank to the application of objector i.e. the petitioner wherein the objection taken by the petitioner has been duly considered and replied to, a copy of the said reply has been annexed as annexure CA-3 to the counter affidavit. The said reply has been considered by the Additional District Magistrate while passing the order under Section 14 of the SARFAESI Act.

17. Keeping in view the conduct of the borrower a reference may be made to the judgment of the Apex Court rendered in Andhra Pradesh State Financial Corporation v. M/s. GAR Re-Rolling Mills and another, AIR 1994 SC 2151, where the Supreme Court observed:-

"A court of equity, when exercising its equitable jurisdiction under Article 226 of the Constitution must so act as to prevent perpetration of a legal fraud and the courts are obliged to do justice by promotion of good faith, as far as it lies within their power. Equity is always known to defend the law from clefty evasions and new subtleties invented to evade law."

18. In the case of *M.P. Mittal v. State of Haryana & Ors.*, AIR 1984 SC 1888, the Hon"ble Supreme Court held as follows:-

"The appeal arises out of a writ petition, and it is well settled that when a petitioner invokes the jurisdiction of the High Court under Article 226 of the Constitution, it is open to the High Court to consider whether, in the exercise of its undoubted discretionary jurisdiction, it should decline relief to such petitioner if the grant of relief would defeat the interests of justice. The Court always has power to refuse relief where the petitioner seeks to invoke its writ jurisdiction in order to secure a dishonest advantage or perpetuate an unjust gain. This is a case where the High Court was fully justified in refusing relief."

19. The Hon"ble Supreme Court in *State of Maharashtra v. Prabhu*, (1994) 2 SCC 481 considered the equity jurisdiction of the High Court under Article 226 of the Constitution and pointed out as follows:-

"Even assuming that the construction placed by the High Court and vehemently defended by the learned counsel for respondent is correct should the High Court have interfered with the order of Government in exercise of its equity jurisdiction..... Where the Government or any authority passes an order which is contrary to rules or law it becomes amenable to correction by the courts in exercise of writ jurisdiction. But one of the principles inherent in it is that the exercise of power should be for the sake of justice. One of the yardstick for it is if the quashing of the order results in greater harm to the society then the court may restrain from exercising the power.....Therefore, even if the order of the Government was vitiated either because it omitted to issue a proper show-cause notice or it could not have proceeded against the respondent for his past activities the High Court should have refused to interfere in exercise of its equity jurisdiction as the facts of the case did not warrant interference..... It is the responsibility of the High Court as custodian of the Constitution to maintain the social balance by interfering where necessary for sake of justice and refusing to interfere where it is against the social interest and public good."

20. The same position was reiterated by the Hon"ble Supreme Court in the case of *Chandra Singh v. State of Rajasthan & Anr.*, AIR 2003 SC 2889 in which it was observed as follows:-

"Issuance of a writ of Certiorari is a discretionary remedy *Champalal Binani v. CIT, West Bengal*, AIR 1970 SC 645. The High Court and consequently this Court while exercising its extra ordinary jurisdiction under Articles 226 or 32 of the Constitution of India may not strike down an illegal order although it would be lawful to do so. In a given case, the High Court or this Court may refuse to extend the benefit of a discretionary relief to the applicant."

21. In *ONGC Ltd. v. Sendhabhai Vastram Patel & Ors.*, reported in (2005) 6 SCC 454, the Supreme Court held as follows:-

"It is now well settled that the High Court and the Supreme Court while

exercising their equity jurisdiction under Articles 226 and 32 of the Constitution as also Article 136 thereof may not exercise the same in appropriate cases. While exercising such jurisdiction, the superior courts in India may not strike down even a wrong order only because it would be lawful to do so. A discretionary relief may be refused to be extended to the appellant in a given case although the Court may find the same to be justified in law. See *S.D.S. Shipping (P) Ltd. v. Jay Container Services Co. (P) Ltd.*, (2003) 9 SCC 439."

22. Respondent no. 2 who owes approximately a sum of Rs. Rs.67,00,26,840/- to SBI and a sum of Rs. 75,48,38,788.78/- to PNB and with the sole intention of playing fraud with the Bank has executed a lease deed surreptitiously and that too after the receipt of the notice and in complete violation of Section 13(13) of the SARFAESI Act as well as the condition mentioned in the notice under Section 13(2) of the SARFAESI Act itself. Reference may also be had to a recent judgment of Division Bench of Allahabad High Court rendered in *Surendra Kumar Maheshwari v. State of U.P. and others*, 2006(2) ADJ 182 wherein the Court while dealing with the similar situation has held that the grant of relief in writ jurisdiction is discretionary and a Court can decline the relief where the person seeks to secure a dishonest advantage or perpetuate unjust gain.

23. In the present case, lease deed has been executed after the receipt of notice under Section 13(2) of the SARFAESI Act and thus it cannot be said that the lease is valid or that the possession of the petitioner is a lawful possession.

24. In view of the aforesaid facts and circumstances, this Court finds that the petitioner is not entitled to grant of any indulgence of this Court in exercise of its equitable jurisdiction under Article 226 of the Constitution.

25. The writ petition fails and is accordingly dismissed.