
(2019) 08 JH CK 0050

In the Jharkhand High Court

Case No : Writ Petition (c) No. 3483 of 2019

Satish Giri And Ors

APPELLANT

Vs

State of Jharkhand And Ors

RESPONDENT

Date of Decision : 26-08-2019

Acts Referred:

Securitization And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13, 13(2), 13(4), 14, 14(i), 14(ii), 14(1)(i), 14(1)(ii), 14(1)(iii), 14(1)(iv), 14(1)(v), 14(1)(vi), 14(1)(vii), 14(1)(viii), 14(1)(ix), 17, 17(1)
Recovery Of Debts Due to Banks And Financial Institutions Act, 1993 — Section 19(4)
Constitution Of India, 1950 — Article 226

Citation : (2019) 08 JH CK 0050

Hon'ble Judges : Sujit Narayan Prasad, J

Bench : Single Bench

Advocate : Sumeet Gadoaia, Nitish Krishna, Parth S.A. Swaroop Pati

Final Decision : Disposed Off

Judgement

1. Mr. Parth S.A. Swaroop Pati, learned counsel has submitted that he has put his appearance through a caveat petition being Cvt. No.164 of 2019 by showing the respondent-Bank as necessary party.

2. Mr. Sumeet Gadodia, learned counsel for the petitioners has submitted that the respondent-Bank being a necessary party has already been impleaded as respondent to the proceeding.

3. This Court after hearing the learned counsel for the parties on this application is of the view that since the respondent-Bank has already been impleaded as party to the proceeding, therefore, no order is required to be passed in the instant caveat application.

4. In view thereof, the instant caveat application is disposed of and the appearance of Mr. Parth S.A. Swaroop Pati, learned counsel is recorded by taking his vakalatnama on record.

W.P.(C) No.3483 of 2019 :

5. This writ petition is under Article 226 of the Constitution of India seeking therein the following prayers:

"(i) For issuance of an appropriate writ/order/direction for quashing/setting aside the order contained in Memo No. 203(ii)/Ni dated 18.06.2019 (Annexure-5), wherein an order has been passed in exercise of the power under Section 14(i) and 14(ii) of "The securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002" for deployment of police force for taking over possession of the residential house of the Petitioners, being House No.319 situated at Road No.3, R.S. Plot No.61, Hesal, Janak Nagar, Piska More, Ratu Road, Ranchi, having an area of 4.95 decimals.

(ii) For issuance of further appropriate writ/order/direction, including Writ of Declaration, declaring that the action of the Respondent-authorities, particularly Respondent Nos.1 and 2 in taking physical possession of residential house of the Petitioners and sealing the same on 9th July, 2019 is wholly illegal, arbitrary and in utter violation of the Judgment dated 26th July, 2018 (Annexure-4) passed by Debts Recovery Tribunal, Ranchi in S.A. 108 of 2017, wherein the Notice of possession issued by Respondent No.3-Bank dated 24.10.2017 was set aside by the said Tribunal.

(iii) For issuance of further appropriate writ/order/direction including Writ of Mandamus, directing the Respondents to immediately and forthwith handover back possession to the Petitioners of their aforesaid residential house by unsealing the same, especially in view of the fact that Respondent-authority itself, vide Memo No.245(ii)/Ni dated 09.07.2019 (Annexure-6), has kept the earlier order dated 18.06.2019 (Annexure-5) in abeyance, but despite the said fact, possession of the residential house of the Petitioners has been undertaken through the help of Police and the same has been sealed."

6. The writ petition has been listed at serial No.50 on the Board today.

Ms. Shilpi John, learned counsel on being instructed by Mr. Sumeet Gadodia, learned counsel for the petitioners has mentioned the matter for hearing it out of turn on the ground that the educational certificate as also the books and school diary etc., of the son and daughter of the petitioners are lying in the house, which has been sealed, which was the subject matter of sanction of the loan amount by the Bank in favour of the petitioners.

It has been submitted that the daughter of the petitioners namely, Miss. Raj Nandini is required to take admission in graduate course i.e., B.Sc. but all the certificates since are lying in an almirah in the house which is being sealed by the respondent-bank, if not be released, their daughter would be made to suffer and further she has also been qualified in the medical entrance examination and as such, the certificates are required to be produced for counseling.

This Court after considering the aforesaid ground for hearing the matter out of

turn, has posted the matter for its hearing subject to availability of the learned counsel for the respondent Bank namely, Mr. Parth S.A. Swaroop Pati.

7. The matter has been taken up out of turn and Mr. Parth S.A. Swaroop Pati, learned counsel for the respondent-Bank has not objected to the same.

8. The writ petition itself has been heard on merit as also the interlocutory application.

9. The brief facts of the case of the petitioners as per the pleadings made in the petition is that the loan has been sanctioned in favour of the petitioners by the respondent-Bank, the same having become Non-Performing Asset (in short, NPA), a proceeding has been initiated by the Bank before the Debt Recovery Tribunal being O.A. No.223 of 2016 which was disposed of on 29.09.2018 wherein after hearing the parties, the application filed by the Bank has been allowed and debt is determined with costs against the defendants, the petitioners herein, and accordingly the order has been passed making the Bank entitled to receive from defendants jointly and severally, which is debts with interest amount to Rs.28,78,636/- as on 30.07.2011 together with pendent lite and future interest @ 10 % per annum simple from 31.07.2011 and the entire sum due and recoverable with costs.

10. The defendants have been debarred from transferring, alienating encumbering or otherwise dealing with or disposing of the mortgaged or hypothecated or any other properties and assets without paying the aforesaid adjudicated dues to the applicant bank to secure the ends of justice.

The said order has not been challenged by the petitioners.

11. The Bank subsequent thereto, has resorted to the provision of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short SARFAESI Act, 2002) by issuing notice under Section 13(2) of the Act, 2002 upon the petitioners, borrowers, on 30.01.2012.

12. The petitioners have failed to comply with the demand notice as issued under Section 13(2) of the Act, 2002, as such, took symbolic possession of the assets of the petitioners vide possession notice dated 24.10.2017 and for taking the physical possession, the District Magistrate has been approached under Section 14 of the Act, 2002 who has passed an order on 18.06.2019 for taking physical possession of the premises in question but subsequent thereto, when the petitioners have approached before the District Magistrate and brought to his notice about non-issuance of notice under Section 13(4) of the Act, 2002, the effect of the order dated 18.06.2019 has been stayed vide order dated 09.07.2019 but the respondent-Bank has sealed the premises which according to the petitioners is without any authority of law since once the District Magistrate has declined to take decision in pursuance to the provision as contained under Section 14 of the Act, 2002 denying the handing over of the physical possession of the premises, as such, sealing of the premises in question by the respondent-

Bank is nothing but an arbitrary exercise of power on their behalf.

13. Mr. Parth S. A. Swaroop Pati, learned counsel for the respondent-Bank has submitted that the instant writ petition may not be entertained as because the loan has been sanctioned in favour of the petitioners way back on 20th May, 2010 for grant of home loan of Rs.30,00,000/- under the home loan scheme for purchase of the flat, after due consideration, home loan to the tune of Rs.27,68,571/- has been extended out of which includes Home Loan of Rs.26,50,000/-, Life Insurance Premium of Rs.1,07,711/- and property insurance amount of Rs.10,860/- as per the terms and conditions stipulated in the sanction letter dated 31.05.2010. He has also executed a power of attorney on 07.06.2010 in favour of the Bank and created equitable mortgage over the immovable property over which the home loan was sanctioned by submitting the registered sale deed No.14089/2010 dated 17.06.2010, sale agreement dated 06.05.2010 and other title deeds pertaining to the residential house measuring 1591 sq. ft. standing upon land measuring 3 katha equivalent to 4.95 decimal being Holding No.793/P 18 in ward No.4 (old), ward No.33 (new) recorded under khata No.36, Plot No.61 marked as sub-plot No.61/9 situated at Village-Hesal, P.S.-Suhdeonagar, District Ranchi.

Subsequent thereto, the Bank has disbursed a sum of Rs.27,68,571/- on different dates and after getting the said benefit, the petitioners have breached and defaulted in fulfilling their obligations rendering the accounts irregular and neglecting to take any steps for regularizing the same. They also failed and neglected to repay the principal, interest and other monies falling due in respect to financial facilities in terms of the Home Loan agreement.

The Bank has issued a notice on 30.01.2012 under Section 13(2) of the SARFAESI Act, 2002 and called upon the petitioners and demanded to make payment of outstanding amount of Rs.30,50,172/- as on 10.01.2012 along with further interest and costs and as per the statement of account, the total dues according to the Bank comes to Rs.45,58,224/- up to 10.02.2016.

The petitioners have failed to make payment and as such the Bank has resorted to the provision of Section 19(4) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 in which the petitioners have appeared and the adjudication of an amount of Rs.28,78,636/- as on 30.07.2011 together with pendent lite and future interest @ 10 % per annum simple from 31.07.2011 and the entire sum due and recoverable with costs but the petitioners have failed to make payment of the said amount as also not appealed against the said order.

The respondent-Bank has issued a notice under Section 13(4) for taking symbolic possession over the premises in question and thereafter made application under Section 14 of the Act, 2002 by making an application before the District Magistrate in which an order has been passed, subsequent thereto, the order passed for taking physical possession has been kept in abeyance but even if the order passed by the District Magistrate has been kept in abeyance, it is not that

the physical possession of the premises in question cannot be taken.

He has further submitted by taking aid of the provision of Section 17(1) of the SARFAESI Act, 2002 that the petitioners can well raise all these issues by filing a SARFAESI Application under the said provision but instead of doing so, the instant writ petition has been filed.

14. However, upon this, Mr. Sumeet Gadodia, learned counsel for the petitioners has submitted that there is no difficulty to avail the remedy as available under Section 17 (1) of the SARFAESI Act, 2002 but appropriate order may be passed in interlocutory application so far as it relates to the study materials of son and daughter of the petitioners as also the certificates as has been prayed in an interlocutory application being I.A. No.7350 of 2019.

15. Upon this, Mr. Pati, learned counsel for the Bank with all fairness has submitted by accepting the factual aspects that the property hypothecated and mortgaged is the flat in question with the condition not to transfer, alienate encumbering or otherwise dealing with or dispose of the mortgaged or hypothecated or any other properties and assets without paying the aforesaid adjudicated dues but since the documents which are now being sought to be released which are lying under the premises in question such as books, certificates of son and daughter of the petitioners, if this Court will pass an appropriate direction, the same will be acted upon.

16. After hearing the learned counsel for the parties and on appreciation of their rival submissions, this Court before dealing with the arguments advanced on behalf of the parties, so far as it relates to the merit of the issues as per the pleadings and prayer made in the writ petition are concerned, the same needs to be answered first since the issue pertains to maintainability on the ground of remedy available under Section 17(1) of the SARFAESI Act, 2002.

17. The provision of Section 17(1) of the SARFAESI Act, 2002 provides provisions for making an application by the borrower by way of SARFAESI application after issuance of notice under Section 13 (4) of the Act, 2002, the purpose is that there may not be any hindrance in early recovery of public money.

18. The issue for entertaining a writ petition by the High Court under Article 226 of the Constitution of India has been dealt with by Hon'ble Apex Court in catena of decisions, reference of which needs to be made herein.

It needs to refer the judgment of the Hon'ble Apex Court regarding jurisdiction of the High Court sitting under Article 226 of the Constitution of India. Reference, in this regard, needs to be made in the case of Authorized Officer, State Bank of Travancore and Ors. vs. Mathew K.C. reported in (2018) 3 SCC 85, wherein, by taking aid of the judgment pronounced in the case of United Bank of India vs. Satyawati Tandon and Ors. reported in (2010) 8 SCC 110 and the General Manager, Sri Siddeshwara Cooperative Bank Limited and Anr. vs. Ikbali and Ors. reported in (2013) 10 SCC 83, it has been laid down that a writ petition after

issuance of notice under Section 13 (4) of the Act, 2002 is not to be entertained.

In the said judgment, reference of another judgment rendered in the case of Dwarikesh Sugar Industries Ltd. vs. Prem Heavy Engineering Works (P) Ltd. and Anr. reported in (1997) 6 SCC 450, wherein, it has been laid down at para 32 : -

"32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops."

In view of such circumstances, the stand of the High Courts have been deprecated in entertaining writ applications after issuance of notice, auction, having been taken in pursuance to the provision of Section 13 (4) of the Act, 2002. Recently in the judgment rendered in the case of ICICI Banks vs. Umakant Mohapatra reported in 2018 SCC OnLine SC 2349, the same view has been reiterated i.e. not to maintain the writ petition against the action taken in pursuance to the provision of Section 13 (4) of the Act, 2002.

19. It is evident from the provision of SARFAESI Act that in case of objection, if any, raised by the borrower which has been rejected, the secured creditor is entitled to take possession of the secured assets but the legislation has been made by inserting a provision under Section 14 of the Act, 2002 visualizing the possibility of resistance for such action for seeking the assistance of the judicial power of the State for obtaining possession of the secured assets, in those cases where the secured creditor seeks it.

Under the scheme of Section 14 of the SARFAESI Act, a secured creditor who desires to seek the assistance of the State's coercive power for obtaining possession of the secured asset is required to make a request in writing to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction, the secured asset is located praying that the secured asset and other documents relating thereto may be taken possession thereof.

The other provisions as contained under Section 14 stipulates that a secured creditor who is seeking intervention of the Magistrate under Section 14 is required to file an affidavit furnishing the information contemplated under various sub-clauses (i) to (ix) of the first proviso to Section 14(1) for passing of a suitable order by the Magistrate regarding taking possession of the secured asset, the Magistrate will examine the factual correctness of the assertions and by recording reasons of his satisfaction, is supposed to pass an appropriate order regarding taking of possession of secured asset.

The matter pertaining to invoking the jurisdiction as conferred under Section 14

of the Act, 2002 has been dealt with by the Hon'ble Apex Court in the case of Standard Chartered Bank vs. V. Noble Kumar & Ors., reported in (2013) 9 SCC 620 wherein it has been laid down at paragraph 26 that the scheme of Sections 13 and 14 and the object of the enactment, it is not that only after making an unsuccessful attempt to take possession of the secured asset, secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under Section 13(4) and on facing resistance, he may still approach the Magistrate under Section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before approaching the Magistrate under Section 14.

The further consideration has been made with respect to the provision of appeal as provided under Section 17 of the Act, it has been laid down in the said judgment by the Hon'ble Apex Court that by whatever manner the secured creditor obtains possession either through the process contemplated under Section 14 or without resorting to such a process obtaining of the possession of a secured asset is always a measure against which a remedy under Section 17 is available.

In the judgment rendered by Hon'ble Apex Court in the case of Hindon Forge Pvt. Ltd. Vs. State of Uttar Pradesh through District Magistrate, Ghaziabad and Anr., reported in (2019) 2 SCC 198 wherein it has been laid down that the appeal under Section 17 of the Act, 2002 can even be filed before the D.R.T. after issuance of order under Section 14 as has been held at paragraph 21 that all measures having been taken under Section 13 (4), and before the date of sale auction of the property, it would be open for the borrower to file appeal under Section 17 of the Act before the Debt Recovery Tribunal.

20. In view of the aforesaid position of law as has been settled by Hon'ble Apex Court as referred hereinabove, this Court is of the view by going across the factual aspect wherein also the petitioners are raising the issue of order passed by the District Magistrate under Section 14 and subsequently it has been recalled and further the order passed by the Debt Recovery Tribunal under the Act, 1993, the same would not be proper for this Court to adjudicate it under Article 226 of the Constitution of India.

21. In view thereof, the writ petition fails and stands dismissed.

I.A. No.7350 of 2019 :

22. The instant interlocutory application has been filed for seeking a direction upon the respondent-Bank to handover the books, essential articles of their livelihood including necessary documents pertaining to their children and petitioner No.1 from sealed premises.

23. It has been stated in the application at paragraph 7 & 8 thereof that the son of the petitioners namely, Himanshu Kumar is studying in standard-X in St. Xavier School, Doranda and the daughter namely, Miss. Raj Nandini who has

completed her intermediate course and required to take admission in graduate course i.e., B.Sc. and orally it has been submitted that the daughter of the petitioners is to appear in counseling for the medical entrance examination, as such, the certificates has been prayed to be handed over to the petitioners as also the other materials.

24. This Court after considering the arguments advanced on behalf of the parties in this regard and going across the order passed by the Debt Recovery Tribunal dated 29.09.2018 by which the petitioners have been directed to deposit a sum of Rs.28,78,636/- as has been brought on record by way of supplementary affidavit filed on 16.07.2019 which contains a direction also by debarring the defendants, petitioners herein, from transferring, alienating encumbering or otherwise dealing with or disposing of the mortgaged or hypothecated or any other properties and assets without paying the aforesaid adjudicated dues to the applicant Bank to secure the ends of justice, therefore, is of the view that the other articles like jewellery, car, cash amount etc., as has been referred at paragraph-6 cannot be directed to be released in favour of the petitioners but so far as the books and certificates of the son and daughter of the petitioners are concerned, the same, if not allowed to be handed over in their favour, it will ultimately lead to hindrance in the education of both the children and further as has been informed that the daughter of the petitioners is to participate in counseling for which the educational certificates/Aadhar card etc., would be required, keeping this fact into consideration, this Court is of the view that appropriate direction is required to be passed in this regard.

25. In view thereof, the books, school uniform, school diary of the son of the petitioners namely, Himanshu Kumar and the certificate of the daughter namely, Miss. Raj Nandini for intermediate course and other certificates/Aadhar card and the books and study material are directed to be released, to be handed over in favour of the petitioners in presence of Executive Magistrate by making an appropriate inventory in presence of the authorized officer and the competent representative of the respondent-Bank, to be prepared in presence of the petitioners and Executive Magistrate, authorized officer and competent representative of the respondent Bank within 24 hours from the date/time of deputing Executive Magistrate as directed hereinbelow, by giving the copy of the inventory to the petitioners and also by keeping it on record pertaining to the SARFAESI issues.

26. The Deputy Commissioner, Ranchi/Sr. Superintendent of Police, Ranchi is directed to depute an officer of the rank of Executive Magistrate along with police force within 48 hours from the date/time of service of copy of this order.

27. In view thereof, interlocutory application being I.A. No.7350 of 2019 stands disposed of.