

Madras High Court

Indian Overseas Bank vs M/S.Sree Aravindh Steels Ltd on 9 September, 2008

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09/09/2008

CORAM

THE HONOURABLE MR.JUSTICE T.SUDANTHIRAM

CrI.O.P.(MD).No.3102 of 2008

Indian Overseas Bank,
K.Abishekapuram Branch,
Mannarpuram,
Tiruchirappallai - 620 020
rep. by the Authorized Officer
A.Rasheed Khan ... Petitioner

Vs

1.M/s.Sree Aravindh Steels Ltd.,
a public limited company registered
under the Companies Act,
14-a, E.V.R. Road,
Puthur, Trichirappalli - 620 017.

2.Sri.Arun Shankar,
Managing Director,
M/s.Sree Aravindh Steels Ltd.,
14-A, E.V.R. Road,
Puthur, Trichirappalli - 620017.

3.Sri.S.B.Shankar,
"Pathmavilla",
3-B, Bhulabai Desai Road,
Chookkikulam,
Madurai - 625 002.

4.The Inspector of Police,
Thuvakudi Police Station,
Thuvakudi,
Tiruchirappalli - 620 002. ... Respondents

Prayer

Petition filed under Section 482 of the Code of Criminal Procedure, to

call for the records relating to the order dated 11.12.2007 made in Crl.M.P.No.1472 of 2007 on the file of the learned Chief Judicial Magistrate, Tiruchirappalli and set aside the same and consequently directing the learned Chief Judicial Magistrate, Tiruchirappalli to pass appropriate order in accordance with Section 14 of SARFAESI Act and take possession of the secured assets and hand over the same to the petitioner bank.

!For Petitioner ... Ms.J.Maria Roselin
for Mr.V.Sribalaji
^For Respondent ... Mr.P.Rajendran
No.4 Government Advocate (Crl. Side)
* * * * *

:ORDER

This petition is filed praying to set aside the order passed by the learned Chief Judicial Magistrate, Tiruchirappalli dated 11.12.2007 in Crl.M.P.No.1472 of 2007.

2. The petitioner herein is Indian Overseas Bank, a nationalised bank, who is a secured creditor. The first respondent herein is a public limited company, who is a principal borrower and the second respondent is the Managing Director and the third respondent is the Director and also the guarantor and the fourth respondent viz., the Inspector of Police, Thuvakudi Police Station is an unnecessary party.

3. The petitioner herein filed an application before the learned Chief Judicial Magistrate, Tiruchirappalli for taking possession of secured assets under Section 14(1) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter called as SARFAESI Act). As the learned Chief Judicial Magistrate, Tiruchirappalli had dismissed the said application, the petitioner has preferred this petition before this Court under Section 482 Cr.P.C.

4. This being a case of civil nature, the question that arose immediately in the mind of this Court is that whether the application under Section 482 Cr.P.C. is maintainable. Though the petitioner could have preferred a Civil Revision Petition under Article 227 of the Constitution of India, the petitioner has not done it so. Though this is a case of civil nature, an order being passed by the learned Chief Judicial Magistrate, Tiruchirappalli, a revision is maintainable under Section 397 Cr.P.C., since, any order passed by any Magistrate can be challenged by way of revision by the aggrieved person under Section 397 Cr.P.C. Further, when the matter came up for hearing before His Lordship Mr.Justice S.Nagamuthu, Hon'ble Judge referred the matter to a Division Bench to decide the question whether the learned Chief Judicial Magistrate, Tiruchirappalli has got power to entertain an application under Section 14 of SARFEASI Act. The matter was heard by the Division bench and decided as follows:

"Therefore, holding that the term 'Chief metropolitan Magistrate' will have reference to a metropolitan area and the term 'Chief Judicial Magistrate' will have reference to an area outside a metropolitan area, and therefore, the Chief Judicial Magistrate, Tiruchirappalli has got power to entertain a petition under Section 14 of the Securitisation and Reconstruction of Financial Assets

and Enforcement of Security Interest Act, 2002, we direct the Registry to place the matter before the concerned Court, for further proceedings".

5. Now, it is for this Court to decide whether the order passed by the learned Chief Judicial Magistrate, Tiruchirappalli is to be confirmed or liable to be set aside. As per Section 14 of SARFAESI Act, a 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, take possession of such assets and document relating thereto and forward such assets and documents to the secured creditor.

6. In this case, the petitioner-bank filed an application before the learned Chief Judicial Magistrate, Tiruchirappalli under Section 14 of SARFAESI Act and the learned Chief Judicial Magistrate, Tiruchirappalli also issued summons to the respondents and the third respondent alone filed a counter and the learned Chief Judicial Magistrate, Tiruchirappalli after hearing the learned counsel appearing for the petitioner and third respondent, dismissed the application mainly for the reasons as per the order, which is as follows: "10. On behalf of the petitioner a notice u/s 13(2) having been issued, even after its receipt the beneficiaries of the loan has not repaid the loan. The petitioner has filed this petition u/s 14(1). The petitioner sought for an order may be passed as prayed for taking action against Borrowers u/s 13(2). "the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor 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)." Action has been initiated against the Respondents under this provision.

11. Notice has been issued under the above said provision. The beneficiaries have not repaid the amount towards principal or interest. By an Amendment to the Special Act, Sec. 13(3-A) has been introduced under Act 30 of 2004 dated 11.11.2004. This amendment came into force from the date of amendment. It is as follows:

3A:- "If, on receipt of the notice under sub section (2) the borrower makes any representation or raises any objection and if the secured creditor comes to the conclusion such representation or communicate within one week of receipt of such a representation or objection the reasons for non-acceptance of the representation or objections to the borrower".

It has to be determined whether under this provision the secured creditor has considered the reply given by the Respondent/Debtors after carefully considering the reply or objections and intimate the beneficiaries that the appeal or objection cannot be acceptable or tenable and he shall communicate its reasons for not accepting the reply within one week. Whether this procedure has been followed or not as by the petitioner-bank? There is no mention in the petition about the compliance of this rule.

Therefore this Court cannot grant any relief u/s 14(1) of the Special Act. This Court is of the opinion that the petition is not maintainable u/s 14(1) of the Special Act and the petition filed u/s 14(1) by

the Petitioner Bank as Secured Creditor is hereby ordered to be dismissed".

7. The learned counsel appearing for the petitioner submitted that the learned Chief Judicial Magistrate, Tiruchirappalli has erred by giving notice to the respondents and also by taking into consideration, the counter filed by the third respondent. The learned counsel appearing for the petitioner further submitted that when a petition is filed under Section 14 of SARFAESI Act, the concerned Magistrate is not required to give notice to the borrower or to the third party, but he has to only verify from the bank or financial institution whether the notice under Section 13(2) of SARFAESI Act was given or not and whether the secured assets fall within his jurisdiction and there shall be no adjudication of any kind at that stage and it is only if the above conditions are not fulfilled the concerned Magistrate can refuse to pass an order and not otherwise.

8. The learned counsel appearing for the petitioner relied on the decision of this Court in M/s. Sundaram Home Finance Limited v. K.Raja in C.R.P.PD.No.1559 of 2004, wherein it is held as under:

"2. Mr. AR.L.Sundaresan, learned counsel appearing for the petitioner took me through Section 13(2) & (4) and Section 14 of the said Act and contended that, in deciding to grant the relief made to the Court under Section 14 of the said Act, no notice need be sent to the other side. A reading of Section 14 of the said Act do show that the contention of the learned counsel for the petitioner is right. Accordingly, the order of the lower Court so far as it relates to ordering notice to the respondent alone is set aside. The lower Court is directed to act as per the requirement of Section 14 of the said Act immediately on production of a copy of this order. The revision stands disposed of accordingly".

9. The learned counsel appearing for the petitioner further relied on the decision of the Division Bench of this Court in Sundaram Home Finance Limited, rep by its Manager-Recovery, Madhavan, 46, Whites Road, Royapettah, Chennai-14 vs. 1. The Tahsildar, Hosur 2. The District Collector, Krishnagiri reported in 2007 (2) CTC 1, wherein it is held as follows:

"9. The words of the section and the law laid down in Mardia Chemical's case (supra) do not envisage a notice under Section 13(4). Reasons for not accepting the objection are to be communicated before taking measures like taking over possession of the secured assets. This is the fairness that is required of the lender. But if the borrower has not responded to the notice under Section 13(2), the lender has no occasion to communicate his reasons, necessarily the tender proceeds to the next stage. The borrower gets a right to challenge the action only after any of the measures contemplated under Section 13(4) have been taken. It is clear from the paragraphs extracted above from Mardia Chemical's case that the communication of the reasons may not be taken to give an occasion to resort to such proceedings which are impermissible under the Act. A person who does not respond to the notice under Section 13(2) of the Act should be considered to be aware of the consequences that will follow. In any event, it is not possible to hold that a borrower who has not responded to the notice under Section 13(2) will be entitled to a notice under Section 13(4), whereas, in respect of a borrower who has responded to a notice under Section 13(2) and has had the rejection communicated by the bank, the bank can proceed straightaway to take the

measures contemplated under Section 13(4). There is no room for visualizing two such courses of action. This will be reading words into the Section, which the legislature had not used. It is not our duty to legislate. The Supreme Court also was aware that "some of the provisions may be a bit harsh for some of the borrowers", yet has not, in its judgment, held that a pre-Section 13(4) notice must be issued. We are unable to read a requirement of such notice either in the Section or in the Judgment".

10. In view of the decision rendered by the Division Bench of this Court cited supra, this Court now holds that no notice is necessary to the borrowers and in such a case even though the notice was issued by the learned Chief Judicial Magistrate, Tiruchirappalli, it is not necessary to give notice to the respondents 1 to 3 to decide the issue.

11. The learned counsel appearing for the petitioner further submitted that the petitioner had sent a notice under Section 13(2) of the Act and also received objections from the respondents 1 to 3 and the petitioner also in turn had sent a reply, giving reasons for non-acceptance of the objections of the borrower. But mere failure to mention it in the petition would not affect the requirement of the petition.

12. The learned counsel appearing for the petitioner further submitted that even assuming that the petitioner has not communicated to the borrower, the reasons for non-acceptance of the representation or objection of the borrower, the only remedy available to the borrower is under Section 17 of the SARFAESI Act, after issuance of the possession notice.

13. The learned counsel appearing for the petitioner again relied on the decision of the Division Bench of this Court in Industrial Development Bank of India Ltd., by Deputy General Manager & the Authorised Officer, 115, Anna Salai, Saidapet, Chennai-15 vs. Kamaldeep Synthetics Ltd., rep. by its Managing Director, V. Nandakumar, No.A-1, Alankar Apartment, No.12, Raman Street, T.Nagar, Chennai-600 017 reported in 2007(2) CTC 397, wherein it is held as follows:

"6. Ms. J. Anandhavalli, learned counsel appearing for the respondent, however, submitted that there has been total non-compliance of Section 13(3-A) of the SARFAESI Act and, therefore, the entire proceedings are vitiated. Learned counsel submitted that in response to the notice dated 20.12.2005 issued under Section 13(2), a reply letter dated 16.02.2006 was sent by the respondent raising objections to the said notice. The reasons for non-acceptance of the objections raised were communicated by the appellant-bank only by letter dated February 22, 2006. However, before even communicating the reasons, the appellant-bank issued the possession notice on February 20, 2006. According to the learned counsel, the notice for possession under Section 13(4) of the SARFAESI Act could be issued by the bank only after the reasons for non- acceptance of the objections were communicated by the appellant-bank to the respondent-borrower and therefore, notice under Section 13(4) is illegal and valid.

7. We are unable to accept the submission of the learned counsel for the respondent. Section 13(3-A) of the SARFAESI Act, which was incorporated by the Amendment Act 30 of 2004, provides that if, on receipt of the notice under sub- section (2), the borrower makes any representation or raises any

objection, the secured creditor must consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower. This provision is obviously incorporated in the light of the decision of the Supreme Court in *Mardia Chemicals Ltd. v. Union of India*, 2004(2) CTC 759 : 2004(4) SCC 311.

8. In *Mardia Chemicals* case, the Supreme Court held that under Section 13(2) of the SARFAESI Act, it is incumbent upon the secured creditor to serve sixty days notice before proceeding to take action under sub-section (4) of Section 13 of the SARFAESI Act. After service of notice, if the borrower raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered with due application of mind and the reasons for not accepting the objections, howsoever brief that may be, must be communicated to the borrower. The reasons so communicated shall only be for the purpose of the information/ knowledge of the borrower without giving rise to any right to approach the DRT under Section 17 of the SARFAESI Act, at that stage. The Court explained that communication of reasons not to accept the objections of the borrower is for the purpose of his knowledge which would be a step forward towards his right to know as to why his objections have not been accepted by the secured creditor, who intends to resort to harsh steps of taking over the management/business of namely, the secured assets without intervention of the Court. Such person in respect of whom steps under Section 13(4) of the SARFAESI Act are likely to be taken cannot be denied the right to know the reason for non-acceptance of his objections. This will be in keeping with the concept of right to know and lender's liability of fairness to keep the borrower informed particularly of the developments immediately before taking measures under sub-section (4) of Section 13 of the SARFAESI Act. The Court, however, made it clear that as per the provisions of the SARFAESI Act, the borrower will not be entitled to challenge the reasons communicated or the likely action of the secured creditor at the stage of communication of reasons, unless his right to approach the DRT as provided under Section 17 of the SARFAESI Act matures on any measure having been taken under sub-section (4) of Section 13 of the SARFAESI Act.

9. The proviso to sub-section (3-A) of Section 13 of the SARFAESI Act makes it abundantly clear that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the DRT under Section 17 or the Court of District Judge under Section 17-A of the Act. Thus, the basic object of sub-section (3-A) of Section 13 of the SARFAESI Act is to ensure the element of transparency and fair play in the implementation of the provisions of the SARFAESI Act. Learned counsel for the respondent is unable to demonstrate prejudice or loss that is likely to be caused to the respondent by reason of the possession notice given to it, earlier to the communication of the reasons for non-acceptance of the objections raised by the borrower. In our opinion, at the most, it would amount to a mere irregularity and having regard to the facts and circumstances of the case, we are satisfied that the appellant- bank has substantially complied with the provisions of Section 13(3-A) of the SARFAESI Act".

(emphasis supplied)

14. The learned counsel appearing for the petitioner also relied on the decision of the Division Bench of Bombay High Court in Trade Well, a Proprietorship firm and Mr.Suniel K.Mehta, Proprietor of Trade Well v. Indian Bank, a Body corporate consulted Under the Banking Companies (Acquisition and Transfer of Undertaking) Act, 1970 and The State of Maharashtra in Crl.W.P.Nos.2767 of 2006 and 27, 124 and 343 of 2007, wherein it is held as follows:

"67. When the bank takes any measures under Section 13(4), on account of failure of the borrower to repay the liability is already crystallized. Similarly when the secured creditor approaches the CMM/DM for assistance to take possession of the secured asset, the liability having been crystallized, there can be no adjudication about it at that stage. Possession has to be taken by non-adjudicatory process. There is no question of pointing out to the CMM/DM at that stage that the person who is to be dispossessed is a tenant, or that he has a prior registered sale deed or that in case of simple mortgage, ownership rights are not transferred; that the mortgagee is only entitled to an obligation to pay and, hence, possession cannot be taken or that such a course will improve or change the contract etc. Grievance that reasons for not accepting the objections were not communicated can also not be raised at that stage because consideration of reply is in the realm of adjudication which cannot be done under Section 14. Besides as per proviso to Section 13 (3-A) and explanation to Section 17, non-communication of reasons to the borrower does not confer on the borrower or any person right to prefer an application under Section 17 at the stage of communication. This is the scheme of the NPA Act. It is so framed to achieve its object. At first blush this may appear harsh. But it is not so. The borrower and the third party is not remedy-less. Remedy is provided in Section 17 where appropriate relief can be given to them. It is after measures under Section 13(4) are taken that an application under Section 17 can be filed by a borrower or any person and in that application, all grievances including the grievance that reasons were not communicated can be voiced. Prior to that, at no point of time any grievances can be raised. Section 17 offers an adequate remedy. We shall advert to Section 17 a little later.

... ..

85. In our opinion, at the time of passing order under Section 14 of the NPA Act, the CMM/DM will have to consider only two aspects. He must find out whether the secured asset falls within his territorial jurisdiction and whether notice under Section 13(2) of NPA Act is given or not. No adjudication of any kind is contemplated at that stage.

... ..

90. Following conclusions emerge from the above discussion:

1. The bank or financial institution shall, before making an application under Section 14 of the NPA Act, verify and confirm that notice under Section 13(2) of the NPA Act is given and that the secured asset falls within the jurisdiction of CMM/DM before whom application under Section 14 is made. The bank and financial institution shall also consider before approaching CMM/DM for an order under Section 14 of the NPA Act, whether Section 31 of the NPA Act excludes the application of Section 13 and 14 thereof to the case on hand.

2. CMM/DM acting under Section 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 under Section 13(2) of the NPA Act is given or not and whether the secured assets fall within his jurisdiction. There is no adjudication of.
4. It is only if the above conditions are not fulfilled that the CMM/DM can refuse to pass an order under Section 14 of the NPA Act by recording that the above conditions are not fulfilled. If these two conditions are fulfilled, he cannot refuse to pass an order under Section 14.
5. Remedy provided under Section 17 of the NPA Act is available to the borrower as well as the third party.
6. Remedy provided under Section 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 Articles 226 and 227 of the Constitution of India should not be entertained.
8. In exceptional cases of gravest injustice, a writ petition could be entertained by this Court.
9. Great care and caution must be exercised while entertaining a Writ petition because in a given case it may result in frustrating the object of the NPA Act.
10. Even if a writ petition is entertained, as far as possible, the parties should be relegated to the remedy provided under Section 17 of the NPA Act before the DRT by passing an interim order which will protect the secured assets. Adjudication and final order should be left to the DRT as far as possible". (emphasis supplied)
15. As per the above said principles, the conclusion of the learned Chief Judicial Magistrate, Tiruchirappalli that the petitioner has not complied with the provision of 13(3-A) of SARFAESI Act and therefore the relief cannot be granted under Section 14(1) of the Act, is incorrect.
16. In the result, the order passed by the learned Chief Judicial Magistrate, Tiruchirappalli in Crl.M.P.No.1472 of 2007 dated 11.12.2007 is set aside and the learned Chief Judicial Magistrate, Tiruchirappalli is directed to consider the application afresh on the basis of the above principles laid down and proceed according to law. The petitioner is also entitled to file additional materials, if available. Accordingly, this petition is allowed.

smn To

- 1.The Inspector of Police, Thuvakudi Police Station, Thuvakudi, Tiruchirappalli - 620 002.

2.The Public Prosecutor, Madurai Bench of Madras High Court, Madurai.