

(2014) 07 CAL CK 0073

Calcutta High Court (Port Blair Bench)

Case No: M.A. No. 26 of 2014

Chellaperumal

APPELLANT

Vs

The Authorised Officer

RESPONDENT

Date of Decision: July 4, 2014**Acts Referred:**

- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1973 (CrPC) - Section 20, 3
- Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) - Section 13(2), 13(4), 14, 17, 17(1)

Hon'ble Judges: Subrata Talukdar, J; Harish Tandon, J**Bench:** Division Bench**Advocate:** Mohammed Tabraiz, Advocate for the Appellant; Krishna Rao, S.C. Mishra and Rakesh Pal Gobind, Advocate for the Respondent**Final Decision:** Allowed

Judgement

Harish Tandon, J.

The appellant is a borrower within meaning assigned u/s 2(f) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) and defaulted in payment of loan taken from the financial institution by mortgaging the property. Subsequently, the financial institution declared the assets to be non-performing one and issued notice u/s 13(2) of the SARFAESI Act. After the expiration of the statutory period provided therein steps were taken to take possession of the secured assets of the borrower u/s 13(4) of the SARFAESI Act. In furtherance thereof, an application was taken out u/s 14 of the SARFAESI Act for an order to take physical possession of the secured assets.

2. Indisputably, the Additional District Magistrate, South Andaman district passed an order on 14th August, 2012 directing the Superintendent of Police of the District, Port Blair to make arrangement for State Bank of India to take possession of the

assets mentioned in the order. The said order is assailed in this writ petition; Firstly, that the Additional District Magistrate is not competent to pass an order u/s 14 of the SARFAESI Act; secondly, section 20 of the Code of Criminal Procedure provides the delegation of power of District Magistrate to be exercised by Additional District Magistrate by an order of the State Government; thirdly, section 3A of the Code of Criminal Procedure which has its applicability in Andaman and Nicobar Islands empowered the District Magistrate and also the Additional District Magistrate, if the State Government so directs to be construed as reference to the Chief Judicial Magistrate and fourthly, in absence of the notification or otherwise conferment of power by the State Government upon the Additional District Magistrate to discharge the functions and duties of the District Magistrate, the Additional District Magistrate cannot exercise such power of the District Magistrate.

3. The financial institution who is arraigned as respondent in the writ petition took a preliminary objection as to the entertainability/maintainability of the writ petition because of efficacious alternative remedy available u/s 17 of the SARFAESI Act. It is further submitted that the provisions contained u/s 14, is in effect, an extension of the provision contained u/s 13(4) of the SARFAESI Act and in view of the specific remedy provided u/s 17 of the SARFAESI Act, the Court should decline to exercise the power of judicial review under Article 226 of the Constitution of India.

4. The respondents say that an application u/s 14 of the SARFAESI Act was taken before the District Magistrate and in view of the conferment of the power upon the Additional District Magistrate, such application has been considered and an order is passed thereupon which cannot be said to be illegal being contrary to the spirit of section 14 of the SARFAESI Act.

5. The Hon''ble Single Bench held that all the points agitated by the writ petitioner can be sufficiently and conveniently decided by the forum u/s 17 of the SARFAESI Act and declined to grant relief in invoking the powers of judicial review.

6. Section 13(4) of the SARFAESI Act empowers the secured creditor to recover his secured debts by taking possession of the secured assets of the borrower; taking over the management of the borrower and may transfer, assign or sell for realizing the secured assets in order to take possession of the secured asset, a request in writing shall be made to the Chief Metropolitan Magistrate or the District Magistrate as the case may be within whose jurisdiction the secured asset is situated. The said authority on such request shall take possession of such assets or the documents relating thereto and forward the same to the secured creditor.

7. The question that sub-section (1) of section 17 of the SARFAESI Act does not contemplate the action u/s 14 but is restricted to the measures referred in section 13(4) of the SARFAESI Act has been settled by the Apex Court in the case of *Kanaiyalal Lalchand Sachdev and others Vs. State of Maharashtra and others*, reported in (2011) 2 SCC 782 wherein it is laid down that the action u/s 14 of the

SARFAESI Act constitutes an action taken after the stage of 13(4) and therefore, falls within the ambit of section 17(1) of the SARFAESI Act.

8. There is no hesitation in our mind that the order passed u/s 14 of the SARFAESI Act is susceptible to be challenged u/s 17 of the SARFAESI Act before the Debts Recovery Tribunal.

9. The power of judicial review under Article 226 of the Constitution is a discretionary and the equitable one. Exclusion of the jurisdiction on the ground of efficacious alternative remedy is not a rule of compulsion but a rule of discretion. There cannot be rigidity against the entertainability/maintainability of the writ petition on alternative remedy. The existence of alternative remedy is not an absolute bar in entertaining the writ petition under Article 226 of the Constitution of India. The Court have imposed self-restriction to exercise the power under Article 226 of the Constitution when the relief can be had from the alternative remedy provided under the statute.

10. In the case of [Satwati Deswal Vs. State of Haryana and Others,](#) it is held that the writ petition is maintainable despite the existence of alternative remedy where an action impugned therein is taken by the authority lacking inherent jurisdiction in these words:

5. In our view, the High Court had fallen in grave error in rejecting the writ petition on the aforesaid ground. First, such an order of termination was passed without issuing any show-cause notice to the appellant and without initiating any disciplinary proceedings by the authorities and without affording any opportunity of hearing. It is well settled that a writ petition can be held to be maintainable even if an alternative remedy is available to an aggrieved party where the court or the tribunal lacks inherent jurisdiction or for enforcement of a fundamental right; or if there had been a violation of a principle of natural justice; or where vires of the Act were in question.

11. In the case of [Union of India \(UOI\) and Others Vs. Tania Construction Pvt. Ltd.,](#) it is held that the constitutional powers of the High Court is not circumscribed by alternative remedy in these words:

33. Apart from the above, even on the question of maintainability of the writ petition on account of the arbitration clause included in the agreement between the parties, it is now well established that an alternative remedy is not an absolute bar to the invocation of the writ jurisdiction of the High Court or the Supreme Court and that without exhausting such alternative remedy, a writ petition would not be maintainable. The various decisions cited by Mr. Chakraborty would clearly indicate that the constitutional powers vested in the High Court or Supreme Court cannot be fettered by any alternative remedy available to the authorities. Injustice, whenever and wherever it takes place, has to be struck down as an anathema to the rule of law and the provisions of the Constitution.

12. The Three Judge Bench of the Supreme Court in the case of [The Executive Engineer and Another Vs. Sri Seetaram Rice Mill](#), held that where a question involving jurisdiction or the matter touching the root of the jurisdiction is involved, the High Court is competent to exercise the power of judicial review irrespective of the fact that there is existence of alternative remedy. In this regard it would be apt to quote paragraph 81 which reads thus:

81. Should the courts determine on merits of the case or should they preferably answer the preliminary issue or jurisdictional issue arising in the facts of the case and remit the matter for consideration on merits by the competent authority? Again, it is somewhat difficult to state with absolute clarity any principle governing such exercise of jurisdiction. It always will depend upon the facts of a given case. We are of the considered view that interest of administration of justice shall be better subserved if the cases of the present kind are heard by the courts only where they involve primary questions of jurisdiction or the matters which go to the very root of jurisdiction and where the authorities have acted beyond the provisions of the Act. However, it should only be for the specialised tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case.

13. In conspectus of the above exposition of law, where the Hon'ble Single Bench passed an order relegating the appellant to exhaust his remedy u/s 17 of the SARFAESI Act and refusing to exercise the power of judicial review, is susceptible to be interfered with.

14. The points recorded in the preceding paragraphs strikes at the root of the matter relating to the jurisdiction of the Additional District Magistrate in exercising the power u/s 14 of the SARFAESI Act.

15. Section 20 of the Code of Criminal Procedure, 1973 provides that there shall be as many persons as think fit to be appointed as Executive Magistrates by the State Government in every district and in every Metropolitan area and out of them one shall be appointed as District Magistrate. The State Government may also appoint any Executive Magistrate to be Additional District Magistrate who shall have such powers of the District Magistrate under Code or under any other law for the time being force as may be directed by the State Government. It would be profitable to quote section 20 of the Cr.P.C. which reads thus:

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 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 the 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 sub-division and may relieve him of the charge as occasion requires; and the magistrate so placed in charge of a sub-division shall be called the Sub-Divisional 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 and Executive Magistrate in relation to a metropolitan area.

16. It leaves no ambiguity that the Additional District Magistrate can exercise such power of District Magistrate as may be directed by the State Government and not otherwise.

17. Section 3A of Cr.P.C. enacted specifically for Andaman and Nicobar Islands have some relevancy in the present context. The said provision is conveniently quoted hereinbelow:

Section 3A

Andaman and Nicobar Islands (U.T.)

(1) After section 3, the following section shall be inserted, namely:-

3A. Special provision relating to Andaman and Nicobar Islands.-(1) References in this Code to-

(a) The Chief Judicial Magistrate shall be construed as references to the District Magistrate or, where the State Government so directs, also to the Additional District Magistrate;

(b) a Magistrate or magistrate of the first class or of the second class or judicial magistrate of the first class or of the second, shall be construed as references to such Executive Magistrate as the State Government may, by notification in the Official Gazette, specify.

2. The State Government may, if it is of opinion that adequate number of persons are available for appointment as Judicial Magistrate, by notification in the Official Gazette, declare that the provisions of this section shall, on and from such day as may be specified in the notification, cease to be in force and different dates may be

specified for different Islands.

3. On the cesser of operation of the provisions of this section every inquiry or trial pending, immediately before such cesser, before the District Magistrate or Additional District Magistrate or any Executive Magistrate, as the case may be, shall stand transferred, and shall be dealt with, from the state which was reached before such cesser, by such Judicial Magistrate as the State Government may specify in this behalf.

18. Even this special provision requires a specific conferment of the power upon the Additional District Magistrate by an order of the State Government. It is a specific case of the appellant that the order dated 14th August, 2012 passed by the Additional District Magistrate, South Andaman district without being empowered by the State Government per se is not in conformity with the mandatory provisions enshrined u/s 14 of the SARFAESI Act.

19. This Court, therefore, finds that the order dated 14th August, 2012 impugned in the writ petition raises a jurisdictional issue and the Hon"ble Single Bench should not have declined to exercise the power conferred under Article 226 of the Constitution of India.

20. A further fact needs to be recorded before deciding the matter conclusively. A specific stand is taken by the respondent No. 1 that the petitioner have already approached the Debts Recovery Tribunal-I, Kolkata by filing SA No. 48 of 2011 and it would be just and equitable that the petitioner should assail the impugned order u/s 17 of the SARFAESI Act before the Debts Recovery Tribunal.

21. We have noticed the application on which the said proceeding originated wherefrom it appears that challenging a notice u/s 13(2) of the SARFAESI Act and the notice of possession the challenge is made therein.

22. Had it been a case that the order of the authority competent to entertain an application u/s 14 of the SARFAESI Act, is assailed on any other ground than the ground of incompetence or lack of power, the Writ Court was justified in relegating the parties to alternative remedy provided under the statute. But, in the instant case we have found that the Additional District Magistrate was not specifically empowered by the State Government to exercise the power exercisable by the District Magistrate u/s 14 of the SARFAESI Act and the same strikes at the root of the matter. This Court does not concur with the submission of the respondents on the ground of alternative remedy.

23. This Court, therefore, set aside the order of the Hon"ble Single Bench. Resultantly the order dated 14th August, 2012 passed by the Additional District Magistrate, South Andaman district is bad and without jurisdiction, the same is also hereby quashed and set aside.

24. The appeal succeeds.

25. There shall, however, be no order as to costs.

Subrata Talukdar, J.

26. I agree.