

- : 1 :-

IN THE HIGH COURT OF MADHYA PRADESH

AT INDORE

BEFORE

HON'BLE SHRI JUSTICE VIVEK RUSIA

&

HON'BLE SHRI JUSTICE AMAR NATH (KESHARWANI)

ON THE 5th OF JULY, 2022

WRIT PETITION No. 5864 of 2022

Between:-

1. SMT. MISHRI BAI W/O LATE SHRI NIRMAL KUMAR, AGED ABOUT 85 YEARS, OCCUPATION: HOME MAKER, R/O 599-A, MAHALAXMI NAGAR, INDORE (MADHYA PRADESH)
2. SMT. SUMAN MODI W/O SHRI ANIL MODI, AGED ABOUT 55 YEARS, OCCUPATION: HOME MAKER, R/O 599-A, MAHALAXMI NAGAR, INDORE (MADHYA PRADESH)
3. SHRI MAHAK MODI S/O SHRI ANIL MODI, AGED ABOUT 33 YEARS, OCCUPATION: BUSINESS, R/O 599-A, MAHALAXMI NAGAR, INDORE (MADHYA PRADESH)

.....PETITIONERS

(DEVAASHEESH DUBEY, LEARNED COUNSEL FOR THE PETITIONERS)

AND

1. SHUBH LAXMI MAHILA COOPERATIVE BANK LTD. THROUGH AUTHORISED OFFICER 255, R.N.T. MARG, INDORE (MADHYA PRADESH)
2. ADDITIONAL DISTRICT MAGISTRATE INDORE COLLECTORATE, MOTI TABELA INDORE (MADHYA PRADESH)
3. TEHSILDAR KANADIYA COLLECTORATE MOTI TABELA INDORE (MADHYA PRADESH)
4. M/S RAJ AGRO CORPORATION THR ITS PROPRIETOR SMT. NEHA PANDYA W/O SHRI ANKUR PANDYA, AGED ABOUT 38 YEARS, R/O 210, TIRUPATI BUSINESS CENTRE, 22/1, SOUTH

TUKOGANJ, GEETA BHAWAN, INDORE
(MADHYA PRADESH)

5. M/S ANKUR CORPORATION THR ITS
PROPRIETOR SMT. PRAMILA PANDYA W/O SHRI
RAJKUMAR PANDYA, AGED ABOUT 40 YEARS,
R/O 210, TIRUPATI BUSINESS CENTRE, 22/1,
SOUTH TUKOGANJ, GEETA BHAWAN, INDORE
(MADHYA PRADESH)

.....RESPONDENTS

*(SHRI VALMIK SAKARGAYEN, LEARNED COUNSEL FOR THE
RESPONDENT NO.2 AND 3.*

*SHRI AASHAY DUBEY, LEARNED COUNSEL FOR THE
RESPONDENT [R-1])*

*This petition coming on for order this day, JUSTICE VIVEK
RUSIA passed the following:*

ORDER

Petitioners have filed the present petition being aggrieved by the letter dated 02.03.2022 (Annexure P/16) written by the Tehsildar, Knadiya, Indore/ respondent No.3 whereby petitioners and respondents No.4 and 5 were directed to hand over the physical possession of the ground floor of property situated at EB-250 (Old No.BB-1), Sector-B, Scheme No.94, Near Bombay Hospital, Indore (M.P.).

The facts of the case in short are as under:

[2] Respondents No.4 and 5 took financial assistance of Rs. 35,00,000/- each (two loans) from respondent No.1/Bank. The petitioners have stood as guarantors by mortgaging the property situated at EB-250 (Old No.BB-1), Sector-B, Scheme No.94, Near Bombay Hospital, Indore (M.P.) (hereinafter referred to as "mortgaged property") as a security against the said two loans. In the month of January 2018, the aforesaid two loan accounts were classified as None-Performing Assets (in short 'NPA') by the

respondent No.1/Bank followed by the issuance of notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as ' the SARFAESI Act). After receipt of notice under Section 13(4) of the SARFAESI Act, the petitioners approached respondent No.1/Bank showing a willingness to clear the outstanding dues of respondent No. 4 & 5 by way of the schedule prepared by the Bank. The respondent No.1/Bank did not agree with the proposal and decided to proceed under the SARFAESI Act by filing an application under Section 14 of the SARFAESI Act before respondent No.2. Vide order dated 20.09.2019, the respondent No.2 has allowed the application filed by the respondent No.1/ Bank. In compliance with the aforesaid order, on 28.01.2020, the physical possession of the mortgaged property was taken by respondent No.3 and handed over to respondent No.1/Bank.

[3] According to the petitioner, on 01.02.2020, the possession of the mortgaged property was restored to the petitioners by respondent No.1/Bank, after accepting Rs.10,74,606/- and 10,26,600/- by way of the settlement in such eventuality, the order passed by District Magistrate has lost its consequence as the loan accounts stood regularized. It is further submitted by the learned counsel that the petitioners undertook to clear the remaining outstanding loan accounts within six months by handing over the post-dated cheques, meaning thereby all the proceedings/measures taken under the SARFAESI Act have come to an end.

[4] According to the petitioners, in the month of March 2020 due to the Covid-19 Lockdown, the cheques were given to the Bank, have returned unpaid, the respondent No.1 has initiated the

proceedings under Section 138 of the Negotiable Instruments Act against the petitioners, which is still pending.

[5] Respondent No.1/ Bank requested to respondent No.3 that cheques given by the petitioners have been dishonoured, hence, the order dated 20.09.2019 passed by District Magistrate be executed again. In turn, respondent No.3, by impugned notice dated 02.03.2021, directed petitioners to hand over the possession of the remaining part of the mortgaged property.

[6] Being aggrieved by the aforesaid notice, the petitioners have approached before this Court *inter alia* on the ground that respondent No.3 had become *functus officio* on 28.01.2020, once the possession was handed over to respondent No.1 in compliance with the order dated 20.09.2019, hence, impugned notice bad in law and liable to be quashed.

[7] Shri Dubey, learned counsel for the petitioners has placed reliance on the judgment passed by Apex Court in the case of ***State Bank of India and Others Vs. S.N. Goyal*** reported in (2008) 8 SCC 92 in which the Apex Court has held that once an Authority exercising quasi judicial power, takes a final decision, it cannot review its decision unless the relevant statute or rules permit such review and it becomes *functus officio*. Hence, once the order passed by the District Magistrate has been complied with, possession had been taken from the petitioners then in execution of the same order again the respondents cannot demand possession from the petitioners. Now respondent No.1/Bank is required to initiate proceedings afresh against the petitioners or borrowers under section 13 of the SARFAESI Act.

[8] Learned counsel for respondent No.1/Bank submits that as of

today the total liability against the petitioners and respondents No.4 and 5 is more than 65 lacs. The cheques issued by the petitioners by way of the settlement have been returned unpaid for which the proceedings under Section 138 of the Negotiable Instruments Act have been initiated. It is further submitted that the petitioners, if aggrieved by the order passed by District Magistrate, have a remedy to approach the DRT by way of an application under Section 17 of the SARFAESI Act, hence, the present petition is not maintainable and liable to be dismissed.

We have heard the learned counsel for the parties and perused the record.

[8] The main contention of the learned counsel for the petitioners is that the order passed by the District Magistrate under section 14 of the SARFAESI Act does not survive because, in compliance with the aforesaid order, respondent No.3 had already taken possession of the mortgaged property and handed over to the respondent No.1/Bank, however, thereafter by way of settlement again the possession was restored to the petitioners and even if there was some default on part of the petitioners, now the respondent No.1/Bank is required to take fresh steps taking possession back to the petitioners. The Tehsildar cannot issue a fresh notice to the petitioners for handing over the possession as DM and Tehsildar have become *functus officio*.

[9] In the present case, respondent No.1 approached respondent No.2 and obtained the order under Section 14 of the SARFAESI Act. After the aforesaid order, respondent No.3 took possession of the secured assets and handed them over to respondent No.1/Bank. Thereafter, some settlement arrived between the bank and the

petitioners on 01.02.2020 and the petitioners issued post-dated cheques to respondent No.1/Bank and on such conditions respondent No.1/Bank has released the property in favour of the petitioners. The cheques given by the petitioners have been returned unpaid, therefore, again the loan account became NPA and outstanding debt was restored. The petitioners have violated the terms and conditions of the settlement, thus the Manager of respondent No.1/Bank has requested Tehsildar to initiate proceedings for taking over the possession of the secured assets in which we do not find any illegality.

[10] During this intervening period, the present petitioners have also tried to ditch respondent No. 1/ bank by entering into an agreement of sale dated 11.12.2015 to sell the secured assets. Hence, the Bank lodged an FIR against the petitioners for the offence punishable under Section 420/34 of I.P.C. The petitioners filed a bail application under Section 438 of Cr.P.C. bearing M.Cr.C. No.59481/2021 before this Court. In the said bail application, the petitioners admitted the liability of Rs. 75 lacs without interest and showed bonafide intention to repay the loan. On a condition of a deposit of 50% of the admitted liability, anticipatory bail was granted to the petitioners, therefore, the intention of the petitioners is not bonafide. They are not intending to return the amount to respondent No.1/Bank. The cheques given by the petitioners, have returned unpaid, they tried to sell the property, thus they cannot be permitted to take technical objection to avoid their liability to repay the amount to the bank. The writ remedy is not available to such type litigant whose intentions are not bonafide.

[11] The petitioners are not challenging the validity of the order dated 20.09.2019 passed by the District Magistrate u/s 14 of the SARFAESI Act. The said order is still valid as the same has neither been reviewed, cancelled by the same authority or set aside by the Higher Court/ Tribunal, therefore, the said order still exists in the eye of law and compliance of the said order, the Tehsildar may take action for taking possession of the property till the dues of the bank are not cleared and accounts are closed. The assets of the petitioners are still secured and the same has not been released by clearing the debt.

[12] Section 13 of the SARFAESI Act provides that where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as a non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4). If on receipt of notice under sub-section (2) of Section 13 of the SARFAESI Act, the borrower makes any representation, the secured creditor shall consider the same. In case the borrower fails to discharge his liability in full within the period specified period, the secured creditor may take recourse to one or more under sub-section (4) of section 13 of SARFAESI Act either to take possession of the secured asset of the borrower or take over the management of the business. In order to take possession under sub-section (4) of section 13 of the SARFAESI Act, the secured creditor may file an

application before the District Magistrate under Section 14 of the SARFAESI Act seeking assistance in taking possession of secured assets. After taking possession under Section 14 of the SARFAESI Act. Any person aggrieved by any of the measures referred to in sub-section (4) of Section 13 of the SARFAESI Act taken by the secured creditor or his authorised officer, may make an application before the Debts Recovery Tribunal. Section 18 provides a remedy before the DART against the order passed by DRT under Section 17 of the SARFAESI Act.

[13] After taking possession of the secured assets under sub-section (4) of Section 13 of the SARFAESI Act. Under sub-section (6) of Section 13 of the SARFAESI Act, all the rights in, or in relation to, the secured asset vests with the secured creditor. The secured creditor gets the right to recover all the dues, costs, charges and expenses by the sale of secured assets by way of auction. Under sub-section (10) of Section 13 of the SARFAESI Act where dues of the secured creditor are not fully satisfied with the sale proceeds, the secured creditor may file an application in the form and manner as may be prescribed to the DRT. Therefore, the borrower, as well as the guarantor, shall not be discharged from liability to repay the loan amount to the Bank unless the bank recovers the entire outstanding amount by the sale of the secured assets under the provision of the SARFAESI Act, 2002. The secured creditor is not required to approach again and again before the District Magistrate or DRT for recovery of the amount, once the order has been passed under section 14 of SARFAESI Act until unless the entire outstanding amount is recovered, the order remains valid, therefore, the Tehsildar has not committed any error of law or he does not

become *functus officio* unless the entire outstanding amount is recovered by the Bank. It is settled law that any order passed by the Authority, quasi-judicial authority or the Court or Tribunal remains valid unless reviewed, recalled, cancelled by the same authority or court or set aside by the Higher Court/ Tribunal, thus the order passed by District Magistrate is still valid and Respondent No.1 /Bank is free to take steps thereafter until the entire outstanding amount is cleared.

[14] In the circumstances of the present case, we are satisfied that no error has been committed by the Tehsildar by issuing an impugned notice/letter to the petitioners. The petition is sans merits, deserves dismissal and is accordingly dismissed.

Certified copy as per Rules.

(VIVEK RUSIA)
JUDGE

(AMAR NATH (KESHARWANI)
JUDGE

praveen