

M/S. Sri Balaji Centrifugal Castings vs M/S. Icici Bank Limited Rep. By Its ... on 12 July, 2018

Equivalent citations: AIRONLINE 2018 HYD 126

Author: T.Amarnath Goud

Bench: T.Amarnath Goud

THE HONBLE SRI JUSTICE SANJAY KUMAR AND THE HONBLE SRI JUSTICE T.AMARNATH GOUD

WRIT PETITION No.18947 OF 2018

12-07-2018

M/s. Sri Balaji Centrifugal Castings Petitioner.. Petitioner

M/s. ICICI Bank Limited rep. by its Authorized Officer, Nanakramguda, Hyderabad and an

Counsel for petitioner : Sri Vedula Venkataramana,
M/s. Bharadwaj Associates

Counsel for respondent No.1: Sri R.Raghunandan and
Sri G.Kalyan Chakravarthy

^Counsel for respondent No.2: --

<Gist:

>Head Note:

? CASES REFERRED:

1. (2013) 9 SCC 620
2. 2018 SCC ONLINE SC 237
3. (2014) 6 SCC 1
4. AIR 2010 Madras 24
5. 2013 ILR Vol.I Allahabad 113
6. 2017 (2) Banking Cases 500 (Allahabad)

THE HONBLE SRI JUSTICE SANJAY KUMAR
AND
THE HONBLE SRI JUSTICE T.AMARNATH GOUD

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O R D E R

(Per Sri Justice Sanjay Kumar) The petitioner firm seeks a declaration that the ICICI Bank Limited, the first respondent herein, had no legal right to invoke Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, the SARFAESI Act), having already delivered physical possession of the secured asset to the auction purchaser on 07.12.2017 and in consequence, challenges the order dated 05.05.2018 passed by the learned Chief Metropolitan Magistrate, Ranga Reddy District at L.B.Nagar, in exercise of power under Section 14 of the SARFAESI Act, in Crl.M.P.No.224 of 2018 filed by the bank. In the alternative, the petitioner firm seeks a direction to the bank to cancel the auction sale of the secured asset held on 08.11.2017, return the highest bid amount to the auction purchaser and thereafter avail the benefit of Section 14 of the SARFAESI Act.

The secured asset in question is Plot No.B-52, along with the Industrial Shed therein, situated at the Assisted Private Industrial Estate at Balanagar, Hyderabad. The petitioner firm claims to be the absolute owner of the said shed. M/s. Sojiram Ispat Private Limited, the second respondent herein, availed certain credit facilities from the bank and in relation thereto, the petitioner firm created a security interest over its shed by mortgaging the same with the bank. The said shed was put to auction sale by the bank on 08.11.2017 pursuant to recovery proceedings initiated under the SARFAESI Act. Sale certificate dated 07.12.2017 was issued by the bank in favour of the auction purchaser, M/s. Varun Motors, which is not made a party to this writ petition. Possession of the shed was also delivered to the auction purchaser. However, as such possession was taken over forcibly from it by the bank, the petitioner firm filed W.P.No.19442 of 2017 before this Court complaining of the same and seeking redelivery. The writ petition was allowed by this Court vide order dated 14.12.2017. S.L.P. (Civil) No.638 of 2018 filed by the bank against the said order was dismissed by the Supreme Court on 22.01.2018. Thereupon, the bank redelivered possession of the shed to the petitioner firm on 01.03.2018. Thereafter, the bank approached the learned Chief Metropolitan Magistrate, Range Reddy District at L.B.Nagar, under Section 14 of the SARFAESI Act, by filing Crl.M.P.No.224 of 2018, seeking to take possession of the shed. The petitioner firm claims that though it was shown as a respondent in the said petition, no notice was served upon it and a warrant was straightaway issued to an Advocate- Commissioner to take physical possession of the shed. Apprehending dispossession pursuant thereto, the petitioner firm is before this Court.

The petitioner firm would point out that in the petition filed in support of Crl.M.P.No.224 of 2018 the bank admitted that possession of the shed was handed over to the auction purchaser on 07.12.2017 and contend that once the auction sale concluded by delivery of physical possession of the property sold, the security interest of the bank over the mortgaged property would come to an end and Section 14 of the SARFAESI Act would no longer be available to it as the said provision is to be invoked only by a secured creditor for taking possession of a secured asset which is required to be sold or transferred. The petitioner firm would assert that the bank could have invoked Section 14 of the SARFAESI Act only before such sale, when the shed still remained a secured asset. It would further contend that as the sale already stood concluded, it is for the auction purchaser to take recourse to civil legal remedies by filing a suit for recovery of possession, as the bank no longer had a security interest in the shed sold. It is on this ground that the petitioner firm assails the action of the

bank in taking recourse to Section 14 of the SARFAESI Act by filing Crl.M.P.No.224 of 2018 before the learned Chief Metropolitan Magistrate, Ranga Reddy District at L.B.Nagar. According to the petitioner firm, the bank has to cancel the sale already held and only thereafter avail the benefit of Section 14 of the SARFAESI Act. The logic of the petitioner firm in this regard is that in the event the bank cancels the auction sale, the shed would again assume the character of a secured asset, whereby the bank could take measures for taking over its possession by invoking Section 14 of the SARFAESI Act.

The bank filed a counter through the Authorized Officer-cum-Chief Manager at its Hyderabad branch. Therein, the bank adverted to details of the proceedings initiated by it for recovery of its dues in relation to the loan account of the second respondent company, which was classified as a non- performing asset on 30.11.2012. The bank also adverted to the creation of a security interest by the petitioner firm over its sheds in Plot Nos.B-52 and B-53 at Balanagar, Hyderabad, along with buildings, structures, fixtures, fittings, plant and machinery, etc, therein. The bank stated that it invoked the provisions of the SARFAESI Act by issuing demand notice dated 16.02.2013 under Section 13(2) thereof. The amount due as on 15.02.2013, mentioned therein, stood at Rs.21,96,30,336/-. Thereafter, the bank took recourse to Section 13(4) of the SARFAESI Act, read with Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (for short, the Rules of 2002), and issued possession notice dated 19.06.2013. The same was published in two leading newspapers on 23.06.2013. The bank also filed O.A.No.570 of 2013 (renumbered as O.A.No.1849 of 2017) before the Debts Recovery Tribunal, Hyderabad, against the borrower company, the petitioner firm and other guarantors for recovery of its dues. This O.A. is still pending. Crl.M.P.No.489 of 2013 was filed by the bank before the learned Chief Metropolitan Magistrate, Ranga Reddy District, under Section 14 of the SARFAESI Act for taking physical possession of the secured assets. Pursuant thereto, G.Narasimhulu, Advocate-Commissioner, was appointed by the Court to take over possession of the secured assets. S.A.(IR) No.483 of 2013 (numbered as S.A.No.514 of 2013 and again renumbered as S.A.No.417 of 2017) was filed by the petitioner firm before the jurisdictional Debts Recovery Tribunal seeking stay of all further proceedings pursuant to the possession notice dated 23.06.2013. Conditional stay order dated 03.10.2013 was passed therein directing the petitioner firm to pay 30% of the amount claimed in the possession notice. As the petitioner firm failed to comply with this condition, the stay stood vacated. However, owing to the stay order, the Advocate-Commissioner failed to take over possession of the secured assets. The S.A is still pending. One Darshan Agarwal filed S.A.No.625 of 2013 (renumbered as S.A.No.619 of 2017) before the Debts Recovery Tribunal, Hyderabad, claiming that he was the tenant of the petitioner firm in relation to the secured shed and that he was in possession. The Tribunal granted stay in his favour but the same was not extended beyond 14.12.2016. Thereafter, the S.A itself stood dismissed for default on 09.08.2017. While so, the bank filed Crl.M.P.No.1020 of 2015 before the learned Chief Metropolitan Magistrate, Ranga Reddy District at L.B.Nagar, for taking physical possession of the secured shed in Plot No.B-53 at Balanagar, Hyderabad. G.Jyothi, Advocate, was appointed as the Commissioner to take over possession of the said shed, vide order dated 17.12.2015. Possession was accordingly taken on 11.01.2016 and handed over to the bank. Crl.M.P.No.68 of 2017 was filed by the bank before the learned Chief Metropolitan Magistrate, Ranga Reddy District, for taking over physical possession of the secured shed in Plot No.B-52 at Balanagar, Hyderabad. One Bumanandham, Advocate, was appointed as the Commissioner to take over the physical possession of this shed, vide order dated

31.01.2017. The warrant issued to him was to be executed and returned on or before 26.05.2017. The Advocate-Commissioner however failed to execute the warrant and did not co-operate for taking over physical possession of the shed for reasons best known to him. The warrant issued to the Advocate- Commissioner therefore lapsed and there was no extension. The bank admitted that it took over physical possession of the said shed on 12.06.2017 by other means and conducted the auction sale thereof on 08.11.2017. The bank further stated that as the petitioner firm secured a conditional order from the Tribunal in S.A.No.417 of 2017 but failed to comply with the condition imposed, the sale was conducted, as scheduled, in respect of the sheds in Plot Nos.B-52 and B-53. M/s. Varun Motors was declared the highest bidder at Rs.21.40 Crore for the two plots/sheds. Sale certificate dated 07.12.2017 was issued in its favour and possession of both the plots/sheds was also handed over to it along with the title deeds. The bank however pointed out that the sale certificate in favour of the auction purchaser had not been registered and therefore, the transfer as per law was yet to be completed. The bank claimed that even after appropriation of these auction proceeds, the outstanding dues of the borrower company stood at Rs.31,96,82,364/- as on 31.05.2018. The bank adverted to the filing of W.P.No.19442 of 2017 by the petitioner firm and the order passed therein, directing redelivery of the possession of the subject shed. The bank also acknowledged the dismissal by the Supreme Court of the Special Leave Petition filed by it against the said order. The bank stated that physical possession of the subject shed was redelivered to the petitioner firm on 01.03.2018. Thereafter, on 09.03.2018, the bank filed a fresh application under Section 14 of the SARFAESI Act before the learned Chief Metropolitan Magistrate, Ranga Reddy District, for appointment of an Advocate- Commissioner to take physical possession of the subject shed in Plot No.B-52 at Balanagar, Hyderabad. Warrant was issued on 05.05.2018 appointing Pidugu Anitha, Advocate-Commissioner, to take over physical possession of the shed and to handover the same to the bank on or before 03.08.2018. The bank stated that the Advocate-Commissioner visited the subject shed on 12.06.2018 for taking over its possession and found that a tenant claimed to be in occupation thereof. Without going into the validity of the alleged rental agreement, the Advocate-Commissioner gave notice to the said tenant asking him to vacate the subject shed within fifteen days. The alleged tenant undertook by way of a letter to vacate the subject shed within fifteen days, i.e., by 27.06.2018. The bank stated that the petitioner firm allegedly entered into a rental agreement with one Jilthender Mukkamala under unregistered document dated 18.03.2018 for a period of eleven months, commencing from 08.04.2018, at a monthly rental of Rs.20,000/-. The bank further stated that the deponent to the writ affidavit, Gopal Agarwal, a partner of the petitioner firm, came to the subject shed on the said day, met the Advocate-Commissioner and confirmed that the property had been let out in favour of the alleged tenant. The bank pointed out that the petitioner firm had not taken its consent before entering into the alleged rental agreement and in any event, the alleged tenant was willing to vacate the premises within fifteen days, as undertaken by him. The bank alleged that the creation of this rental agreement was a malafide action on the part of the petitioner firm, which was hit by the provisions of the Transfer of Property Act, 1882, and the SARFAESI Act. The bank denied the claim of the petitioner firm that it had no right over the shed after its sale in favour of M/s. Varun Motors, the auction purchaser. It asserted that the sale transaction would be complete only when the sale certificate issued to the auction purchaser is registered and as the said event was yet to take place, the transfer of the shed in favour of the auction purchaser was still incomplete. It further contended that even after sale of the secured asset, a secured creditor could still file an application under Section 14 of the SARFAESI Act for obtaining

its physical possession. Reference was made to the fact that this Court, while allowing W.P.No.19442 of 2017, left it open to the bank to initiate lawful measures for securing possession of the property in accordance with the provisions of the SARFAESI Act. Lastly, the bank contended that though the petitioner firm claimed that it had no notice in Crl.M.P.No.224 of 2018, an Advocate had appeared on its behalf before the learned Magistrate and argued against the appointment of an Advocate-Commissioner. The bank therefore sought dismissal of the writ petition.

Sri Vedula Venkataramana, learned senior counsel representing M/s. Bharadwaj Associates, counsel for the petitioner firm, would advance four- fold arguments.

He would firstly contend that the banks right to invoke Section 14 of the SARFAESI Act is a one time measure and that it was not open to it to file successive applications under the said provision, even if it failed to secure physical possession pursuant to the earlier order passed thereunder. He would assert that the liberty granted by this Court while allowing W.P.No.19442 of 2017 must be understood in the context of the statutory scheme and therefore, Crl.M.P.No.224 of 2018 could not be filed afresh by the bank under Section 14 of the SARFAESI Act.

The second ground of attack urged by him is that, as the auction sale was already held on 08.11.2017 in so far as the subject shed is concerned and its actual physical possession was delivered pursuant thereto on 07.12.2017 to the auction purchaser, the bank ceased to be a secured creditor in so far as the shed was concerned and the shed itself ceased to be a secured asset. He would point out that as this Court found fault with the manner in which the bank had taken physical possession of the shed and allowed W.P.No.19442 of 2017 vide order dated 14.12.2017, the bank returned its actual physical possession. Learned senior counsel would assert that it is irrelevant as to how and why the bank took back possession of the shed from the auction purchaser but once it conceded that physical possession had been handed over to the auction purchaser, it lost its right to again file an application under Section 14 of the SARFAESI Act as the subject shed lost the character and status of a secured asset.

The third contention urged by the learned senior counsel is that while entertaining the application under Section 14 of the SARFAESI Act, the Magistrate concerned ought to have afforded an opportunity of hearing to the petitioner firm, which was shown as a party thereto but was not even put on notice. Learned senior counsel would assert that failure to do so would amount to violation of the principles of natural justice.

The fourth and last ground of attack of the learned senior counsel is that the bank ought not to have held the auction without taking over physical possession of the shed, as a secured creditor cannot sell a secured asset which is not even in its possession. Reliance is placed in this regard on Sections 13 (4)(a), 13(6) and 14(1) of the SARFAESI Act and the learned senior counsel would assert that no title would pass in favour of such an auction purchaser. Reference is also made to certain observations of the Supreme Court in STANDARD CHARTERED BANK V/S. V.NOBLE KUMAR . Learned senior counsel would draw a distinction as to the principles laid down recently by the Supreme Court in ITC LIMITED V/s. BLUE COAST HOTELS LIMITED , by pointing out that the facts of the two cases are distinguishable.

Sri R.Raghuveer, learned senior counsel representing Sri G.Kalyan Chakravarthy, learned counsel for the bank, would counter these arguments. He would state that the contention of the petitioner firm that it had no opportunity of hearing is factually incorrect as the averment in the banks counter-affidavit that an Advocate appeared on behalf of the petitioner firm before the learned Chief Metropolitan Magistrate, Ranga Reddy District, prior to appointment of the Advocate-Commissioner, remained un rebutted and no reply affidavit was filed by the petitioner firm. Learned senior counsel would argue that the petitioner firm is utterly lacking in bonafides, as a new tenant has now emerged claiming rights under an unregistered lease agreement but in any event, the alleged tenant agreed to part with his possession by way of an undertaking, whereunder he agreed to vacate the subject shed and hand over the possession thereof to the Advocate-Commissioner by 27.06.2018. Learned senior counsel would point out that nothing in the scheme of Section 14 of the SARFAESI Act lends itself to the interpretation that only a single application can be maintained thereunder by a secured creditor for taking over possession of a secured asset. He would further point out that as the earlier taking over of possession of the subject shed was considered by this Court in W.P.No.19442 of 2017 and the said writ petition was allowed, delivery of possession by the bank to the auction purchaser could not be treated as a valid and legal delivery whereby the sale could have concluded. He would also point out that the sale certificate in favour of the auction purchaser is yet to be registered as on date and therefore, the sale transaction is still inchoate. On these grounds, learned senior counsel would assert that the present application filed by the bank under Section 14 of the SARFAESI Act was valid and justified.

In reply, Sri Vedula Venkataramana, learned senior counsel, would contend that as the alleged tenant was claiming rights under an unregistered document which was not even signed by the so called lessor, the same was irrelevant for the purposes of this case. He would state that the learned Chief Metropolitan Magistrate, Ranga Reddy District, did not deem it appropriate to issue notice to his client and mere watching of the proceedings was not sufficient in itself to infer compliance with the principles of natural justice. He would further state that registration of the sale certificate is only for the purpose of making it a public document but the very execution thereof is sufficient to infer completion of the sale transaction. He would assert that Section 14 of the SARFAESI Act does not indicate that applications can be filed multiple times thereunder and in the absence of such liberty being given in clear terms in the provision itself, a secured creditor could not invoke it time and again. He would assert that by exercise of power under Section 14 of the SARFAESI Act, serious consequences follow as the borrower is divested of physical possession of the secured asset and therefore, such power must be invoked only when the occasion warrants and not on multiple occasions. He would therefore reiterate his prayer for relief.

The case essentially turns on the interpretation of Section 14 of the SARFAESI Act. This provision 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 asset 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 asset, 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 assets 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 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 within a period of thirty days from the date of application:

Provided also that if no order is passed by the Chief Metropolitan Magistrate or District Magistrate within the said period of thirty days for reasons beyond his control, he may, after recording reasons in writing for the same, pass the order within such further period but not exceeding in aggregate sixty days.

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.

(1A) 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.

Though the language of Section 14(1) gives one to understand that the power thereunder is to be invoked if a secured asset is required to be sold or transferred by the secured creditor under the provisions of the SARFAESI Act, it is now well settled that a secured creditor can sell a secured asset even without taking actual physical possession thereof. The statutory scheme of the Rules of 2002 also make this clear, as Rule 9(7) of the said Rules speaks of the secured asset being sold subject to encumbrances. Further, this aspect stands settled by the recent judgment of the Supreme Court in BLUE COAST HOTELS LIMITED². That was a case where the secured asset was sold prior to taking over of its physical possession under Section 14 of the SARFAESI Act, but the Supreme Court did not frown upon such a sale or hold that it was contrary to the procedure contemplated under the SARFAESI Act. Therefore, this Court finds no merit in the contention of Sri Vedula Venkataramana,

learned senior counsel, that the bank could not have proceeded with the auction sale without having legally recognized physical possession of the secured shed. In any event, it is an admitted fact that as on the date of the said auction sale, the bank did have actual physical possession, be it by legal or illegal means, and was therefore in a position to deliver physical possession of the shed to the auction purchaser. It was only due to the intervention of this Court in W.P.No.19442 of 2017 that this delivery of possession stood abrogated and the bank was constrained to redeliver physical possession of the shed to the petitioner firm. It is however clear from the observations of the Supreme Court in BLUE COAST HOTELS LIMITED² that a sale transaction in favour of an auction purchaser would not be complete till legal transfer of the physical possession of the asset sold. The observations in Paras 67 and 68 of the judgment are apposite and are extracted herein:

67. We note that even though the entire right, title and interest were purported to have been transferred, all the rights, transfer and interest could not be said to have been transferred since the possession of the property was not transferred to creditor. The possession was retained by the debtor who continued to do business and receive rent from the rooms on the property and has in fact continued to do so till date. There is no doubt that after taking over the property from debtor, the creditor also acquired the right to receive the usufruct of the property i.e. the rent in this case.

However, this was an interest in the property which was not at any point of time transferred to the auction purchaser.

68. In this case, the creditor did not have actual possession of the secured asset but only a constructive or symbolic possession. The transfer of the secured asset by the creditor therefore cannot be construed to be a complete transfer as contemplated by Section 8 of the Transfer of Property Act. The creditor nevertheless had a right to take actual possession of the secured assets and must therefore be held to be a secured creditor even after the limited transfer to the auction purchaser under the agreement. Thus, the entire interest in the property not having been passed on to the creditor in the first place, the creditor in turn could not pass on the entire interest to the auction purchaser and thus remained a secured creditor in the Act.

Though Sri Vedula Venkataramana, learned senior counsel, would rely on certain observations of the Supreme Court in STANDARD CHARTERED BANK¹ to the effect that preservation, valuation and sale of secured assets, under Rule 8 of the Rules of 2002 and other subsequent rules thereof, would arise only after possession is handed over to the secured creditor, the issue that fell for consideration in the said case was with regard to the manner in which possession of a secured asset is to be taken over by a secured creditor and not as to the manner in which a sale was to be conducted. That aspect squarely fell for consideration in BLUE COAST HOTELS LIMITED² and stands settled thereby.

The other issue raised by Sri Vedula Venkataramana, learned senior counsel, is as to the requirement of putting a borrower on notice by the Magistrate concerned when his power is invoked under Section 14 of the SARFAESI Act. It is no doubt true that after insertion of the proviso to Section 14(1), by Act No.1 of 2013 with effect from 15.01.2013, the Magistrate concerned is required

to satisfy himself that the contents of the affidavit filed by the secured creditor are in conformity with clauses (i) to (ix) enumerated thereunder. These clauses, as have been set out hereinbefore, demonstrate that the secured creditor must declare to the effect that he has afforded a sixty day notice period to the borrower as required by Section 13(2) of the SARFAESI Act, considered his objections or representation, if any, and affirm that the borrower did not make any repayment in spite of such notice, thereby entitling it to take measures under Section 13(4) read with Section 14 of the SARFAESI Act.

Though it has been held by the Supreme Court that while exercising power under Section 14 of the SARFAESI Act, the Magistrate concerned does not play an adjudicatory role and merely an administrative one, the later judgments of the Supreme Court and more particularly, in *HARSHAD GOVARDHAN SONDAGAR V/s. INTERNATIONAL ASSETS RECONSTRUCTION COMPANY LIMITED*, indicate that the Magistrate concerned at least has to verify certain factual aspects and in that regard, he must also put a lessee in actual physical possession of the secured asset, if there is one, on notice and afford him an opportunity of hearing to demonstrate that his tenancy is lawful. The Supreme Court made it clear that if it is so, it would not be open to the Magistrate to cut short a lawful lease and direct delivery of possession of the secured asset to the secured creditor. The Supreme Court further made it clear that in such a situation the secured creditor must necessarily take legal measures to terminate the lawful lease before gaining actual physical possession of the secured asset. If this is the situation when a lawful lessee is stated to be in possession, the question would arise as to whether the borrower is entitled to be put on notice prior to an order/warrant being issued by the Magistrate concerned in exercise of power under Section 14. In terms of *STANDARD CHARTERED BANK*¹, the borrower, if aggrieved by an order under Section 14 of the SARFAESI Act, is entitled to approach the jurisdictional Debts Recovery Tribunal under Section 17 thereof. However, in a given situation, if the secured creditor has not been truthfully forthcoming or has willfully suppressed its failure in complying with the mandate of Clauses (i) to (ix) of the first proviso to Section 14(1) and files a false affidavit, the borrower would first have to go through the inconvenience of losing actual physical possession of the secured asset before availing the remedy under Section 17, as he would have no information till the order/warrant is executed by the Advocate-Commissioner/Tahsildar, appointed to do so.

In that view of the matter, this Court is of the opinion that for the limited purpose of satisfying himself as to whether the contents of the affidavit are factually true, the Magistrate concerned may have to put the borrower on notice. Be it noted that this is not for the purpose of any adjudication but only for verifying the limited facts necessary to infer compliance with Clauses (i) to (ix) stipulated under the first proviso to Section 14(1) of the SARFAESI Act.

However, in the case on hand, the claim of the petitioner firm does not fall under any of the aforestated Clauses (i) to (ix) of the first proviso to Section 14 of the SARFAESI Act. The argument put forth by Sri Vedula Venkataramana, learned senior counsel, is that the petitioner firm ought to have been afforded an opportunity of hearing by the Chief Metropolitan Magistrate, Ranga Reddy District, to argue the points now advanced in this writ petition. The issues raised presently do not fall within the ambit of Clauses (i) to (ix) under the first proviso to Section 14(1). As already pointed out supra, the Magistrate concerned does not have the power of undertaking adjudication under

Section 14 of the SARFAESI Act and plays a limited administrative role of verifying certain factual aspects only. Therefore, even if we are inclined to accept that Section 14 of the SARFAESI Act may have to be construed to mean and imply that prior notice should be issued to the borrower by the Magistrate concerned upon receipt of an application under Section 14 only for the limited purpose of verifying the contents of the affidavit filed by the secured creditor in the context of Clauses (i) to (ix) stipulated under the first proviso to Section 14(1) of the SARFAESI Act, the same would not come to the rescue of the petitioner firm, which practically wants the Magistrate to undertake adjudication while exercising power under Section 14 of the SARFAESI Act.

The other aspects argued by Sri Vedula Venkataramana, learned senior counsel, with regard to the secured shed sold by the bank ceasing to be of such character and status after its sale, thereby divesting the bank of its right to invoke Section 14 of the SARFAESI Act, does not merit consideration in the light of the judgment of the Supreme Court in BLUE COAST HOTELS LIMITED². No doubt, that was not a case where Section 14 of the SARFAESI Act had been invoked prior to the sale, as in the case on hand, but the observations of the Supreme Court to the effect that even after such sale, the secured creditor would be at liberty to invoke the power thereunder squarely settles the issue. Further, we find no logic or rationale in the plea that a secured creditor can invoke the power under Section 14 of the SARFAESI Act only once. To accept this proposition would mean that an unscrupulous borrower may defeat the very purpose of initiation of SARFAESI proceedings by prevailing over the Advocate-Commissioner appointed in exercise of power under Section 14 and thereby nullify the entire recovery proceedings initiated by such secured creditor. The language of the provision demonstrates that an application can be made thereunder for taking possession of the secured asset or if it is required to be sold or transferred. Therefore, there is no embargo evident from the provision itself curtailing the right of the secured creditor to invoke it but only once. Be it noted that this provision is a machinery provision intended to give effect to the regime created under the SARFAESI Act, whereby a secured creditor is allowed the benefit of deviating from the ordinary legal process for recovering its dues and bring a mortgaged asset to sale for the said purpose, by duly following the procedure prescribed thereunder. Such a machinery provision cannot be construed or interpreted in a narrow compass to the extent that it would defeat the very purpose underlying the enactment, as advocated by Sri Vedula Venkataramana, learned senior counsel. Significantly, in M/S. KATHIKKAL TEA PLANTATIONS V/s. STATE BANK OF INDIA , DILIP KUMAR SINGH V/s. STATE OF U.P. and PUNJAB NATIONAL BANK V/s. STATE OF U.P. , the Madras and Allahabad High Courts held that Section 14 of the SARFAESI Act could be invoked by a secured creditor even after sale of the secured asset.

It may also be noted that this Court, while allowing W.P.No.19442 of 2017, specifically observed that the said order would not preclude the bank from initiating lawful measures for securing possession of the subject shed in accordance with the provisions of the SARFAESI Act. If the petitioner firm was of the opinion that the provisions of the SARFAESI Act were no longer available to the bank for securing possession of the subject shed, it should have been aggrieved by the liberty granted by this Court and taken measures to challenge grant of such liberty by way of independent proceedings. It however did not choose to do so. It is therefore too late in the day for the petitioner firm to now claim that the order passed by this Court in W.P.No.19442 of 2017 should be construed and interpreted to suit its own interest.

On the above analysis, this Court holds that the auction sale by the bank in favour of M/s. Varun Motors, the auction purchaser, was not vitiated by the subsequent development of it being divested of the physical possession of the shed sold to it. Further, this Court holds that the action of the bank in initiating measures afresh under Section 14 of the SARFAESI Act for securing possession of the shed sold by it to M/s. Varun Motors, the auction purchaser, is valid on facts and in law. Finally, this Court also holds that there is no bar to a secured creditor maintaining more than a single application under Section 14(1) of the SARFAESI Act for securing the possession of the very same secured asset.

The writ petition therefore fails on all counts and is accordingly dismissed. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

_____ SANJAY KUMAR,J _____ T.AMARNATH GOUD,J 12th
JULY, 2018