
PHYSICAL POSSESSION OF DEFAULTER'S PROPERTY BY SECURED CREDITOR - AN ANALYSIS

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Abstract

The SARFAESI Act (Securitisation and reconstruction of financial assets and enforcement of security interest Act) 2002 enables the creditor banks and financial institutions to recover the outstanding loan amount due in a simple way. They can conduct auction sale of the mortgaged residential and commercial properties without intervention of court. Once if a loan Account is overdue for 90 days, it will be classified as Non performing asset. S.13 of the act prescribes the procedure for taking symbolic possession of the mortgaged property and S.14 prescribes the procedure for taking physical possession with the help of a magistrate to recover the defaulted amount by auction sale. The main admiring feature of this act is the power given to the creditor banks and financial institutions to bring the property for sale without filing suit and execution petition in the court. Therefore the tedious work of filing civil suit and to obtain Judgment after completion of appeal was reduced. In S.14 of the act, the creditor has to file application before the Chief Metropolitan Magistrate or District Magistrate seeking assistance for taking physical possession of the secured asset. Though S.14 clearly says that no court shall question the authority of the magistrate, I have analysed in this article the power given to the magistrate in passing order and the interpretation delivered by various high courts and debt recovery tribunals in the process of exercise of powers by the magistrate in ordering physical possession.

Keywords: SARFAESI Act, financial institutions, Jurisdiction, Mortgage, Metropolitan

Introduction

Taking possession of the defaulter's property by the banks involves many legal procedures. Section 14 of the SARFAESI Act provides the method for applying before the Chief Metropolitan Magistrate or District Magistrate in the process of taking physical possession of the secured assets of the borrower by the secured creditor after completion of all notice procedures for taking symbolic possession as prescribed under section 13(2) and 13(4) of the act. This section 14 can be utilized by the creditor banks and financial institutions if they find difficult for taking physical possession in recovering

the loan amount which is not less than 1 lakh rupees or not less than 20% of the principal and interest due. The Secured creditor may approach the concerned Chief Metropolitan Magistrate or District Magistrate for an order to take physical possession with the assistance of Police authorities or Advocate/Commissioner.

Jurisdiction of Magistrate for Ordering Physical Possession

Regarding the jurisdiction of the magistrate, the creditor banks and financial institutions have to file an application with affidavit under section 14 to the magistrate who is having territorial jurisdiction in the place where the mortgaged property is situated. It is strictly mentioned in the act that non jurisdictional magistrate cannot pass orders for taking physical possession. After scrutinizing the application and affidavit the magistrate shall pass orders granting assistance through advocate commissioner or police as prayed by the creditor banks and financial institutions. After taking physical possession, the same will be forwarded to the secured creditor banks and financial institutions. In the case of *Shanthi Charitable trust Vs. State Bank of India*, there arose a question that in the metropolitan areas the chief metropolitan magistrate is having territorial jurisdiction as per S.14, but in other areas whether the chief Judicial Magistrate can be supplemented with the same power. Held in non metropolitan areas only the District magistrate (Collector) shall have jurisdiction and not chief Judicial Magistrate. In the year 2003 in the case of *Smt.Santhosh Raghav Vs. Oriental Bank of Commerce*, the mortgaged property was in Noida, U.P, but the chief Metropolitan Magistrate, Delhi has passed the order for taking physical possession under S.14 of the SARFAESI Act. Held the order is not maintainable and the notice to take possession by the creditor Bank was quashed. But in the case of *Merit International Educational Foundation Vs. Authorised officer, Canara Bank*, it was held that the Chief Judicial Magistrate in non metropolitan areas is having the same power as Chief Metropolitan Magistrate in metropolitan Area. Thus a perusal of the above Judgments clearly establishes the interpretation given by the courts in S.14 regarding the Jurisdiction by Chief Judicial Magistrate in Non metropolitan areas for passing orders to take physical possession.

Power to question the validity of Mortgage

The District Magistrate or Chief Metropolitan Magistrate as under S.14 is not having any authority in law to scrutinize the validity of mortgage, in respect of the secured asset and in consequence to declare the mortgage as void. On the ground of genuineness of mortgage also the magistrate cannot dismiss the application filed under S.14. Therefore as such the magistrate can only order to take physical possession of the mortgaged asset and document and forward the same to the secured creditor. The Magistrate cannot decide the dispute between the parties. This was Held in *SICOM Ltd Vs. District Magistrate / Collector*. If the asset is not a secured asset then the magistrate can refuse to entertain the petition under S.14 (i.e) the property must be the actual mortgaged property and not some other different property. This was observed

by the learned Justice in the case of Ayishumma Vs. V.T.Hassan. Similarly the magistrate cannot entertain the objections filed by any third party. In Syndicate Bank Ltd Vs. State of U.P., it was held that the bank by getting an order from the magistrate under S.14 had taken physical possession of the secured assets and sealed the premises of factory on default in payment of loan by borrower. The son of borrower filed an objection petition to open the sealed premises on the ground of legal heir. It was Held the magistrate is not authorized to pass any orders to third party under the Act.

Section 14 SARFAESI Act Vs Section 21 General Clauses Act

S.21 of the General Clauses Act provides power to the Judges to issue, to include, to add, to amend, vary or rescind any order or notification or rules or bye laws. The issue in this chapter is whether a magistrate under S.14 of Sarfaesi Act can adopt such powers as provided under S.21 of the General Clauses Act?. The solution for this issue is delivered in the case of Union Bank of India Vs. State of Maharashtra. Held since S.14 of the SARFAESI Act gives finality to the powers of a magistrate that the court should not decide the disputes between the parties and pass any other orders , the act of a magistrate under SARFAESI Act stand excluded from the purview of S.21 of the General Clauses Act. Moreover S.35 of SARFAESI Act clearly provides an overriding effect over other Laws.

High Court's Interference over order of Magistrate U/S.14 Sarfaesi Act

After filing of application by the creditor bank or financial institution u/s 14 for protection to take physical possession, if there is any abnormalities in sending notice u/s. 13(2) and 13(4) and the magistrate without noticing it, if passed any order for taking possession then the order of the Magistrate can be questioned in the High Court. This was observed in the case of R.Shivasubramaniyan Vs. State Bank of India. It was further observed by the learned Justice that though the learned Magistrate is discharging only ministerial function and no adjudication is necessary , but having regard to the right of property under Article 300-A of the Indian Constitution , certain minimum requirement of application of mind is necessary. If the magistrate finds necessary to appoint an advocate/commissioner to assist the secured creditor for taking possession and for identification of the assets, the magistrate may pass such orders and it is valid under law. This was Held in the case of Mohammed Ashraf Vs.Union of India AIR 2009 Ker 14. A perusal of S. 14(3) shows that no act of the Chief Metropolitan Magistrate or District magistrate done in pursuance of this S.14 shall be called in question in any court or before any authority. In the case of V.N.Radhakrishnan Vs. State of Kerala , it was Held that the quash petition filed under section 482 Criminal procedure code is not maintainable.

If a tenant objects for being evicted by the creditor bank or financial institution on the basis of a magistrate order, then the magistrate cannot pass order against eviction. But in a latest Case, Harshad Govardhan Sondagar Vs. International Assets

reconstruction Co.Ltd & others , Held if a tenancy agreement is made before the creation of mortgage between debtor and tenant and if the creditor bank was aware of that tenancy, then the magistrate under S.14 has to provide some time to the tenant to vacate. But the tenancy agreement must be valid under Law. In another case K.K.Jose Mels Vs.Authorised Officer, Kotak Mahindra Ban Ltd, the tenant moved the High court for not taking possession on the basis of order made by the magistrate U/S.14 . The court scrutinized all the documents of the petitioner and found out that the lease deed was entered on 23.02.2011 but the mortgage was created on 28.12.2009 thereby the tenant is not protected by the Judgment passed in Harshad Govardhan case , moreover the lease deed is unregistered.

Amendment to S.14 of SARFAESI Act

Since many petitions under Article 227 of the constitution of india have been filed in the High court praying to pass an order to the Chief Metropolitan Magistrate or District magistrate to dispose the application filed under S.14, an amendment was made in the Sarfaesi act by passing of the Enforcement of security interest and Recovery of debts laws and Miscellaneous provisions (Amendment) Act 2016. By that amendment with effect from 01.09.2016 , the Chief Metropolitan Magistrate or District magistrate should dispose the application made by creditor bank or financial institution under S.14 within 30 days of filing and should not extend beyond 60 days for any valid reasons. An amendment was also made in S.17 (4-A) of Sarfaesi Act conferring Jurisdiction to Debt Recovery Tribunals to decide the tenancy rights. This amendment was referred by the Honourable Mr.Justice.S.Manikumar and Mr.Justice.S.Audhinathan in the case of P.S.Ganesan Vs. Authorised officer, Canara bank, Erode and it was Held High Court will not entertain writ petitions to decide tenancy matters.

From the above analysis the powers of the Magistrate under S.14 can be summarized as follows:

- (a) The creditor bank or financial institution before applying before a magistrate under S.14 should verify that proper notice under S.13(2) was served providing the statutory time of 60 days and S.13 (4) symbolic possession notice was also served to the borrower and reply have been made to the objection of the borrower, if any.
- (b) The Mortgaged property does not come within the exclusions provide under S.31 of the Sarfaesi Act (i.e) Agricultural lands , Defaulted amount of borrower is not less than 1 lakh rupees or not not less than 20% of the principal & interest due, etc .
- (c) Notice need not be sent by the Magistrate to the Borrower
- (d) Appeal remedy for the borrower is available before the Debt Recovery Tribunal.
- (e) After Amendment in 2016, application to be disposed within 30 days but valid reasons not more than 60 days.

Conclusion

A Scrutiny of above mentioned facts will clearly show that S.14 of the SARFAESI Act after amendment will ensure the speedy recovery of loan dues by creditor banks or financial institutions. Before amendment it was a blunt tool but after amendment it became a sharp weapon and empowered the magistrate to apply the principles of natural justice in disposing the application. The attitude of the bank and borrower has created a division between them leading to misunderstanding and distrust. Therefore by S.14 the magistrate promotes the relationship between them by hearing both parties and aid in the process of taking physical possession for speedy recovery of loan arrears.

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