
(2016) 05 DEL CK 0055
In the Delhi High Court
Case No : LPA 699 of 2015

Agarwal Tracom Pvt Ltd

APPELLANT

Vs

Punjab National Bank and Others

RESPONDENT

Date of Decision : 11-05-2016

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4), 17(1), 34

Citation : (2016) 6 ADDelhi 593 : (2017) 1 BC 742 : (2017) 2 DCR 32 : (2016) 230 DLT 218 : (2017) 1 DRTC 797

Hon'ble Judges : Gorla Rohini, Chief Justice; Jayant Nath, J.

Bench : Division Bench

Advocate : Abhirajit Mitra, Sr. Advocate with Surjadipta Seth, Ajit Sharma & Satadeep Bhattacharya, Advocates, for the Appellant; Hasmat Nabi, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Jayant Nath, J. - The present appeal is filed seeking to impugn the judgment of the learned Single Judge dated 1.9.2015 by which the Writ Petition was dismissed holding that the appellant has an alternate efficacious remedy of approaching the Debt Recovery Tribunal under section 17(1) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act").

2. The brief relevant facts as stated which led to filing of the Writ Petition are that the borrower M/s. India Iron and Steel Corporation Limited had its factory on plot of land measuring Khasra No. 116, 117, 119 and 153, village Noorpur Khirki and Khasra No. 40, 41 min. 42 village Faridnagar, Tehsil Dhampur, District Bijnor, Uttar Pradesh and the plant and machinery therein at the premise. The said property was mortgaged by the borrower with the respondent bank for obtaining financial facilities. On account of defaults committed by the borrower the respondent bank initiated appropriate proceedings under the provisions of

SARFAESI Act, 2002. A sale notice was issued on 17.5.2014 about sale/auction of the property and the Plant and Machinery on 17.6.2014. The reserve sale price of the mortgaged immovable property was fixed at Rs.4.15 crores and the reserve sale price of hypothecated goods was fixed at 12.06 crores. The total price was Rs.16.26 crores. The appellant participated in the auction. Before participation it deposited Rs.1.62 crores towards 10% of the minimum reserve price. The appellant was declared as the single highest bidder as no other bids were received by the bank. Pursuant to letter of acceptance, the appellant paid the balance of 15% being Rs.2,44,50,000/-. The appellant entered into an MOU on 18.6.2014 with respondent bank by which 75% of the balance sale price being Rs.12,19,50,000/- was payable by the appellant to the respondent bank within 120 days i.e. by 15.10.2014. The appellant is stated to have given 4 post dated cheques each of Rs.3,04,87,500/- to be encashed on 17.7.2014, 16.8.2014, 15.9.2014 and lastly on 15.10.2014. Certain steps were taken by the appellant pursuant to the MOU i.e. dismantling of the plant and machinery for the purpose of selling of scrap after depositing equivalent amount.

3. In the meantime, the borrower commenced legal proceedings before Debt Recovery Tribunal, Lucknow. These were dismissed by DRT Lucknow on 26.9.2014, It appears that the borrower thereafter also filed proceedings before DRAT, Allahabad and the Allahabad High Court. The full details of the proceedings are not relevant for the purpose of adjudication of the issue raised in the present appeal. It appears that certain disputes arose between the appellant and the respondent bank on account of which on 26.6.2015 and 7.7.2015 the respondent bank issued a letter intimating the appellant that the auction confirmed in his favour stood cancelled in view of non-payment of the balance 75% consideration amount. The appellant has raised various pleas stating that the respondent bank acted in breach of the agreed terms, failed to issue sale certificate in respect of 975 MT of scrap material etc. It is also the grievance of the appellant that despite the auction sale being cancelled by the respondent bank, the respondent bank has not refunded the admitted amount of Rs.1.62 crores lying with the respondent bank. Hence, the present Writ Petition was filed seeking directions to the respondent to refund the said money.

4. The learned Single Judge by the impugned order relying upon the judgment of the Supreme Court in *United Bank of India v. Satyawati Tondon and Others*, (2010) 8 SCC 110, held that the appellant is covered by the expression "any person" used in Section 17 of SARFAESI Act and has an alternative and efficacious remedy of approaching the DRT and initiating appropriate proceedings against the respondent seeking the same relief. Accordingly, the Writ Petition was dismissed.

5. We have heard the learned senior counsel for the appellant and the learned counsel for the respondents. Learned senior counsel appearing for the appellant has strenuously relied upon judgments of the Division Bench of Bombay High Court in *Umang Sugars Pvt. Ltd. v. State of Maharashtra and Anr.*, 2014(4)

MH.L.J 113, and of the learned Single Judge of Madras High Court in Chemstar Chemicals and Intermediates (P) Ltd. v. The Commercial Tax Officer, Purasawalkam, Assessment Circle, 2010 (6) CTC 635 to contend that in the present factual scenario no appeal lies under section 17 of the SARFAESI Act and hence the appellant does not have an alternative remedy. It was urged that an appeal can be filed by any person aggrieved by any measure referred to in section 13(4) of the Act whereas the auction proceedings of a secured asset is not a subject covered under section 13(4) of the Act.

6. Learned counsel appearing for the respondent bank has relied upon judgment of the Supreme Court in United Bank of India v. Satyawati Tondon and Others (supra), to contend that the appellant could approach the DRT in terms of section 17 of the Act. He also relied upon the judgment of the Supreme Court in Jagdish Singh v. Heeralal and Others, (2014) 1 SCC 479 to support his contention.

7. We may first have a look at Section 17(1) of the SARFAESI Act which provides for a right of appeal. Same reads as follows:-

"17. Right to appeal (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken"

8. Section 13(4) of the Act reads as follows:-

"13. Enforcement of security interest (4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset: PROVIDED that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt: PROVIDED FURTHER that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt.

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of

the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt."

9. Reference may also be had to the Section ousting jurisdiction of Civil Courts i.e. Section 34 of the SARFAESI Act which reads as follows:-

"34. Civil Court not to have jurisdiction : No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)".

10. There is a difference of the opinion in the judgments of various High Courts on the issue namely as to whether an auction purchaser in an auction sale conducted by a secured creditor of the secured assets, if aggrieved by any step could file an appeal under Section 17(1) of the Act before the DRT or that he would have to approach the civil court.

11. We may first have a look at the judgment relied upon by the learned senior counsel for the appellant of the Bombay High Court in *Umang Sugars Pvt. Ltd. v. State of Maharashtra* (supra). The High Court held as follows:-

"24. In order to consider the objections raised by respondent No. 2, with due circumspection, it is necessary to consider the phraseology used in Section 13(4) of the SARFAESI Act. It begins with a clarification pertaining to the failure on the part of the borrower to discharge his liability in full within a specified period which gives rise to a right and remedy to the secured creditor to initiate measures to recover the secured debt as per sub clauses (a) to (d). In our view, the petitioner in the instant case has raised a limited issue to the extent of recovering the E.M.D. and to withdraw from the tender proceedings. The petitioner is a bidder and is naturally neither a borrower nor a secured creditor.

34. We have given a close look to the phraseology of Section 13(4) of the SARFAESI Act. Section 13(4) clearly appears to be a provision meant only for the secured creditor to take recourse to one or more of the measures mentioned in sub clauses (a) to (d). As such, we are of the view that measures initiated under section 13(4) by M/s. Uttam (an unsecured creditor) cannot be termed to be the measures initiated by a secured creditor. As such, though for the purposes under section 17 (Right to appeal) of the SARFAESI Act, the petitioner is presumed to fall within the meaning of "any person", it can not be held to be aggrieved by the appeal filed by M/s. Uttam. Our view is fortified by the phraseology of Section 17 as well in light of the words "any of the measures referred to in s/s 4 of Section 13 taken by the secured creditor". As such, in our considered view, the petitioner would not have an alternate remedy of right to appeal under section 17."

12. To the same effect, is the other judgment relied upon by the learned senior counsel for the appellant of the learned Single Judge of the Madras High Court in Chemstar Chemicals and Intermediates (P) Ltd. v. The Commercial Tax Officer, Purasawalkam, Assessment Circle (supra). In that case the court held that the relief sought therein was not against any measure taken under section 13(4) of the Act. The petitioner was a third party who had participated in an auction held in pursuance of action taken under Section 13(4) of SARFAESI Act and is not a person aggrieved against action taken under section 13(4) of the Act and no appeal lies under Section 17(1) of the Act.

13. A similar view has also been taken by learned Single Judge of the Guwahati High Court in Rose Valley Real Estate and Construction Ltd. v. United Commercial Bank Ltd. Anr., AIR 2008 Guwahati 38 and the Division Bench of the Karnataka High Court in R. Venkatpati v. Bank of India, AIR 2014, Karnataka 33.

14. However, a Division Bench of the Madras High Court in ICICI Bank Ltd. v. Mr. P. Veerendar Chordia (2010) 4 MAD LJ 261 took a different view. The facts of that case were that the Bank after taking over the property, which was a secured asset, put the same for sale. The bank accepted the offer of the purchaser and agreed to sell the property under a private treaty/agreement. A dispute arose between the parties and the purchaser filed an appropriate petition before the DRT under Section 17(1) of the SARFAESI Act seeking refund of the forfeited amount of Rupees fifty lacs. The issue before Madras High Court was as follows:

"10.1. Whether the Debts Recovery Tribunal-III, Chennai has got jurisdiction and is right in entertaining the appeal filed by the respondent/purchaser under Section 17(1) of the SARFAESI Act?"

Relevant paras 14, 15 and 17 of the judgment read as follows:

"14. As per Rule 8(5) of the Security Interest (Enforcement) Rules, 2002, the methods of sale of the immovable secured assets include:

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction; or

(d) by private treaty.

15. Therefore, it follows that the sale of a secured asset by private treaty as provided for under Rule 8(5)(d) of the Security Interest (Enforcement) Rules, 2002 is a "sale" within the meaning of Section 13(4) of the SARFAESI Act. In the case on hand, there is no dispute regarding the fact that the sale is a private treaty, falling within the meaning of Rule 8(5)(d) of the Security Interest (Enforcement) Rules, 2002 and under Section 13(4) of the SARFAESI Act.

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17. Section 17(1) makes it abundantly clear that any person (including borrower) aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer may make an application to the Debts Recovery Tribunal. Therefore, not only the borrower but any person who is aggrieved of the actions of the secured creditor has recourse to appeal to the Debts Recovery Tribunal under Section 17(1) of the SARFAESI Act. Since the Respondent, a third party to the loan transaction, has entered into a Memorandum of Understanding with the secured creditor/Bank for the purchase of the mortgaged property and the order of forfeiture came to be passed against him by the secured creditor/Bank, after having initiated the proceedings under the SARFAESI Act and having agreed to sell the property under private treaty, it will definitely fall within the jurisdiction of Debts Recovery Tribunal being a "sale" within the meaning of Section 13(4) of the SARFAESI Act read with Rule 8(5) of the Security Interest (Enforcement) Rules, 2002 and therefore, the Respondent is completely justified in approaching the Debts Recovery Tribunal for redressal of his grievance under Section 17(1) of the SARFAESI Act. Therefore, the Debts Recovery Tribunal-III, Chennai is completely within its jurisdiction in entertaining the appeal filed by the Respondent/purchaser under Section 17(1) of the SARFAESI Act. This point is answered accordingly."

15. The issue is whether the action of the respondent bank in seeking to sell the secured asset by a public auction or otherwise would be as per section 13(4) of the SARFAESI Act. If so, whether any person other than the borrower aggrieved by the sale process done by the bank would be entitled to file an appeal before DRT under section 17(1) of the Act and be ousted from approaching a civil court in terms of Section 34 of the Act.

16. For interpreting Section 13(4) of the Act, the three sections would have to be read together, namely, Sections 13 (4), 17 (1) and 34 of the Act to see whether an appeal lies under Section 17 (1) of the Act. We may for the purpose of interpreting these provisions look at the "doctrine of purposive advancement". The purposive approach or the "modern principle in construction" is an approach to statutory and constitutional interpretation under which common law courts interpret an enactment (that is, a statute, a part of a statute, or a clause of a constitution) in light of the purpose for which it was enacted. Purposive interpretation is exercised when the courts utilise extraneous materials from the pre-enactment phase of legislation, including early drafts, committee reports, etc. The Supreme Court explained this approach in the case of *Shri Ram Saha v. State of West Bengal*, (2004) 11 SCC 497. In para 19 the Court stated as follows:-

"It is well-settled principle of interpretation that a statute is to be interpreted on its plain reading; in the absence of any doubt or difficulty arising out of such reading of a statute defeating or frustrating the object and purpose of an enactment, it must be read and understood by its plain reading. However, in case of any difficulty or doubt arising in interpreting a provision of an enactment,

courts will interpret such a provision keeping in mind the objects sought to be achieved and the purpose intended to be served by such a provision so as to advance the cause for which the enactment is brought into force. If two interpretations are possible, the one which promotes or favours the object of the Act and purpose it serves, is to be preferred. At any rate, in the guise of purposive interpretation, the courts cannot rewrite a statute. A purposive interpretation may permit a reading of the provision consistent with the purpose and object of the Act but the courts cannot legislate and enact the provision either creating or taking away substantial rights by stretching or straining a piece of legislation."

The above rule of interpretation was also noted by the Supreme Court in *Sindhi Education Society and Anr. v. Chief Secretary Govt. of NCT of Delhi and ors.*, (2010) 8 SCC 49.

17. We may now look at the objects for which the SARFAESI Act was enacted.

"Statement of Objects and Reasons:

The financial sector has been one of the key drivers in India's efforts to achieve success in rapidly developing its economy. While the banking industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of nonperforming assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas. These Committees, inter alia, have suggested enactment of a new legislation for securitisation and empowering banks and financial institutions to take possession of the securities and to sell them without the intervention of the court.

2. It is now proposed to replace the Ordinance by a Bill, which, inter alia, contains provisions of the Ordinance to provide for-

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(h) empowering banks and financial institutions to take possession of securities given for financial assistance and sell or lease the same or take over management in the event of default, i.e. classification of the borrower's account as nonperforming asset in accordance with the directions given or guidelines

issued by the Reserve Bank of India from time to time."

18. Hence, the object was to overcome slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. It was sought to provide a new legislation for empowering the banks and financial institutions to take possession of the securities and to sell them without the intervention of the Court.

19. The object of the said Statute was considered by the Supreme Court in the case of *United Bank of India v. Satyawati Tondon and Others* (supra). The Supreme Court observed as follows:

"11. The Government of India accepted the recommendations of the two Committees and that led to enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act"), which can be termed as one of the most radical legislative measures taken by Parliament for ensuring that dues of secured creditors including banks, financial institutions are recovered from the defaulting borrowers without any obstructions. For the first time, the secured creditors have been empowered to take steps for recovery of their dues without intervention of the courts or tribunal."

20. To fulfil the objectives of the Act, Section 13(4) provides that in case a borrower fails to discharge his liability in full, the secured creditor may apart from other remedies, take possession of the secured assets including right to transfer by way of lease, assignment or sale for realising the secured asset. Hence, Section 13(4) of the Act that gives a right to a secured creditor to transfer by sale the secured asset for realising the secured asset. The procedure to be followed for effecting sale of the secured asset is provided under The Security Interest (Enforcement) Rules, 2002 which have been framed in exercise of powers under section 38(1) and 38 (2) (b) read with section 13(4), (10), (12) of the SARFAESI Act. In our opinion, this right to transfer by way of sale etc. the secured asset would include all ancillary and incidental matters pertaining to the sale. Hence, if an auction purchaser has any grievance against the secured creditor on account of any action taken by the secured creditor, the remedy of the auction purchaser would be to approach DRT under section 17(1) of the Act. He would be covered by the phrase "Any person" as used in Section 17(1) of the Act.

21. The Supreme Court in the case of *United Bank of India v. Satyawati Tandon and Others* (supra) held that the expression "any person" used in Section 17 (1) of the Act is of wide import and takes within its fold not only the borrower or the guarantor or any other person who may be affected by the action taken under Section 13 (4) or Section 14.

22. The above interpretation would also ensure that the specialised Tribunal as per the Act, namely, the DRT would continue to handle the entire proceedings relating to the secured asset starting from taking over possession of the asset

from the defaulter till actual sale etc. of the secured asset and realisation of the proceeds to be adjusted against the dues of the banks/financial institutions. Any other interpretation of the statutory provisions would lead to an anomalous situation where proceedings pertaining to taking over of the secured assets would be dealt with by a specialised Tribunal, namely DRT and the subsequent stage, namely sale etc. of the secured assets would be dealt with by a civil court.

The above interpretation would also be as per the object of the Act which sought to provide for recovery of dues of the banks/financial institutions without intervention of the courts in a speedy manner.

23. The above view would also follow from the judgment of the Supreme Court in the case of Pegasus Assets Reconstruction P. Ltd. v. Haryana Concast Limited and Ors., AIR 2016 SC 494 where the Supreme Court held that the SARFAESI Act is a complete code. The Court also held as follows:-

"25. The aforesaid view commends itself to us also because of clear intention of the Parliament expressed in Section 13 of the SARFAESI Act that a secured creditor has the right to enforce its security interest without the intervention of the court or tribunal....."

24. Accordingly, we concur with the view taken by the Division Bench of the Madras High Court in the case of ICICI Bank Ltd. v. Mr. P. Veerendar Chordia (supra).

25. We agree with the conclusions of the learned Single Judge that the appellants have an efficacious alternative remedy of approaching DRT under section 17(1) of the SARFAESI Act. Accordingly, we dismiss the present appeal. All applications are also dismissed.