(2015) 04 RAJ CK 0131

In the Rajasthan High Court

Case No : Civil Writ Petition No. 11538/13

Amit Prakash Gupta and Others APPELLANT

Vs

Bank of Baroda RESPONDENT

Date of Decision : 13-04-2015

Acts Referred:

Constitution of India, 1950 — Article 226, 226(3)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 13(4), 14
Transfer of Property Act, 1882 — Section 69, 69A

Citation : (2015) 04 RAJ CK 0131

Hon'ble Judges : Sangeet Lodha, J

Bench : Single Bench

Advocate : L.R. Mehta and Ramit Mehta, for the Appellant; R.K. Salecha, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sangeet Lodha, J.—By way of this writ petition, the petitioners have questioned legality of Demand Notice dated 1.6.13 issued by the Authorised Officer of the Respondent-Bank of Baroda ("the Respondent Bank"), under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act, 2002"), communication dated 14.8.13 of the Authorised Officer of the Bank rejecting petitioners'' representation/objections to the said Demand Notice dated 1.6.13 and the action of the Respondent Bank in classifying the petitioners'' loan account as "Non Performing Asset" (NPA). That apart, the petitioners have prayed that the Respondent Bank may be restrained from initiating any fresh action against all or any of subject immovable properties of the petitioners under the SARFAESI Act, 2002.

2. The relevant facts in nutshell are that the petitioner No. 3-M/s. U.N. Automobiles Private Limited (''the Petitioner Company''), a company incorporated under the provisions of the Companies Act, 1956, was granted various credit

facilities by way of financial assistance by the Respondent Bank against the security interest created by it. The credit facility by way of financial assistance granted by the Respondent Bank were also secured by personal guarantee of the petitioner No. 1 and 2, who had created security interest by way of equitable mortgage of their properties. The Petitioner Company defaulted in repayment of secured debt and therefore, the loan account was classified as NPA on 29.8.12 and thereafter, vide Demand Notice dated 6.10.12, the Petitioner Company was required to discharge in full its liabilities to the Respondent Bank, within 60 days from the date of the notice. The legality of the proceedings taken by the Respondent Bank for enforcement of the security interest as aforesaid, was questioned by the petitioners by way of S.B.C. Writ Petition No. 8373/13 "Mr. Amit Prakash Gupta and Anr. vs. Bank of Baroda and Ors.", before the Jaipur Bench of this court. On 28.5.13, learned counsel appearing on behalf of the Respondent Bank, made a statement before the court that Demand Notice issued under Section 13(2) of the SARFAESI Act, 2002 on 6.10.12 as also the notice dated 12.4.13 demanding possession of the secured assets have since been withdrawn by the Respondent Bank, under the letter dated 28.5.13. In view of the submissions made on behalf of the counsel for the Respondent Bank, the writ petition preferred by the petitioners was dismissed by the court as having rendered infructuous and it was ordered that the interim order dated 24.5.13 passed by the court shall also ceases to be operative. The Respondent Bank was extended liberty to take steps for recovery of the outstanding amount against the petitioners in accordance with law.

3. Thereafter, vide separate Demand Notice dated 1.6.13, issued by the Authorised Officer of the Respondent Bank under Section 13(2) of the SARFAESI Act, 2002, the petitioners herein, the borrower and the guarantors, were directed to discharge the demand raised aggregating Rs. 52,41, 12,611/- alongwith interest @ 15.75%, calculated at monthly rest w.e.f. 1.6.13, within a period of 60 days. In response to the notice, the petitioners submitted Representation-cum-Objections to the Demand Notice in terms of provisions of sub-section 3A of Section 13 of the SARFAESI Act, 2002. The Representation-cum-Objections submitted by the petitioners were rejected by the Authorised Officer of the Respondent Bank vide communication dated 14.8.13.

4. In these circumstances, aggrieved by the action of the Respondent Bank in initiating the fresh proceedings for enforcement of the security interest under the provisions of the SARFAESI Act, 2002, the petitioners filed the present writ petition before the Jaipur Bench of this court, registered as S.B.C. Writ Petition No. 15754/13, on 31.8.13. However, a coordinate Bench of this court at Jaipur Bench, vide order dated 9.9.13, directed to transfer the present petition to the Principal seat of the High Court at Jodhpur observing that the matter is primarily against the orders and the action taken by the Respondent Bank at Udaipur.

5. On 11.9.13, a coordinate Bench of this court while issuing the notices to the Respondent Bank, by way of interim order directed the petitioners to deposit at

least a sum of Rs. 1,00,00,000/- (Rupees One Crore only), in one installment or in two installments as may be considered appropriate by them, but before 30.9.13. On the condition of aforesaid deposit of Rs. 1,00,00,000/- before 30.9.13, the Respondent Bank and its enforcement agency M/s. Rajvanshy and Associates to whom the Respondent Bank had issued necessary instructions on 2.9.13, were directed not to proceed further to put to auction, or alienate the secured assets of the petitioners without leave of this court.

6. After service of the notice, on 27.9.13, the Respondent Bank filed an application (IA No. 4915/13) under Article 226(3) of the Constitution of India for vacating the ex parte interim order dated 11.9.13 passed by this court, as aforesaid. The Respondent Bank preferred yet another application (IA No. 4914/13) praying for dismissal of the writ petition on account of possession of the secured assets having been taken by the Bank on 11.9.13 and the availability of effective and efficacious alternative remedy under Section 17 of the SARFAESI Act, 2002.

7. During the pendency of the application (IA No. 5144/13) preferred by the Respondent Bank as aforesaid, the petitioners preferred an application seeking direction to the Respondent Bank to grant NOCs to the petitioners permitting them to sale secured assets/properties in the open market. The petitioners offered to deposit Rs. 2,00,00,000/- every quarter, subject to clearance/NOCs being given by the Respondent Bank to the petitioners in respect of the secured assets. However, the said application stands dismissed as not pressed vide order dated 17.10.13 passed by this court. On 18.10.13, the petitioners made yet another application seeking directions to the Respondent Bank to grant NOC in respect of all the secured assets/properties of the petitioners permitting them to sale the secured assets/properties in the open market and prayed that the petition may be kept pending before this court for a reasonable time and in the meantime, the petitioners be directed to sale the alleged secured assets in open market and continuously make the payments to the Respondent Bank as per the directions of this court. The petitioners filed an undertaking allegedly as per the directions of this court given on 17.10.13 in terms that the petitioners shall deposit a total sum of Rs. 20,00,00,000/- by selling either the property situated at Madari Industrial Area, Udaipur or the property known as Govardhan Villas, situated at Udaipur, mentioned at serial No. 2 to 4 at page No. 4 and 5 of the writ petition, within a period of 3 to 4 months from the date of permission. It is pertinent to note that the order dated 17.10.13 passed by a coordinate Bench of this court, does not contain directions to the petitioners to file the undertaking as aforesaid. Be that as it may, vide order dated 18.10.13 passed by a coordinate Bench of this court, the undertaking alleged to have been filed by the petitioners was directed to be forwarded to Mr. R.K. Salecha, Advocate, the learned counsel appearing for the Respondent Bank and the matter was posted for orders on 23.10.13.

8. On 23.10.13, the Respondent Bank while filing the written submissions

declined to agree with the proposal of the petitioners, setting out the reasons therefor in details and prayed for the rejection of the prayer made by the petitioners in the said undertaking dated 18.10.13.

9. Vide order dated 19.11.13 passed by this court, the matter was directed to be listed for final disposal.

10. On 17.11.14, learned counsel appearing for the petitioners submitted that the petitioners have laid a fresh application for ''One Time Settlement'' (OTS) proposal before the Respondent Bank in consonance and conformity with the Guidelines issued by the Respondent Bank which is likely to be accepted. The submissions made by the counsel for the petitioners were refuted by the counsel appearing for the Respondent Bank, stating that no proposal has been received and the Respondent Bank has granted umpteen opportunities to the petitioners for availing the benefit of OTS. Learned counsel submitted that the chances of the settlements are remote but still the Bank authorities shall examine the proposal of the petitioners objectively.

11. On 5.12.14, the coordinate Bench of this court passed an order in the following terms:

"Mr. Mehta, learned counsel for the petitioner submits that fresh proposal submitted by the petitioner before the Bank for one time settlement is still under consideration before the Higher (sic) Authorities of the Bank, as the petitioner was called on 24.11.2014 for talks.

Mr. Salecha on the other hand, submits that penultimate paragraph of letter dated 19.11.2014 (Annex.14) is crystal clear that the proposal of one time settlement is not acceptable to the Bank.

Be that as it may, let this matter be posted on 15.01.2015 for final disposal".

12. On 15.1.15, when the matter was taken up for hearing by a coordinate Bench of this court, the learned counsel appearing for the Respondent Bank made it plain that no proposal for OTS is pending before the Respondent Bank. In this view of the matter, the coordinate Bench while observing that in compliance of the order, the written arguments have not been submitted by the petitioners, released the matter from "Part Heard" and directed it to be listed on 22.1.15. Thereafter, the matter was adjourned from time to time and today, it is listed for final disposal at the admission stage.

13. Heard learned counsel appearing for the parties.

14. At the outset, the learned counsel appearing for the Respondent Bank submitted that while taking the measures under Section 13(4) of the SARFAESI Act, 2002, the possession of the secured assets had already been taken by the Respondent Bank on 9.9.13 and 10.9.13 even before the present matter was taken up for consideration by this court on 11.9.13. Accordingly, it is submitted that the measures under Section 13(4) having been taken by the Respondent

Bank, the secured creditor, the effective and efficacious alternative remedy of filing application before Debt Recovery Tribunal under Section 17 of the SARFAESI Act, 2002, questioning the legality of the measures taken by the Respondent Bank for enforcement of the security, in terms of Section 13(4) of the SARFAESI Act, 2002, is available to the petitioners and therefore, there is absolutely no reason as to why the petitioners should be permitted to invoke the extra ordinary jurisdiction of this court under Article 226 of the Constitution of India. Learned counsel submitted that as a matter of fact, the petitioners are guilty of concealment of material fact from this court inasmuch as, on 11.9.13, when the matter was taken up by this court for admission hearing, the petitioners were well aware about the proceedings taken by the Respondent Bank under Section 13(4) of the SARFAESI Act, 2002, however, they deliberately concealed the factum of proceedings taken as aforesaid from this court. In support of the contentions, learned counsel has relied upon the decisions of the Hon''ble Supreme Court in the matters of United Bank of India Vs. Satyawati Tondon and Others, AIR 2010 SC 3413 : (2010) 3 BC 495 : (2010) 3 CompLJ 585 : (2010) 7 SCALE 696 : (2010) 8 SCC 110 : (2010) 9 SCR 1 : (2010) 9 UJ 4395 : (2010) AIRSCW 7049 : (2010) AIRSCW 5267 , Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, (2010) 1 BC 698 : (2011) 101 CLA 146 : (2011) 162 CompCas 337 : (2011) 2 CompLJ 1 : (2011) 3 JT 159 : (2011) 2 RCR(Civil) 676 : (2011) 2 SCALE 233 : (2011) 2 SCC 782 : (2011) 106 SCL 1 : (2011) 2 SCR 602 : (2011) AIRSCW 1194 : (2011) AIRSCW 5913 : (2011) 1 Supreme 655 and GM, Sri Siddeshwara Co-operative Bank Ltd. and Another Vs. Sri Ikbal and Others, (2013) 116 CLA 110 : (2013) 5 CTC 200 : (2013) 11 JT 573 : (2013) 10 SCALE 396 : (2013) 10 SCC 83 .

15. Replying the preliminary objections raised on behalf of the Respondent Bank, learned counsel appearing for the petitioners submitted that admittedly, the Demand Notice earlier issued by the Respondent Bank under Section 13(2) of the SARFAESI Act, 2002 on 6.10.12 as also the notice dated 12.4.13 demanding possession of the secured assets were withdrawn by the Respondent Bank on 28.5.13 and therefore, the writ petition preferred by the petitioners earlier, questioning the action taken by the Respondent Bank as aforesaid was dismissed by the Jaipur Bench of this court vide order dated 28.5.13 as infructuous. Learned counsel submitted that while passing the order dated 11.9.13 in the present matter, a coordinate Bench of this court categorically observed that the Respondent Bank is required to explain its conduct in this regard besides answering the writ petition on merits and taking its objections as to its maintainability, if any. Learned counsel submitted that the Respondent Bank has not come up with any explanation for taking the proceedings afresh under Section 13(2) of the SARFAESI Act, 2002 vide Demand Notice dated 1.6.13. Learned counsel submitted that the petitioners'' loan account has been classified as NPA on 29.9.12 in defiance of guidelines of Reserve Bank of India. Learned counsel submitted that after declaration of the account as NPA, the interest cannot be added to the account and therefore, the action of the Respondent

Bank in adding the interest after declaration of the account as NPA, is unjustified. Learned counsel submitted that the mortgage of the immovable properties has not been created in the manner which is recognised or enforceable by law and therefore, the Respondent Bank is not entitled to take proceedings for enforcement of the security interest. Learned counsel submitted that while issuing the Demand Notice dated 6.10.12, the outstanding dues were quantified at Rs. 45.03 crores, which could not enhance to Rs. 52.41 crores in the short span of time. Learned counsel submitted that the distress sale of assets may not fetch the adequate realisation of the secured assets and therefore, the impugned proceedings taken by the Respondent Bank in high handed manner are not sustainable in the eyes of law. Learned counsel submitted that if the petitioners are permitted to sale the secured assets in the open market, the maximum value thereof shall be realised and the petitioners shall be in position to discharge the entire outstanding dues. Learned counsel submitted that on the facts and in the circumstances of the case, where the Respondent Bank is acting in most arbitrary manner and not accepting the proposal made by the petitioners for OTS, the petitioners are entitled to invoke the extra ordinary jurisdiction of this court under Article 226 of the Constitution of India.

16. Replying the arguments of the learned counsel appearing for the petitioners, learned counsel appearing for the Respondent Bank submitted that order dated 28.5.13 was passed by Jaipur Bench of this court, appreciating the relevant factual and legal position and if the petitioners were aggrieved by the same, nothing prevented them from availing the remedy of special appeal before the Jaipur Bench of this Court. Learned counsel submitted that on account of withdrawal of the first demand notice, there is no statutory bar on the Respondent Bank to issue the Demand Notice under Section 13(2) of the SARFAESI Act, 2002 de novo and therefore, the Respondent Bank has committed no illegality in taking the proceedings for recovery of the outstanding dues by issuing the impugned Demand Notice. Learned counsel submitted that while dismissing the petition vide order dated 28.5.13, the Jaipur Bench of this court has specifically observed that the Respondent Bank shall be free to take steps for recovery of the outstanding amount against the petitioners in accordance with law. Regarding the outstanding dues being enhanced to Rs. 52.41 crores, learned counsel submitted that the Demand Notice dated 6.10.12 contained the outstanding dues as on 30.6.12 whereas, the impugned demand notice dated 1.6.13 contains the outstanding dues as on 31.5.13. It is submitted that the difference in outstanding dues is attributable to the interest on the outstanding amount during the period from 1.7.12 to 31.5.13. Learned counsel submitted that if the petitioners have any submission to make in this regard, it is always open for them to make such submission before the Debt Recovery Tribunal by making an appropriate application under Section 17 of the SARFAESI Act, 2002 and therefore, all these questions are not required to be examined by this court in exercise of its extra ordinary jurisdiction under Article 226 of the Constitution of India.

17. I have considered the rival submissions and perused the material on record.

18. Indisputably, the Petitioner Company was granted various credit facilities by way of financial assistance by the Respondent Bank against the security interest created by the petitioner No. 3-borrower and the guarantors, the petitioners No. 1 and 2 herein, in favour of the Respondent Bank. It is also not in dispute that the security interest was created by the petitioners by way of equitable mortgage by deposit of the title deeds of various properties though, it is contended that the mortgage has not been created in the manner recognised and enforceable by law. That apart, though it is contended by the petitioners that the credit facilities were not extended by the Respondent Bank to the petitioners in full as promised yet, the default on the part of the petitioners in repayment of the outstanding dues, is not in dispute. In the considered opinion of this court, on account of withdrawal of the earlier Demand Notice dated 6.10.12 issued under Section 13(2) of the SARFAESI Act, 2002 and notice dated 12.4.13 demanding possession of the secured assets having been withdrawn, the Respondent Bank is not precluded from taking proceedings under the SARFAESI Act, 2002 afresh and therefore, the proceedings taken by the Respondent Bank by issuing the impugned Demand Notice under Section 13(2) of the SARFAESI Act, 2002, directing the petitioners to deposit the outstanding dues, quantified as aforesaid, cannot be held to be illegal or without jurisdiction for this reason.

19. It is to be noticed that Section 13(1) of the SARFAESI Act, 2002, which deals with enforcement of the security interest, specifically provides that notwithstanding anything contained in Section 69 or 69A of the Transfer of Property Act, 1982, any security interest created in favour of any secured creditor shall be enforceable without intervention of the court or tribunal, by such creditors in accordance with the provisions of the Act. Further, Section 13(2) of the SARFAESI Act, 2002 provides that when a borrower who is under a liability to secured creditor makes any default in repayment of secured debts and his account in respect of such debt is classified by the secured creditor as NPA then the secured creditor may require the borrower by notice in writing to discharge the liabilities to the secured creditor within 60 days from the date of notice, failing which secured creditors shall be entitled to exercise all or any of the rights under sub-section (4) of Section 13. As per Section 13(4) of the SARFAESI Act, 2002, in case of borrower failing in discharging his liability within the period specified in Section 13(2), the secured creditor is empowered to take recourse to any of the actions as specified including taking possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured assets. In this view of the matter, the action of the Respondent Bank in initiating the proceedings under Section 13(2) and 13(4) of the SARFAESI Act, 2002, cannot be said to be initiated acting without jurisdiction.

20. Admittedly, any person including borrower aggrieved by any of the measures adopted by the secured creditors referred to in sub-section (4) of Section 13 may make an application to the Debts Recovery Tribunal having jurisdiction in the

matter within 45 days from the date on which such measures had been taken and therefore, if aggrieved by the measures adopted by the Respondent Bank as aforesaid, nothing prevented the petitioners from availing the remedy available under Section 17 of the SARFAESI Act, 2002. It is pertinent to note that in terms of Section 17(3) of the SARFAESI Act, 2002, if the Debts Recovery Tribunal after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditors are not in accordance with the provisions of the Act and Rules made thereunder, may require restoration of possession of the secured assets to the borrower and declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor as invalid and may pass such order as may consider appropriate and necessary in relation to any of the course taken by the secured creditor under sub-section (4) of Section 13. In this view of the matter, the petitioners, if aggrieved by the action taken by the Respondent Bank under Section 13(4) of the SARFAESI Act, 2002 are entitled to avail the remedy available under Section 17 of the SARFAESI Act, 2002 before the Debt Recovery Tribunal.

21. It is not disputed before this court that taking proceedings in terms of Section 13(4) of the SARFAESI Act, 2002, the possession of the secured assets was taken by the Respondent Bank on 9.9.13 and 10.9.13 and therefore, the petitioners who were well aware about the measures taken by the Respondent Bank in terms of Section 13(4) of the SARFAESI Act, 2002, were expected to disclose the facts in this regard before this court when the matter was taken up in the first instance for admission hearing on 11.9.13. Suffice it to say that the conduct of the petitioners in not disclosing the factum of the measures adopted by the Respondent Bank under Section 13(4) of the SARFAESI Act, 2002, in the first instance, when the matter was taken up for consideration by this court, is not appreciated.

22. At this stage, it will be appropriate to refer to the decisions of the Hon''ble Supreme Court relied upon by the counsel for the petitioners.

23. In United Bank of India''s case (supra), while dealing with the matter regarding the power of the creditor bank against the borrower/guarantor in terms of provisions of Section 13(2) and (4) and Section 14 of the Act, the Hon''ble Supreme Court observed as under:-

"Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

(emphasis added)

24. In Kanaiyalal Lalchand Sachdev''s case (supra), the Hon''ble Supreme Court observed that an action taken under Section 14 of the Act of 2002 constitutes an action taken after the stage of Section 13(4) of the SARFAESI Act, 2002 and therefore, the same would fall within the ambit of Section 17(1) of the SARFAESI Act, 2002 and thus, the said Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the SARFAESI Act, 2002 by providing for an appeal before the Debt Recovery Tribunal.

25. In Sri Siddeshwara Cooperative Bank Ltd.''s case (supra), the Hon''ble Supreme Court inter alia relying upon its earlier decision rendered in United Bank of India''s case (supra), categorically held that the remedy under Section 17 of the SARFAESI Act, 2002 is an efficacious remedy and the borrower must avail the remedy and cannot be permitted to directly approach the High Court in extra ordinary jurisdiction under Article 226 of the Constitution of India.

26. In view of the discussion above, this court is of the considered opinion that the present writ petition does not suggest any special feature warranting interference by this Court in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India, bypassing the effective and efficacious remedy available to the petitioners under the relevant statute.

27. In the result, the writ petition fails, it is hereby dismissed. The petitioners shall be at liberty to take recourse to the remedy of appeal available to it under Section 17 of the SARFAESI Act, 2002, against the measures adopted by the Respondent Bank in terms of Section 13(4) of the SARFAESI Act, 2002. In the facts and circumstances of the case, since the petitioners were pursuing the present writ petition before this Court against the impugned action of the Respondent Bank, it is directed that if the petitioners files an appeal/application before the Debts Recovery Tribunal having jurisdiction in the matter, aggrieved by the measures adopted by the Respondent Bank under sub-section (4) of Section 13 of the SARFAESI Act, 2002, within a period of 30 days from the date of this order, the question of limitation will not come in their way and the appeal/ application, if any, filed within the stipulated period, shall be decided by the Tribunal on merits. Since the petitioners are being relegated to the remedy available under the relevant statute and therefore, it is further clarified that the appeal/application, if any, filed by the petitioners, shall be decided by the Debts Recovery Tribunal, uninfluenced by the observations, if any, made by this Court

touching the merits of the case. No order as to costs.

