
(2012) 02 CAL CK 0002
In the Calcutta High Court
Case No : C.O. No. 1543 of 2011

Amritraj Investments Pvt. Ltd.

APPELLANT

Vs

Dhanalakshmi Bank Ltd

RESPONDENT

Date of Decision : 20-02-2012

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(3A), 13(4), 17, 2(o)

Citation : (2012) 4 BC 63 : (2012) 2 CHN 604

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : P.K. Dutt, C.K. Dutta and Pravat Sil, for the Appellant; V. Raja Rao and A. Rao, for the Respondent

Judgement

Harish Tandon, J.—This revisional application is directed against judgment and order dated 3rd February, 2011, passed by the Debt Recovery Appellate Tribunal, Kolkata in Appeal No. 79 of 2009. A short but interesting question is raised in this revisional application by the petitioner as to whether it is an account which is declared as non-performing assets for non-payment of the term deposit or the property which is hypothecated and/or pledged for securing such term loan when depletes its value is termed as nonperforming assets.

2. According to the petitioner which is not disputed by the Financial Institutions/ Bank that the flat which stood as collateral security for such term loan would fetch much value than the claim of the bank and as such the action of the bank under the Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act after declaring the said asset as NPA is illegal and contrary to the aims and object for which such act was introduced.

3. Before dealing with such point, certain facts is required to be narrated.

4. On 30th September, 2003, the opposite party bank sanctioned a term loan of Rs. 32 lakhs against an equitable mortgage of the entire 5th floor of the

premises No. 45, Jhowtalla Road, Kolkata- 700019. An irrevocable Power of Attorney was executed to enable the opposite party bank to collect the rent directly from the tenant which would be adjusted against the said term loan. Subsequently, the tenant defaulted in making the payment on and from the month of June, 2005. On August 5, 2006, The opposite bank intimated to the petitioner that as on July 31, 2006, there is a total outstanding of Rs. 34,49,239/- where in turn the petitioner proposed for settlement of the aforesaid dues at Rs. 22 lakhs as the Bank has collected more than Rs. 10 lakhs as rent from the said tenant. Such proposal was not accepted by the bank as according to it, the petitioner is obliged to make the payment of a sum of Rs. 30,79,8957-.

5. The petitioner opposite party, thereafter, issued a notice u/s 13(2) of Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act on April 29, 2007 and thereafter issued farther notice u/s 13(4) of the said Act on February 22, 2008.

6. Challenging the aforesaid Act of the opposite party bank, the petitioner moved before the Debt Recovery Tribunal u/s 17 of the Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act which was registered as SA No. 68 of 2008. The Debt Recovery Tribunal Dismissed the said application and an appeal preferred against the said order before the Debt Recovery Appellate Tribunal being Appeal No. 79 of 2009 is also dismissed. Against refusal of the said application u/s 17 of the Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act by the Debt Recovery Tribunal which is stood affirmed before the Appellate Tribunal, the present revisional application is filed.

7. As indicated above, the point which is urged by the respective parties in this revisional application is the core issue which is to be decided herein.

8. By contending the "asset" means of fixed asset which is capable of fetching a value ascertainable in the form of money, the action of the bank in declaring such asset as non-performing assets (NPA) is illegal and contrary to the guidelines issued by the Reserve Bank of India from time to time.

9. A bone of contention of the petitioner is that the flat comprised in the entire 5th Floor of the Premises No. 45, Jhowtalla Road, Kolkata- 700019 has a present market value of above 123 lakhs whereas the claim of the opposite party bank is to the tune of 30 lakhs and odd and as such declaration of non-performing asset is illegal and bad. It is strenuously submitted that if the liability is more than the value of the asset then only such asset could be declared as non-performing asset and not otherwise. By contending so reliance is placed upon the judgment of the Apex Court in case of Transcore Vs. Union of India (UOI) and Another, .

10. By refuting the contention of the petitioner, the respondent bank submits that non-performing assets as defined in the said Securitisation & Reconstruction of Financial Assets and Enforcement of Security Interest Act means an account and not the fixed assets. It is further contended that the Reserve Bank of India

has issued a prudential norms on income recognition, asset classification and provisioning which contains the provision for declaration of nonperforming assets and the same has been strictly adhere to before declaring the said account as non-performing assets. It is further contended that the Apex Court judgment rendered in case of M/s. Transcore (supra) does not lay down the proposition as tried to be contended by the petitioner and placed certain paragraphs of the said judgment in support of the above contention.

11. The object aim and purpose for which the Securitisation Act in acted is well-defined by the Supreme Court in case of M/s. Transcore (supra), it has been held that the non-performing asset is nothing but a cost to the economy which basically is an account which becomes nonviable and non-performing in terms of the guidelines given by the Reserve Bank of India. The non-performing asset represents the amounts receivable and realisable by the financial institutions/bank.

12. The aforesaid aims, object and purpose are elucidated in Paragraph 12 which reads thus:

12. The NPA Act, 2002 is enacted to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith. The NPA Act enables the banks and FI to realize long-term assets, manage problems of liquidity, asset liability mismatch and to improve recovery of debts by exercising powers to take possession of securities, sell them and thereby reduce non-performing assets by adopting measures for recovery and reconstruction. The NPA Act further provides for setting up of asset reconstruction companies which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale. The said Act also empowers the said asset reconstruction companies to take over the management of the business of the borrower. The constitutional validity of the said Act has been upheld in the case of Mardia Chemicals Ltd. and Ors. vs. Union of India and Ors. reported in 2004 (4) 311. After the judgment of this Court in Mardia Chemicals, the amending Act 30 of 2004 was inserted,. By the said Act 30 of 2004, Section 19(1) of the DRT Act was recasted simultaneously with Section 13 of the NPA Act, 2002. These amendments were made in order to enable the banks/FIs to withdraw, with the permission of DRT, the O. As. made to it, and thereafter take action under the NPA Act. In the judgment in Mardia Chemicals (supra) this Court observed that, in cases where a secured creditor has taken action u/s 13(4), it would be open to the borrower to file an application u/s 17 of the NPA Act. In the said judgment, this Court further observed that if the borrower, after service of notice u/s 13 (2) of the NPA Act, raises any objection or places facts for consideration of the secured creditor, such reply to the notice must be considered such reply to the notice must be considered by the bank/FI with due application of mind and reasons for not accepting the objections briefly must be given to the borrower. In the said judgment, it is further stated that the reasons so communicated shall only be for

the purposes of information/knowledge of the creditor and such reasons will not give him any right to approach the Tribunal u/s 17 of the NPA Act. The appellant here in (M/s. Transcore) mainly relied on the said reasons given by this Court in Mardia Chemicals (supra) in support of its contention that the Notice dated 6.1.2003 under section 13(2) of NPA Act was merely a show cause notice and it did not constitute "action" under the NPA Act and, therefore, the said bank was obliged statutorily to apply for withdrawal of O.A. No. 354/99 before invoking the NPA Act.

13. Section 2(o) of the Securitisation Act defines non-performing assets in the following words:

(o) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset,-

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the directions or guidelines relating to assets classifications issued by the Reserve Bank;

14. The RBI in the prudential norms provided as to when the account can be classified as substandard, doubtful and loss assets. Paragraph 2.1.3 (i) of the said prudential norms which was issued by the RBI vide circular No. DBOD No. BP. Bc. 10/21.04.048/2004-05 dated 17.07.2004 defines the non-performing asset where the interest and/or installment of principal remain overdue for a purpose more than 180 days in respect of term loan. Substandard assets, default assets and loss assets are defined in the said prudential norms as:

4.1.1. Sub-standard Assets

A sub-standard asset was one, which was classified as NPA for a period not exceeding two years. With effect from 31 March, 2001, a sub-standard asset is one, which has remained NPA for a period less than or equal to 18 months. In such cases, the current net worth of the borrower/guarantor or the current market value of the security charged is not enough to ensure recovery of the dues to the banks in full. In other words, such an asset will have well-defined credit weakness that jeopardise the liquidation of the debt and are characterized by the distinct possibility that the banks will sustain some loss, if deficiencies are not corrected.

With effect from 31 March 2005, a sub-standard asset would be one, which has remained NPA for a period less than or equal to 12 months.

4.1.2. Doubtful Assets

A doubtful asset was one, which remained NPA for a period exceeding two years.

With effect from 31 March 2001, an asset is to be classified as doubtful, if it has remained NPA for a period exceeding 18 months. A loan classified as doubtful has all the weaknesses inherent in assets that were classified as sub-standard, with the added characteristic that the weaknesses make collection or liquidation in full, - on the basis of currently known facts, conditions and values- highly questionable and improbable.

With effect from March 31, 2005, an asset would be classified as doubtful if it remained in the sub-standard category for 12 months.

4.1.3. Loss Assets

A loss asset is one where loss has been identified by the bank or internal or external auditors or the RBI inspection but the amount has not been written off wholly. In other words, such an asset is considered uncollectible and of such little value that its continuance as a bankable asset is not warranted although there may be some salvage or recovery value.

15. Therefore, it is only when the said account being the asset of the bank becomes doubtful, substandard and loss, the same can be declared as non-performing asset as held by the Supreme Court in case of M/s. Transcore(supra) in these words:

It is only when these assets in the hands of the bank or FI becomes sub-standard, doubtful or loss then the account or the asset becomes classifiable as a non-performing asset and it is only then the NPA Act comes into operation.

16. Section 13(2) comes in operation when the borrower makes any default in repayment of the secured debt or any installment and his account in respect of such debt is classified as non-performing assets which could obviously be done if the same has become substandard doubtful or loss. The aforesaid classification can be done in accordance with the guidelines issued by the RBI as held in case of M/s. Transcore (supra) in the following words:

That notice of demand is based on the footing that the debtor is under a liability and that his account in respect of such liability has become sub-standard, doubtful or loss. The identification of debt and the classification of the account as NPA is done in accordance with the guidelines issued by RBI.

17. Admittedly in the instant case, there has been no payment towards the debt after the cessation of payment of rent by the tenant for more than 180 days and the action of the bank in declaring the said account as non-performing assets in terms of the guidelines issued by the RBI, cannot be faulted with. Furthermore, in a representation u/s 13(3A) of the Securitisation Act there is no objection taken by the petitioner relating to the declaration of the asset as non-performing assets.

18. Thus I do not find any merit in the instant revisional application.

19. The same is hereby dismissed.

20. However, there shall be no order as to costs. Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis.