

(2011) 09 SHI CK 0097
In the High Court Of Himachal Pradesh
Case No : CWP No. 1585 of 2011

Amy Agro Pvt. Ltd.

APPELLANT

Vs

State Bank of Patiala and Another

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 140
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(1), 13(2), 13(4), 14, 17

Citation : (2011) 09 SHI CK 0097

Hon'ble Judges : V.K. Ahuja, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Ahuja, J.—The present writ petition has been filed under Article 226 of the Constitution of India praying that a writ of certiorari be issued to the Respondents by quashing Annexure P-14 possession notice dated 4.3.2011. The other prayer made in the petition is for issuance of writ of mandamus directing the Respondents to release the working capital which was sanctioned vide letter dated 22.6.2007 Annexure P-4. Another prayer made in the petition is for issuance of writ of mandamus directing the Respondents not to sell the unit in pursuant to the possession notice dated 4.3.2011.

2. Brief facts leading to the filing of the present writ petition are that the Petitioner is a company registered under the Companies Act. The project of the Petitioner was funded by term loan from Himachal Pradesh Financial State Corporation and the Petitioner company started commercial production in May, 2005. The Petitioner obtained total loan from the Himachal Pradesh State Financial State Corporation to the tune of Rs. 22.50 Lacs as a term loan and soft loan of Rs. 7.50 Lacs. It was under a scheme known as Non Employee Scheme (NEF) and the funds were used for construction of the building and installing the machinery. Before releasing the amount, the Himachal Pradesh Financial State

Corporation took all the papers of the property situated at Nalagarh and also by taking guarantee of one Ravinder Kaur Kang by submitting the documents of her property/flat situated in Shimla.

3. It was further alleged that after installation of unit and machinery, the Petitioner needed working capital to run his unit and approached Respondent No. 1. Accordingly, Respondent No. 1 wrote a letter to Himachal Pradesh Financial State Corporation regarding the proposal and asked for No Objection Certificate (NOC) from the Himachal Pradesh Financial State Corporation, who gave No Objection Certificate to the Respondents if the entire loan taken from the Himachal Pradesh Financial State Corporation is paid back. The Respondents sanctioned the loan facility to the present Petitioner. The working capital of Rs. 10 Lacs was also included in the sanctioned loan proposed. But the Respondents returned back the amount taken by the Himachal Pradesh Financial State Corporation and no working capital was released. The Petitioner approached the Respondents for working capital. The Bank prepared appraisal report. The Respondents directed the Petitioner to furnish a third party guarantee acceptable to the bank since earlier guarantee was waived of. The Petitioner was unable to pay back the loan amount taken by him and a notice u/s 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act was issued and after issuance of notice, the property of the Petitioner was taken in possession vide notice dated 4.3.2011. Feeling aggrieved, the Petitioner has filed the present petition praying for the relief's mentioned above.

4. A notice of the petition was issued to the Respondents, who filed reply.

5. I have heard learned Counsel for the parties and have gone through the documents on record.

6. The submissions made by the learned Counsel for the Petitioner were that as per letter Annexure P-2 dated 14.11.2006, the Respondents had agreed to take over the loan as disbursed by the Himachal Pradesh Financial State Corporation subject to some conditions. It was also reported vide Annexure P-3 of the Himachal Pradesh Financial State Corporation to the Respondents that the account is regular and Title Deeds were to be released in favour of the Petitioner after acceptance of the loan of the Corporation. The Respondents vide their letter dated 22.6.2007 Annexure P-4 addressed to the Petitioner had agreed to take over the existing term loan and of the company raised from Himachal Pradesh Financial Corporation amounting to Rs. 31.17 Lacs and further prayed for fresh term loan of Rs. 8 Lacs for construction of boundary wall etc. and a term loan of Rs. 0.83 Lac for payment of BIS certificate Renewal fee and also sought security and equitable mortgage of land and building of the factory and equitable mortgage of the flat at Shimla along with other bank guarantees sought by the Respondents. The properties were to be valued by the valuer of the bank.

7. In reply filed by the Respondents, they have pleaded that the Petitioner was granted a loan of Rs. 32.86 Lacs, which was paid to the Himachal Pradesh

Financial Corporation and a further sum of Rs. 8 Lacs was released in favour of the Petitioner for purchase of machinery etc. In regard to the sum of Rs. 10 Lacs towards the working capital, it was pleaded that it was not released in favour of the company as the Director of the Company failed to comply with the terms and conditions of the loan as requested from time to time and as per letter dated 14.12.2009 Annexure R-1. In their letter Annexure R-1, they have sought several information from the Petitioner. Thus, it was pleaded that since the Petitioner failed to repay the amount as agreed and the amount was declared as NPA proceedings were initiated under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement and Security Interest Act, 2002, hereinafter referred to as the "said Act". Thereafter, a notice was issued, which was served upon the Petitioner company and the Petitioner failed to make any representation against the notice nor paid any amount. It was pleaded that a sum of Rs. 52 Lacs is due against the Petitioner, which he had failed to pay and accordingly, the action was taken in accordance with law.

8. A preliminary objection was also taken by the Respondents in the reply that in view of the law laid down by the Apex Court, the petition is not maintainable, which shall be referred below.

9. The submissions made by the learned Counsel for the Petitioner is that there was no willful default on the part of the Petitioner and since the Respondents had refused to sanction the working capital of Rs. 10 Lacs as agreed by them, there has been infringement of his fundamental right and as such, he is entitled to the relief's claimed by him.

10. On the other and, the submissions made by the learned Counsel for the Respondents were that there is no fundamental right of the Petitioner to get the loan and the unit was declared as Non Performing Assets (NPA) in 2008 and notice was issued. It was also submitted that the Petitioner had the remedy to file representation under the said Act u/s 13(4) and there was also remedy to file an appeal u/s 17 of the said Act, but no such action was taken and jurisdiction of the Civil Court was barred u/s 34 of the said Act.

11. To substantiate his submissions that the jurisdiction can be exercised by this Court, the learned Counsel for the Petitioner had relied upon the decision in United Bank of India Vs. Satyawati Tondon and Others, The observations made in Paras 36 and 37 are relevant, which may be reproduced below:

36. We have heard the learned Counsel for the Appellant and perused the record. Normally, this Court does not interfere with the discretion exercised by the High Court to pass an interim order in a pending matter but, having carefully examined the matter, we have felt persuaded to make an exception in this case because the order under challenge has the effect of defeating the very object of the legislation enacted by Parliament for ensuring that there are no unwarranted impediments in the recovery of the debts, etc. due to banks, other financial institutions and secured creditors.

37. The question whether the Appellant could have issued notices to Respondent 1 under Sections 13(2) and (4) and filed an application u/s 14 of the SARFAESI Act without first initiating action against the borrower i.e. Respondent 2 for recovery of the outstanding dues is no longer res intergra. In Bank of Bihar Ltd. Vs. Dr. Damodar Prasad and Another, , this Court considered and answered in affirmative the question whether the Bank is entitled to recover its dues from the surety and observed: (AIR p. 299, para 6)

6. ...It is the duty of the surety to pay the decretal amount. On such payment he will be subrogated to the rights of the creditor u/s 140 of the Contract Act and he may then recover the amount from the principal. The very object of the guarantee is defeated if the creditor is asked to postpone his remedies against the surety. In the present case the creditor is a banking company. A guarantee is a collateral security usually taken by a banker. The security will become useless if his rights against the surety can be so easily cut down.

12. It was finally held in Para-40 as under:

40. In view of the law laid down in the aforementioned cases, it must be held that the High Court completely misdirected itself in assuming that the Appellant could not have initiated action against Respondent 1 without making efforts for recovery of its dues from the borrower, Respondent No. 2.

13. It was observed that facts of that case show that even after receipt of notices under Sections 13(2) and (4) and order passed u/s 14 of the Act, Respondents did not bother to pay the outstanding dues and only a paltry sum was paid. An undertaking was given to pay the balance amount in instalments, but the Respondent did not honour her commitment. Thus, it was held that the action taken by the Appellant for recovery of its dues by issuing notices under Sections 13(2) and 13(4) and by filing an application u/s 14 cannot be faulted on any legally permissible ground and in view of the Hon'ble Supreme Court, the High Court committed a serious error by entertaining the writ petition of Respondent No. 1.

14. The above decision rather goes as against the Petitioner and it was observed in Para 46 that if the Petitioner is able to show that its case falls within any of the exceptions carved out in Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar, or Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, and Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, then the High Court may, after considering all the relevant parameters and public interest, pass an appropriate interim order.

15. On the other hand, learned Counsel for the Respondents had relied upon the following decisions apart from the above decision to substantiate his submissions:

Reliance was placed upon the decision in Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others, The observations made in Paras 18 and 22 are relevant, which may be reproduced below:

Section 14 of the Act provides that the secured creditor can file an application before the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction, the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor. Therefore, it follows that a secured creditor may, in order to enforce his rights u/s 13(4), in particular Section 13(4)(a), may take recourse to Section 14 of the Act.

An action u/s 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action u/s 13(4) of the Act, by providing for an appeal before the DRT.

Reliance was also placed upon the decision in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, their lordships had referred in Para-46 of the judgment to the objections, which can be raised by the borrower in reply to the notice u/s 13(2) of the Act and it was observed in Para-46 as under:

46. We are holding that it is necessary to communicate the reasons for not accepting the objections raised by the borrower in reply to the notice u/s 13(2) of the Act, more particularly for the reason that normally in the event of non-compliance with notice, the party giving notice approaches the court to seek redressal but in the present case, in view of Section 13(1) of the Act the creditor is empowered to enforce the security himself without intervention of the court. Therefore, it goes with logic and reason that he may be checked to communicate the reason for not accepting the objections, if raised and before he takes the measures like taking over possession of the secured assets, etc.

16. It was also observed in Para-50 that an appeal is entertainable before the Debts Recovery Tribunal only after such measures as provided in Sub-section (4) of Section 13 are taken and Section 34 bars to entertain any proceedings in respect of a matter which the Debts Recovery Tribunal or the Appellate Tribunal is empowered to determine. Thus, it was observed that it can be said that no remedy is available to the borrowers and the jurisdiction is very much of the Civil Court, where for example, the action of the secured creditor is alleged to be fraudulent or his claim may be so absurd and untenable which may not require any probe whatsoever or to say precisely to the extent that the scope is permissible to bring an action in the Civil Court in the cases of English mortgages.

17. It is, therefore, clear from the perusal of the decisions of the Hon'ble Supreme Court that they have clearly laid that when notices are issued under the provisions of the Act and action is taken by the Debts Recovery Tribunal and the Act provides a complete remedy for the Petitioner, the writ jurisdiction should be exercised sparingly and in exceptional circumstances. The Petitioner has not

been able to bring home his case under any of the exceptional circumstances except that there was violation of his fundamental rights to get loan. This is not the fundamental right to get loan and the case of the Petitioner had to be considered on merits and he had to comply with the conditions laid down for the grant of loan. There is nothing that the Petitioner complied with those conditions and furnished guarantee as demanded by the Respondents and accordingly, the action was taken under the provisions of the Act and no case is made out for exercising the jurisdiction of this Court.

18. In view of the above discussion, I accordingly, hold that there is no merit in the petition filed by the Petitioner, which is dismissed, so also the pending miscellaneous application(s), if any.