
(2014) 09 JH CK 0084
In the Jharkhand High Court
Case No : W.P. (C) No. 4530 of 2014

Anil Kumar Akela

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 10-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 — Section 13(2), 13(3-A), 13(4), 17, 35

Citation : (2014) 09 JH CK 0084

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Advocate : Sumeet Gadodia, Advocates for the Appellant; Rajesh Kumar,
Advocates for the Respondent

Judgement

S. Chandrashekhar, J.—The petitioner, one of the Directors of M/s. Buddha Vihar Construction Pvt. Limited has challenged the Auction Notice dated 21.08.2014 in the present writ petition.

2. On 27.08.2010, M/s. Buddha Vihar Construction Pvt. Limited took Working Capital Demand loan of Rs. 1,40,00,000/- from the respondent - Bank of India. The petitioner stood as a Guarantor and deposited 4 Title Deeds of property. On 25.09.2012, a notice under Section 13(2) of the SARFAESI Act, 2002 was issued which was subsequently withdrawn vide letter dated 20.06.2013. Thereafter, the respondent - Bank filed OA No. 194 of 2013 before the Debts Recovery Tribunal, Ranchi for recovery of Rs. 01,63,51,070/- along with pendente lite and future interest. While proceeding in OA No. 194 of 2013 continued, the respondent - Bank arbitrarily and illegally issued notice dated 11.10.2013 under Section 13(4) of the SARFAESI Act, 2002 and took possession of the mortgaged property. The Auction Notice dated 21.08.2014 was published on 22.08.2014 in the Hindi daily newspaper namely, "Dainik Bhaskar, Jamshedpur Edition" for auction sale of three mortgaged properties of the petitioner. Though, the bank statement of the loan amount would reflect a different figure, in notice dated 21.08.2014 an

amount of Rs. 1,44,31,442/- has been shown due from the petitioner. The petitioner has already paid the amount of Rs. 1 Crore and 21 Lacs against the loan amount and interest and he has only defaulted in payment of some instalments. The petitioner has been continuously depositing the instalment and lastly an amount of Rs. 2 Lacs was deposited on 21.04.2004 on which date, the balance Loan liability was only Rs. 76,87,484/-.

3. Heard the learned counsel appearing for the parties and perused the documents on record.

4. The learned counsel appearing for the petitioner submitted that two proceedings simultaneous under The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 as well as under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are not permissible and till the decision in OA No. 194 of 2013, the respondent - Bank was duty-bound not to initiate auction under the SARFAESI Act, 2002 and therefore, the entire proceeding including the auction notice dated 21.08.2014 issued under the SARFAESI Act, 2002 is illegal and liable to be quashed. Referring to statement of bank account, a copy of which has been filed as Annexure-5 with the writ petition, the learned counsel for the petitioner would contend that between the period 21.05.2013 and 21.04.2014, the petitioner has deposited as many as 11 deposits and the total dues recoverable for the loan amount is shown as Rs. 76,87,484/- only. Out of the 11 deposits, one deposit is for Rs. 20 Lacs and 2 deposits of Rs. 6 Lacs each with another deposit of Rs. 5 Lacs. It is thus contended that from the statement of the loan account of the petitioner, it is apparent that the petitioner intended to make payment however, the respondent - Bank has illegally issued the auction notice dated 21.08.2014. It is further submitted that the object behind the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is to recover the money due to the bank/financial institutions and since the petitioner has shown intention to repay dues to the respondent - Bank, the auction notice dated 21.08.2014 is liable to be quashed.

5. The learned counsel appearing for the respondent - State Bank of India submitted that the earlier notice under Section 13(2) of the SARFAESI Act, 2002 which was issued on 25.09.2012 was withdrawn due to technical reasons and therefore, a fresh notice under Section 13(2) was issued in proper format on 20.06.2013. The petitioner submitted representation under Section 13(3-A) on 24.08.2013 which was immediately replied vide letter dated 02.09.2013. On the promise of the petitioner to pay the monthly instalments and other dues regularly further action under SARFAESI Act was kept at abeyance and therefore, the possession notice under Section 13(4) was not published. However, after 17.10.2013 the petitioner miserably failed to deposit the loan amount. It is further submitted that in Transcore Vs. Union of India (UOI) and Another, , it has been categorically held by the Hon''ble Supreme Court that the proceeding under

the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 can continue simultaneously. It is further stated that the only remedy to the petitioner is to move an application under Section 17 of the SARFAESI Act, 2002 and the petitioner cannot approach this Court challenging the auction notice dated 21.08.2014 by filing the writ petition. It is further submitted that, as a matter of fact, the petitioner has already filed SARFAESI Appeal on 25.11.2013 itself challenging the notices under Section 13(2) and 13(4) as well as possession notice dated 11.10.2013.

6. I have carefully considered the submissions of the learned counsel appearing for the parties and perused the documents on record.

7. Before adverting to the contention raised by the learned counsel for the petitioner, it is necessary to examine the maintainability of the writ petition. In *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, , upholding the constitutional validity of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Act, 2002, the Hon"ble Supreme Court observed as under;

81. "..... The effect of some of the provisions may be a bit harsh for some of the borrowers but on that ground the impugned provisions of the Act cannot be said to be unconstitutional in view of the fact that the object of the Act is to achieve speedier recovery of the dues declared as NPAs and better availability of capital liquidity and resources to help in growth of the economy of the country and welfare of the people in general which would subserve the public interest."

8. In *United Bank of India Vs. Satyawati Tondon and Others*, , the Hon"ble Supreme Court has observed that,

43. "..... 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."

9. In *Satyawati Tondon (supra)* case, after taking note of the judgment in *Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes*, and other judgments the Hon"ble Supreme Court observed thus;

55. "It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

10. Whether the Debts Recovery Tribunal can deal with a situation arising after the notice under Section 13(4) of the SARFAESI Act, 2004 or not has also been settled by the Hon"ble Supreme Court in *Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill*, wherein the Hon"ble Supreme Court has held that "... the law is otherwise and it contemplates that the action taken by a secured creditor in terms of Section 13(4) is open to scrutiny and cannot only be set-aside but even the status quo ante can be restored by the Debt Recovery Tribunal".

11. The contention advanced on behalf of the petitioner that he has shown sufficient bona fide for making repayment of the loan amount by giving as many as 12 deposits within one year and therefore, the respondent - Bank should not have issued the Auction Notice dated 21.08.2012 also does not merit acceptance. The repayment of a loan liability has to be in terms of the repayment Schedule or as directed by the creditor - Bank and certainly not as per the convenience of the borrower. The petitioner has not brought on record any material to indicate that the payments made by him were in terms of the respondent - Bank's agreement. Moreover, the Debts Recovery Tribunal has sufficient power to stay the proceeding if the borrower deposits the amount due for payment.

12. It is also a matter of record that the petitioner has filed a SARFAESI Appeal before the Debts Recovery Tribunal, Ranchi challenging notice dated 11.10.2013 under Section 13(2) and 13(4) of the SARFAESI Act, 2002. It cannot be disputed that the petitioner can challenge auction notice dated 21.08.2014 before the Debts Recovery Tribunal. Insofar as, the contention of the petitioner that the proceeding under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 as well as proceeding under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 cannot continue simultaneously, the issue is no longer res integra. The Hon"ble Supreme Court, in *Transcore Vs. Union of India & Anr.* (supra) and *Mathew Varghese Vs. M. Amritha Kumar and Others*, cases, has categorically held that the proceedings in both the Acts are complementary to each other and both can continue simultaneously.

13. For dealing with the contention that before resorting to provisions under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Act, 2002, the respondent - Bank should have withdrawn Original Application filed before the Debts Recovery Tribunal, Ranchi, certain provisions of the SARFAESI Act as well as the Recovery of Debts Due to Banks and Financial

Institutions Act, 1993 need to be examined. Section 37 of the SARFAESI Act, 2002 provides that, the provisions of this Act and the Rules made thereunder shall be in addition to, and not in derogation of, the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or any other law for the time being in force. Section 35 of the SARFAESI Act gives the overriding effect to the provisions of this Act notwithstanding anything inconsistent contained in any other law for the time being in force. In *Mathew Varghese Vs. M. Amritha Kumar and Others*, , a somewhat identical question has been answered by the Hon''ble Supreme Court in these words,

45. "A close reading of Section 37 shows that the provisions of the SARFAESI Act or the Rules framed thereunder will be in addition to the provisions of the RDDB Act. Section 35 of the SARFAESI Act states that the provisions of the SARFAESI Act will have overriding effect notwithstanding anything inconsistent contained in any other law for the time being in force. Therefore, reading Sections 35 and 37 together, it will have to be held that in the event of any of the provisions of the RDDB Act not being inconsistent with the provisions of the SARFAESI Act, the application of both the Acts, namely, the SARFAESI Act and the RDDB Act, would be complementary to each other. In this context reliance can be placed upon the decision in *Transcore Vs. Union of India*. In Para 64 it is stated as under after referring to Section 37 of the SARFAESI Act: (SCC p. 162)

64. According to American Jurisprudence, 2d, Vol. 25, p. 652, if in truth there is only one remedy, then the doctrine of election does not apply. In the present case, as stated above, the NPA Act is an additional remedy to the DRT Act. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Even according to Snell's Principles of Equity (31st Edn., p. 119), the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, therefore, the doctrine of election has no application."

14. I am of the opinion that the present writ petition is not maintainable and in fact this is an abuse of process of law. The petitioner has already approached the Debts Recovery Tribunal, Ranchi by filing a SARFAESI Appeal under Section 17 of the Act and no valid ground has been disclosed by the petitioner for rushing to this Court by filing the present writ petition.