(2010) 02 GUJ CK 0035

In the Gujarat High Court

Case No : Special Civil Application 1123 of 2010

Authorised Officer, Canara Bank APPELLANT

Vs

Sulay Traders and Others RESPONDENT

Date of Decision : 25-02-2010

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(1), 13(2), 13(3A), 13(4), 14

Citation : (2010) 51 GLR 770

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : Vishwas K. Shah, for K.I. Shah, for the Appellant; P.S. Champaneri, for the Respondent

Judgement

Jayant Patel, J.—The petitioner by this petition has challenged the order dated 20-1-2010 passed by the Chief Metropolitan Magistrate in Misc. Criminal Application No. 13 of 2010, whereby he has issued notice upon the opponent therein against whom the order u/s 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "Securitisation Act") has been prayed.

2. As larger question had arisen in the present petition as to whether the Magistrate could exercise the power of issuing notice to the borrower or the party against whom the application is made u/s 14 of the Securitisation Act or not, the notice was ordered to be issued to the Government Pleader on behalf of the State Government as well as to the learned Assistant Solicitor General on behalf of the Central Government. Thereafter, the learned Government Pleader had called for the remarks of the Executive Magistrate regarding the exercise of the power u/s 14 of the Securitisation Act and he has placed on record the comments received by him together with the suggestion.

3. I have heard the learned Assistant Solicitor General Mr. Champaneri. After the

comments received on behalf of the State Government, Mr. Shah, learned Counsel for the petitioner is also heard.

4. At this stage, it deserves to be recorded that this Court had an occasion to consider the question, of course at the admission stage, as to whether the learned Metropolitan Magistrate was required to issue the notice u/s 14 of the Securitisation Act to the borrower or that he had only to issue the orders u/s 14 of the Act without verification of the condition precedent for exercise of the powers or not, in the case of Al-fare Textile and Engineering Pvt. Ltd. v. Bombay Mercantile Co-op. Bank Ltd. in Spl. C.A. No. 11674 of 2008 and it was observed by the Court, inter alia as under:

8. The larger question which may arise for consideration is mode and manner of the exercise of the power by the learned Magistrate u/s 14 of the Securitisation Act for providing police assistance to me financial institution. As per the scheme of the Act read with the provisions of Section 14 of the Securitisation Act, it prima facie appears that it is required for the learned Magistrate to verify the record to the extent that the conditions precedent for exercise of the power by the Bank u/s 13(4) of the Securitisation Act are satisfied, and thereafter, there was resistance to take possession, and hence, the application was made before the learned Magistrate by the financial institution/Bank.

9. As per the scheme of the Act, following aspects are required to be verified/ examined by the learned Magistrate, while exercising power u/s 14 of the Securitisation Act.

(A) The transaction of the mortgaged property.

(B) The declaration of the Account as N.P.A.

(C) The issuance of the notice u/s 13(2) of the Securitisation Act and the receipt thereof by the borrower, or the person against whom order is to be passed.

(D) The reply of the borrower or the guarantor as the case may be, or the person against whom the order is to be passed.

(E) The decision of the Bank, if any, with the proof for communication of the same to the person concerned.

(F) The declaration that after the communication of the decision u/s 13(3A) of the Securitisation Act, the payment is not fully made by the borrower and such would include the details of the payment, if any, made by the borrower after notice u/s 13(2) of the Securitisation Act, or after communication of the decision u/s 13(3A) of the Securitisation Act, as the case may be.

(G) The statement mentioning the net amount outstanding, as recoverable by the Bank.

(H) The details of the litigation if any, for recovery of the amount, may be before the Civil Court, or may be before the D.R.T. or before the Board of Nominees or before any forum known to law as the case may be.

(I) The statement to the effect that no prohibitory order is passed by any competent forum in such proceedings or the order, if any, which would result into putting clog over the exercise of the power under the Securitisation Act by the financial institution/Bank.

(J) The Bank has attempted to take possession u/s 13(4) of the Securitisation Act, if any, and if not the reasons thereof.

(K) The resistance, if any, made by the borrower or person concerned against whom order is prayed.

(L) The status of the property as per the information of the Bank whether vacant, occupied or not.

10. It is only after the aforesaid details are submitted, the learned Magistrate would be required to examine the same, and after the conditions precedent for exercise of the power u/s 13(4) of the Securitisation Act are verified, the order u/s 14 of the Securitisation Act may be passed by the learned Magistrate.

11. If the learned Magistrate has any doubt about the genuineness of the statement made, or the reliability of the statement of the statement made, or about the condition precedent for exercise of the power u/s 13(4) of the Securitisation Act, he may also be required to issue notice to the borrower, and thereafter, he may exercise the power u/s 14 of the Securitisation Act.

12. However, it cannot be concluded that the power to be exercised u/s 14 of the Securitisation Act is only mechanical exercise of the power and the learned Magistrate without issuing any notice in every case, even if, the conditions precedent are not verified, would be required to issue order u/s 14 of the Securitisation Act for providing police assistance.

13. The attempt was made by the learned Counsel appearing for the respondent to contend that in view of the decision of this Court in case of Bank of India Vs. Pankaj Dilipbhai Hemnani and Others, the learned Magistrate is not required to exercise judicial power, but the power to be exercised by him is ministerial power, and therefore, no notice is required to be issued. It was also submitted that as per the decision of the Bombay High Court in case of Trade Well; Sunil K. Mehta v. Indian Bank in Appeal No. 2767 of 2006 and allied matter decided on 2-4-2007, no notice is required to be issued by the learned Magistrate before passing order u/s 14 of the Securitisation Act. Therefore, the learned Magistrate was justified in passing the order in the present case, without issuing notice to the borrower.

14. The learned Counsel has also relied upon the decision of this Court in case of Tensile Steel Ltd. and Ors. v. Punjab & Sind Bank and Ors. reported at 2006 (4) GLR 3013 and more particularly the observation made at Paragraph No. 19 to the effect that the Section does contemplate notice to the borrower/ guarantor or

hearing borrower/guarantor, and therefore, it was submitted that the notice is not required to be issued.

15. It may be that the Section may not provide for hearing, but the same would not absolve the learned Magistrate from verification of the requirement for exercise of the power u/s 13(4) of the Securitisation Act, by the borrower or exercise of the power by him u/s 14 of the Securitisation Act while issuing the order for providing police assistance to the extent of breaking open of the lock and to take over the possession. Therefore, even if the principles are considered, it may be that generally notice may not be required, but verification at the end of the learned Magistrate of the requisite condition cannot be avoided nor can be kept aside, while exercise of the power u/s 14 of the Securitisation Act. Further, it is only at the time of verification upon doubt created, or reliability of the statement is at doubt or that there is any prohibitory order concerning to the recovery of the dues by the financial institution of any competent forum, in such a particular case notice may also be required to be issued by the learned Magistrate. Therefore, decision cannot be read to conclude that in every case irrespective of the facts brought before the learned Magistrate by the financial institution, no notice whatsoever is required to be issued.

It is true that thereafter, the said Special Civil Application, vide order dated 7-9-2009 came to be finally disposed of and the aspects of interim direction is not expressly considered in the final order dated 7-9-2009, however in the said order, at Para 12, the Court observed thus:

Section 14 of the Act is about seeking aid and assistance for taking measures u/s 13(4) of the Act, and therefore, no independent or exclusive power is conferred upon the Magistrate or designated officer. While exercising powers u/s 14 of the Act, the Magistrate or the designated officer performs ministerial duty and no adjudication is invoked. That verification of basic requirements prior to taking measures u/s 13(4) of the Act will be sufficient compliance while exercising such powers, since Sub-section (1) of Section 14 nowhere contemplates that powers under this Section be exercised only when resistance is shown by the borrower or guarantor. In fact, usage of force or assistance of police is ordered only when Magistrate on his own or on the basis of averments made in the application of the secured creditor, finds it necessary, he can order taking possession of the property in question by usage of police force.

(Emphasis supplied)

Therefore, the question of verification of the basic requirement prior to taking measures u/s 13(4) of the Act is observed in the final order also.

5. It was submitted by the learned Counsel for the petitioner that anomalous situation arise before different Magistrate of the same State inasmuch as if the matter is filed before the Metropolitan Magistrate Court for the Metropolitan area of Ahmedabad city, as a course all Magistrates are issuing notice. Whereas if the application is filed before the Executive Magistrate, different situation prevails.

Some Executive Magistrates are issuing notice whereas, some Executive Magistrates straightaway pass the order. It was therefore submitted by the learned Counsel for the petitioner as well as the learned Government Pleader and the learned Assistant Solicitor General that this Court in exercise of the power under Article 226/227 of the Constitution may streamline the procedure and may also make observations for the manner and mode of exercising of the power by the learned Magistrate while rendering assistance to the secured creditor u/s 14 of the Securitisation Act. It is on account of the aforesaid, this Court had called upon the learned Government Pleader as well as the learned Assistant Solicitor General to make their submissions for streamlining the exercise of the power, though may be ministerial function so that such power may not be exercised in a mechanical manner, which may result into irreversible situation at a later stage or the purpose of the Act with which the power is clothed u/s 14 of the Act to the Magistrate may not be frustrated.

6. Having considered the above and after taking into consideration the provisions of the Securitisation Act, it deserves to be observed that the power u/s 14 of the Securitisation Act with the Magistrate is to render assistance to the secured creditor, but before such assistance is rendered u/s 14 of the Act, following three aspects are required to be considered by the learned Magistrate:

(1) He has to verify the record to the extent that the conditions precedent for exercise of the power by the Bank u/s 13(4) of the Securitisation Act are satisfied.

(2) That there was resistance to take possession. Though, such resistance may not be sine qua non in all cases.

(3) The application is made before the learned Magistrate by the financial institutions by giving the following details-

(A) The transaction of the mortgaged property.

(B) The declaration of the Account as N.P.A.

(C) The issuance of the notice u/s 13(2) of the Securitisation Act and the receipt thereof by the borrower, or the person against whom order is to be passed.

(D) The reply of the borrower or the guarantor as the case may be, or the person against whom the order is to be passed.

(E) The decision of the Bank, if any, with the proof for communication of the same to the person concerned.

(F) The declaration that after the communication of the decision u/s 13(3A) of the Securitisation Act, the payment is not fully made by the borrower and such would include the details of the payment, if any, made by the borrower after notice u/s 13(2) of the Securitisation Act, or after communication of the decision u/s 13(3A) of the Securitisation Act, as the case may be.

(G) The statement mentioning the net amount outstanding, as recoverable by the Bank.

(H) The details of the litigation if any, for recovery of the amount, may be before the Civil Court, or may be before the D.R.T. or before the Board of Nominees or before any forum known to law as the case may be.

(I) The statement to the effect that no prohibitory order is passed by any competent forum in such proceedings or the order, if any, which would result into putting clog over the exercise of the power under the Securitisation Act by the financial institution/Bank.

(J) The Bank has attempted to take possession u/s 13(4) of the Securitisation Act, if any, and if not the reasons thereof.

(K) The resistance, if any, made by the borrower or person concerned against whom order is prayed.

(L) The status of the property as per the information of the Bank whether vacant, occupied or not.

7. After the aforesaid details are submitted, the learned Magistrate would be required to examine the same and verify the aspects being condition precedent for exercise of the power u/s 13(4) of the Act. If the learned Magistrate has any doubt about the genuineness of the statement or the reliability of the statement made, or about the compliance of any condition precedent for exercise of the power u/s 13(4) of the Securitisation Act, he has two options; one is that, he may call upon the Bank itself to supply the necessary details on any aspects, if he is not satisfied about the condition precedent for exercise of the power u/s 13(4) of the Securitisation Act; the second is that he may issue the notice to the borrower for verification of the existence of any fact which is required to be verified by him. Thereafter, he may proceed for exercise of the power u/s 14 of the Securitisation Act.

8. Be it noted that the Magistrate while exercising power u/s 14 of the Securitisation Act is required to verify the existence of the facts attracting power u/s 13(4) of the Securitisation Act, and he is not required to examine or adjudicate the rights of the parties, if it is demonstrated before him that certain facts do exist. It is the only factual verification to be made by the learned Magistrate. For example, the existence of equitable mortgage wherein he will be required to verify whether there is a document of equitable mortgage and whether the original title-deeds are deposited with the Bank or not. Similarly, whether notice u/s 13(2) of the Securitisation Act has been served upon the person concerned or not, whether any reply or objection is raised or not, and if yes, whether decision is taken or not and whether such decision is communicated or not and whether any payment is made or not after the notice u/s 13(2) of the Securitisation Act, and if yes, any amount outstanding, etc. There cannot be any exhaustive list of the verification of facts, but suffice it to state that he would

only be required to verify the existence of the fact which are relevant to have condition precedent for exercise of the power u/s 13(4) of the Securitisation Act. But he will not be required to adjudicate on the aspects of illegality and validity of such facts or the rights flowing therefrom.

9. It deserves to be recorded that if there is any prohibitory order of any competent forum restraining the Bank from exercising the power under the Securitisation Act, or restraining the Bank from recovering the amount which is made as the basis for exercising of the power under the Securitisation Act, it would be sufficient for the learned District Magistrate to decline the exercise of the power. Reference may be made to the decision of this Court in the case of Apex Electricals Ltd. Vs. ICICI Bank Ltd., and the observations made at Para 65.4.

10. If the facts of the present case are examined in light of the aforesaid, it cannot be said that the exercise of the power by the learned Magistrate for issuing notice is illegal or arbitrary. On the contrary, the application made by the petitioner does not meet with the requisite detail as referred to hereinabove. Hence, no case is made out for interference to the order passed by the learned Magistrate and the petition deserves to be dismissed subject to the aforesaid observations.

11. However, before parting with, it deserves to be observed that as the observations are made by this Court regarding various facets for verification of the aspects for exercise of power u/s 14 of the Securitisation Act and the requisite details, the State shall be at the liberty to circulate the order to the Executive Magistrate concerned.

12. Office shall also circulate the copy of the order to all the Metropolitan Magistrates for appropriate action.

13. In the event, the details are not submitted in the pending application, it would be open to the Magistrate or the Executive Magistrate, as the case may be, to call for the details so as to comply with the aspects of verification of condition precedent for exercise of the power u/s 13(4) of the Securitisation Act, and consequently, for the orders u/s 14 of the Act.

14. Petition is disposed of accordingly.