

(2009) 07 SC CK 0154

In the Supreme Court Of India

Case No : Civil Appeal No. 4429 of 2009 (Arising out of S.L.P. (C) No. 27399 of 2008) and Civil Appeal No. 4433 of 2009 (Arising out of S.L.P. (C) No. 3020 of 2009)

Authorized Officer, Indian Overseas Bank and Another

APPELLANT

Vs

Ashok Saw Mill

RESPONDENT

Date of Decision : 16-07-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 7
Constitution of India, 1950 — Article 14
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13,

Citation : AIR 2009 SC 2420 : (2009) AIRSCW 4949 : (2011) 162 CompCas 324 : (2009) 4 CompLJ 433 : (2009) 9 JT 491 : (2009) 8 MLJ 897 : (2009) 2 OLR 348 : (2009) 8 SCC 366 : (2009) 94 SCL 73 : (2009) 11 SCR 1599 : (2009) 7 UJ 3168

Hon'ble Judges : Cyriac Joseph, J;Altamas kabir, J

Bench : Division Bench

Advocate : V.T. Gopalan, Altaf Ahmed, F.B. Benjamin Garg, M.A. Chinnasamy, K. Krishna Kumar, Preetam Shah, Malini Poduval, Babita Sant, C.K. Rai, Anindita Popli and Prateeksh Kurup, for the Appellant; S. Sethuraman and S. Thananjayan, for the Respondent

Final Decision : Dismissed

Judgement

Altamas Kabir, J.—Leave granted in both the Special leave petitions.

2. The respondent firm and its sister concern, M/s. Ashok Woodworks, which is also a partnership firm, availed of various loans from the appellant Bank which were secured by movable and immovable assets. The loanee firms having defaulted in repayment of the loans and since their accounts became Non Performing Assets (hereinafter referred to as 'NPA'), the Bank initiated action against them under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act') and issued separate demand notices to the

respondent partnership firm and its sister concern u/s 13(2) thereof on 17th September, 2002, and 21st September, 2002, for the recovery of Rs. 1,56,47,638/and Rs. 1,40,18,468.36, respectively.

3. As the respondent and its sister concern did not respond to the said demand notices, the appellant Bank invoked Section 13(4) of the above Act and took possession of the secured assets on 4th December, 2002. The said action of the Bank, as also the vires of the SARFAESI Act, were challenged by the respondent partnership firm and its sister concern by way of two separate writ petitions, being Writ Petition Nos. 46328 and 46329 of 2002, in which an interim stay of all further proceedings under the said Act was granted on 27th December, 2002. The said writ petitions were ultimately heard and dismissed by a common order on 23rd April, 2004, with liberty to the respondent firm to approach the Debts Recovery Tribunal (hereinafter referred to as 'the DRT'), within 30 days. Since, despite such liberty, the respondent firm did not approach the DRT, the Bank took a decision to sell the secured assets of the respondent firm. At that stage, negotiations were held between the parties for a One-Time Settlement, which also failed, causing the Bank to issue a sale notice dated 26th July, 2007, inviting sealed tenders for the sale of the secured assets of the firm. The same was challenged by the respondent firm on 18th August, 2007, in Writ Petition No. 27472 of 2007 on the ground that it was unable to move the DRT in view of the expiry of the period of limitation prescribed under the Act. After hearing the parties, the High Court refused to grant any interim relief and posted the writ petition for final disposal.

4. During the pendency of the said writ petition, the respondent firm, along with M/s. Ashok Woodworks, filed SARFAESI Application No. 74 of 2007 before the Debts Recovery Tribunal at Madurai for setting aside the sale notice dated 26th July, 2007, on the selfsame cause of action. Despite being informed of the pendency of the writ petition for the selfsame reliefs, the said Tribunal by its order dated 7th September, 2007, directed the Bank to defer the proposed sale which was scheduled to be held on 7th September, 2007. The appellant Bank thereupon filed Civil Writ Petition No. 1392 of 2007 before the Madurai Bench of the Madras High Court challenging the filing of S.A. No. 74 of 2007. The same was admitted and all proceedings in S.A. No. 74 of 2007 were stayed. The said writ petition came up for hearing before the High Court on 18th September, 2007, and was disposed of in the absence of the counsel for the Bank with liberty to the respondent firm to move the Debts Recovery Tribunal at Madurai. The appellant Bank filed Review Petition No. 165 of 2007, praying for recall of the order dated 18th September, 2007, by which the writ petition had been disposed of in its absence. On 6th October, 2007, the appellant Bank was permitted to open the sealed tenders which it had received pursuant to the sale notice dated 26th July, 2007, subject to the condition that the sale effected would be subject to the confirmation of the Court. Pursuant to the said order, the sealed tenders were opened on 8th October, 2007, and 3 of the 5 properties were sold and the same was recorded by the DRT. Subsequently, despite the pendency of the

review petition, the respondent firm withdrew S.A. No. 74 of 2007, and filed a fresh application being S.A. No. 104 of 2007. The review petition filed by the Bank before the Madurai Bench of the Madras High Court was consequently rendered infructuous and was dismissed on 23rd June, 2008.

5. Aggrieved by the said order, the Bank filed Writ Appeal No. 926 of 2008, which was dismissed by the Division Bench of the High Court on 1st September, 2008, against which the present appeal has been preferred.

6. Appearing for the appellant Bank, Mr. V.T. Gopalan, learned Senior Advocate, urged that before the learned Single Judge it had been contended that the provisions of the SARFAESI Act being similar to an English mortgage, on the issuance of notice u/s 13(4) thereof and upon taking over possession of the secured assets, the property vested with the Bank which was thereafter at liberty to bring it to sale as it deemed fit and proper. It had also been submitted that despite liberty having been granted to the respondent firm to move the DRT within the time permitted under the said order, the respondent firm had chosen not to do so and was, therefore, precluded from challenging the same subsequently. In this regard, reliance had been placed on the decision of this Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, in which the validity of the SARFAESI Act had been challenged. While upholding the constitutional validity of the Act, it was also held that the steps taken pursuant to notice u/s 13(4) of the Act could not be challenged before the DRT u/s 17 of the SARFAESI Act beyond the period prescribed thereunder. Reference was also made to the decision of this Court in *Transcore Vs. Union of India (UOI) and Another*, where the same view was reiterated.

7. Mr. Gopalan submitted that a Division Bench decision of the Bombay High Court rendered in *UCO Bank Vs. Kanji Manji Kothari and Co. and Others*, on 19th December, 2007, was also cited before the learned Single Judge in support of the contention that once possession is taken u/s 13(4) of the Act, the right, title and interest of the borrower gets extinguished and thereafter it would not be open for the borrower to challenge the subsequent sale in an application u/s 17 of the SARFAESI Act. It was also urged that the Tribunal could not entertain a debate on the question whether the debt had become due or not because the SARFAESI Act proceeds on the basis that the liability is crystallized and the debt becomes due the moment action u/s 13(4) is taken and a security interest is also created in the secured assets. It was also observed that while the DRT is entitled to consider whether the possession of the secured assets had been taken in accordance with the SARFAESI Act and the rules framed thereunder, once the liability stood crystallized it could no longer be adjudicated upon by the DRT.

8. Mr. Gopalan submitted that the scope of the inquiry before the DRT is confined to the action taken by the secured creditor u/s 13(4) of the SARFAESI Act and the subsequent action taken to bring the secured assets to sale or to transfer the interest therein in any manner whatsoever, could not be made the subject matter of inquiry before the DRT. In other words, the jurisdiction of the Tribunal u/s

17(3) would have to be confined to any action taken by the secured creditor in taking possession of the secured assets under Sub-section (4) of Section 13 and not in regard to any subsequent steps which the secured creditor may take to dispose of the secured assets in accordance with the provisions of the Act. Mr. Gopalan submitted that the SARFAESI Act neither contemplates restoration of possession of the secured assets by efflux of time nor does it place a mandate on the secured creditor to dispose of the secured assets within a specified period. It was urged that since the secured assets vest with the secured creditor once possession is taken, the rules do not contemplate the involvement of the borrower in the sales process and the Authorized Officer is also empowered under Rule 8 of the Security Interest (Enforcement) Rules, 2002, to sell the secured assets by way of private treaty.

9. Mr. Gopalan lastly contended that the Writ Appeal No. 926 of 2008 had been filed against the order of the learned Single Judge dated 23rd June, 2008, made in Review Application No. 165 of 2007 filed by the Bank for review of the order dated 18th September, 2007, passed in the writ petition filed by the Bank and that such appeal was not maintainable having regard to the provisions of Order 47 Rule 7 of the Code of Civil Procedure. Consequently, the order passed therein was invalid on such score as well and was liable to be set aside.

10. While adopting Mr. Gopalan's submissions, Mr. Altaf Ahmed, learned Senior counsel appearing for the Auction Purchaser in the appeal arising out of S.L.P. (C)No.3020 of 2009, submitted that the action taken by the Bank u/s 13(4) of the SARFAESI Act was not governed by the provisions of the Limitation Act. He urged that Section 13(2) of the Act, which deals with the enforcement of security interest, does not prescribe any period of limitation and only sets out the procedure for the recovery of dues once a debt is classified as a Non-Performing Asset (NPA). Mr. Ahmed submitted that Section 13(2) provides for a demand to be made within 60 days from the date of notice being issued to the borrower to discharge his liabilities in full. But once the demand was made, no further period of limitation is prescribed or contemplated for taking action in terms of Section 13(4) of the Act. Mr. Ahmed urged that Section 36 of the Act, which deals with limitation, will have to be read in the aforesaid manner since it refers only to steps to be taken u/s 13(4) which would relate back to the stage of Section 13(2) of the Act.

11. Mr. Ahmed submitted that Section 34 gives the provisions of the SARFAESI Act an over-riding effect over the general law, which will also include the law of limitation.

12. Opposing the submissions made on behalf of the Bank and the Auction Purchaser, Mr. S. Sethuraman, learned Advocate appearing for the respondent, submitted that after the pronouncement of the decision in Mardia Chemicals Ltd.'s case (supra), certain amendments were effected to Section 17 of the SARFAESI Act, whereby the provisions of Sub-sections (2) and (3) of Section 17 of the SARFAESI Act were substituted with Sub-sections (2) to (7) by Act 30 of

2004, in which a new dimension was added providing for an inquiry before the Tribunal in an application filed u/s 17. The same gave rise to a continuing cause of action which was available to a borrower to work out his remedy u/s 17 of the SARFAESI Act by challenging the sale notice.

13. In support of his submissions, Mr. Sethuraman referred to and relied on two decisions of the Madras High Court in (1) Indian Overseas Bank Vs. G.S. Rajshekar, and (2) Ramco Super Leathers Ltd. and Anr. v. UCO Bank and Anr. (2007) 5 MLJ 986, which were affirmed by the Full Bench of the Madras High Court in Lakshmi Shankar Mills (P) Ltd. v. The Authorized Officer/Chief Manager, Indian Bank and Ors. (2008) 2 LW 381. Mr. Sethumaran submitted that after considering the provisions of Section 17 in detail, the learned Single Judge relying upon the Division Bench judgment came to the conclusion that any person, including a borrower, could file an appeal u/s 17 at any stage, including the stage when the management of the business is taken over or possession is taken of the secured assets of the borrower. In such a case, the Tribunal has power to restore possession in favour of the borrower, if such action taken under Sub-section (4) of Section 13 is declared invalid.

14. The main question which falls for determination in this appeal is whether the DRT would have jurisdiction to consider and adjudicate with regard to post 13(4) events or whether its scope in terms of Section 17 of the SARFAESI Act would be confined to the stage contemplated u/s 13(4), as contended on behalf of the appellants. An additional question with regard to the maintainability of the appeal will have to be taken into consideration while deciding the present appeal.

15. In order to answer the aforesaid questions which arise in this appeal, it will be necessary to look into the relevant provisions of Sections 13 and 17 of the SARFAESI Act, as they originally stood and as they now stand after the amendments effected thereto by the amending Act of 2004.

16. In the Statement of Objects and Reasons of the amending Act reference has been made to the decision of this Court in Mardia Chemicals Ltd.'s case (supra). It has been mentioned therein that Sub-section (2) of Section 17 had been declared ultra vires Article 14 of the Constitution. It was also mentioned that it had become necessary to make amendments in Sections 13 and 17 of the Act since it had been held that where a secured creditor had taken action under Sub-section (4) of Section 13 of the Act, it would be open to the borrowers to file appeals u/s 17 of the Act within the period of limitation as prescribed therefor. It is on such account that Section 13 of the principal Act was amended by inserting Sub-section (3-A).

17. Further more, in Sub-section (4) Clause (b) was substituted by a fresh provision which entitled the secured creditor to take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale for releasing the secured asset.

18. The said amendments were made in order to give an opportunity to the

borrower to approach the DRT at any stage against any measure taken by the secured creditor under Sub-section (4) of Section 13 which were not in conformity therewith and to have the possession of secured assets restored in the event such action was found to be invalid. At the same time, more power was given to the secured creditor to exercise control over the management of the business of the borrower which included the right to transfer by way of lease, assignment or sale of the secured assets for releasing the same.

19. The scheme of the SARFAESI Act as it now stands after the 2004 Amendment for enforcement of security interest is that notwithstanding the provisions of Section 69 or Section 69A of the Transfer of Property Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, in accordance with the provisions of the Act. Chapter III of the Act which deals with enforcement of security interest begins with Section 13, which is one of the Sections relevant for a decision in this appeal. Since we are concerned with Sub-sections (1) to (4) of Section 13, the same are extracted hereinbelow:

13. Enforcement of security interest.- (1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

(3) The notice referred to in Sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non- payment of secured debts by the borrower.

(3A) If, on receipt of the notice under Sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the Court of District Judge u/s 17A.

(4) In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:--

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

Provided that the right to transfer by way of lease assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole, of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security or the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

20. The other relevant provision which is Section 17 is also included in Chapter III and has been extensively amended after the decision in the Mardia Chemicals Ltd.'s case (supra). The same is also reproduced hereinbelow for a better understanding of the scheme of the Act after the amendments effected:

17. Right to appeal.- (1) Any person (including borrower), aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, [may make an application along with such fee, as may be prescribed] to the Debts Recovery Tribunal having jurisdiction in the matter within forty- five days from the date on which such measure had been taken.

rovided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

[Explanation.-For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under Sub-section (1) of Section 17.]

[(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) 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 creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management of the business to the borrower or restoration of possession of the secured assets to the borrower, it may by order, declare the recourse to any one or more measures referred to in Sub-section (4) of Section 13 taken by the secured creditors as invalid and restore the possession of the secured assets to the borrower or restore the management of the business to the borrower, as the case may be, and pass such order as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under Sub-section (4) of Section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under Sub-section (4) of Section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under Sub-section (4) of Section 13 to recover his secured debt.

(5) Any application made under Sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

Provided that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under Sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in Sub-section (5), any part to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and the rules made thereunder.]

21. It is clear that while enacting the SARFAESI Act the Legislature was concerned with measures to regulate securitisation and reconstruction of financial assets and enforcement of security interest. The Act enables the Banks and Financial Institutions to realise long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The provisions of Section 13 enable the secured creditors, such as Banks and Financial Institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale for realizing secured assets, subject to the conditions indicated in the two provisos to Clause (b) of Sub-section (4) of Section 13.

22. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the Banks or Financial Institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in Sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in Sub-section (3) thereof.

23. The intention of the legislature is, therefore, clear that while the Banks and Financial Institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee. The consequences of the authority vested in DRT under Sub-section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. The Legislature by including Sub-section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases. Resultantly, the submissions advanced by Mr. Gopalan and Mr. Altaf Ahmed that the DRT has no jurisdiction to deal with a post 13(4) situation, cannot be accepted. The dichotomy in the views expressed by the Bombay High Court and the Madras high Court has, in fact, been resolved to some extent in the Mardia Chemicals Ltd.'s case (supra) itself and also by virtue of the amendments effected to Sections 13 and 17 of the principal Act. The liberty given by the learned Single Judge to the appellants to resist S.A. No. 104 of 2007 preferred by the respondents before the DRT on all aspects was duly upheld by the Division Bench of the High Court and there is no reason for this Court to interfere with the same.

24. We are unable to agree with or accept the submissions made on behalf of the appellants that the DRT had no jurisdiction to interfere with the action taken by the secured creditor after the stage contemplated u/s 13(4) of the Act. On the other hand, 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 DRT.

25. The other point regarding the maintainability of the appeal against the review petition, is of little consequence since the appeal was preferred by the appellants themselves. Having invoked the jurisdiction of the Appellate Court, it was no longer open to the appellants to take a contrary view and to urge that such appeal was not maintainable having been filed against an order passed in a review petition.

26. We, therefore, see no reason to interfere with the judgment and order of the High Court and the appeal is accordingly dismissed, but without any order as to costs.

27. The Civil Appeal No. _____ of 2009 (@ SLP No. 3020 of 2009 filed by M/s Vasantha Communications Pvt. Limited and others is also disposed of on the basis of the findings in this judgment, without any order as to costs.