
(2010) 02 GUJ CK 0109
In the Gujarat High Court
Case No : L.P.A. No. 2172 of 2009

Bharatbhai Ramniklal Sata

APPELLANT

Vs

Collector and District Magistrate and Another

RESPONDENT

Date of Decision : 03-02-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1
Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(3), 13(3A), 13(4), 13(4A)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 3, 3A, 4, 8, 9

Citation : AIR 2010 Guj 72 : (2010) 2 BC 293 : (2010) 3 GLH 632 : (2010) 2 GLR 985

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; Anant S. Dave, J

Bench : Division Bench

Advocate : Thakkar Assoc, for the Appellant; Trusha Patel, Assistant Govt. Pleader and Nalini S. Lodha, for the Respondent

Final Decision : Allowed

Judgement

S.J. Mukhopadhaya, C.J.—In both these appeals, as common order is under challenge and common question of law is involved, they are heard together and disposed of by this common Judgment.

2. The facts reveal that the lands in question were in possession of the appellants but were mortgaged with Bank of Baroda (hereinafter referred to as the "Bank") since 16th February, 2006. The bank, after issuance of notice u/s 13(2) of The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "The Securitisation Act"), having failed to receive any reply, took steps u/s 14 of the said Act requesting District Magistrate, Rajkot to assist the secured creditor in taking possession of secured assets. The appellants were borrowers/mortgagors or tenants in actual possession of the portion of the property, being aggrieved by such action,

preferred an Appeal u/s 17 of the said Act, which was opposed by the Bank on the ground that it has not taken any measures u/s 13(4) of the Act and thereby appeals u/s 17 were not maintainable. The Presiding Officer, Debt Recovery Tribunal-II, Ahmedabad accepting the contention raised by the Bank observed that, "It is difficult to hold on the strength of the order of the District Magistrate passed u/s 14 of the NPA Act that the possession is taken or the measures u/s 13(4) are taken" and thereby dismissed all the appeal being premature and not maintainable.

3. It appears that the appellants thereafter challenged the order dated 6th January, 2009 passed by the District Magistrate, Rajkot, whereby it was ordered to take over the possession of the property by filing different writ petitions, which, having dismissed, the present appeals have been preferred against the common order dated 29.10.2009.

4. Learned single Judge, while noticed that there was a provision of appeal u/s 17 of the Act, against action u/s 13(4) of the Act and in the circumstances, authority acting u/s 14 of the Securitisation Act is not required to act beyond the scope of provisions of Section 14 of the Act by usurping adjudicatory power available to DRT u/s 17 of the Act, refused to grant relief, taking into consideration the fact the appellants have not challenged the order dated 9th April, 2009 passed by DRT-II, Ahmedabad and there is no legal infirmity in the order dated 6th January, 2009.

5. Learned Counsel appearing on behalf of the appellants submitted that the DRT having not entertained the appeal u/s 17 of the Act on the ground that no action has been taken u/s 13(4) of the Act, the appellants, had no other option but to challenge the order dated 6th January, 2009 passed by the District Magistrate, Rajkot u/s 14 otherwise in absence of any other remedy against such action, the learned Judge ought to have decided the question whether such action taken was in accordance with Securitisation Act and the Rules thereunder. It was also contended that if the Bank has not taken any action u/s 13(4) of the Act, the District Magistrate has no jurisdiction to take steps and pass order u/s 14 of the Act.

6. Per contra, according to learned Counsel for the Bank, unless symbolic or actual possession of the land is taken, it cannot be alleged that any measure is taken u/s 13(4) of the Act. Action u/s 14 only shows intention of the Bank to take steps u/s 13(4) in future. It was also contended that the order dated 9th April, 2009 passed by DRT-II, Ahmedabad was not under challenge and as the learned single Judge was deciding the question of legality and propriety of the order dated 6th January, 2009 passed by the District Magistrate, Rajkot u/s 14 of Act, in absence of any infirmity in the said proceeding u/s 14, the writ petitions were rightly rejected. If the order passed by DRT-II would have been under challenge, it was open to the bank to defend the said order.

7. We have heard learned Counsel appearing for the parties and perused the

record.

8. The question arises for determination in this case is whether the action u/s 14 of the Act amounts to taking measures u/s 13(4) of the Act.

9. Chapter-III of the Securitisation Act deals with enforcement of security interest and for enforcement, the secured creditor, without intervention of Court or Tribunal, may take steps for recovery of secured debts. For taking such steps, initially notice is required to be issued under Sub-section (2) to Section 13 on the borrower, who is under a liability, to a secured creditor under a security agreement, and makes any default in repayment of secured debt or any instalment thereof and thereby, the borrower by notice in writing may be asked to discharge his liability to secured creditor within 60 days. The details of amount required to be shown in the notice with an intention to enforce to recover the secured assets by the secured creditor in terms of Sub-section (3) to Section 13 of the Act. On receipt of such notice under Sub-section (2), the borrower may raise objections and file representation under Sub-section (3A) to Section 13 and the secured creditor in his turn, is required to decide objections in one or other way.

In case the borrower fails to discharge his liability within that period as prescribed in the notice under Sub-section (2), the secured creditor may take recourse to one or more measures to recover its secured debt under Sub-section (4) to Section 13 of the Act such as taking over possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured assets; taking over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured assets; appoint any person to manage the secured assets, possession of which has been taken over by the secured creditor and may 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. The Rule, namely, The Security Interest (Enforcement) Rules, 2002 has been enacted prescribing similar procedure under Rule 3 read with Rule 3A, Rule 4 etc.

10. From Sub-section (4) of Section 13 of the Act, it will be evident that taking over possession is one of the measures, which can be taken by secured creditor to recover the secured debt. Even without taking possession of the secured asset, the management of the business of the borrower can be taken over including right of transfer by way of lease etc., a person can also be appointed to manage the secured asset, possession of which has been taken over.

The word "possession" is a relative word and dichotomy between symbolic and physical possession does not find place in the Act as held by the Supreme Court decision in case of Transcore Vs. Union of India (UOI) and Another, wherein the Supreme Court made the following observations:

73. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/tribunals.

Section 14 of the Act prescribes the manner in which possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred. For that purpose the secured creditor is required to request in writing to the District Magistrate or Metropolitan Magistrate to take possession thereof. The concept of taking possession, without making any distinction between symbolic or physical possession has to be kept in mind for taking measures under Sub-section (4) to Section 13 of the Act. In this regard, following observation was made by the Supreme Court in the case of *Transcore v. Union of India and Anr.* (supra), as quoted hereunder:

74. Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed u/s 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realising the secured assets. Section 13(4-A) refers to the word "possession" simpliciter. There is no dichotomy-in-"Sub-section (4-A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/has taken possession of the property u/s 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession request in writing to the District Magistrate to take possession thereof. Section

17(1) of the NPA Act refers to the right of appeal. Section 17(3) states that if DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures u/s 13(4) taken, by the secured creditor are not in accordance with the provisions of the Act it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by, the authorised officer taking possession. As-stated above, the NPA Act provides for recovery of possession by non-adjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8 undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. u/s 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a Court Receiver under Order 40 Rule 1 CPC. The Court Receiver can take symbolic possession and in appropriate cases where the Court Receiver finds that a third-party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorised officer under Rule 8 has greater powers than even a Court Receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third-party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of dispute which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules.

11. From the aforesaid provisions of law and the decision of the Supreme Court, it will be clear that for taking possession, one of the measures for recovery of

secured debts under Sub-section (4) to Section 13 of the Act includes the measures taken by secured creditor u/s 14 and therefore, if any order is passed u/s 14, though it cannot be challenged before any Court of law in view of Sub-section (3) to Section 14, but one can raise the legality and propriety of such measures of taking possession u/s 17, if such measure is against the Securitisation Act or Rules framed thereunder.

12. The Debt Recovery Tribunal-II, Ahmedabad by common order dated 9.4.2009, erred in holding that the order passed by District Magistrate, Rajkot u/s 14 of the Act does not amount to measures taken under Sub-section (4) to Section 13 of the Act.

13. Learned single Judge, by impugned judgment dated 29th October, 2009, while rightly held that any action under Sub-section (4) to Section 13 of the Act is open to challenge u/s 17 of the Act, but failed to notice that in such circumstances the High Court under Article 226 of the Constitution of India ought not to have decided the question whether such measures taken u/s 14 was legal or not. It was not proper for the learned single Judge to give any finding in either way with regard to legality and propriety of order dated 6th January, 2009, passed u/s 14, the aggrieved person having forum to challenge the action under Sub-section (4) to Section 13 of the Act, which includes the measures taken u/s 14, before the Debt Recovery Tribunal u/s 17 of the Act.

14. For the reasons as discussed above, and to enable the appellant and aggrieved person to raise all the questions regarding legality and propriety of action of the Bank before the Tribunal, we not only set aside the order dated 29th October, 2009 passed by the learned single Judge in Special Civil Application Nos. 4563/09 and 4564/09, but also set aside" the common order dated 9.4.2009, passed by the Debt Recovery Tribunal-II. Ahmedabad in Appeal Nos. 04/09, 06/09 and 07/09. All the aforesaid Appeals stand restored to original file of Debt Recovery Tribunal-II, Ahmedabad with a direction to the Tribunal to decide the appeals on merits, after notice and hearing the parties. Both the appeals are allowed. There should be no order as to costs.