
(2010) 10 GAU CK 0003
In the Gauhati High Court
Case No : Writ Petition (C) No. 5694 of 2010

Bolin Chandra Deuri

APPELLANT

Vs

Union Bank of India and Others

RESPONDENT

Date of Decision : 11-10-2010

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 14, 14(1)
Transfer of Property Act, 1882 — Section 69, 69A

Citation : AIR 2011 Guw 24

Hon'ble Judges : Iqbal Ahmed Ansari, J

Bench : Single Bench

Advocate : K. Bhuyan and S. Nath, for the Appellant; None, for the Respondent

Final Decision : Dismissed

Judgement

I.A. Ansari, J.—The Petitioner No. 2 is a licensee of retail vend of foreign liquor, the business whereof was being run in the name and style of M/s. Eureka Wine shop. The Petitioner No. 1 is a Government employee presently serving as Assistant Accounts Officer with the Assam Tribal Development Authority under the Department of Welfare of Plain Tribes and Backward Classes, Govt. of Assam.

2. The Petitioner No. 2 applied to the Respondent-bank seeking sanction of cash credit accommodation and housing loan. In course of time, the cash credit facility and the housing loan were obtained by the Petitioner No. 2. While the loan was applied for, the Petitioner No. 1, being the husband of the Petitioner No. 2, stood as a guarantor for the loan obtained by Petitioner No. 2. As the Petitioners, admittedly, defaulted in maintaining the cash credit limit and also in payment of the housing loan, the Respondent-bank issued, on 7-1-2006, a notice u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (in short, "the Act of 2002"), calling upon the Petitioners to discharge, in full, their dues of a sum of Rs. 6,81,188A together with interest within 60 days from the date of the notice making it clear that in

the event of failure of the Petitioners to discharge, in full, the Petitioners' liabilities, the Respondent-bank would, in terms of the provisions of the Act of 2002, take necessary action for enforcing the security interest by taking possession of, and selling, the secured assets for realizing the dues of the Respondent-bank.

3. Though the Petitioners claim to have made some payments towards their debts, they did not, admittedly, discharge, in full, their liabilities. Long after expiry of a period of 60 day, as stipulated in the notice, dated 7-1-2006, aforementioned, the Respondent-bank issued another notice, on 8-8-2006, informing the Petitioners that since they had failed to discharge, in full, their liabilities, the Respondent-bank had been left with no option, but to take action by taking possession of, and selling, the secured assets in order to realize the bank's dues in accordance with the Act of 2002. By the said notice, dated 8-8-2006, the Respondent-bank called upon the Petitioners to hand over or surrender the possession of the secured assets to the officials and representatives of the bank on 1-9-2006 at 11.30 a.m.

4. The Petitioners, even after receiving the said notice, dated 8-8-2006, failed to discharge, in full, their liabilities, and their liabilities soared to a sum of Rs. 17,61,872/-. The Respondent bank, then, issued a letter, dated 17-2-2010, to the Petitioners informing them that despite repeated assurances and commitments made by the Petitioners, the Petitioners had not deposited the entire outstanding dues to the Respondent bank to the tune of Rs. 17,61,872/-, together with interest and, consequently, the Respondent-bank had no option, but to take, in accordance with the provisions of the Act of 2002, possession of the secured assets mortgaged with them and realize the outstanding dues by auction sale of the properties. By the notice, dated 17-2-2010, the Petitioners were further informed that the Respondent-bank has already applied to the Magistrate for police assistance in taking over possession of the secured assets. Notwithstanding the notice of auction sale, which the Respondent-bank, as indicated hereinbefore, gave to the Petitioners, by their notice, dated 17-2-2010, the Respondent-bank, once again, even under the notice, dated 17-2-2010, requested the Petitioners to make payment of their entire outstanding dues within 6-3-2010 making it, however, clear that in the event of failure of the Petitioners to make payment of their outstanding dues, the Petitioners shall vacate the premises and hand over possession thereof to the officials and representatives of the Respondent-bank, who would be present at the site, on 8-3-2010, at 11 a.m. onwards. On the request so made by the Respondent-bank, an order has, eventually, been passed by Respondent No. 6, namely, District Magistrate, Kamrup, (Metro), Guwahati, detailing Respondent No. 7, an Executive Magistrate, to assist the authorized officer of the Respondent bank in securing possession of the secured assets.

5. Aggrieved by the order, dated 21-7-2010, passed by Respondent No. 6, namely, District Magistrate, Kamrup (Metro), Guwahati, the Petitioners have,

now, filed this writ petition, under Article 226, seeking to get the order dated 21-7-2010, set aside and quashed on the ground that the Petitioners have offered, rupees two lakhs to allow them to remain in possession of the secured assets. It is the further case of the Petitioners that the Respondent-bank has acted in an arbitrary manner without giving due consideration to the financial constraints, which the Petitioners had been Undergoing, and that since the Petitioners had offered a proposal for one-time settlement, the Respondent-bank ought not to have passed the impugned order.

6. I have heard Mr. K. Bhuyan, learned Counsel, for the Petitioners.

7. Appearing on behalf of the Petitioners, the only ground, which Mr. Bhuyan, learned Counsel, has taken for challenging the notice, dated 17-2-2010, aforementioned, and the order dated 21-7-2010, is that the Respondent-bank, without any order from any Court, or the Debts Recovery Tribunal (in short, "DRT"), could not have sought for police help and Respondent No. 6, who is a District Magistrate, could not have detailed an Executive Magistrate to assist the authorized officer of the Respondent-bank in taking possession of the secured assets.

8. The primary question, therefore, which falls for consideration, is this: Whether, without an order from any Court and/or any order from the DRT, a secured creditor, as defined in Section 2(zd), can take possession of the secured asset in the event of default in making payment of the dues of the secured creditor and put the secured asset to auction sale? Yet another question, which falls for determination, in this writ petition, is: Whether, in order to take possession of the secured asset, police assistance can be obtained by a secured creditor without any order from any Court or from the DRT?

9. For the purpose of answering the questions posed above, it needs to be noted that secured asset, as defined in Section 2(1)(ze), means the property on which security interest is created and secured creditor, as defined in Section 2(1)(zd), means any bank or financial institution or any consortium or group of banks or financial institutions. A secured debt, according to Section 2(1)(ze), means a debt, which is secured by any security interest, the security interest being the right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31.

10. When a debtor defaults in making payment of the debt, how the security interest of a financial institution can be enforced is embodied in Section 13 of the Act of 2002. In fact, Section 13 gives a complete scheme for enforcement of security interest.

11. Section 13(1) makes it clear that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882, any security interest, created in favour of any secured creditor, may be enforced, without the intervention of a Court or Tribunal, by such creditor in accordance with the

provisions of the Act of 2002. Thus, Section 13(1) itself makes it abundantly clear that secured interest, created in favour of a secured creditor, may be enforced by the secured creditor without intervention of a Court or Tribunal. How secured creditor can enforce security interest stand, as indicated, embodied in Section 13 of the Act of 2002.

12. Section 13(2) of the Act of 2002 lays down that 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 the installment 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) of Section 13 of the Act of 2002.

13. In the case at hand, on the default of the Petitioners to make payment of the Respondent-bank's dues, a notice was duly issued by the Respondent-bank, on 7-1-2006, demanding payment, in full, of their dues. This demand, which was raised by the letter, dated 7-1-2006, was, in fact, a demand notice u/s 13(2). In terms of Section 13(2), secured creditor is entitled to demand from the borrower to discharge, in full, the borrower's liability to the secured creditor within a period of sixty days. As the Petitioners failed to discharge their liabilities, in full, pursuant to the notice, issued u/s 13(2), the Respondent-bank took recourse to Section 13(4), which leaves 4 (four) courses open to a secured creditor for enforcing discharge of the liabilities of the borrower, one of such courses being, as indicated by Section 13(4)(a), to take possession of the secured assets of the borrower including the right to transfer the secured asset by way of lease, assignment or sale for realizing the security interest. The notice, dated 8-8-2006, was, thus, a notice u/s 13(4). Clause (a) of Section 13(4) makes it very clear that secured creditor may not only take possession of the secured asset of the borrower, but the secured creditor will also have the right to sell the secured asset for realizing the security interest of the secured creditor.

14. Close on the heels of Section 13, as discussed above, Section 14(1) clearly lays down 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 by the secured creditor under the provisions of the Act of 2002, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate, or the District Magistrate, within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate, on such request being made to him (a) take possession of such secured asset and documents relating thereto; and (b) forward such assets and documents to the secured creditor.

15, The request, which the Respondent-bank, in the present case, had made, by

their letter dated 17-2-2010, to the District Magistrate to, give them police assistance in obtaining possession of the secured asset was in exercise of their right u/s 14. Section 14(2) lays down that for the purpose of securing compliance with the provisions of Sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary. The order, which was passed by Respondent No. 6, namely, District Magistrate, on 21-7-2010, is, in fact, in exercise of the District Magistrate's power u/s 14(2).

16. There is nothing in the Act of 2002 or any of the provisions, contained therein, indicating that for the purpose of taking over possession of the secured asset, the secured creditor cannot seek police assistance from the District Magistrate without obtaining an order from a Court or from the DRT. Far from this, Section 14 makes it clear that in order to obtain possession or control of any secured asset, a secured creditor may request, in writing, the Chief Metropolitan Magistrate or the District Magistrate, within whose jurisdiction any such secured asset or other documents, relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, on such request being made to him, may (a) take possession of such asset and documents relating thereto; and (b) forward such assets and documents to the secured creditor. In the facts and attending circumstances of the present case, the District Magistrate was within the ambit of his powers, when he passed the impugned order, dated 21-2-2010, detailing an Executive Magistrate (i.e., Respondent No. 7) to provide police assistance to secure creditor, i.e., the Respondent-bank.

17. Because of what have been discussed and pointed out above, this Court does not find that the notices, given by the Respondent-bank and/or the directions given by the Respondent No. 6 and/or the police assistance sought for by the Respondent-bank and/or the police assistance sought to be provided by the District Magistrate, by detailing an Executive Magistrate for this purpose, is without jurisdiction or contrary to law. Situated thus, it becomes clear that the present writ petition is wholly without merit.

18. In the result and for the reasons discussed above this Writ petition fails, the same is not admitted and shall accordingly stand dismissed.

19. No order as to costs.