(2010) 04 AP CK 0054

In the Andhra Pradesh High Court

Case No : Writ Petition No. 22166 of 2009

Chembeti Brahmaiah Chowdary APPELLANT

Vs

The State of Hyderabad RESPONDENT

Date of Decision : 13-04-2010

Acts Referred:

Constitution of India, 1950 — Article 14
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3A), 13(4), 14
Transfer of Property Act, 1882 — Section 69, 69A

Citation : AIR 2010 AP 203 : (2010) 4 BC 218

Hon'ble Judges : Noushad Ali, J;Goda Raghuram, J

Bench : Division Bench

Advocate : V.S.R. Anjaneyalu, for the Appellant; A. Krishnam Raju SC for S.B.H, for the Respondent

Final Decision : Dismissed

Judgement

Goda Raghuram, J.—The Writ Petition is filed for direction to the respondents not to dispossess the petitioner from Flat No. H-4, Fourth Floor of Uma Maheswari Gardens, D. No. 10-51-6/3/44, Kailashmetta, Asilmetta, Visakhapatnam; for a direction to regularise the account No. 62004835945; for a declaration that the action of the respondents is illegal and ultra vires the provisions of Article 14 of the Constitution of India besides in violation of the Securitisation Act and Rules framed thereunder on the subject and for such other order or orders as appropriate.

2. This Writ Petition is one more episode in a series of proceedings initiated by the petitioner to interdict proceedings under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the Securitisation Act). The relevant facts require to be noticed. The petitioner (borrower) availed cash credit loan in an amount of Rs. 10,00,000/- from the respondent bank (the secured creditor) for his business and provided as collateral security the residential Flat No. H-4, Fourth Floor of Uma Maheswari

Gardens, Kailashmetta, Asilmetta, Greater Visakhapatnam Municipal Corporation, by depositing the original title deeds and a letter of confirmation, dated 06-02-2006, creating an equitable mortgage. The petitioner admittedly committed default in the payment of monthly instalments. The secured creditor classified the loan account as a non-performing asset (NPA) and initiated proceedings under the Securitisation Act. The account was classified as NPA on 30-04-2007. The secured creditor issued eviction notice dated 26-07-2007 u/s 13(2) of the Act, which the petitioner received but failed to discharge the liability as stipulated, within the period of 60 days. Thereupon, the Authorised Officer of the secured creditor issued a possession notice on 08-10-2007. The petitioner thereupon filed S.A. No. 117 of 2007 before the Debts Recovery Tribunal, Visakhapatnam (Tribunal) impeaching the action of the secured creditor i.e., the taking of possession. An interim stay was granted by the Tribunal on condition that the petitioner should deposit Rs. 1,00,000/- on or before 06-11-2007 and in default the secured creditor would be at liberty to proceed against the property. The petitioner failed to comply with the condition and the stay stood dissolved. The Tribunal granted on 11-02-2008 an interim stay again on condition. The condition was not complied with and that stay also stood vacated. On 03-11-2008 S.A. No. 117 of 2007 was dismissed by the Tribunal for default.

3. As symbolic possession alone was taken of the secured asset on 08-10-2007, in view of the dismissal of S.A. No. 117 of 2007 the Authorised Officer of the secured creditor with a view to bring the property to sale under the provisions of the Act was required to take physical possession of the property. As the petitioner was interfering with the secured creditor''s efforts to take possession of the property, the respondent bank filed through its Authorised Officer Criminal M.P. No. 4297 of 2008 u/s 14 of the Act. After obtaining an order u/s 14, when the Officer of the Court proceeded to the property to take possession and hand it over to the Authorised Officer of the bank, the petitioner''s wife is stated to have obstructed the delivery process and to have filed M.P. No. 480 of 2009 in Criminal M.P. No. 4297 of 2008 questioning the bank''s right to proceed against the property. M.P. No. 480 of 2009 was dismissed on 20-04-2009.

4. Thereafter, the wife of the petitioner filed W.P. No. 8595 of 2009 on behalf of her daughter Yamini Meenakshi for a declaration that the action of the Authorised Officer of the bank in initiating proceedings u/s 13(2) and 13(4) and u/s 14(1)(2) of the Securitisation Act, by filing Criminal M.P. No. 4297 of 2008 before the Chief Metropolitan Magistrate, Visakhapatnam was unsustainable. In the said Writ Petition interim stay of all further proceedings in Criminal M.P. No. 4297 of 2008 was sought. On this application this Court by order dated 24-04-2009 directed interim stay of the proceedings u/s 14 including sale of the property subject to the condition that the petitioner therein should deposit Rs. 5,00,000/- within six weeks (from the date of the order) failing which the interim stay would stand vacated. This order of this Court dated 24-04-2009 was however not complied with and in view of the default condition, the interim stay stood dissolved.

5. Consequently, further proceedings in Criminal M.P. No. 4297 of 2008 continued and under Police Aid and orders of the Tribunal for removal of obstruction passed on 09-10-2009, possession of the property was taken. At this stage, the petitioner filed the present Writ Petition and in W.P.M.P. No. 28774 of 2009 obtained an order from this Court on 15-10-2009 directing the respondents not to dispossess the petitioner from the secured asset subject to condition that the petitioner deposits Rs. 1,00,000/- within three weeks.

6. The Learned Counsel for the petitioner states that the amount of Rs. 1,00,000/- as directed by this Court in its order dated 15-10-2009 has been deposited within time.

7. In the counter affidavit to this Writ Petition, the secured creditor states categorically that the amount due from the petitioner as on 31-01-2010 is Rs. 9,17,769.97 and that the period for which the loan of Rs. 10,00,000/- by way of a overdraft is sanctioned had also expired on 02-02-2009 i.e., three years from the date of the initial sanction i.e., 03-02-2006. The contention of the petitioner that time for repayment ensured up to the end of 2013 is clearly and categorically denied by the secured creditor.

8. It requires to be noticed that initiation of proceedings under the provisions of the Securitisation Act and in particular proceedings u/s 13(4) of the Act was challenged by the petitioner in S.A. No. 117 of 2007. This appeal was dismissed for non-prosecution by the Tribunal on 03-11-2008. The petitioner had neither taken steps to have S.A. No. 117 of 2007 restored nor has challenged the order of the Tribunal dismissing the S.A. No. 117 of 2007 dated 03-11-2008 for non-prosecution. In the circumstances, validity of the proceedings initiated under the Act including the issue whether the loan account of the petitioner is not an NPA cannot be canvassed in this Writ Petition.

9. The Learned Counsel for the petitioner would strenuously contend that as he had paid an amount of Rs. 1,00,000/- pursuant to the interim order of this Court dated 15-10-2009 within the period stipulated in that order and on that payment being reckoned and adjusted from the dues of the petitioner, loan amount would no longer continue to be an NPA. This contention does not commend acceptance by this Court.

10. Section 13 occurring in Chapter III of the Act enables the secured creditor to enforce any security interest created in its favour in accordance with the provisions of the Act. Sub-Section (2) of the Section 13 enacts as follows:

13. Enforcement of security interest:--(2) Where any borrower, who is under a liability to a 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).

11. Default is defined in Section 2(j) of the Act that non-payment of any principal debt or interest thereon or any other amount payable by the borrower to any secured creditor consequent upon which the account of such borrower is classified as non-performing asset in the books of account of the secured creditor. Section 2(o) defines a non-performing asset as an asset on account of a borrower, which has been classified by a bank or financial institution as sub-standard, doubtful or loss asset in accordance with the directives or guidelines relating to assets classification, issued by the Reserve Bank. On an interactive analysis of the provisions of the Section 2(j)(o) and Section 13(2) of the Securitisation Act, it is apparent that the condition precedent for initiating proceedings is a default in respect of an account classified as a non-performing asset in the books of account of the secured creditor, in accordance with the directions or guidelines relating to assets classification, issued by the Reserve Bank. The determination of an account as a non-performing asset is therefore a threshold aspect, i.e., prior to initiation of proceedings under the provisions of the Securitisation Act. Such determination if validly done, the initiation of proceedings under the provisions of the Act is not liable to be interdicted. Any repayment made after initiation of proceedings would not, on the ratio of the provisions of the Act, alter the status of the account as a non-performing asset, nor disable further proceedings.

12. Learned Counsel for the petitioner would rely on a decision of a learned Division Bench of this Court in Sravan Dall Mill P. Limited Vs. Central Bank of India and Another, to contend that even if a particular account had become an NPA, subsequent payment by the borrower would entitle a borrower to upgrade the said account and bring it out of the classification as NPA. In Sravan Dall Mill''s case the borrower questioned the notice u/s 13(2) of the Act, assailing the classification of the petitioner''s account as NPA and the initiation of proceedings under the provisions of the Act. The petitioner therein had contended that the determination of its account as NPA was unjustified and the jurisdictional fact necessary for invocation of the provisions of Section 13 of the Securitisation Act was non-existent. The petitioner furnished details of the term loan availed off, the security interest created, the repayments made from time to time and asserted including in its response to the Section 13(2) Notice issued therein that the secured creditor was not justified in classifying the account as NPA, contrary to the directions and guidelines issued by the RBI on assets classification. The secured creditor in its response u/s 13(3A) had recorded a vague assertion that it had every right to take legal action under the Act but did not factually dispute the assertions of the petitioner therein, on the basis of which it was contended that the classification of the account as NPA was unwarranted. On this factual platform and the status of the pleadings, the learned Division Bench of this Court held that there is no reference in the bank''s reply (under Section 13(3A)) as to when and how the account was classified as NPA, particularly when the petitioner had asserted to the contrary and objected to the very classification. This Court held that the right of the borrower to have a due consideration of its objections is

an important right and the bank is bound to apply its mind and inform the borrower of its reasons as to why and how its account was classified as NPA, particularly when the borrower had raised specific objections in this regard; this Court added that the reply of the bank must indicate an application of mind that the decision of the bank in classifying the account as NPA was in conformity with the prudential norms of the RBI; non-consideration of the said objections by merely station in reply that the bank has considered the same, cannot be in fulfilment of the obligations u/s 13(3A), held this Court. Thereafter in para 23 the learned Division Bench records this observation:

It also cannot be disputed that even assuming that particular account had become NPA, the subsequent payments by the borrower entitled a borrower to upgrade the said account and may come out of the said classification of his account as NPA. Therefore, it is incorrect to presume that once an NPA is always an NPA and it is precisely for the said reason that the Clause 4.2.4 of the prudential norms specifically states that if interest and principal are paid by the borrower in case of loans classified as NPA, the said account should no longer be treated as NPA and may be classified as sub-standard account. Consequently, therefore, the action under the SARFAESI Act with regard to the said account would not be tenable, as jurisdictional fact u/s 13(2) of the SARFAESI Act would remain unsatisfied.

13. The above observation cannot fairly be understood as laying down a principle that payments made after the account had been validly classified as NPA and proceedings initiated by issuing notice u/s 13(2) of the Act, would have the effect of upgrading the account and bringing out of the contours of NPA. Since the factual matrix on which the judgment in Sravan Dall Mill''s case supra was rendered was in respect of a challenge to a notice u/s 13(2) of the Act, the observations extracted above must be construed as pertaining to payments made before initiation of proceedings under the provisions of the Act, by issuance of a notice u/s 13(2). Therefore, where an account is classified as NPA and there is a time lag between such classification and initiation of proceedings under the provisions of the Act, if any payments are made and those payments have the effect of upgrading the account and bringing it out of the contours of NPA under the applicable prudential norms of the RBI (relating to assets classification), then and in such an event alone initiation of the proceedings under the provisions of the Act would be unsustainable as devoid of the jurisdictional factual basis for initiation of proceedings. A Writ or order in the nature of prohibition or certiorari, as the case may be would in such circumstances be justified. The contention of the Learned Counsel for the petitioner that NPA classification is a dynamic event to be computed every time a payment is made into an account and even after a valid initiation of proceedings would frustrate the legislative philosophy underlying the provisions of the Securitisation Act, which is intended to provide a speedy remedy to a secured creditor to realise his debts by enforcement of the security interest without the intervention of a Court or Tribunal, in respect of a secured asset. This legislative

intention is fortified by the non obstante provision in Section 13 immunising the enforcement process under this provision from any contrary provision contained in Section 69 or 69A of the Transfer of Property Act, 1882. The non obstante provision in Section 35 providing overriding effect to the provisions of the Securitisation Act, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law reinforces the special trajectory of the provisions of the Act. Proceedings validly initiated under the provisions of the Act after a legitimate classification of an account as NPA cannot be interdicted by the contrivance of a borrower making payments with a view to bringing the account out of the NPA classification. Such an interpretation would frustrate the purposes of the Act. The judgment of the learned Division Bench of this Court in Sravan Dull Mill''s case does not, on a true and fair consideration of the observations extracted supra support the extravagant contention of the petitioner that subsequent payments made by the petitioner would bring it out of the NPA net and consequently the provisions of the Act.

14. On the aforesaid analysis and in view of the dismissal of S.A. No. 117 of 2007 by order of the Debts Recovery Tribunal, Visakhapatnam, dated 03-11-2008 and in view of the persistent and recidivist litigative campanis by and on behalf of the petitioner, we find no justification to grant relief to the petitioner, particularly when there is no legal basis for seeking the reliefs presented in this Writ Petition. There are no merits. The Writ Petition is accordingly dismissed. The interim order dated 15-10-2009 stands dissolved. No costs.

