(2017) 01 DEL CK 0053

In the Delhi High Court

Case No : W.P.(C) 10589 of 2016 and CM Nos. 41568 of 2016 (stay), 41569 of 2016 (additional documents) and 44831 of 2016 (under Order 1, Rule 10 CPC)

Chunnu Fashions APPELLANT

Vs

Edelweiss Asset Reconstruction Co. Ltd. RESPONDENT

Date of Decision : 16-01-2017

Acts Referred:

Constitution of India, 1950 — Article 226
Recovery of Debts Due To Banks And Financial Institutions Act, 1993 — Section 21
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(1), Section 13(2), Section 13(3), Section 13(3A), Section 13(4), Section 13(5), Section 17, Section 18
Security Interest (Enforcement) Rules, 2000 — Rule 3(a), Rule 3(b), Rule 3(c)

Citation : (2017) 237 DLT 7 : (2017) 140 SCL 5

Hon'ble Judges : Ms. Indira Banerjee and Mr. Anil Kumar Chawla, JJ.

Bench : Division Bench

Advocate : Mr. Kailash Vasdev, Sr. Advocate with Mr. Gaurav Gupta, Mr. S.S. Sandhu and Ms. Divija Rajkhowa, Advocates, for the Petitioner; Ms. Priyadarshini Verma, Advocate, for the Respondent No. 1; Mr. Brijesh Kumar Tamber, Advocate, for the Respondent No. 2

Final Decision : Dismissed

Judgement

Indira Banerjee, J. (Oral) - This writ petition is directed against an order dated 27.11.2015, passed by the learned Debt Recovery Appellate Tribunal (DRAT), Delhi in IA No.811/2015 in Appeal No.6015/2015, whereby the learned DRAT dismissed an appeal against an order dated 20.08.2013, of the Debt Recovery Tribunal (DRT) II, Delhi, under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, hereinafter referred to as the SARFAESI Act, on the ground of non-compliance with an earlier direction issued on 13.10.2015 to the petitioner for deposit of 25% of the amount directed to be paid by the order under appeal.

2. The petitioner No.1 is a proprietorship concern of B.M. Sarin (HUF), a Hindu

Undivided Family, of which the petitioner No.2 Shri B.M. Sarin is the karta. The petitioner nos. 3 and 4 are co-parceners of BM Sarin (HUF). The petitioner no.1 is duly registered with the Export Promotion Council since 11.12.1998, its registration number being AEPC/REG/MFG-21406. The petitioner No.1 had for its business purposes, availed credit facilities from Indian Bank, predecessor-in-interest of the respondent Edelweiss Asset Reconstruction Company Ltd.

3. The Haryana State Industrial Development Corporation (HSIDC), had allotted the property being Plot No.23, Sector-4, Industrial Estate, IMT Manesar, Gurgaon to BM Sarin (HUF). A Deed of Conveyance was executed by HSIDC through the petitioner no.2, in favour of the petitioner no.1.

4. By way of security for the credit facilities, the petitioner no.1 mortgaged the said property to Indian Bank.

5. Section 13 (1), (2), (3), (3A), (4) and (5) of the SARFAESI Act provides as follows:-

"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 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 subsection (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 under section 17 or the Court of District Judge under section 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 business of the borrower including the right to transfer by way of lease, assignment or sale for realising 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 for 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.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower."

6. On or about 19.4.2011, Indian Bank issued a notice to the petitioner no.1 under Section 13(2) of the SARFAESI Act, calling upon the petitioner no.1 to pay the amount claimed in the notice within sixty days.

7. On 12.6.2011, the petitioner no.1 objected to the said notice under Section 13 (3A) of the SARFAESI Act read with Rules 3 (a) to (c) of the Security Interest (Enforcement) Rules 2000. The objection/ representation was rejected by Indian Bank on 27.6.2011. On 10.8.2011, Indian Bank took symbolic possession of the said property under Section 13(4) of the SARFAESI Act.

8. Under Section 17 of the SARFAESI Act, any person including a borrower aggrieved by any of the measures referred to in sub Section (4) of Section 13 taken by a secured creditor or his authorised officer, may make an application to the DRT having jurisdiction in the matter, within 45 days from the date, on which the measure had been taken. On receipt of such an application, the DRT is required to consider whether 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 SRAFAESI Act and the rules made thereunder.

9. Section 17(3) provides that, if the DRT, 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 law, it may require restoration of the possession of the secured asset to the borrower.

10. If, however, the DRT declares the recourse taken by the secured creditor under sub Section (4) of Section 13 to be in accordance with the provisions of the SARFAESI 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.

11. Section 18 of the SARFAESI Act provides as follows:-

"18. Appeal to Appellate Tribunal (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal under section 17, may prefer an appeal along with such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal: PROVIDED that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower: PROVIDED FURTHER that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less: PROVIDED ALSO that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five per cent of debt referred to in the second proviso. (2) Save as otherwise provided in this Act, the Appellate Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) and rules made thereunder."

12. Section 21 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, (hereinafter referred to as the 1993 Debt Recovery Act), provides as follows:-

"Deposit of amount of debt due, on filing appeal ? Where an appeal is preferred by any person from whom the amount of debt is due to a bank or a financial institution or a consortium of banks or financial institutions, such appeal shall not be entertained by the Appellate Tribunal unless such person has deposited with the Appellant Tribunal seventy-five per cent, of the amount of debt so due from him as determined by the Tribunal under section 19.

Provided that the Appellant Tribunal may, for reasons to be recorded in writing waive or reduce the amount to be deposited under this section."

13. Under Section 21 of the 1993 Debt Recovery Act, an appeal is not to be entertained by the Appellate Tribunal, unless the person preferring the appeal has deposited 75% of the amount of the debt due from him as determined by

the Tribunal under Section 19. In terms of the proviso, the Appellate Tribunal may for reasons to be recorded in writing waive or reduce the amount to be deposited under the said section. Unlike Section 18 of the 1993 Debt Recovery Act, Section 18 of the SARFAESI Act does not permit full waiver.

14. In Narain Chandra Ghose v. UCO Bank and Ors. reported in (2011) 4 SCC 548, the Supreme Court held that the condition of pre-deposit for entertainment of an appeal being mandatory under Section 18 of the SARFAESI Act, an appeal cannot be entertained, unless the condition precedent of deposit is fulfilled. The Court also held that the condition of pre-deposit being mandatory, complete waiver of pre-deposit is beyond the provisions of the Act.

15. The learned DRAT has reduced the required pre-deposit of 25%, which is the minimum amount required to be deposited in view of the third proviso to Section 18 of the SARFAESI Act.

16. In view of the verdict of the Supreme Court in Narain Chandra Ghose (supra) and the mandatory requirement of the third proviso to Section 18 of the SARFAESI Act, the writ petition cannot be entertained and the same is dismissed. All the pending applications are also dismissed.