
(2010) 09 MP CK 0003
In the Madhya Pradesh High Court
Case No : W.A. No. 302 of 2010

Dhar Textile Mills Ltd.

APPELLANT

Vs

Canara Bank and Others

RESPONDENT

Date of Decision : 21-09-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Debts Recovery Tribunal Act, 2002 — Section 17
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 17
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15, 22, 22

Citation : (2010) 159 CompCas 620 : (2011) ILR (MP) 826 : (2011) 1 MPHT 343

Hon'ble Judges : S.S. Kemkar, J;Prakash Shrivastava, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Shantanu Kemkar, J.—This intra Court appeal u/s 2(1) of the Madhya Pradesh Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005 has been directed against the order dated 29.07.2010 passed by Single Bench of this Court in W.P. No. 7986 of 2009.

2. In the aforesaid writ petition, the Petitioner had prayed for following reliefs:

(A) that the proceedings initiated by the Respondents under the provisions of SARFAESI Act, 2002 be quashed.

(B) that the notice dated 24.08.2009 issued by Respondent No. 2 u/s 13(2) of SARFAESI Act be set aside.

(C) that the Respondent be directed to obey the mandate of Section 22 of SICA Act, 1985.

3. Briefly stated, a reference u/s 15(1) of the Sick Industrial Companies (Special Provision) Act, 1985 (for brevity the SICA) was filed on 31.3.2004 by the Appellant company before the "Board", constituted under the SICA, stating

therein that it has become a "sick industrial company". In the said reference a prayer was made by the Appellant for determination of the measures which shall be adopted with respect to the Appellant company. On 25.08.2006, the Board declared the Appellant company as a sick company u/s 3(1)(o) of the SICA. The Board in exercise of its powers u/s 17(3) of the SICA appointed the Standard Chartered Bank as operating agency for Appellant company. Thereafter on 9.10.2009 the Appellant company had filed a draft rehabilitation scheme before the Board, which according to the Appellant, is pending for consideration.

4. In the mean while, as the Appellant company failed to repay the credit facility availed by it and having committed default in repayment of debt, the first Respondent Canara Bank issued a notice dated 24.08.2009 to the Appellant company in exercise of its powers u/s 13(2) of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity Act of 2002) claiming to be the authorised officer of Consortium of Banks comprising of Standard Chartered Bank Mumbai and Canara Bank, Siyaganj Branch, Indore and R.N.T. Marg Branch, Indore. In the said notice it was also stated by the first Respondent Bank that the Standard Chartered Bank is assignee of debts due and payable by the Appellant to State Bank of India, State Bank of Indore and State Bank of Saurashtra. It was also averred in the said notice that the first Respondent - Canara Bank and the third Respondent - Standard Chartered Bank are secured creditors to the extent of 81% in respect of the assets/securities of the Appellant company. It was stated that from March 2004 the operation and conduct of the financial assets/credit facilities made available to the Appellant, become irregular and the Appellant had failed to keep up the terms of the agreement in clearing the dues of the Consortium of Canara Bank & Standard Chartered Bank within the time given. Thus having been evasive in settling the dues, the debts of the Appellant company has to be classified as Non Performing Asset". Accordingly, by the said notice, the Appellant company was informed that the consortium of the Banks will exercise all or any of the rights against the Appellant as provided u/s 13(4) of the Act of 2002.

5. The Appellant company submitted its representation/objection to the said notice stating therein that the noticee consortium does not represent more than three -fourth value of the amount outstanding against it and as such the noticee is not entitled to exercise the rights u/s 13(4) of the Act of 2002. It was also alleged that third Respondent - Standard Chartered Bank, Mumbai is not empowered to trade in debts as it is not having registration in terms of Section 3(1) of the Act of 2002. A plea was taken by the Appellant company that it is a sick company and in the circumstances, the proposed action through the notice u/s 13(2) of the Act of 2002 is barred by Section 22 of the SICA.

6. The first Respondent vide reply dated 29.10.2009 rejected the objections raised by the Appellant company and once again requested the Appellant to repay the outstanding dues as per the notice issued to it u/s 13(2) of the Act of

2002. Aggrieved the Appellant had filed the aforesaid W.P. No. 7986 of 2009 before this Court. The learned Single Judge vide order dated 29.07.2010 dismissed the writ petition on the ground that the Appellant has got an alternative remedy available under the Act of 2002 before the Debts Recovery Tribunal u/s 17 of the Act of 2002 in case an order is passed against it u/s 13(4) of the Act of 2002. Aggrieved the Appellant has filed this appeal.

7. Shri GM Chaphekar, learned Senior Counsel appearing for the Appellant company argued that the impugned order passed by the learned Single Judge dismissing the Appellant's writ petition on the ground of availability of alternative remedy, is not sustainable. According to him, in view of the law laid down by the Supreme Court in the case of Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others, availability of alternative remedy is no bar for invoking jurisdiction by this Court under Article 226 of the Constitution of India. He further argued that the very assignment of debt by the State Bank of India, State Bank of Indore and State Bank of Saurashtra in favour of the Standard Chartered Bank, which is not registered u/s 3 of the Act of 2002 being illegal, the issuance of notice u/s 13(2) by the first Respondent as a consortium of the financial institutions, was without jurisdiction. He argued that in the absence of fulfillment of requirement of Section 13(9) of the Act of 2002 the first Respondent is not entitled to take measures u/s 13(4). He further argued that the learned Single Judge has misconstrued the law laid down by the Division Bench of Orissa High Court in the case of Noble Aqua Pvt. Ltd. and Others Vs. State Bank of India and Others, . He pointed out that the finding recorded by the learned Single Judge in paragraph 7 of the impugned order that the Division Bench of Orissa High Court has upheld the action of the Bank in taking action against the Petitioner company therein under the provisions of the Act of 2002, is contrary to what has been laid down by the Division Bench of Orissa High Court Placing reliance on the judgment of Orissa High Court in the case of Noble Acqua Pvt. Limited (supra), learned Senior Counsel argued that in view of the pendency of the reference under of SICA, the bar contained in Section 22 of the SICA is attracted in matter. He urged that the question with regard to the validity of transfer of security interest by the State Bank of Indore, State Bank of India and State Bank of Saurashtra in favour of the third Respondent Standard Chartered Bank, who is not authorised to trade in securities, is a question which cannot be gone into by the Debts Recovery Tribunal in an appeal u/s 17 of the Act of 2002.

8. Shri Manoj Munshi, learned Counsel appearing for the third Respondent - Standard Chartered Bank, on the other hand supported the impugned judgment passed by the learned Single Judge. He argued that the Appellant has not approached this Court with clean hands as it has concealed the material subsequent event which has taken place after passing of the impugned order by the learned Single Judge. He stated that before filing of the writ appeal, the first Respondent - Canara Bank had already taken possession of the secured assets of the Appellant company by taking measures u/s 13(4) of the Act of 2002. Thus according to him, this writ appeal deserves to be dismissed for non-disclosure of

this material fact. Even otherwise, he submitted that since the measures u/s 13(4) of the SARFAESI Act, 2002 have been taken before filing of the writ appeal this writ appeal has rendered infructuous and as such it be dismissed. Supporting the impugned order passed by learned Single Judge, Shri Manoj Munshi learned Counsel for the third Respondent argued that in view of pronouncements of the various Courts, including the judgment passed in the case of Nabha Industries Limited v. Punjab State Industrial Development Corporation and Anr. 2010 154 C.C. 646(P & H) , the order dated 19.05.2010 passed in W.P. No. 2079 of 2010 by a Division Bench of Bombay High Court in the case of Nouveaw Exports Private limited v. Appellate Authority for Industrial and Financial Reconstruction Co. and Ors., the law laid down by the Supreme Court in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., and a judgment delivered by the Supreme Court on 26.07.2010 in the case of United Bank of India v. Satyawati Tondon and other - 2010 1 NSC 550, this writ appeal deserves dismissal.

9. Shri Manoj Munshi, learned Counsel also submitted that though in paragraph 7 the learned Single Judge may have recorded an incorrect finding that the Division Bench of Orissa High Court has upheld the action of the Bank in proceeding against the Petitioner company under the Act of 2002, but the judgment delivered by Division Bench of Orissa High Court has been considered by various High Courts, as would be clear from the judgment delivered by the Division Bench of the Punjab and Haryana High Court in the case of Nabha Industries Limited v. Punjab State Industrial Development Corporation and Anr. (supra) and the judgment of Division Bench of Bombay High Court in the case of Nouveaw Exports Private limited v. Appellate Authority for Industrial and Financial Reconstruction Co. and Ors., and according to these judgments the reference shall stand abate, if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such creditors, have taken any of the measures to recover their security debt under Sub-section (4) of Section 13 of the Act of 2002 in view of the proviso contained in Section 15 of the SICA. He further argued that the Standard Chartered Bank has not violated the provisions of Act of 2002 and has not committed any illegality in becoming assignee of debts due to the other Banks. It is also his case that in case the Appellant company seeks to challenge the assignment made in favour of the third Respondent - Standard Chartered Bank, the Appellant company has got remedy of taking appropriate steps including filing of a civil suit. He also stated the question as to whether the consortium represents three-fourth value of the amount outstanding or not as per the requirements of Section 13(9) of the Act of 2002 can be very well gone into in an appeal u/s 17 of the Act of 2002. However, according to him, the notice u/s 13(2) of the Act of 2002 cannot be challenged in a writ petition in view of the law laid down by the Supreme Court.

10. Having heard learned Counsel for the parties and after going through the impugned order and the annexures, we find that against the impugned order

dated 29.07.2010 passed by learned Single Judge, this writ appeal was filed on 16.08.2010 i.e. much after the measure u/s 13(4) was taken by the first Respondent - Canara Bank. Thus, though the measure u/s 13(4) was already taken still the same was not disclosed by the Appellant in the writ appeal. No explanation on the part of the Appellant company has been offered even during the course of the arguments as to why this material fact has not been disclosed in the writ appeal. In the circumstances, on the ground of suppression of material fact, this writ appeal deserves to be dismissed. However, we deem it proper to consider and decide the other submissions made by the teamed counsel for the parties in regard to the validity of the impugned order passed by the learned Single Judge.

11. So far as to the Appellant's challenge to the notice u/s 13(2) of the Act of 2002 the Supreme Court in the case of United Bank of India v. Satyawati Tendon and Ors., after considering the scheme of the Act of 2002 and the law laid down by it in the case of M/s Mardia Chemicals Limited v. Union of India as also in the case of Whirlpool Corporation v. Registrar of Trade Marks, Mumbai (supra) has observed as under:

12. The Division Bench of the High Court did not even advert to the Appellant's plea that the writ petition should not be entertained because an effective alternative remedy was available to the writ Petitioner u/s 17 of the SARFAESI Act and passed the impugned order restraining the Appellant from taking action in furtherance of notice issued u/s 13(4) of the SARFAESI Act. The reason which prompted the High Court to pass the impugned interim order and operative portion thereof are extracted below:

Learned Counsel for the Petitioner has urged that the loan was taken by Respondent No. 4 for opening a colour lab at 50/43, Raj Complex, K.P. Kakkar Road, Allahabad, but the loan has not been repaid by Respondent No. 4 and the bank is proceeding against the Petitioner who is the guarantor of the loan. It is not clear from the documents produced by learned Counsel for the bank as to what steps have been taken by the bank against the borrower of the loan and merely issuance of notice u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 against the borrower is not sufficient. The bank should have proceeded against the borrower and exhausted all the remedies against him and thereafter the bank could have proceeded against the guarantor. Until further orders of this Court, the Respondents are restrained from proceeding u/s 13(4) of the Act 2002 with regard to Petitioner's property who was the guarantor of the loan. However, if any possession has been taken by the bank then the property shall not be sold to any one else and the Petitioner shall be continued in possession of the property.

13. We have heard learned Counsel for the Appellant and perused the record. Normally, this Court does not interfere with the discretion exercised by the High Court to pass an interim order in a pending matter but, having carefully examined the matter, we have felt persuaded to make an exception in this case

because the order under challenge has the effect of defeating the very object of the legislation enacted by the Parliament for ensuring that there are no unwarranted impediments in the recovery of the debts, etc. due to banks, other financial institutions and secured creditors.

18. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the Petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the Petitioner is able to show that its case falls within any of the exceptions carved out in *Baburam Prakash Chandra Maheshwari Vs. Antarim Zila Parishad now Zila Parishad, Muzaffarnagar*, *Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai and Others*, and *Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others*, and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

27. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

12. In yet another case the Supreme Court in the case of *Punjab National Bank and Anr. v. M/s Imperial Gift House and Ors.*- 2009 INSC 1074 decided on

14.5.2009 has held as under:

Heard learned Counsel for the parties.

By the impugned order, in effect and substance, the High Court has quashed notice issued by the Bank u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, [for short, "the Act"]. Upon receipt of notice, Respondents filed representation u/s 13(3)(A) of the Act, which was rejected. Thereafter, before any further action could be taken u/s 13(4) of the Act by the Bank, the writ petition was filed before the High Court. In our view, the High Court was not justified in entertaining the writ petition against the notice issued u/s 13(2) of the Act and quashing the proceedings initiated by the bank.

Accordingly, the appeal is allowed, impugned order passed by the High Court is set aside and the writ petition filed before it is dismissed.

13. In view of the aforesaid pronouncements of the Supreme Court, in our considered view, the learned Single judge has committed no error in not entertaining the writ petition against the notice issued u/s 13(2) of the Act of 2002. Moreover as observed aforesaid after the dismissal of the writ petition the measure u/s 13(4) has also been taken by the first Respondent Bank, in the circumstances, the Appellant has to seek alternative and efficacious remedy provided u/s 17 of the Act of 2002.

14. The Appellants contention that the question raised and involved in the matter cannot be gone into by the Debts Recovery Tribunal is also wholly misconceived, in view of the wide scope of the jurisdiction vested in the Debts Recovery Tribunal u/s 17 of the Act of 2002. Section 17 of the Act of 2002 reads as under:

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 measures had been taken:

[Provided 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 secured assets 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 assets as invalid and restore the possession of the secured assets to the borrower or restore the management of the secured assets 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 party 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 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.]

15. On a bare reading of the aforesaid provision of appeal it is very clear that the

Debts Recovery Tribunal is empowered to consider whether any of the measures referred to in Section 13(4) of the Act of 2002 taken by the secured creditor for enforcement of security are in accordance with the provisions of the Act of 2002 and the rules made thereunder. In the circumstances we are of the view that in the appeal the Appellant's objection about nonfulfillment of requirement of Section 13(9) of the Act of 2002 can be very well considered by the Debts Recovery Tribunal. The Appellant's other objection that the third Respondent is no registered u/s 3(1) of the Act of 2002 and, therefore, the assignment made in its favour is not valid, also can be gone into in appeal in view of the powers conferred upon the Debts Recovery Tribunal u/s 17(2) of the Act of 2002.

16. As regards the Appellant's contention that in view of the provision contained in Section 22 of the SICA the proposed action through notice u/s 13(2) of the Act of 2002 is barred is not tenable in view of the second and third proviso of Section 15 of the SICA which reads as under:

Provided further that no reference shall be made to the Board for Industrial and Financial Reconstruction after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where financial assets have been acquired by any securitisation company or reconstruction company under Sub-section (1) of Section 5 of that Act:

Provided also that on or after the commencement of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, where a reference is pending before the Board for Industrial and Financial Reconstruction, such reference shall abate if the secured creditors, representing not less than three-fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such secured creditors, have taken any measures to recover their secured debt under Sub-section (4) of Section 13 of that Act.

17. In the case of Nabha Industries Limited (supra) the Division Bench of Punjab and Haryana High Court and in the case of Nouveaw Exports Private limited (supra) a Division Bench of Bombay High Court after considering the aforesaid proviso of Section 15 of the SIC A have held that in case the secured creditors, representing not less than three - fourth in value of the amount outstanding against financial assistance disbursed to the borrower of such creditors have taken any measure to recover their security debt u/s 13(4) of the Act of 2002 the reference shall stand abate. We find ourselves in complete agreement with this view taken in the case of Nabha Industries Ltd. and also in the case of Nouveaw Exports Private Limited (supra). In the circumstances at this stage when prima facie there is a specific averment that the assignment in favour of the third Respondent was effected on 29.3.2006, the reference u/s 15 of the SICA was made on 31.3.2004 much after the 21.6.2002 the date of commencement of the Act of 2002 and also having regard to the averment that the noticee consortium are secured creditors to the extent of 81% in respect of the assets/securities of the Appellant company in our view the reference under

SICA stands abate and as such no interference is called for on this ground.

18. Accordingly, for the reasons stated hereinabove, keeping the questions raised to be left open to be decided by the Debts Recovery Tribunal or by the competent Court, the writ appeal fails and is hereby dismissed. It is further made clear that dismissal of this writ appeal and the observations made hereinabove would not come in the way of the Debts Recovery Tribunal for deciding the validity of the measures as to whether they are taken in accordance with the provision of the Act of 2002 and the Rules made thereunder or not, in case any appeal is filed before it.