(2006) 05 MP CK 0102

In the Madhya Pradesh High Court

Dharam Pal Kohli APPELLANT

Vs

State Bank of India and Another RESPONDENT

Date of Decision : 20-05-2006

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 17, 2

Citation : AIR 2007 MP 68

Hon'ble Judges : A.K. Mishra, J

Bench : Single Bench

Judgement

Arun Mishra, J.—Petitioner in this writ petition is assailing an action initiated by the respondent No. 1 State Bank of India under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the rules framed thereunder.

2. Petitioner has assailed the initiation of the proceedings on various grounds. However, petitioner''s counsel has submitted that respondent Bank is employing agency of muscle man in order to make recovery under the aforesaid Act and the rules which is illegal and unconstitutional act. Procedure of law cannot be allowed to be misuse and recovery cannot be handed over to the muscleman, who may recover the amount by threat or by unlawful means. The recovery has to be made only in accordance with the provisions of the Act and rules, in peaceful manner. He has further pointed out that petitioner is ready to make deposit as per the amount determined on the date on which account was declared NPA and petitioner is ready to make the offer within 7 days inclusive of the other amount which he has to pay. The Bank may be directed to consider it reasonably before ordering the auction of the house.

3. Shri Rajesh Maindiretta and Shri Sameer Seth, learned Counsel for the respondents have submitted that employment of enforcement agencies is permissible as provided under Rule 8 of the Rules framed under thee Rules of 2002. For employment of enforcement agencies advertisement was issued. The

enforcement agency which has been employed is not having any past criminal record and the enforcement agency is appointed by Board of Director at the highest level. The action will be taken in accordance with law without use of any force or violence or unlawful methods. Only symbolical possession has to be taken at this stage as property has not been, auctioned as yet and symbolical possession has already been taken without use of any force. Thus allegation that muscle man were used is baseless. It is also submitted by the counsel for the respondents that petitioner is having the remedy u/s 17 of the Act of 2002 before the Debt Recovery Tribunal by way of filing an appeal/application, hence in view of availability of alternative efficacious remedy, no case for interference is made out. However, it is assured that in case any reasonable offer is made that will be considered in accordance with the prevailing guidelines.

4. After hearing the learned Counsel for the parties in my opinion it is permissible for the Bank to employ the enforcement agency as it is apparent from Rule 8 of the Rules of 2002 that where the secured asset is an immovable property, the authorised officer shall take or cause to be taken possession. The words ''cause to be taken'' are of immense importance. Thus it is not necessary that the authorised officer personally should take the possession in every case, it is permissible to employ enforcement agency.

5. Shri H. C. Kohli, learned Counsel for the petitioner has placed reliance on Section 13(4) of the Act of 2002 which provides that "secured creditor" can only take possession u/s 13(4) and "secured creditor" has been defined in Section 2(z)(d) of the Act of 2002 to mean that any bank or financial institution or any consortium or group of banks or financial institutions and includes debenture trustee appointed by any bank or financial institution or securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be or any other trustee holding securities on behalf of a bank or financial institution, in whose favour security interest is created for due repayment by any borrower of any financial assistance. Thus he has submitted the enforcement agency cannot be said to be a secured creditor, hence only "secured creditor" can act in the process of attachment and sale of the property not an enforcement agency. Provisions of Section 13(4) and Section 2(zd) are quoted below:

2(zd). "Secured creditor" means any bank or financial institution or any consortium or group of banks or financial institutions and includes -

(i) debenture trustee appointed by any bank or financial institution; or

(ii) securitisation company or reconstruction company, whether acting as such or managing a trust set up by such securitisation company or reconstruction company for the securitisation or reconstruction, as the case may be; or

(iii) any other trustee holding securities on behalf of a bank or financial institution.

in whose favour security interest is created for due repayment by any borrower of any financial assistance;

13(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.

6. The Authorised Officer is defined in Rule 2(a), which is quoted below:

2(a). "Authorised officer" means an officer not less than a chief manager of a public sector bank or equivalent, as specified by the Board of Directors or Board of Trustees of the secured creditor or any other person or authority exercising powers of superintendence, direction and control of the business or affairs of the secured creditor, as the case may be, to exercise the rights of a secured creditor under the Ordinance.

The authorised officer is defined in Rule 2(a) to mean that the officer as specified in the aforesaid rules or any other person or authority exercising the powers of superintendence, direction and control of the business or affairs of the secured creditor can act to recover amount. On reading of Section 13(4) it is clear that it is an enabling provision. When Section 13(4) and Rule 2(a) together, there is no iota of doubt that enforcement agency can be employed by the Bank for assisting it for taking action under the aforesaid Act and the rules.

7. Coming to the submission that whether enforcement agency with the past criminal record can be employed the answer is ''no'' antecedents have to be verified by the Bank, though in the instant case there is no material brought on

record by the petitioner so as to show that enforcement agency or individuals employed by it were having the criminal record. Obviously the power under the Act and the Rules is not contemplated to be given to muscle man who may use force or violence or other illegal coercive methods. The counsel for the respondents have submitted that antecedents of agency were verified by board of directors at highest level and there is no muscle man or person with past criminal record employed by enforcement agency.

8. Coming to the question of alterative remedy, obviously remedy is available to the petitioner u/s 17 of the Act of 2002 before the Debt Recovery Tribunal. However, in case petitioner submits reasonable offer as prayed within seven days, let it be considered within three weeks thereafter and be dealt with by a reasoned order. In case petitioner is aggrieved by the decision taken, has the remedy u/s 17 of the aforesaid Act before the DRT. For the period of four weeks status quo be maintained by the parties.

9. Writ petition stands disposed of No costs.

