(2010) 01 AHC CK 0200

In the Allahabad High Court

Diksha Offset Printing & Publication APPELLANT

Vs

Chief Judicial Magistrate, Gorakhpur and Others. RESPONDENT

Date of Decision : 04-01-2010

Acts Referred:

Citation : (2010) 01 AHC CK 0200

Hon'ble Judges : V.K.Shukla, J

Final Decision : Dismissed

Judgement

V.K. Shukla, J.—Present writ petition has been filed for quashing of the order dated 03.10.2009 passed by Chief Judicial Magistrate, Gorakhpur accepting the request of Bank under Section 14(1) & 14 (2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002.

2. Brief background of the case is that petitioner''s firm namely, M/s Diksha Offset Printing & Publication has taken loan. Said loan in question was not deposited as per term and condition and petitioners in their turn proceeded to file suit No. 839 of 2008 for not adopting coercive method and for accountancy. Injunction application was also moved. Said proceedings are on going. The Bank in question published auction notice in exercise of its authority under Section 13(4) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 for putting up for sale of property for realization of debts due to the Bank. It has been mentioned in paragraph11 of the writ petition that some auction proceedings has taken place. It has been contended that thereafter application has been moved under Section 14(1) & (2) and same has been allowed. At this juncture present writ petition in question has been filed.

3. Learned counsel for the petitioner Sri H.P. Mishra, contended with vehemence that civil suit filed on behalf of petitioner has been pending and in such a situation, said steps ought not to have been undertaken as has been sought to be undertaken in the present case, as such order passed by Chief Judicial Magistrate is liable to be set aside.

4. Countering the said submission Sri Rakesh Mishra, Advocate contended that SRFAESI Act 2002 is special Act and action which has been taken is strictly in accordance with law, as such writ petition in question is liable to be dismissed.

5. After respective arguments have been advanced, undisputed position is that Bank acting through its authorized officer in exercise of its authority under Section 13(4) of SRFAESI 2002 has put up the property in question for sale and this much has also been accepted at the Bar that auction proceedings has been undertaken and in order to get possession of the said property in question in favour of auction purchaser application has been moved under Section 14(1) & (2) of the Act for rendering assistance in procuring possession and said application has been allowed.

6. Hon''ble Apex Court in the case of M/s Transcore Vs. Union of India & Anr reported in AIR 2007 712, framed three points for determination; second point thereof, which was taken for determination is as follows:

"(II) Whether recourse to take possession of the secured assets of the borrower in terms of "Section 13 (4) of the NPA Act comprehends the power to take actual possession of the immovable property."

7. Said issue has been dealt with in paragraph 52 of the aforesaid judgment, and therein view has been taken by Hon''ble Apex Court that till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL Rule 1 CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has 5 greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Relevant extract, paragraphs 52 to 56 of the said judgment is being quoted below:

52. The short question under this head is whether recourse to take possession of the secured assets of the borrower under Section 13(4) of the NPA Act comprehends the power to take actual possession of the immovable property.

53. Mr. N. C. Sahni and Mr. Pankaj Gupta, learned advocates appearing on behalf of the respective borrowers submitted that Section 13(4) of the NPA Act empowers the secured creditor to take possession of the secured immovable assets of the borrower on expiry of sixty days and notice served under Section 13(2) of that Act. It is pointed out that in many cases, the banks/FIs have taken actual physical possession whereas in other cases they have taken only a symbolic possession. Learned advocates submitted that in Kalyani Sales Co., the High Court has rightly held that if physical possession is taken on expiry of sixty days, the remedy of application under Section 17 of the NPA Act by the borrower would become illusory and meaningless as the borrower or the person in possession would be dispossessed even before adjudication of the objections by the tribunal. Learned advocates further submitted that under Section 13(8), the

bank/FI is prevented from selling the secured assets, if the dues of the secured creditor with all costs, charges and expenses are tendered to the secured creditor at any time before the date fixed for sale. Learned advocates pointed out that under Rule 8(1) of the 2002 Rules, a secured creditor is empowered to take possession as per notice appended in terms of Appendix IV. That notice cautions the borrower not to deal with the property. Learned advocates submitted that notice in terms of Rule 8(1) of the 2002 Rules operates as attachment. It contemplates a symbolic possession. Learned advocates submitted that actual physical possession of immovable assets can be taken under Rule 8(3), in cases where there is a vacant plot or a property which is lying unattended, but where the immovable property is in actual physical possession of any person, the person in possession cannot be dispossessed by virtue of a notice under Rule 8(1); that actual physical possession is to be delivered only after confirmation of sale under Rule 9(6) read with Appendix V under which the authorised officer is empowered to deliver the property to the purchaser free from all encumbrances in terms of Rule 9(9) of the 2002 Rules. Learned advocates, therefore, submitted that the High Court was right in holding that the borrower or any other person in possession of the immovable property cannot be physically dispossessed at the time of issuing notice under Section 13(4) of the NPA Act so as to defeat the adjudication of his claim by the DRT under Section 17 of NPA Act, and that, physical possession can be taken only after the sale is confirmed in terms of Rule 9(9) of the 2002 Rules.

54. We do not find any merits on the above contentions for the following reasons.

"55. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPA Act deals with the former type of securities under which the secured creditor, namely, the bank/FI obtains interest in the property concerned. It is for this reason that the NPA Act ousts the intervention of the courts/Tribunals.

56. Keeping the above conceptual aspect in mind, we find that Section 13(4) of the NPA Act proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13(2), which enables the secured creditor to take recourse to one of the measures, namely, taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realizing the secured assets. Section 13(4A) refers to the word "possession" simpliciter. There is no dichotomy in subsection (4A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That

notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 13(4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9(6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9(9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor. (Emphasis supplied). Section 14 of the NPA Act states 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, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17(1) of NPA Act refers to right of appeal. Section 17(3) states that if the DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13(4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13(4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then the DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPA Act provides for recovery of possession by nonadjudicatory process, therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly, refers to sale of immovable secured asset. However, Rule 8(4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13(8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8(4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a court receiver under Order XL, Rule 1, CPC. The court receiver can take symbolic possession and in appropriate cases where the court receiver finds that a third party interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a court receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorized officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that third party interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPA Act read with the 2002 Rules.

(iii) On Point No. 3, on question of Court fee : "

8. On the parameter as set out, in the fact of the present case, action taken is strictly in accordance with law, as such no interference is being made.

9. Consequently, present writ petition as it has been framed and drawn is dismissed.

