

(2009) 07 CAL CK 0007

In the Calcutta High Court

Case No : C.O. No. 3372 of 2008 with C.A.N. No. 2980 of 2009

Elements Coke Pvt. Ltd.

APPELLANT

Vs

UCO Bank

RESPONDENT

Date of Decision : 16-07-2009

Acts Referred:

Constitution of India, 1950 — Article 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(3A), 13(4), 17(1)

Citation : AIR 2009 Cal 252 : 114 CWN 662 : (2010) 8 RCR(Civil) 2351

Hon'ble Judges : Jyotirmay Bhattacharya, J

Bench : Single Bench

Advocate : Ajoy Krishna Chatterjee, Aniruddha Roy, Somnath Saha and Sudeshna Bagchi, for the Appellant; Sabyasachi Chowdhury and Soumen Das, for the Respondent

Judgement

Jyotirmay Bhattacharya, J.—The following issue has been raised in this revisional application before this Court for its consideration:

Whether the Debt Recovery Tribunal (DRT) at Calcutta has jurisdiction to entertain an application u/s 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereafter referred to as the SARFAESI Act) over the subject-matter of the dispute arising out of an action taken by the concerned bank against the borrower as per Section 13(4) of the said Act for realisation of its dues by sale of the mortgaged property of the petitioner at Gujarat?

2. In fact, the petitioner (borrower) invoked the jurisdiction of the Debt Recovery Tribunal at Calcutta for redressal of its grievances arising out of the action taken by the bank (secured creditor) u/s 13(4) of the said Act, as according to the petitioner, part of the cause of action has arisen within the territorial jurisdiction of the said Tribunal. The part of the cause of action which according to the

petitioner arose within the jurisdiction of the said Tribunal, are as follows:

1. Pursuant to the request made by the petitioner, UCO Bank, Ashram Road Branch, Ahmedabad sent its proposal dated 23rd August, 2003 to the UCO Bank Head Office, Credit Department at 10 BTM Sarani, Kolkata-700001 (hereafter referred to as the Head Office of the Bank) inter alia for sanction of the said credit proposal favouring the petitioner.
2. Pursuant to the said request made by the Ahmedabad Branch of the said Bank, the head office of the bank by its letter dated 13th November, 2003 advised the Ahmedabad Branch that competent authority had sanctioned the credit proposal on 7th November, 2003 subject to the terms and conditions enclosed in Annexure "2" with its memorandum dated 29th October, 2003. The said letter dated 13th November, 2003 was issued from the head office of the bank which is situated within, the jurisdiction of the Tribunal at Kolkata.
3. Ashram Road Branch of the said bank issued a notice on 3rd March, 2006 u/s 13(2) of the said Act alleging that the petitioner committed default in payment of its dues as per the terms and conditions of sanction of its credit proposal. The said notice which was addressed to the petitioner was served upon the petitioner at its registered office at 7/1, Lord Sinha Road, Kolkata within the jurisdiction of the said Tribunal. Pursuant to the said notice the petitioner submitted its representation on 28th April, 2006. Such representation was sent from "the registered office of the petitioner at Kolkata to the branch of the said bank at Ahmedabad. The said representation was received by the branch of the said bank at Ahmedabad.
4. Since the said representation was not considered by the said bank, a writ petition being W.P. No. 13158(W) of 2006 was moved by the petitioner before this Hon'ble Court and the said writ petition was ultimately disposed of on 25th May, 2006 after a contested hearing by granting liberty to the bank to take appropriate steps in accordance with law to protect its interest and directing the bank to consider the said representation of the petitioner and inform the decision to the petitioner before taking steps.
5. Pursuant to the said direction passed by this Hon'ble Court in the aforesaid writ petition, the Ashram Road Branch of the said bank disposed of the petitioner's said representation and ultimately communicated its decision from the said branch of the bank to the petitioner's Advocate at 6, Old Post Office Street, Kolkata-1 within the jurisdiction of the said Tribunal.
6. On 25th May, 2006 the concerned bank issued a notice for taking possession of the factory, plant and assets of the petitioner situated at Ahmedabad and the copy of the said possession notice was also served upon the petitioner at its registered office at Lord Sinha Road within the jurisdiction of the Tribunal.
7. Challenging the said action of the bank, the petitioner on or about 22nd June, 2006 filed an application u/s 17 of the said Act before the learned DRT-1 at

Kolkata. An interim order of injunction was passed by the said Tribunal on 30th June, 2006 directing the parties to maintain status quo. Such injunction was passed on the petitioner's application for interim injunction. Though the bank accepted the said order without filing any appeal, but subsequently the bank challenged the territorial jurisdiction of the said Tribunal to entertain the said application u/s 17 of the said Act, as according to the bank, the said Tribunal has no territorial jurisdiction to entertain the said application as no part of the integral part of the cause of action for the said application had arisen within the territorial jurisdiction of the said Tribunal.

3. The sum and substance of the contention of the bank regarding the lack of territorial jurisdiction of this Tribunal to entertain the said application is as follows:

1. Though notice u/s 13(2) of the SARFAESI Act is a condition precedent before measures under 13(4) of the said Act can be taken but it does not form an integral part of the cause of action and the receipt of the notice itself does not give any cause of action to the borrower since it is not the issuance of the notice u/s 13(2) of the SARFAESI Act that give rise to the cause of action but non-payment of demand raised in the said notice which gives right to the bank to take over the mortgage assets of the defaulting borrower u/s 13(4) of the said Act.

2. The right of the petitioner (borrower) to approach the Debt Recovery Tribunal u/s 17 of the SARFAESI Act accrues only after measures are taken under Sub-section (4) of Section 13 of the said Act. As such, service of notice of Section 13(4) of the said Act forms an integral part of the cause of action to approach the Debt Recovery Tribunal u/s 17 of the said Act.

3. Measures u/s 13(4) of the SARFAESI Act deals with enforcement of security interest only and therefore, any proceeding of this nature arising out of the enforcement action has to bar co-relation with territorial limits-within which such security interest is enforced. Admittedly the mortgage properties and/or the securities all situate at Ahmedabad in respect of which possession notice was issued.

4. The bank having its head office at Kolkata is of no consequence as each banking branch is treated as a separate entity and thus cannot cloth the Debt Recovery Tribunal, Kolkata any jurisdiction to entertain the said appeal as the sanction of the loan proposal was, in fact, given by the branch office at Ashram Road Branch at Ahmedabad.

5. Similarly, (i) service of notice u/s 13(2) of the said Act upon the petitioner at its registered office at Kolkata and/or (ii) sending of representation from the from the registered Office of the petitioner and/or (ii) receipt of the communication of the bank's decision from its Ashram Road Branch by the petitioner at its registered office address at Kolkata and/or (iv) service of notice u/s 13(4) of the said Act upon the petitioner at its registered office at Kolkata,

are of no consequence as the aforesaid acts and/or action do not form an integral part of the cause of action so far as enforcement of security is concerned as per Section 13(4) of the said Act.

4. The learned Debt Recovery Tribunal, Kolkata held that it has territorial jurisdiction over the subject-matter as the head office of the creditor bank, from where it carries on its business for gains, is situated within the territorial jurisdiction of Kolkata and the High Court at Kolkata had entertained and disposed of the writ petition filed by the borrower despite objection of the creditor bank that the High Court at Kolkata had no territorial jurisdiction to entertain the same.

5. Thus, the objection regarding lack of territorial jurisdiction of the Tribunal to entertain the petitioner's application u/s 17 of the said Act which was raised by the opposite party bank, was not accepted by the said Tribunal.

6. The bank was aggrieved against the said order. As such, the bank preferred an appeal before the Debt Recovery Appellate Tribunal, Kolkata. The learned Appellate Tribunal reversed the judgment and/or order of the learned Debt Recovery Tribunal, Kolkata by holding inter alia that no part of integral part of the cause of action has arisen within the territorial jurisdiction of the said Tribunal and as such, the said Tribunal has no territorial jurisdiction to entertain the said application u/s 17 of the said Act.

7. The learned Appellate Tribunal was of the view that grant of formal sanction of the loan by head office of the creditor bank at Kolkata and/or service of some of the notices at the registered office of the borrower at Kolkata did not constitute an integral part of the cause of action. According to the learned Appellate Tribunal, since the borrower was granted loan on credit facilities on certain terms and conditions by Ashram Road Branch of the creditor bank and since Immovable properties situated in the State of Gujarat were secured for repayment of outstanding dues of the creditor bank and since the notice for public auction of the secured properties was published in the newspaper in a Gujarat, these part of the bundle of facts really form the integral part of the cause of action so far as the petitioner's application u/s 17 of the Said Act is concerned wherein the measure taken u/s 13(4) of the said Act has been challenged.

8. The propriety of the said judgment and/or order, of, the learned Debt Recovery Appellate Tribunal, Kolkata is under challenge in this application under Article 226 of the Constitution of India before this Court.

9. Heard Mr. Chatterjee, learned Counsel, appearing for the petitioner and Mr. Chowdhury, learned Counsel, appearing for the opposite party, considered the materials on record including the order impugned.

10. Let me now consider the merit of this revisional application with reference to the question as formulated above.

11. Jurisdiction of the Tribunal is dealt with u/s 19 of the Recovery of Debts due

to Banks and Financial Institutions Act, 1993. Clause (C) of Section 19(1) of the DRT Act is relevant here for the purpose of resolving the dispute regarding the Jurisdiction of the Tribunal over the subject-matter of the present dispute. As such, only that part of the said provision is set out hereunder:

Section 19(1)

Where a bank or a financial institution has to recover any debt from any person, it may make an application to the Tribunal within local limits of whose jurisdiction

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- (a) the defendant, or each of the defendants where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or
- (b) any of the defendants, where there are more than one, at the time of making the application, actually and voluntarily resides or carries on business or personally works for gain; or
- (c) the cause of action, wholly or in part, arises.

12. The said provision thus makes it clear that if any part of the cause of action arises within the territorial jurisdiction of this Tribunal at Kolkata then certainly the said Tribunal is competent to entertain the petitioner's said application u/s 17 of the said Act.

13. Now, what is the meaning of cause of action? It has been held by the Hon'ble Supreme Court in the case of Swamy Atmananda and Others Vs. Sri Ramakrishna Tapovanam and Others, that cause of action means every fact which, it traversed it would be necessary for the plaintiff to prove in order to support his right to a judgment of the Court or in other words it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on, but includes all the material facts on which it is founded.

14. If this principle is applied to the facts of the instant case then, of course, broadly speaking all the facts starting from sanction of the loan proposal of the petitioner from the bank having its Branch Office at Ashram Road at Ahmedabad up to the issuance of notice for taking possession of the petitioner's securities at Ahmedabad will constitute cause of action for filing application u/s 17 of the said Act. But can it be said that all this acts and/or actions constitute integral part of the cause of action of the present application?

15. For ascertaining what are the acts and/or action which constitute the integral part of the cause of action, this Court is required to consider the following two decisions of the Hon'ble Supreme Court on which the learned Counsel for both the parties placed strong reliance:

1. In the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.,

2. In the case of Transcore Vs. Union of India (UOI) and Another, .

16. In the case of Mardia Chemicals, the Hon''ble Supreme Court made it clear that no right accrues to approach Debt Recovery Tribunal at any stage prior to Section 13(4) of the said Act. Or in other words right to approach the Tribunal u/s 17 of the said Act matures only when any measure is taken u/s 13(4) of the said Act.

17. According to Mr. Chowdhury, the proviso to Section 13(3A) read with the explanation added to Section 17(1) of the said Act makes it clear that the right to apply u/s 17 of the said Act matures only when any measure referred to in Section 13(4) is taken by the secured creditor or his authorised officer. According to Mr. Chowdhury, the aforesaid provision makes it clear that though action u/s 13(4) of the said Act can be taken preceded by service of notice u/s 13(2) of the said Act upon the borrower but, still then, restriction has been imposed upon the right of the borrower to approach the Tribunal u/s 17 of the said Act for challenging any action taken by the Bank u/s 13(2) or Section 13(3A) stage. Thus, Mr. Chowdhury submits that service of notice u/s 13(2) of the said Act upon the borrower cannot be regarded as an integral part of the cause of action.

18. Mr. Chowdhury thus submitted that integral part of the cause of action for the present purpose means any measure which will be taken by the bank and/or the secured creditor u/s 13(4) of the said Act. Mr. Chowdhury submitted that the spirit of the provision contained in Section 13(4) shows that the proceeding contemplated therein is akin to execution proceeding and in the instant case expression action is to be construed as a suit or a legal proceeding which has already commenced as per Section 13(4) of the said Act in Gujarat where the secured assets which are sought to be sold in execution, are lying. According to Mr. Chowdhury, the expression "action" used in the case of Transcore to describe a notice u/s 13(2) of the said Act would not convert the same into a cause of action to approach the Debt Recovery Tribunal u/s 17 particularly, in view of the expressed proviso contained in Section 13(3A) read with the provision of Section 17(1) of the SARFAESI Act.

19. Mr. Chowdhury further pointed out by referring to the decision of the Division Bench of this Hon''ble Court in the case of Oriental Bank of Commerce Vs. Santosh Kumar Agarwal, that mere fact that the regional office is situated within does not give jurisdiction to this Tribunal as each Branch of a bank is a separate entity.

20. Thus. Mr. Chowdhury supported the judgment passed by the learned Appellate Tribunal.

21. In my view, sanction of the loan proposal either from the bank in its Head office at Calcutta or from its branch office at Ahmedabad does not form part of

the integral part of cause of action. As such this part of the controversy has no relevance on the issue in hand.

22. Mr. Chatterjee, on the contrary, submitted that no action u/s 13(4) of the said Act can arise without service of demand notice and/or show cause notice u/s 13(2) of the said Act. According to Mr. Chatterjee realization process which starts with notice u/s 13(2) of the said Act is completed by the measures to be taken u/s 13(4) of the said Act. Thus, according to Mr. Chatterjee it is a complete chain and the chain is not complete without (1) service of notice u/s 13(2) of the said Act, (2) consideration of the borrower's representation by the creditor bank (3) communication of its decision on the said representation and in addition thereto, (4) the measures to be taken u/s 13(4) of the said Act. Thus, according to Mr. Chatterjee if any part of the said chain is taken out of the said chain, the chain will be snapped. As such, Mr. Chatterjee submitted that service of notice u/s 13(2) of the said Act upon the petitioner at its Head Office at Calcutta, sending of representation from the registered office to the Ashram Branch and the communication of the bank's decision to the petitioner at the registered office at Calcutta do constitute the integral part of the cause of action for filing an application u/s 17 of the said Act.

23. For assessing the facts which exactly constitute an integral part of the cause of action for filing an application u/s 17 of the said Act, this Court is required to take note of provision contained in Section 13(2), Section 13(3A), Section 13(4) and Section 17(1) of the said Act read with Section 19 of the DRT Act.

24. If the aforesaid provisions are taken into consideration, then this Court finds that the entire realisation process is divided in two phases. The first phase of such process commences with service of demand notice and/or show cause notice u/s 13(2) of the said Act upon the borrower. Once such notice is served, the borrower gets a right to submit its representation in the form of his reply to the said show cause notice for denying and/or disputing the correctness of such demand and/or legality of such notice. If such representation is submitted, then the concerned Bank/secured creditor is required to consider the said representation and to come to the conclusion as to the acceptability and/or tenability of the said representation and thereafter to communicate its decision to the borrower as per Section 13(3A) of the said Act. The proviso to Section 13(3A) of the said Act provides that such communication of the secured creditor's decision to the borrower will not confer any right upon the borrower to approach the Tribunal/Court for challenging the correctness of such decision. Thus, the decision of the secured creditor becomes final and conclusive so far as the legality and/or conclusiveness of such demand as assessed by the secured creditor.

25. This is the end of the first phase of this chapter. The scheme of the said Act thus makes it clear that the integral part of the cause of action for the first phase of this chapter are as follows:

1. Borrower makes a default in repayment of secured debt or any installment under a security agreement and his account In respect of such debt Is classified by the secured creditor as non-performing assets.
2. Secured creditor, may by notice invite the borrower to discharge his liability in full to the secured creditor within sixty days from the date of notice, with a rider that falling compliance of such notice, the creditor will exercise all or any of the rights under Sub-section (4) thereof. Details of the demand should be Indicated in the notice.
3. Borrower may submit his representation to the secured creditor raising his objection to such demand.
4. Secured creditor will have to consider the said representation and come to a decision with regard to the objection raised by the borrower in his representation.
5. Secured creditor will have to Intimate his decision to the borrower.
26. These are the entire bundle of facts which forms integral part of the cause of action for the first phase of the said scheme.
27. But, the proviso to Section 13(3A) of the said Act provides that this part of the cause of action is not amenable to the jurisdiction of the Tribunal/Court.
28. In case of failure to discharge the liability by the borrower as per Section 13(2) of the said Act, the second phase of this chapter commences when the secured creditor takes recourse to one or more of the measures as specified in Sub-section (4) of Section 13 thereof, for recovery of secured debts.
29. Once such step is taken by the secured creditor, a fresh cause of action arises for challenging the said action of the secured creditor to Tribunal/Court, as the case may be, as per Section 17 of the said Act.
30. If this part of the scheme of the Act is examined then it goes without saying that failure to discharge the liability by the borrower as per demand notice u/s 13(2) of the said Act is an integral part of the cause of action for the second phase which provides the remedy for realisation of secured debt by the secured creditor u/s 13(4) of the said Act.
31. Now, the moot question is, as to how such failure is to be ascertained. As per the security agreement, the borrower is required to pay his debt at the Ashram Road Branch of the said bank at Ahmedabad. The said bank at its Ashram Road Branch is required to examine its records for ascertaining as to whether the borrower has discharged his liability or not. In case it is found that the borrower has failed to discharge his liability, then steps for realisation is to be taken by sale of the secured assets, which admittedly in the instant case situate at Ahmedabad beyond the territorial jurisdiction of the DRT Kolkata.
32. On examination of the scheme of the said Act particularly Section 13 thereof, this Court has no hesitation to hold that the measures provided u/s 13(4) of the

said Act is in the nature of execution of the ultimate decision of the secured creditor taken u/s 13(3A) of the said Act coupled with the fact of non-payment of the dues so determined u/s 13(2) and/or Section 13(3A) of the said Act.

33. Since the action u/s 13(4) of the said Act is in the nature of execution proceeding, the Tribunal within whose territorial jurisdiction the secured assets situate, is the only competent Tribunal whose jurisdiction can be invoked for filing an application u/s 17 of the said Act as the cause of action for the second phase of this chapter wholly arises within the jurisdiction of the said Tribunal.

34. Mere service of notice u/s 13(2) of the said Act, and/or communication of the decision of the secured creditor to the borrower at its registered office at Kolkata, though may form part of the cause of action, however, insignificant it may be, but these parts of the cause of action do not form part of the integral part of the cause of action u/s 13(4) of the said Act, as these part of the cause of action has no correlation with the measures to be taken by the secured creditor u/s 13(4) of the said Act for realisation of its dues by sale of the secured assets of the borrower.

35. In this regard, reliance may be made to the decision of the Hon"ble Supreme Court in the case of Oil and Natural Gas Commission Vs. Utpal Kumar Basu and Others, where in a similar set of facts the Hon"ble Supreme Court held that mere service of notice even if service of such notice is a precondition for initiation of a proceeding, does not constitute the integral part of the cause of action.

36. Thus, this Court does not find any justification to interfere with the impugned order passed by the learned Appellate Forum.

37. Accordingly, this Court does not find any merit in this application. This application, thus, stands rejected.

Re : CAN 2990 of 2009

38. This application has been filed by Dhir & Dhir Asset Reconstruction and Securitisation Company Ltd. which is not a party to the original proceeding.

39. There is hardly any scope for entertaining any application from a stranger who is not a party in the original proceeding.

40. That apart, the relief claimed in this application has no correlation with the subject-matter of dispute which is presently under consideration of this Court.

41. As such, this Court refuses to entertain this application. This application, thus, stands rejected.

42. This order, however, will not prevent the applicant to seek appropriate relief before appropriate forum in accordance with law.

43. Urgent xerox certified copy of this order, if applied for, be supplied expeditiously after complying with all formalities.