(2012) 07 MAD CK 0124

In the Madras High Court

Case No : Writ Petition No. 19903 of 2011 and M.P. No. 1 of 2011

Eshwar Purushothaman Gardens APPELLANT

Vs

Indian Bank RESPONDENT

Date of Decision : 05-07-2012

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3A), 13(4), 2

Citation : (2013) 1 BC 216 : (2012) 5 CTC 257

Hon'ble Judges : K.K. Sasidharan, J;D. Murugesan, J

Bench : Division Bench

Advocate : B. Ravi Raja, for the Appellant; M. Balachandar, for the Respondent

Final Decision : Dismissed

Judgement

K.K. Sasidharan, J.—This writ petition at the instance of the borrower, challenges the recovery proceedings initiated by invoking the provisions of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act") principally on the ground that the secured asset is an agricultural land and as such, the Bank was not legally correct to invoke the provisions of SARFAESI Act.

The facts:

The petitioner is a registered firm engaged in agricultural operations. The petitioner made an application before the Indian Bank, Coimbatore requesting grant of term loan for agricultural operations. The petitioner offered their agricultural property as collateral security. The Bank sanctioned the loan characterising it as "Agricultural Loan". The petitioner after obtaining the loan amount, engaged in various kinds of agricultural operations.

2. Since the petitioner was not in a position to pay the entire loan amount within the time granted by the Bank, application was given for one-time settlement. However, the proposal was not considered by the Bank. Subsequently, the Bank

initiated proceedings u/s 13(2) of the SARFAESI Act. The notice u/s 13(2) was issued on 26th April, 2011. The petitioner submitted a reply on 23rd June, 2011 wherein, it was stated that the secured property is an agricultural land and as such, the SARFAESI Act has no application. The Bank overruled the objections as per letter dated 24th June, 2011. Subsequently, the Bank issued possession notice on 16th August, 2011. The notice u/s 13(4) is challenged by the petitioner mainly on the ground that the loan in question was sanctioned for agricultural purposes and the security was created in their agricultural land and as such, it is not open to the Bank to invoke the provisions of SARFAESI Act.

Defence:

3. The Chief Manager of Indian Bank, Zonal Office, Coimbatore filed a detailed counter disputing the claim made by the petitioner. According to the Bank, credit facilities were not sanctioned for agricultural purposes. The property is also not used for agricultural purposes. The petitioner has offered their land at Bhavani as security wherein the activities pertaining to commercial/cash crops viz., Coconut, Sugarcane, Turmeric, Mango, Coco, etc., are carried out. Moreover, buildings like farm house, servant quarters, vermiculture sheds, cattle sheds etc., were constructed in the said property and as such, it cannot be said that the property is still an agricultural property. The Bank challenged the very maintainability of the writ petition on the ground of alternative remedy.

Submissions:

4. The learned Counsel for the petitioner submitted that the loan in question was given for agricultural purposes. The agricultural property owned by the petitioner was given as security. Section 31(i) of the SARFAESI Act excludes the provisions of SARFAESI Act with respect to agricultural land. Therefore, the Bank was not justified in issuing notice under Sections 13(2) and 13(4) of the SARFAESI Act. The learned Counsel by placing reliance on the judgment of a Division Bench of this Court in J. Malliga and Others Vs. Union Bank of India and Another, contended that this Court has already made the position clear that even" cardamom plantation" should be treated as an agricultural activity and as such Section 31(i) would come into play, in case security is created in such land. According to the learned Counsel, large number of documents produced by the petitioner including the extract of Patta and the field registers clearly indicates that the property is nothing but agricultural land. Since there is no dispute with respect to the nature of the land in question, the respondent cannot be heard to say that the writ petition is not maintainable.

5. The learned Counsel for the respondent-Bank, by placing reliance on the judgments of Supreme Court in Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah, and Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy, contended that mere description of the property as "agricultural property" is not sufficient. The exemption is connected with the usage of land or the purpose, which must be

agriculture. The learned Counsel contended that only in case there are basic operations and further operation involving expenditure of human skill and labour it can be said that the land is used for agricultural purposes. So far as the present case is concerned, basic operation is lacking. Some of the cultivations are not agricultural in nature. At any rate, it cannot be said that the entire property is used for agricultural activities so as to exclude the land from the purview of SARFAESI Act. According to the learned Counsel, the petitioner has not produced any satisfactory material to prove that the entire lands are agricultural lands and they have been carrying on agricultural activities. Therefore, it cannot be said that the Bank was not justified in issuing notices under Sections 13(2) and 13(4) of SARFAESI Act.

Discussion and conclusion:

6. The SARFAESI Act was enacted to enable the Banks and Financial Institutions to recover the outstanding without approaching the Court and Tribunals. The Banks were not empowered earlier to take possession of securities and disposes of the same to realise the debt. It was only under such circumstances, the Parliament enacted the SARFAESI Act so as to enable the Banks and Financial Institutions to recover the loan without resorting to the time consuming legal proceedings. Section 13(4) permits the Banks and Financial Institutions to take possession of secured asset in case the borrower fails to pay the amount within the period prescribed in the notice issued under Sub-section (2) of Section 13 of the SARFAESI Act.

7. Section 2(t) defines "Property" as immovable property; movable property; any debt or any right to receive payment of money, whether secured or unsecured; receivables, whether existing or future and intangible assets, being know-how, patent, copyright, trademark, licence, franchise or any other business or commercial right of similar nature.

8. Section 31 of the SARFAESI Act deals with certain items of property which are excluded from the purview of SARFAESI Act. Section 31(i) provides that the provisions of the Act shall not apply to any security interest created in agricultural land.

9. The learned Counsel for the petitioner placed heavy reliance on the statement made by the Bank with respect to the nature of loan. According to the learned Counsel, the loan in question was given for agricultural purposes and as such, it is not open to the Bank to invoke the provisions of the SARFAESI Act. We are not in agreement with the said submission. The nature of loan transaction has nothing to do with the applicability of the Act. In case, loan is taken for non-agricultural purposes and security interest is created in agricultural land, the Bank cannot proceed under the SARFAESI Act. Similarly, in case the loan is taken for agricultural purposes and security is created on non-agricultural land, the Act would apply with all vigour and Section 31 would not stand in the way of recovery proceedings.

10. The petitioner submitted an application for financial assistance and pursuant to the said application the Bank issued a sanction letter on 3rd April, 2006. The loan was referred to as agricultural loan categorised as "priority". The Activity was also shown as "agriculture". The land offered by the petitioner as security shows that all those lands were agricultural lands. The sanction ticket issued by the Bank itself contains the details of the property offered as security along with their value.

11. The loan in question was sanctioned to undertake agricultural operations and the very same land was given as security. The details regarding disbursement shows that the loans were sanctioned separately for drip and sprinkler irrigation, vanilla plantation, vermiculture project, digging wells and other agricultural operations.

12. The Bank issued a notice u/s 13(2) of the SARFAESI Act on 26th April, 2011 calling upon the petitioner to discharge the dues. The Bank described the loan as "Agri Medium Term Loan" and the petitioner was directed to pay the entire outstanding within a period of sixty days from the date of receipt of notice. The petitioner in their reply dated 23rd June, 2011 informed the Bank that the loan was given for agricultural purposes and the property offered as security were all agricultural lands. The petitioner very categorically stated that the land was used only for agricultural purposes and given the nature of the land, the SARFAESI Act is not applicable. The Bank considered the representation u/s 13(3-A) and issued a reply to the petitioner on 24th June, 2011. Though the Bank denied the allegation with regard to excess interest charged from the petitioner, the fact remains that the Bank has not specifically denied or disputed the statement made by the petitioner with respect to the nature of land offered as security.

13. The petitioner has produced a copy of patta; certificate from the Village Administrative Officer and a certificate issued by the Tamil Nadu Electricity Board indicating the actual usage of property. Those documents are primary materials to draw a presumption that the property in question is an agricultural land and the petitioner is conducting agricultural operations. It is true that the presumption is rebuttable. However, the Bank has not produced any evidence to rebut this presumption.

14. The learned Counsel for the Bank placed heavy reliance on the judgment of Supreme Court in C.W.T. v. Officer-in-Charge (Court of Wards) (supra) in support of his contention that the land should actually be used for agricultural purposes and mere description of the land as agricultural land would not suffice. The Supreme Court in the said decision considered the definition of "agricultural land" as contained in the Wealth-tax Act, 1957 in the light of the claim made by the assessee for exemption and observed that the land must be an agricultural land, which is said to be either actually used or ordinarily used or meant to be used for agricultural purposes and that the agricultural land must have a connection with an agricultural user or purposes. The Supreme Court further observed that the correct test to apply would be to find out whether human labour had been

applied to the land itself, in order to extract from its natural powers, added to or aided by other natural or artificial sources of strength of the soil, a product which can yield an income.

15. The Supreme Court in Commissioner of income tax, West Bengal v. Raja Benoy Kumar Sahas Roy (supra) held that in order to include the income derived by the assessee as an agricultural income, two conditions should be satisfied namely, (i) that the land from which it is derived should be used for agricultural purposes and is either assessed for land revenue in the taxable territories or is subject to local rates assessed and collected by the officers of the Government as such and (ii) that the income should be derived from such land by agricultural or by one or the other of the operations described in the income tax Act.

16. The scope and ambit of Section 31 of the SARFAESI Act came up for consideration before the High Court of Kerala in Mohammed Basheer, K.P. v. Deputy General Manager, (Judgment dated 11th February, 2010 W.A. No. 155 of 2010). The Division Bench indicated that the agricultural land is that species of land which could be said to be either used or ordinarily used for agricultural purposes. The Bench said.

16. ''Agricultural land'' is that species of land which could be said to be either used or ordinarily used for agricultural purposes. "Agricultural land" must have a connection with an agricultural user or purpose. It is on the nature of user that the meanings of "agricultural purpose" and "agriculture" become relevant. Popular and authoritative Dictionaries say that "agriculture" is the art or science relating to the practices of cultivating the land. Agriculture is the process by which human skill is expended upon land. Human labour, with or without the aid of implements, tools and machines, is employed utilising the art or science of cultivating the ground. In its good sense, it means farming, horticulture, forestry etc., including the allied pursuits, preparation of land or fields in large quantities, preparation of soil, planting of seeds, raising and harvesting of crops, etc. In certain shades, agriculture also includes management of live stock, etc. But primarily, it is understood as the process of putting land to use in the growing of crops by employing human skill and labour upon land. As noted above from Commissioner of income tax, West Bengal v. Raja Benoy Kumar Sahas Roy (supra) agriculture includes raising, on the land, of products which have some utility either for consumption or for trade and commerce.

The term "agriculture" cannot be defined or understood by the nature of the products cultivated. No such classification is conceivable unless specifically provided for, having regard to the specific need to make such classification. If such classification is to provide different consequence of a piece of statute law, including its applicability, we definitely think that such classification should be found explicit on the clear expressions in that particular statute.

17. The Division Bench of the Kerala High Court of Mohammed Basheer, K.P. v. Deputy General Manager (supra) also considered the Statement of Objects and

said:

20. When the Bill leading to the Act was introduced, to replace the predecessor Ordinance, the Statement of Objects and Reasons, in Clause 2(m), specifically referred to the intention to provide for the non-application of the proposed legislation to security interests in agricultural lands. The purpose of using the term "agricultural land" in the Act, to wit, in Section 31(i) thereof, is to provide that the Act shall not be applied to security interests created on such lands. Yet, the Legislature thought it fit not to define the term "agricultural land" for the purpose of the Act. It expressed no intention to classify agricultural lands on any basis. Had it intended, nothing prevented such intention being expressed in the enactment itself. We look at the issue from this angle also because, in hand is a provision that makes an exemption from the application of a statute, which is predominantly penal in nature, as regards securitization and attendant proceedings involving the enforcement of rights of creditors against debtors. The inexcusable conclusion is obvious; that the clear legislative intention is that the term "agricultural land" in Section 31(i) of the Act would be applied without culling out any exemption from that term on the basis or nature of crop or the cultivation that is made on that land. All that is required is that it should be an agricultural land.

18. We are in respectful agreement with the views expressed by the Division Bench of Kerala High Court in Mohammed Basheer, K.P. v. Deputy General Manager (supra).

19. The [earned Counsel for the Bank made an alternative submission that only in case the property is used for production of food crops for human beings, exemption would attract and not for production on a commercial scale. We are not in agreement with the said submission in view of the observation made by the Supreme Court in Commissioner of income tax v. Benoy Kumar Sahas Roy (supra). The Supreme Court said:

91. In considering the connotation of the term "agriculture" we have so far thought of cultivation of land in the wider sense as comprising within its scope the basic as well as the subsequent operations described above, regardless of the nature of the products raised on the land. These products may be grain or vegetables or fruits which are necessary for the sustenance of human beings including plantations and groves, or grass or pasture for consumption of beasts or articles of luxury such as, betel, coffee, tea, spices, tobacco etc., or commercial crops like, cotton flax, jute, hemp, indigo, etc. All these are products raised from the land and the term "agriculture" cannot be confined merely to the production of grain and food products for human beings and beasts as was sought to be done by Bhashyam Ayyangar, J., in Murugessa Chetti v. Chinnathambi Goudun or Sadashiva Ayyar, J., in Rajah of Venkatigiri v. Ayyappa Reddi, but must be understood as comprising all the products of the land which have some utility either for consumption or for trade and commerce and would also include forest products such as timber, sal and piyasal trees, casuarina

plantations, tendu leaves, horranuts etc.

20. The Supreme Court in Commissioner of Wealth-tax, Andhra Pradesh v. Officer-in-Charge, (Court of Wards), Paigah, (supra), indicated the relevant test to determine the issue as to whether a particular property is agricultural. The Supreme Court observed that the determination of the character of land according to the purpose for which it is meant or set apart and can be used is a matter which ought to be determined on the facts of each particular case. The Supreme Court opined, "what is really required to be shown is the connection with an agricultural purpose and user and not the mere possibility of user of land by some possible future owner or possessor, for an agricultural purpose".

21. The documents produced by the petitioner, which includes the sanction ticket issued by the Bank clearly shows that the security interest was created in an agricultural land.

22. The term "agricultural land" is not defined in the SARFAESI Act. The land in question is situated in the State of Tamil Nadu. The Tamil Nadu Patta Pass Book Act, 1983 gives an inclusive definition to the term "agriculture". Section 2 of the said Act would read thus:

2. Definitions--In this Act, unless the context otherwise requires-

(1) "agriculture" includes-

(a) horticulture;

(b) the raising of crops, grass or garden produce;

(c) the use by an agriculturist of land held by him, or part thereof, for grazing;

(d) the use of any land for the purpose of raising manure crops;

(e) dairy farming;

(f) poultry farming;

(g) livestock breeding;

(h) growing of trees;

and "agricultural" shall be construed accordingly;

(2) "credit agency" means any individual, co-operative credit society by whatever name called, including the Land Development Bank, a commercial Bank, a private Bank or any other agency the main object of which is to lend money;

(3) "Government" means the State Government;

(4) "land" means agricultural land, that is to say, land which is used or capable of being used for agricultural purposes or purposes subservient thereto and is either assessed to land revenue in the State or is subject to a local rate assessed and collected by officers of the Government as such and includes horticultural land,

forest land, garden land and plantations, but does not include house site;

(5) "limited owner'' means any person entitled to a life-estate in any land and includes persons deriving rights through him.

Explanation--a person who had a right to enjoy the land during his lifetime shall be deemed to be a limited owner notwithstanding that he had no power to alienate the land.

23. The Act is very clear that any security created in agricultural land is exempted from the purview of SARFAESI proceedings. The nature of land and its usage should be taken together to decide the issue as to whether the land in question is an agricultural land. In case the predominant purpose is agricultural in nature, the exemption provisions would come into operation.

24. The Bank has not produced any material to substantiate its contention that the lands are not agricultural and the petitioner is not doing agricultural operations. Even according to the counter affidavit filed by the Bank, the petitioner has been carrying on agricultural activities on commercial basis. The fact that the agricultural operations are undertaken on commercial basis would not go to show that the activities are not agricultural. While issuing the sanction ticket, the Bank very clearly described the property as agricultural property. However, very conveniently they have omitted the word "agricultural land" while issuing preliminary notice u/s 13(2) and possession notice u/s 13(4).

25. The learned Counsel for the Bank opposed the writ petition also on the ground of maintainability. According to the learned Counsel, the matter involves adjudication of facts and as such, the petitioner should be directed to approach the Debts Recovery Tribunal.

26. There is no doubt that in case the matter involves disputed questions of fact, the same cannot be decided in a writ petition on the basis of affidavits and counter-affidavits. However, the dispute should be a bona fide one and not one raised for the sake of dispute. In case the available materials are sufficient to arrive at a clear finding that the secured asset is an agricultural property, there is no point in directing the borrower/guarantor to approach the Debts Recovery Tribunal. When the very initiation of SARFAESI proceeding is under challenge on the ground of statutory bar, and the available materials are sufficient to decide the issue, it cannot be said that still the party should be directed to approach the Debts Recovery Tribunal.

27. The question regarding alternative remedy would lose its significance in the present case in view of the voluminous documents produced by the petitioner to show that security was created in their agricultural land. Mere denial in the counter-affidavit unaccompanied by documents to prove such defence, would not result in raising a disputed question, so as to direct the parties to approach the Debts Recovery Tribunal.

28. Therefore, on a careful consideration of the entire factual matrix, we are of

considered view that security interest was created by the Bank in an agricultural land and as such, the Bank has no authority to initiate proceedings under the SARFAESI Act. It is open to the Bank to recover the amount due in any other manner known to law. The invocation of the SARFAESI Act alone is held to be barred in view of Section 31(i) of the SARFAESI Act. Accordingly, the notice issued by the Bank u/s 13(4) of the SARFAESI Act is quashed. In the upshot, we allow the writ petition. Consequently, the connected MP is closed. No costs.

