

(2009) 06 AP CK 0019

In the Andhra Pradesh High Court

Case No : Writ Petition No. 2493 of 2009

G. Manohar

APPELLANT

Vs

Indian Bank (ADB), Nagiri Branch

RESPONDENT

Date of Decision : 17-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 146
Contract Act, 1872 — Section 2, 37
General Clauses Act, 1897 — Section 3(42)
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 2, 22
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 2, 2(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 8(1)
Transfer of Property Act, 1882 — Section 58, 59A

Citation : (2009) 5 ALD 532 : (2009) 4 ALT 770

Hon'ble Judges : Vilas V. Afzulpurkar, J; Ghulam Mohammed, J

Bench : Division Bench

Advocate : C. Raghu, for the Appellant; Ambadipudi Satyanaraya, for the Respondent

Final Decision : Dismissed

Judgement

Ghulam Mohammed, J.—The question that arises for determination in this writ petition relates to action of the respondent-bank in initiating proceedings under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) (for short " the SARFAESI Act") in respect of a loan availed by the father of the petitioner.

2. The facts stated are that the father of the petitioner has started the business under the name and style of M/s. Srinivasa Borewells as a Proprietor and secured loan of Rs. 2,16,000/- by mortgage of the property from the respondent-Bank on 13-6-1981 and purchased a Bore-Well Rig. When he committed default in payment of instalments, the respondent bank filed O.S. No. 5 of 1992 before the court of the Subordinate Judge, Puttur for recovery of an amount of Rs.

7,75,326/- by sale of mortgaged property. In the said suit father and mother of the petitioner were made as defendants 2 and 3. The said suit was decreed by the trial Court by its judgment and decree dated 2-5-1999 directing the defendants i.e. mother and father of the petitioner herein to pay an amount of Rs. 10,52,723.75 ps. and interest @ Rs. 3,35,000/- from the date of redemption till the date of realization and in default of the payment the respondent-bank can apply to the court for a final decree for the sale of the mortgaged property for realization of the due amount. The respondent-Bank filed E.P. No. 1 of 2003 and the same was dismissed. Again another E.P. No. 8 of 2004 was filed and it also came to be dismissed. Thereafter E.P. No. 37 of 2008 was filed and the same is pending.

3. As the matter stood thus, the respondent-Bank has issued a notice dated 29-11-2008 u/s 13(2) of the SARFAESI Act calling upon the petitioner and other legal heirs to pay the due amount. In the said notice it is mentioned that the petitioner has been shown as the legal heir of the principal borrower and his mother was shown as the guarantor, and that petitioner's sisters have been also shown as legal heirs of late G. Ramakrishnam Naidu. Immediately after receipt of the said notice, the petitioner made representation dated 5-12-2008 to the respondent-bank stating that the respondent-bank has agreed for one time settlement for Rs. 7,75,326/- and that with a great difficulty he had paid Rs. 70,000/-. It is the grievance of the petitioner that the respondent-Bank, without considering the representation of the petitioner, has issued possession notice under Rule 8(1) of the Security Interest (Enforcement) Rules, 2002 (for short "the Rules"). Challenging the said action of the respondent-bank in initiating proceedings u/s 13(2) of the SARFAESI Act dt. 29-11-2008 and possession notice dated 6-2-2009 issued under Rule 8(1) of the Rules, the present writ petition has been filed.

4. Sri C. Raghu, learned Counsel for the petitioner contends that proceedings under SARFAESI Act cannot be invoked against the legal heirs of the borrower as the definition of the "borrower" contained in Section 2(f) of the SARFAESI Act does not include a legal heir of the borrower and therefore once the Principal Borrower dies the respondent-Bank cannot invoke the provisions of the SARFAESI Act. In support of his contention, learned Counsel relied on the decisions reported in *Institute of Chartered Accountants of India v. Price Waterhouse* AIR 1998 SC 74, *Transcore v. U.O.I* 2006 (2) Scale 585. It is further contended by the learned Counsel for the petitioner that by the time SARFAESI Act came into force with effect from 21-8-2002, already a decree was passed by the civil Court and since the rights under a security agreement available to the respondent-bank have been crystallized in the form of decretal rights provisions of Section 13 of the SARFAESI Act are not applicable.

5. On the other hand, Sri Ambadipudi Satyanarayana, learned Standing Counsel for the respondent-bank would contend that simultaneous proceedings can be initiated against the borrower and that no specific plea was raised by the

petitioner with regard to this aspect. Drawing our attention to the definition of "debt" contained in Section 2(g) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, and also Section 2(f) and 2(1) of the SARFAESI Act learned Standing Counsel further contended that basically the SARFAESI Act was enacted for quick enforcement of the security and it deals with the enforcement of the rights vested in the banks and financial institutions; and that unless it was specifically excluded from the definition of "borrower" contained in Section 2(f) of the SARFAESI Act, it has to be inferred that the legal heirs are not excluded from the definition of borrower, and therefore bank can proceed with the legal heirs under the provisions of SARFAESI Act. Relying on Section 37 of the SARFAESI Act, it was further contended that application of other laws are not barred. Learned Standing Counsel further contends that as per Section 22 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the Tribunals are not bound by the procedure laid down by the Code of Civil Procedure, but shall be guided by the principles of natural justice. It is also contended that the petitioner being succeeded to the property of the deceased cannot disown the liability to pay the debts of the deceased.

6. Having heard the learned Counsel on either side, let us consider the issue as to whether the proceedings under SARFAESI Act can be invoked against the legal heirs of the borrower.

7. The aims and objects of the SARFAESI Act are to regulate Securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected thereto. The SARFAESI Act enables the banks and financial institutions to realize long-term assets, manage problems of liquidity, asset liability mis-match and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The SARFAESI Act further provides for setting up of asset reconstruction companies, which are empowered to take possession of secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realize the secured assets and take over the management of the business of the borrower.

8. In Price Waterhouse's case (supra), the Apex Court while considering the rule of interpretation of statutes, inter alia, held as follows:

Where, the "language" is clear, the intention of the Legislature is to be gathered from the language used. What is to be borne in mind is as to what has been said in the Statute as also what has not been said. A construction which requires, for its support, addition or substitution of words or which results in rejection of words, has to be avoided, unless it is covered by the rule of exception, including that of necessity, which is not the case here....

9. In Transcore's case (supra), considering the object of the SARFAESI Act, it was held by the Apex Court that for recovery of bank dues, banks having elected to seek their remedy in terms of the DRT Act can still invoke SARFAESI Act for

realizing secured assets without withdrawing application filed before the Debts Recovery Tribunal. It was also held by the Apex Court that remedy under SARFAESI Act can be treated as an additional remedy and therefore doctrine of election would not be applicable.

10. Section 2(1) of the SARFAESI Act reads as follows:

(I) "financial assets" means debt or receivables and includes:

(i) a claim to any debt or receivable or part thereof, whether secured or unsecured; or

(ii) any debt or receivable secured by, mortgage of, or charge on, immovable property; or

(iii) a mortgage, charge, hypothecation or pledge of movable property; or

(iv) any right or interest in the security, whether full or part underlying such debt or receivables; or

(v) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or

(vi) any financial assistance;

11. Section 2(o) of the SARFAESI Act reads as under:

(o) "non-performing asset" means an asset or account of a borrower, which has been classified by a bank or financial institution as substandard, doubtful or loss asset,:

(a) in case such bank or financial institution is administered or regulated by any authority or body established, constituted or appointed by any law for the time being in force, in accordance with the directions or guidelines relating to assets classifications issued by such authority or body;

(b) in any other case, in accordance with the 23 directions or guidelines relating to assets classifications issued by the Reserve Bank;]

12. Section 37 of the SARFAESI Act reads as follows:

37. Application of other laws not barred:

The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act 1992 (15 of 1992), the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force.

13. Section 22 of the Recovery of Debts Due to Banks and Financial Institutions

Act, 1993 reads as follows:

22. Procedure and Powers of the Tribunals and Appellate Tribunal:

(1) The Tribunal and the Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to other provisions of this Act and of any rules, the Tribunal and the Appellate Tribunal shall have powers to regulate their own procedure including the places at which they shall have their sittings.

14. The sole contention urged by the learned Counsel for the petitioner is that the definition of borrower under the SARFAESI Act does not include the legal heirs of the borrower and thereby, the learned Counsel contends that if the borrower is no more, the action under the SARFAESI Act cannot be taken against the legal representatives. Learned Counsel, however, does not dispute that legal representatives of the deceased borrower shall be liable to be proceeded against under common law and before the civil Court, but strict interpretation of the SARFAESI Act is necessary and thereby, the legal representatives cannot be proceeded against under the SARFAESI Act.

15. The aforesaid contention needs to be examined from the point of view of the definition of the term "borrower" under the SARFAESI Act, which is as follows:

2(f). "borrower" means any person who has been granted financial assistance by any bank or financial institution or who has given any guarantee or created any mortgage or pledge as security for the financial assistance granted by any bank or financial institution and includes a person who becomes borrower of a securitisation company or reconstruction company consequent upon acquisition by it of any rights or interest of any bank or financial institution in relation to such financial assistance.

16. It would be noticed therefrom that the aforesaid definition uses the words, "means" and "includes" in the body of the said definition. Obviously, therefore, the said definition is not exhaustive. Further, the definition of debt under the SARFAESI Act is as follows:

2(ha). "debt" shall have the meaning assigned to it in Clause (g) of Section 2 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)

17. Since the above definition refers to Recovery of Debts Due to Banks and Financial Institutions Act, 1993, the definition of debt u/s 2(g) of the aforesaid Act is extracted as follows:

2(g). "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time

being in force, in case or otherwise, whether secured or unsecured, or assigned or whether payable under a decree or order of any civil court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

18. The above definition shows that debt due from any "person" includes a decree debt as well or an award and which is legally recoverable. The word "person" is not defined in the Recovery of Debts Due to Banks and Financial Institutions Act and as such, we have to look at the definition of person u/s 3(42) of the General Clauses Act, which is extracted as follows:

3(42). "person" shall include any company or association or body of individuals, whether incorporated or not.

19. We may also notice Section 2(2) of the SARFAESI Act, which is as follows:

2(2). Words and expressions used and not defined in this Act but defined in the Indian Contract Act, 1872 (9 of 1872) or the Transfer of Property Act, 1882 (4 of 1882) or the Companies Act, 1956 (1 of 1956) or the Securities and Exchange Board of India Act, 1992 (15 of 1992) shall have the meanings respectively assigned to them in those Acts.

20. Section 2(c) of the Indian Contract Act, 1872 defines that the person making the proposal is called the "promisor" and the person accepting the proposal is called the "promisee". Further, Section 37 of the Contract Act provides that promises bind the representatives of the promisor in case of the death of such promisor before performance, unless a contrary intention appears from the contract.

21. Section 146 of the Code of Civil Procedure, 1908 provides that where any proceeding is taken or application is made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him. Further, under the principles of interpretation the definition of borrower has to be understood in the light of the object of the Act rather than a literal reading of the said definition. It is well settled that a literal construction, which is opposed to intentions of the Legislature cannot prevail and the definition has to be given a meaning, which will carry further the objects of the Act. If the said definition is literally read, as contended by the learned Counsel for the petitioner, it will reach to absurd results whereby the remedy under the SARFAESI Act could be available only against the original borrower so long as he is alive and after his death, under the SARFAESI Act, the remedy would not be available. Such a construction would completely defeat the purpose for which the SARFAESI Act was enacted. Construction of said definition, therefore, has to be made in such a way as to avoid absurdity in the results by not reading the said definition in a literal and grammatical sense, so as to avoid anomalous situation and absurd results.

22. The conjoint examination of the provisions as above would, therefore,

establish that the term borrower used under the SARFAESI Act is in the context of the use of the said expression and the purpose and the object sought to be achieved with reference to other cognate statutes. The SARFAESI Act being only an additional remedy for enforcement of security interest of the creditor specified therein, Section 37 of the SARFAESI specifically provides that the application of other laws is not barred and the provisions of the SARFAESI Act and the Rules are in addition and not in derogation of the other Acts operating and governing the transaction of borrowing of monies between the parties.

23. It is evident from the averments of the petitioner in paragraphs 3 and 4 of the affidavit that as against the amount borrowed by late father of the petitioner, he had executed a mortgage and the respondent bank had earlier filed a suit in O.S. No. 5 of 1992 before the Subordinate Judge, Puttur. In the said suit apart from the borrower, the father of the petitioner, the guarantors were also made parties and the said suit was decreed on 02.05.1999 for a sum of Rs. 10,52,723.75 ps. with interest at 6% on Rs. 3,35,000/- from the date of redemption till the date of realization.

24. The petitioner specifically admitted in Para 4 that "it is pertinent to mention here that the loan was secured by mortgage and therefore the suit was filed for sale of mortgaged property". Later the respondent bank filed E.P. No. 1 of 2003 which was dismissed on 18.04.2003 and another E.P. No. 8 of 2004 which was also dismissed on 17.03.2008 and further E.P. No. 37 of 2008. It is during the pendency of the third execution petition that the father of the petitioner died and as such, the legal representatives were brought on record and shown as judgment debtors in E.P. No. 37 of 2008. While so, the respondent bank has taken up proceedings u/s 13(2) of the SARFAESI Act and as mentioned above, the petitioner questions the same in this writ petition.

25. The factual aspects mentioned in the affidavit filed in support of the writ petition shows that the loan advanced to the father of the petitioner was secured by mortgage of the mortgaged property in favour of the respondent bank and the present proceedings under the SARFAESI Act is directed against the said secured mortgaged property by taking up proceedings, initially u/s 13(2) and later u/s 13(4) of the SARFAESI Act. The mortgage is defined under the Transfer of Property Act, 1882 under Chapter IV thereof. Sections 58(a) and 59-A are necessary to be noticed, which is extracted as follows:

58(a). A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt or the performance of an engagement which may give rise to a pecuniary liability.

The transferor is called a mortgagor, the transferee a mortgagee, the principal money and interest of which payment is secured for the time being are called the mortgage money, and the instrument (if any) by which the transfer is effected is called a mortgage-deed.

59-A. References to mortgagors and mortgagees to include persons deriving title from them:

Unless otherwise expressly provided references in this Chapter to mortgagors and mortgagees shall be deemed to include references to persons deriving title from them respectively.

26. The above provision would clearly show that the term mortgager and the mortgagee would include the persons deriving title from them and would also include legal representatives, who succeed the mortgager by devolution of the property to them. Thus, it is not open to the legal representatives to say that they are not covered by the definition of borrower in view of the fact that Section 2(2) of the SARFAESI Act provides a reference that the definitions and expressions under the Transfer of Property Act as expressly applicable. The borrower, being admittedly the mortgager, the liability of the borrower/mortgager under the SARFAESI Act cannot be said to have wiped off on account of the death of the mortgager and his legal representatives, therefore, are equally bound and stand covered by the definition of borrower under the SARFAESI Act.

27. That apart, when provisions of Section 13 of SARFAESI Act deal with taking possession of the secured assets or management of the business of the borrower, a right is created by the borrower in favour of the bank/financial institution when he takes a loan secured by pledge, hypothecation, mortgage or charge. Therefore, equity exists in favour of the bank and not in favour of the borrower. The borrower apart from the obligation to repay, should keep the margin and value of the securities hypothecated so that there is no mis-match between the asset-liability in the books of the bank. This obligation is different and distinct from the obligation to repay. A fortiori, the SARFAESI Act is enacted for quick enforcement of the security, and quick recovery of debt is important which is the object the SARFAESI Act, therefore, it is not correct to say that by the time the SARFAESI Act came into force a decree was passed by the civil court and therefore initiation of proceedings under SARFAESI Act are not proper. The fact remains is that two E.Ps. were dismissed and another is pending adjudication and it is for quick realization of the due amount the provisions of SARFAESI Act were initiated. The SARFAESI Act has been enacted to regulate securitisation and to provide for reconstruction of financial assets, and it also provides for enforcement of security interest and for matters connected therewith. When the civil courts failed to expeditiously decide the suits filed by the banks and financial institutions, DRT Act 1993 was enacted, which did not provide for assignment of debts to securitisation companies. In order to empower the banks and financial institutions to liquidate the assets and the secured interests, the SARFAESI Act was enacted and it removes the fetters which were in existence on the rights of the secured creditors. A secured asset under SARFAESI Act is an asset in which interest is created. Therefore, strict interpretation of the words contained in the SARFAESI Act cannot be made so as to nullify the very object of the SARFAESI Act. The remedy under SARFAESI Act can be treated as an additional remedy.

28. Considering the scheme and object of the SARFAESI Act, and Recovery of Debts due to Banks and Financial Institutions Act, 1993, and in the absence of any specific bar with regard to initiation of other proceedings, no hearing can be demanded by debtor from creditor either at the stage of serving of notice u/s 13(2) of the SARFAESI Act or at the stage of giving of reasons by the creditor not accepting the objections taken by the borrower in reply to such notice. The notice issued by the creditor does not attract principles of natural justice. As per the provisions of the SARFAESI Act the debtor can approach Debts Recovery Tribunal and therefore the provisions of CPC are not applicable.

29. In normal circumstances, after the death of the deceased, the property stands devolved on the legal heir of the deceased and he solely succeeds to the property. The father of the petitioner obtained loan by mortgage of the property, therefore legal heir cannot disown the liability of the deceased (borrower) so as to escape from the clutches of the SARFAESI Act. If the contention of the counsel for the petitioner is accepted it leads to a situation which will defeat the object and purpose for which the Act was enacted so as to safeguard the interests of the creditors. It is not as if the proceedings were initiated under SARFAESI Act against the legal heirs only, the fact remains is that though the respondent-bank has obtained a decree for recovery of the loan by sale of mortgaged property, the same could not be realized and therefore in those circumstances it does not preclude the bank to proceed under SARFAESI Act for effective recovery of the loan amount pursuant to mortgage of property by the father of the petitioner.

30. After we prepared this judgment, we noticed the decision of the Delhi High Court in Kamal Gupta v. Bank of India AIR 2008 Delhi 5 where similar question was answered by the Delhi High Court in the negative and has reached the same conclusions as we have reached.

31. For the above discussion, we do not see any merit in the contentions of the learned Counsel for the petitioner. The writ petition is meritless and the same is accordingly dismissed. No costs.