

(2006) 03 DEL CK 0005

In the Delhi High Court

Case No : W.P (C) No's. 2349-50 of 2006

Gargya Research Instruments

APPELLANT

Vs

State Bank of India

RESPONDENT

Date of Decision : 03-03-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13

Constitution of India, 1950 — Article 226

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19

Citation : (2007) 3 BC 77 : (2006) 133 CompCas 323

Hon'ble Judges : Markandeya Katju, C.J.; Madan B. Lokur, J

Bench : Division Bench

Advocate : Pradeep Gupta, for the Appellant; S.L. Gupta, for the Respondent

Final Decision : Dismissed

Judgement

Markandeya Katju, C.J.—This writ petition has been filed for quashing the impugned order dated 23.1.2006 in Miscellaneous Appeal No. 227/2005 and for a writ of mandamus directing the respondents not to dispossess the petitioner from the mortgaged property at C-12, Site-IV, Sahibabad Industrial Area, Ghaziabad, U.P. The petitioner also prayed for a mandamus directing the respondents to settle the matter between the petitioners as per the guidelines on the Rehabilitation/OTS Scheme and not to proceed further for confirming the auction sale.

2. Heard learned counsel for the parties.

3. The facts of the case have been set out in paragraph 3 of the writ petition which we have perused.

4. The petitioner No. 2 is a sole proprietor of petitioner No. 1 and is running a small scale industry for manufacturing various electrical and electronic products.

5. The petitioners had approached the respondent/State Bank of India, and since 1972 was sanctioned and granted various working capital facilities (both fund

based and non-fund based) for its working capital requirements in respect of its business in its factory at C-12, Site-IV, Sahibabad Industrial Complex, U.P which was duly availed and utilized by it over the years.

6. On the request of the defendant No. 1 the respondents/State Bank of India granted and renewed the following financial assistance to the petitioners:-

NATURE OF FACILITY (A) FUND BASED Sanctioned Limit Cash Credit (Factory Type) Rs. 17.00 lacs Cash Credit [E.P.C. (Preshipment)] Rs. 5.00 lacs Cash Credit (Book Debts) Rs. 3.00 lacs Cash Credit (Bills Clean) Rs. 12.00 lacs Cash Credit [Export Bills (post shipment)] Rs. 6.00 lacs Demand Draft Purchase (Cheque) Rs. 2.00 lacs Medium Term Loan Rs. 2.25 lacs (B) NON-FUND BASED Letters of Credit Rs. 6.00 lacs Bank Guarantee Rs. 20.00 lacs

7. The sanction/renewal of the aforesaid facilities by the State Bank of India to the petitioner was subject to the terms and conditions set out in the bank's letter dated 10.8.1994 (the sanction letter) which was duly accepted by the petitioners. In token of the acceptance of the said terms and conditions by the petitioner No. 1, the petitioner No. 2 who is the sole proprietor of petitioner No. 1 duly signed/endorsed copy of the said sanction letter.

8. Pursuant to the sanction of the said facilities the petitioner No. 1 executed various documents and created various securities the details of which have been given in the application of the bank before the DRT u/s 19 of The Recovery of Debts Due to Banks & Financial Institutions Act, 1993 (herein after referred to as the Act).

9. These include:-

(a) Cash Credit of Rs. 17 lacs with interchangeability with Cash Credit [E.P.C. (Pre Shipment)] facility of Rs. 5 lacs aggregating to Rs. 22 lacs in pursuant to which the petitioner No. 1 executed and agreement with Cash Credit dated 10.8.1994 with the bank.

(b) Cash Credit [EPC (Preshipment)] facility of Rs. 5 lacs with interchangeability with Cash Credit (Factory Type) up to Rs. 5 lacs, aggregating to Rs. 10 lacs.

(c) Cash Credit (Book Debts) facility of Rs. 3 lacs.

(d) Cash Credit (Bills Clean) facility of Rs. 12 lacs.

(e) Cash Credit [Export Bills (Post Shipment)] facility of Rs. 6 lacs.

(f) Demand draft purchase (Cheque) facility of Rs. 2 lacs.

(g) Medium Term Loan of Rs. 2.25 lacs.

(h) Bank Guarantee facility of Rs. 20 lacs and Letters of Credit facility of Rs. 6 lacs.

10. Pursuant to the aforesaid documents executed and securities created the

petitioner duly availed and utilised the said credit facilities and loans from time to time. In the meantime, the petitioner No. 1 approached the bank with a request for allowing interchangeability between the Cash Credit (Factory Type) facility of Rs. 17 lacs, Cash Credit [EPC (pre-shipment)] facility of Rs. 5 lacs, Cash Credit (Export Bills (Post Shipment) facility of Rs. 6 lacs & Cash Credit (Bills Clean) facility of Rs. 12 lacs. The bank considered this request and conveyed its sanction for interchangeability of the aforesaid facilities to the maximum limit of Rs. 32 lacs. Pursuant to the sanction of interchangeability aggregating to Rs. 32 lacs by the bank, the petitioner No. 1 executed and entered into an agreement for Cash Credit dated 19.6.1996 with the bank setting out the terms and conditions of the said facility.

11. Under this agreement, the petitioner No. 1 secured payment of the aggregate balance due under the said facility on demand by the bank upon the security of pledge of goods, produce and merchandise deposited and / or to be deposited with the bank. Under this agreement, the petitioner No. 1 also agreed to pay to the bank interest at the rate of 2.75% above SBAR with minimum 17.75% per annum.

12. As further security for the said credit facilities of Rs. 32 lacs the petitioner No. 1 furnished a Demand Promissory Note dated 19.6.1996 in favor of the bank thereby promising to pay to the bank on demand a sum of Rs. 32 lacs for value received with interest from the said date at the rate of 2.75% above SBAR with minimum of 17.75% p.a. with quarterly rests.

13. Pursuant to the aforesaid documents executed and securities created the petitioner No. 1 duly availed the said credit facilities / loan with the aforesaid interchangeability sanctioned to it by the bank over a period of time.

14. In terms of the sanction of the said loan, the petitioner No. 1 was required to repay the said loan to the said bank in accordance with the repayment schedule set out in the loan agreement and to pay interest to the bank as mentioned in the said agreement. Further, with regard to the said credit facilities, the petitioner No. 1 was required to maintain and operate the said accounts in accordance with the terms and conditions of their sanction and also to maintain financial discipline.

15. However, the petitioner No. 1 failed and neglected to repay the said loan to the bank in accordance with the terms and conditions of the said loan agreement. Further, as regard the said credit facilities the petitioner No. 1, contrary to the terms of sanction, did not regularize the said account and defaulted in properly maintaining the said account apart from committing various other breaches and violations of the sanction of the said credit facilities. The petitioner No. 1 further failed to maintain financial discipline in regard to maintenance of the said accounts. As a result, due to periodic defaults the outstanding liability due and payable by the petitioner No. 1 in regard to the said credit accounts started to swell.

16. Despite repeated requests and reminders from the bank, the petitioner No. 1 failed to make good the aforesaid defaults and breaches of the terms and conditions of sanction of the said Loan as well as the said credit facilities. As such, the bank through its lawyer sent a legal notice dated 31.1.1998 calling upon the petitioners to regularise the said accounts by making payment of the entire outstanding dues and take steps to remedy the defaults and breaches set out therein within 15 days of the receipt of the said notice failing which it was categorically pointed out that the bank would be constrained to transfer the petitioner's account to the recalled debt account/protested bill account for initiation of appropriate proceedings in the competent court of law. Despite the said notice the petitioner failed and neglected to make good the defaults set out therein. As such, in accordance with the recognized accounting procedure of the bank and the instructions of the Reserve Bank of India the said accounts of the petitioner No. 1 stood classified as Non-performing Assets w.e.f. 31.3.1997 where after as directed by the Reserve Bank of India the accrued interest is not required to be debited to the said accounts, though the bank is entitled to the recovery of the same under the law w.e.f 1.4.1997.

17. The petitioners, from time to time, executed revival letters in respect of security documents and acknowledged their liability by signing balance confirmation in respect of said loan as well as credit facilities. As per balance confirmation dated 18.4.1998, executed by the petitioners as on 17.4.1998 amounts of Rs. 29,76,175.55, Rs. 3,00,000.00 lacs and Rs. 10,51,459.25 were due and payable by the petitioners in respect of said cash credit facility.

18. Despite the said notice, the petitioners failed and neglected to pay any amount towards outstanding dues to the bank. The total liability of the petitioner is Rs. 55,72,585/- as on 19.11.1998. In view of these facts the bank filed the petition u/s 19 of the Act before the DRT for the following reliefs:

(a) the Defendants No. 1 and 2 to pay to the Applicant a sum of Rs. 55,72,585/- inclusive of interest till 19-11-98 in respect of its outstanding dues with further interest and other charges thereon at the rate of Rs. 16.58% subject to change from time to time in accordance with instructions issued by SBI till payment and/or realization in full;

(b) order sale of mortgaged and hypothecated/pledged properties and assets of the Defendants by public auction or a private treat and net sale proceedings thereof be adjusted towards payment of the Applicant's outstanding dues;

19. The bank also prayed for an interim order restraining the petitioners from transferring, alienating or otherwise dealing with property in question without permission of the Tribunal.

20. Thus a perusal of the OA 400/1998 filed by the bank u/s 19 of the Act against the petitioner shows that the bank has prayed for recovery of Rs. 55,72,585/- together with costs and pendente lite and future interest @ 16.58% per annum.

21. The petitioner filed a written statement before the DRT.

22. By an order dated 21.2.2002 the DRT noted that no one had appeared for the defendant and hence proceeded ex-parte fixing the date 22.4.2002 for ex-parte arguments.

23. Thereafter by an ex-parte order dated 22.4.2002 the DRT allowed the OA filed by the bank and directed the petitioners to pay to the bank jointly or severally a sum of Rs. 55,72,585/- with interest within 30 days. In case of default the above amount was to be recovered from the sale of the mortgaged property/hypothecated assets and other assets/properties of defendants.

24. In paragraph 5 of the impugned order dated 22.4.2002 the DRT has noticed that after service the defendant had appeared and filed a written statement/counter claim. However, subsequently, the defendant stopped appearing and accordingly the case proceeded ex-parte. No evidence was led by the defendant (writ petitioner) before the DRT.

25. On the other hand, evidence was led by the bank by producing witnesses who corroborated the averments made in the OA. The Tribunal held that even otherwise the case of the bank has been duly proved by the witnesses.

26. Subsequently, the writ petitioner by Miscellaneous Application No. 128/1998 dated 10.6.2002 prayed for setting aside the ex parte order dated 22.4.2002. However, that application was rejected by the DRT on 26.8.2002. The order dated 26.8.2002 states as follows:-

26-8-2002

OA No. 400/98

Present:- Ms.Savita Dixit Proxy Counsel for CDs

MA No. 128 of 1998

By this application it has been prayed that final order dated 22-4-2002 be set aside. Ld. Counsel contends that the daughter of Mr.J.C.Gupta Advocate got married on 22-4-2002 and thereafter maternal uncle of the counsel expired, Therefore, Counsel could not appear on 22-4-2002 nor any application for setting aside the ex-parte order dated 22-4-2002 could be filed. Perusal of record shows that defendants were proceeded against ex-parte on 21-2-2002 and thereafter matter was fixed for 22-4-2002 for ex-parte arguments. There is no Explanation as to why no steps were taken between 21-2-2002 to 22-4-2002 for setting aside the ex-parte order. Even this application has been filed in the month of June, 2002 i.e. after two months after passing of the final order. Since there is no sufficient and cogent reason for non-appearance on 21-2-2002 and no application for setting aside ex-parte order was filed as also the past conduct of the defendants as emerging from the records I am of the view that the defendants are only interested in dragging on the litigation. Accordingly, I am of the view that there is no ground to set aside the ex-parte final order. This

application is accordingly dismissed.

Sd/-

(A.K.Pathak)

Presiding Officer DRT-1, Delhi

27. As noted from the order dated 26.8.2002 the contention of the counsel for the petitioner was that the daughter of Mr.J.C.Gupta, Advocate got married on 22.4.2002 and thereafter the maternal uncle of the counsel expired and hence it is alleged that he could not appear on 22.4.2002. In our opinion, even if the allegation that the daughter of the counsel was married on 22.4.2002 was correct the counsel could have sent one of his juniors or some other learned counsel known to him or even his clerk to the DRT to mention this fact to the Presiding Officer, DRT-I, Delhi, but no one appeared on 22.4.2002 even to seek an adjournment. It was only by an application dated 10.6.2002 that the prayer was made to recall the order dated 22.4.2002. There is no Explanation why the application was filed after two months of the passing of the order dated 22.4.2002. In these circumstances, the Presiding Officer of the DRT held that there is no sufficient and cogent reason for non-appearance on 21.2.2002 or 22.4.2002 and it appears that the whole game of the defendant (writ petitioner) was only to drag on the litigation. Hence, he rejected the application under Order 9 R.13 CPC.

28. Against the order dated 26.8.2002 a Miscellaneous appeal No. 227/2005 was filed by the petitioner which has been rejected by the impugned order of the DRAT dated 23.1.2006.

29. We have carefully perused the order dated 23.1.2006 and find no infirmity in the same.

30. It may be mentioned that a writ of certiorari can be issued when there is error of law apparent on the face of the record. No such error of law has been pointed out to us by learned counsel for the petitioner. Whether there was sufficient cause for non-appearance on 22.4.2002 or not is a question of fact, and the DRT as well as DRAT have recorded a finding of fact that there was no sufficient cause. In fact the petitioner had initially appeared before the DRT but subsequently stopped appearing.

31. As regards the affidavit filed by Mr.J.C.Gupta, Advocate it has been noted in the order of the DRAT dated 23.1.2006 in paragraph 11 that the affidavit of Sh. Gupta dated 13.6.2002 does not mention when he was instructed to appear on behalf of the appellant. The appellants were proceeded ex parte on 21.2.2002 and the ex parte decree was passed on 22.4.2002. It is not mentioned in the affidavit of Sh. Gupta that he had been authorised to represent the appellant on or before 22.4.2002.

32. As already stated above, no one appeared before the DRT on 21.2.2002 and

22.4.2002. Even assuming that Sh.J.C.Gupta had been engaged on or before 22.4.2002 he should have sent his junior or requested some other lawyer or even his clerk to mention before the DRT about his personal difficulty. In fact even for about two months after 22.4.2002 no application under Order 9 Rule 13 CPC was filed. Hence, the DRT and DRAT rightly rejected the application under Order 9 Rule 13 CPC. At any event, whether there was sufficient cause for non-appearance or not is a question of fact, and in writ jurisdiction, this Court cannot interfere with a finding of fact.

33. As regards the OTS offer made to the petitioner that was made in the year 2003 which the petitioner did not accept. Now, he is not eligible for the same as OTS is not available when a decree has been passed against a party. It seems to us that the whole game of the petitioner was to drag on the litigation, so that he may not pay his debts.

34. In our opinion, this is not a fit case for interference under Article 226 of the Constitution. Writ is a discretionary remedy, and we are not inclined to exercise our discretion in this case.

35. In *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, the Supreme Court quoted from the Narasimham Committee Report which stated:-

Banks and financial institutions at present face considerable difficulties in recovery of dues from the clients and enforcement of security charged to them due to delay in the legal processes. A significant portion of the funds of banks and financial institutions is thus blocked in unproductive assets, the values of which keep deteriorating with the passage of time. Banks also incur substantial amounts of expenditure by way of legal charges which add to their overheads.

36. In paragraph 34 of the same judgment the Supreme Court observed:-

It is also a fact that a large sum of amount remains unrecovered. Normal process of recovery of debts through courts is lengthy and time consuming and is not suited for recovery of such dues. For financial assistance rendered to the industries by the financial institutions, financial liquidity is essential failing which there is a blockade of large sums of amounts creating circumstances which retard the economic progress followed by a large number of other consequent ill effect.

37. In this case there is no equity in the petitioners favor and hence we are not inclined to exercise our discretion in his favor under Article 226 of the Constitution as we are of the opinion that the petitioner was adopting tactics to avoid paying his dues. It is a well known tactic in Courts that defendants who have a weak case allow an ex-parte decree to be passed, and then apply for restoration and in this manner to drag on the litigation.

38. We have been informed that about Rs. 1,34,000/- crores of loans of banks and financial institutions are outstanding in India and have not been repaid. Unless repayment of the loans is done, the bank or the financial institution

cannot lend money to businessmen for setting up new industrial units. Thus, interfering with such recoveries obstructs industrialization of the country and does incalculable harm to the economy which will be continued to be done if persisted by the courts because new businessmen cannot get loans if the borrowers do not repay their loans.

39. Thus, there is no force in this petition and it is dismissed.