(2008) 01 GUJ CK 0072

In the Gujarat High Court

Case No : Special Civil Application No. 371 of 2008

Ghanshyam Forms Pvt. Ltd. and Another APPELLANT

Vs

Bank of Baroda and Another RESPONDENT

Date of Decision : 16-01-2008

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 17

Citation : (2008) 01 GUJ CK 0072

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : B.J. Trivedi and J.T. Trivedi, for Petitioners 1 - 2, for the Appellant; Indravadan Parmar, for Respondent 1, for the Respondent

Judgement

Jayant Patel, J.—The petitioner has preferred the petition for challenging the notice at anneuxure A issued u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred as to the ''Act'') and the petitioner has also challenged the notice for demanding possession issued u/s 13(4) of the Act.

2. Heard Mr. Trivedi learned Counsel appearing for the petitioner and Mr. Parmar appearing by Caveat for the respondent-Bank.

3. Upon hearing learned Counsel appearing for both the sides, it appears that earlier an action was taken for demanding possession based on the notice u/s 13(2) of the Act, and the same was challenged by the petitioner by preferring Special Civil Application No. 13426 of 2007, and in the said petition this Court (Coram: D.A. Mehta, J.) took the view that the respondent-Bank cannot be permitted to take possession of the secured assets on the basis of Notice dated 20.06.2005, issued u/s 13(2) of the Act, since there was delay of about two years. However, it was observed by this Court in the very judgement that it does not mean that there is any prohibition in so far as respondent-Bank is concerned

to initiate fresh action in accordance with the provisions of the Act. It was also observed by this Court that it is always open to the respondent-Bank to undertake such an exercise by issuance of fresh Notice u/s 13(2) of the Act, and since there was no compliance, the further notice for demanding possession in purported exercise of power u/s 13(4) of the Act.

4. It deserves to be recorded that during the course of the hearing, upon the query of he Court, Mr. Trivedi learned Counsel appearing for the petitioner declared before the Court that the calculation made by the Bank in the impugned notice is not correct as that of the amount of Rs. 39 lacs and as per the petitioner if the matter is considered as per the loan agreement the amount of about Rs. 22 lacs would be outstanding. Of course the said aspect was not admitted by the respondent Bank. However, upon further query by the Court to test the bonafide on the part of the petitioner, Mr. Trivedi learned Counsel for the petitioner declared before the Court that the petitioner is unable to deposit the amount of Rs. 22 lacs at a time with the respondent-Bank, but can deposit at the most Rs. 5 lacs within a period of one month.

5. The aforesaid as such shows that the petitioner is not ready to deposit the amount in response to the Notice issued u/s 13(2) of the Act, so as to come out from the subsequent action u/s 13 of the Act. The aforesaid shows that the petitioner is not even ready to pay the amount with the respondent-Bank, which is due even as per the calculation of the petitioner so as to come out from the action u/s 13(4) of the Act, for taking possession. If the attempt on the part of the litigant is to see that the Notice is not complied with and the matter is further delayed, such cannot be countenanced by this Court, more particularly in view of the facts and circumstances of the present case. Therefore, it can be said that in view of the aforesaid conduct on the part of the petitioner, the petitioner would not be entitled to invoke jurisdiction of this Court u/s 226 of the Constitution.

6. Apart from the above, even if the matter is considered for the sake of examination, it appears that the Bank has issued Notice u/s 13(2) of the Act and the petitioner has thereafter replied and the Bank has thereafter considered the reply of the petitioner and has informed the petitioner that the ground on the basis of which the objections raised by the petitioner are not acceptable. Thereafter, Notice for demanding possession for contemplated action u/s 13(4) of the Act has been issued.

7. Merely because the Bank has not considered the reply properly or has not accepted the proposal of the borrower, would not be a sufficient ground for entertaining the petition at this stage, since this Court is not to sit in appeal over the Banking wisdom nor is to exercise the appellate power against the decision of the Bank. The aforesaid is coupled with the circumstance that after the possession is taken over u/s 13(4) of the Act, the borrower has the remedy u/s 17 of the Act before the Debt Recovery Tribunal and the matter is to be considered only thereafter as per the scheme of the act. The reference may be made to the decision of the Apex Court in case of Mardia Chemicals Ltd. Vs.

Union of India (UOI) and Others Etc. Etc., and more particularly the observations made at para 48 and 80 of the said judgement. Similar situation came to be considered by the Division Bench of this Court (Coram: Honourable the Chief Justice Y.R. Meena and D.A. Mehta, J.) in case of Hemant Automobile Pvt. Ltd. and Anr. v. Union of India reported at 2006(12) GHJ 564 and it was observed by the Division Bench of this Court at paras 6 and 12 of the judgement that no relief can be granted under Article 226 of the Constitution.

8. Mr. Trivedi learned Counsel appearing for the petitioner did make attempt to contend that in view of the subsequent conduct of the Bank, there is novatio of the original loan agreement whereby the petitioner was permitted to make payment of Rs. 35,000/- every month, and petitioner has also paid the said amount. He also submitted that the petitioner cannot be said as willful defaulter and the action of the Bank is malafide. He submitted that the petitioner company is a going on concern and 12 employees are engaged and therefore, if the possession is taken over by the Bank, it may result in to unemployment and 12 families of such employees will suffer. He also submitted that the petitioner did submit the proposal for one time settlement, which is also not considered by the Bank. Whereas Mr. Parmar learned Counsel appearing for the respondent-Bank submitted that there is no novatio of the contract nor action can be said as malafide and the petitioner can be said as defaulter.

9. In my view all such aspect cannot be considered at this stage, more particularly when the Act provides for remedy after action is taken u/s 13(4) of the Act. The aforesaid is coupled with the circumstance that the petitioner is not ready to pay and deposit even admitted amount of Rs. 22 lacs or so.

10. Under the above circumstance, it would not be a case to interfere at this stage in exercise of power u/s 226 of the Constitution.

11. In view of the above, no case is made out for interference, hence, rejected.

