(2023) 03 KL CK 0032

In the High Court Of Kerala

Case No : Writ Petition (C) No. 23434 Of 2022

Gilgal Cashew Exports — APPELLANT

Vs

UCO Bank — RESPONDENT

Date of Decision : 01-03-2023

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(2), 13(3A), 13(4), 17, 17(1)

Citation : (2023) 03 KL CK 0032

Hon'ble Judges : Shaji P. Chaly, J

Bench : Single Bench

Advocate : B.J.John Prakash, P.Pramel, Harishma, Ashik Tom, Celine John, Ramseena N., Deepak Joy.K., Manu S

Final Decision : Dismissed

Judgement

Shaji P. Chaly, J.

1. The petitioner, a MSME unit, has filed the writ petition challenging Exhibit P9 order passed by the Banking Ombudsman, Reserve Bank of India, Thiruvananthapuram, and seeking a direction to the Ombudsman to consider Exhibit P8 representation submitted by the petitioner.

2. The subject issue relates to the loan availed by the petitioner and the consequential action initiated by M/s. UCO Bank, Kollam as per the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 [SARFAESI Act, 2002], on failure to repay the same.

3. Brief material facts for the disposal of the writ petition are as follows:

According to the petitioner, due to the lock-down restrictions consequent to the pandemic covid-19, the petitioner suffered severe loss which was aware to the Bank. The case of the petitioner is that the crisis of the petitioner further deepened by the levy of interest and other charges contrary to the contractual rates between the petitioner and the respondent Bank. It is further pointed out that the Bank, after providing a small assistance under GECL scheme promulgated by the Central Government, failed to provide any further support and proceeded to classify the petitioner's account as NPA on 30.06.2021.

4. Admittedly, the Bank issued Exhibit P2 demand notice dated 14.02.2022 under Section 13(2) of the SARFAESI Act, 2002. However, it is submitted by the petitioner that in the light of the crisis faced by it, it requested for referring their account to the MSME Committee for devising a corrective action plan as envisaged under Exhibit P3 Master Circular issued by the Reserve Bank of India.

5. It is further pointed out that in spite of the earnest efforts made by the petitioner, the first respondent Bank failed to refer the matter to MSME Committee in terms of Exhibit P3 circular. It is also stated that even though the petitioner has submitted a representation before the Bank as well as the Reserve Bank of India, no action was initiated and further proceed to take possession of the property in accordance with the provisions of the SARFAESI Act, 2002.

6. Anyhow, from the notice issued by the Bank, it is quite clear and evident that an amount of Rs.9,94,30,906.75 is allegedly due from the petitioner to the first respondent Bank. The petitioner has also submitted Exhibit P4 representation before the State Level Bankers Committee to which Exhibit P7 reply was issued stating that the remedy of the petitioner is before the Banking Ombudsman or the Reserve Bank of India, Thiruvananthapuram. According to the petitioner, it was under the said circumstances, the petitioner has approached the Banking Ombudsman.

7. However, the Banking Ombudsman, unmindful of the contentions raised by the petitioner, dismissed the writ petition assigning the reason that there is no deficiency of service and therefore, the complaint is not maintainable under clause 10(2)(a) (i) of the RBI-Integrated Ombudsman Scheme, 2021. The case projected by the petitioner is that as per the Integrated Ombudsman Scheme, 2021 and Exhibit P3 circular dated 17.03.2016, the Bank was liable to refer the matter to the MSME Committee in order to consider the claim of the petitioner.

8. The Bank has filed a counter affidavit refuting the claims and demands raised by the petitioner. It was further pointed out that the Bank has provided maximum benefits to the petitioner, when the petitioner submitted a representation under Section 13(3A) of the SARFAESI Act, 2002. It is also submitted that Exhibit R1A reply dated 10.05.2022 was issued by the Bank, from which it is clear that the following benefits were provided to the petitioner:

As per the RBI directions moratorium of six months was permitted to your accounts and FITL was sanctioned to provide you a breathing period to revive your business.

To tide over your position due lo the effect of Pandemic Covid-19, Bank additionally sanctioned one GECL loan to the lune of Rs. 170.00 lacs., and one

UCECL loan of Rs.85.00 lacs and FITL loan of Rs. 22.98 lacs.

Pre pandemic Bank has enhanced your Packing Credit limit from 450.00 lacs to 500.00 Iacs, FBP/ FBN limit from 75.00 lacs lo 150.00 lacs, Cash Credit limit from Rs.100.00 lacs to Rs.200.00 lacs and Fresh

Term Loan of Rs.50.00 lacs for your business purpose.

You have availed the Packing Credit limit to execute your export order. But till date you have not submitted any export documents lo this effect and your Packing Credits are overdue for more than 360 days which attracts the ECNOS rate of interest as per the guidelines issued by Reserve bank of India."

9. Therefore, according to the Bank, the argument advanced by the petitioner that the Bank has not considered the difficulties faced by the petitioner, cannot be sustained under law. However, it is the prime contention of the bank that the petitioner has no locus standi to invoke the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, since the petitioner is left with a remedy under Section 17 of the SARFAESI Act, 2002, consequent to the action initiated by the Bank. The Bank has relied upon various judgments of the Apex Court in that regard and seeks dismissal of the writ petition.

10. A reply affidavit is filed by the petitioner reiterating the stand adopted in the writ petition.

11. I have heard learned counsel for the petitioner Sri. John Prakash, learned Standing Counsel for the Bank Sri. Deepak Joy and the Deputy Solicitor General of India Sri. S. Manu, and perused the pleadings and material on record.

12. The sole question to be considered is whether any manner of interference is required to the order of the Ombudsman in the light of the peculiar facts and circumstances of the case. It is an admitted fact that the Bank has initiated action under the provisions of the SARFAESI Act, 2002. Even though the petitioner has raised a contention that the Bank has failed to refer the matter to the MSME Committee in accordance with the provisions of Exhibit P3 Master Circular of the Reserve Bank of India, it is quite clear and evident that the Bank has provided various stress related reliefs to the petitioner. Moreover, the petitioner has raised all these contentions when the account has become a Non Performing Asset and the consequential action initiated by the Bank under the SARFAESI Act, 2002.

13. The question with respect to the remedy available to an aggrieved person, when an action was initiated by the Banking company, as per the provisions of the SARFAESI Act, 2002, was considered by the Apex Court in United Bank of India v. Satyawati Tondon, [(2010) 8 SCC 110] and held that when an action is initiated under the Act, 2002, an effective remedy is available to an aggrieved person under the provisions of the SARFAESI Act, 2002 and the High Court ordinarily must insist that before availing a remedy under Article 226 of the Constitution of India, the alternative remedy available under a statute must be

exhausted. It was further held therein that unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution, if an effective remedy is available to the aggrieved person, and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions.

14. After considering the gamut of the issues, it was held therein by the Apex Court that the practice of entertaining the writ petition by the High Court in exercise of the jurisdiction under Article 226 of the Constitution of India without exhausting alternative statutory remedy available under the law, is deprecating.

15. The proposition of law laid down by the Apex Court was being followed continuously in various judgments by the Apex Court as well as this Court. [See the judgments in Phoenix Arc Private Limited vs Vishwa Bharati Vidya Mandir (Civil Appeal Nos. 257-259 of 2022 dated 12.01.2022], Y. Sleebachan v. State of Kerala and others [2020 (4) KLT Online 1024], Federal Bank v Sagar Thomas (2003) 10 SCC 733), United Bank of India v. Satyavati Tandon and Others [AIR 2010 SC 3413], Authorised Officer, State Bank of Tranvancore v. K.C.Mathew [(2018) 3 SCC 85 and Varimadugu Obi Reddy v. B. Sreenivasulu and Ors. [MANU/SC/1495/2022]. Therefore, I am convinced that the issues raised by the petitioner on the basis of the action initiated by the first respondent Bank resorting to the provisions of the SARFAESI Act, 2002, cannot be sustained under law.

16. However, the contention advanced by the petitioner is that since the petitioner has raised a claim on the basis of Exhibit P3 Master circular issued by the Reserve Bank of India and having not referred the matter to the MSME Committee, it is an arbitrary and illegal action liable to be interfered with by this court. Further it is contented that the issue cannot be considered by the Debt Recovery Tribunal invoking the power conferred under Section 17 of the SARFAESI Act, 2002.

17. However, on an analysis of sub-Section 1 of Section 17 of the Act, 2002, it is quite clear and evident that any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer may make an application along with such fee, as may be prescribed, to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.

18. Sub-Section (4) of Section 13 makes it clear that in case the borrower fails to discharge his liability in full within the period specified in sub-section (2), the secured creditor is vested with powers to take recourse to one or more of the measures to recover his secured debt. Therefore, if the petitioner has a contention that the Bank has not considered the relevant materials before initiating action as per the provisions of the Act, 2002 it is for the petitioner to

raise the said aspect before the Debt Recovery Tribunal, which is empowered, and competent enough to consider the said issue and pass appropriate orders.

19. Considering the facts and circumstances and the law, I have no hesitation to hold that the petitioner has not made out a case for interference in a proceeding under Article 226 of the Constitution of India. Therefore, the writ petition is dismissed. However, I make it clear that all the questions of law and facts raised by the petitioner in the writ petition are left open to agitate before an appropriate and competent forum.