

(2011) 06 UK CK 0053

In the Uttarakhand High Court

Case No : Writ Petition No's. 707 and 709 (M/S) of 2011

Hari Sagar Educational Trust

APPELLANT

Vs

Uttaranchal Gramin Bank

RESPONDENT

Date of Decision : 24-06-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 13A(3), 17, 2
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 9
Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 143, 143(1), 3(14)

Citation : (2011) 2 UC 1557

Hon'ble Judges : Tarun Agarwala, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Hon"ble Tarun Agarwala, J.—Since both the writ petitions raise a common question of law, the same is being decided together. For facility, the facts of Writ Petition No. 707 (M/S) of 2011 are being taken into consideration.

2. The petitioner is a Trust duly registered before the Sub-Registrar, Vikas Nagar, District Dehradun and has opened an education institution for starting an M.B.A. course. The petitioner applied for a loan for the purpose of establishing a college. The respondent Bank sanctioned a term loan for " 80 lacs which was to be repaid in annual instalments of "13.33 lacs with effect from 1st August, 2009.

3. The loan was sanctioned on obtaining a security agreement, and an equitable mortgage by deposit of title deeds, etc. on 13th August, 2008. It transpires that the petitioner committed a default in paying the first instalment and made a representation. The Bank sympathetically considered the matter and rescheduled the first instalment and the petitioner was required to pay the instalment by August, 2009.

4. In spite of the deferment of the first instalment, the petitioner again committed a default and the amount was not paid. Consequently, the respondent Bank issued a notice dated 24th January, 2011 u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act") classifying the account of the petitioner as a "non-performing asset" and directed the petitioner to discharge its liabilities amounting to " 87,21,136 as on 10th January, 2011 within 60 days. The petitioner did not discharge its liabilities within the stipulated period which led to the issuance of a notice u/s 13(4) of the Act dated 5th April, 2011 for taking possession of the properties of the petitioner. A notice under Rule 9 of the Security Interest (Enforcement) Rules, 2002 was also published in the newspaper for the sale of immovable secured assets, namely, Khasra No. 401 measuring 0.192 hectares, situate at Mauza Suddhowala, Pargana Pachhawadoon, Tehsil Vikas Nagar, District Dehradun.

5. It transpires that after the expiry of 60 days from the date of the issuance of the notice dated 24th January, 2011, the petitioner made a representation dated 30th March, 2011 intimating the respondent Bank to encash the joint FDR. It is alleged that this representation was one u/s 13(3-A) of the Act which has not as yet been disposed of and, which was required to be disposed of before the issuance of the notice u/s 13(4) of the Act. In the light of these facts, the petitioner has filed the present writ petition praying for the quashing of the notice issued u/s 13(2) and 13(4) of the Act and further prayed that the respondent be restrained from interfering in the possession of the land and building belonging to the petitioner.

6. The contention of the petitioner is that the land which has been mortgaged by deposit of title deeds etc. is an agricultural land being Khasra No. 401, which is reflected in the Khatauni as well as in the deed of trust. The learned senior counsel appearing for the petitioner contended that in view of the provision of Section 31(i) read with Section 2(zf) of the Act, the possession of the agricultural land and its sale could not be made under the Act, as the agricultural land is outside the purview of the Act. The learned counsel, consequently, contended that the entire exercise initiated by the respondent Bank was ex facie illegal and without any authority of law. In furtherance of this submission, the learned counsel contended that the land in question is governed by the provision of the U.P.Z.A. & L.R. Act and in view of the provision of Section 143 of the said Act, the land has not, as yet, been declared non-agricultural and consequently, the action of the respondents in taking possession and putting it up for sale was wholly illegal. The learned senior counsel further contended that the representation purported to be u/s 13(3-A) of the Act has not been decided and consequently, the possession could not be taken u/s 13 (4) of the Act till the disposal of the representation. The learned senior counsel further submitted that under the Securitization Companies and Reconstruction Companies (Reserve Bank) Guideline and Direction, 2003, non-performing asset could only be deemed to be such when the overdues is more than 180 days which period had not expired

from the date of payment of the first instalment and consequently, the issuance of the notice u/s 13(2) was wholly illegal and in gross violation to the said guideline of 2003. In the light of the aforesaid submission, the learned senior counsel submitted that the notice issued u/s 13(2) and 13(4) was patently illegal and was liable to be quashed. On the other hand, the learned counsel for the respondent Bank contended that the writ petition was not maintainable and in view of the dictum laid down by the Supreme Court in various judgments, the petitioner should approach the Debts Recovery Tribunal by filing an appeal u/s 17 of the Act. The learned counsel submitted that the disputed questions of fact have been raised which cannot be adjudicated in a writ jurisdiction and consequently, the petitioner has an efficacious alternative remedy of filing an appeal u/s 17 of the Act. The learned counsel submitted that the Act was applicable and that the land in question was no longer an agricultural land since it was not being used for agricultural purposes and that an educational institution had come in existence which has changed the nature of the land. The learned counsel submitted that the words "agricultural land" has to be understood in its literal sense and should not be given a wide meaning. In support of his submission, the learned counsel placed reliance upon various decisions, which will be referred hereinafter at the appropriate stage.

7. In the light of the aforesaid submission, the Court has heard Sri U.K. Uniyal, the learned senior counsel assisted by Sri Sandeep Kothari/the learned counsel for the petitioner and Sri Shalabh Singh, the learned counsel with Sri Anurag Bisaria, the learned counsel for the respondent.

8. In *United Bank of India vs. Satyawati Tandon and others* 2010 (2) D.R.T.C. 457 (S.C.), the Supreme Court held that the High Court should 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 the banks and other financial institutions. Similar view was opined by the Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others* Etc. Etc., . However, the Court finds that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, in appropriate cases, a writ, order or direction, are very wide and there is no express limitation on the exercise of this power. Nonetheless, there is a self-imposed restraint which the High Court is aware and exercises it judiciously while exercising its powers under Article 226 of the Constitution and is slow to exercise such powers when there is an alternative remedy. This alternative remedy cannot be applied as a matter of rule in each and every case. It is a rule of discretion and not one of compulsion.

9. In the light of the aforesaid, the Court finds that a plea has been made that the Act is not applicable and no recovery could be made from the agricultural land of the petitioner. If the Act is not applicable, the notices issued under the said Act would be patently illegal and consequently, a writ would lie and a

prerogative writ could be issued. The plea of alternative remedy will not be available in view of the fact that the petitioner should not be relegated to the mode of availing the alternative remedy u/s 17 of the Act when the basic plea is that the Act was not applicable. In the light of the aforesaid, the Court is of the opinion that the writ petition is maintainable to the extent as to whether the Act is applicable in the case in hand. The petitioner contends that the Act is not applicable in view of the provision of Section 31(i) read with Section 2(zf) of the Act. For facility, the said provisions are extracted hereunder :-

31 (i)- The provisions of this Act shall not apply to any security interest created in agricultural land;

2(zf) - "security interest" means right, title and interest of any kind whatsoever upon property, created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in section 31.

10. A perusal of Section 31(i) indicates that the provision of the Act would not apply to any security interest created in the agricultural land. Security interest has been defined u/s 2(zf) to mean any right, title and interest upon a property created in favour of a secured creditor. In the present case, Khasra No. 401 has been mortgaged in favour of the respondent Bank while obtaining a term loan.

"Agricultural land" has not been defined under the Act. In Commissioner of Income Tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy, , the Supreme Court held that the words "agricultural land" must have a connection with an agricultural user or purpose. The Supreme Court held that the wider meaning given to agricultural operations, such as breeding and rearing of live-stock, poultry farming or dairy farming, should not be given and held that the correct test to apply as to whether the land is an agricultural land or not is 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 to the soil, a product which can yield an income. The Supreme Court further held that the view of the Andhra Pradesh High Court that the land was capable of being used for agricultural purpose was no longer a good law.

11. Relying upon the aforesaid judgment, "the Supreme Court in Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah, held that "agricultural land" is only a species of land and held that if a land is ordinarily being used for purposes of agriculture or purposes subservient to or allied to agriculture, it would be agricultural land. The Supreme Court held that if it is not so used, it would not be agricultural land. The Supreme Court further held:-

For the reasons already given, we do not think that the term "agricultural land" had such a wide scope as the Full Bench appears to have given it for the purposes of the Act we have before us. We agree 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. What is really required to be shown in 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. It is not the mere potentiality, which will only affect its valuation as part of "assets", but its actual condition and intended user which has to be seen for purposes of exemption from wealth-tax. One of the objects of the exemption seemed to be to encourage cultivation or actual utilisation of land for agricultural purposes. If there is neither anything in its condition, nor anything in evidence to indicate the intention of its owners or possessors, so as to connect it with an agricultural purposes, the land could not be "agricultural land" for the purposes of earning an exemption under the Act. Entries in revenue records are, however, good prima facie evidence. We do not think that all these considerations were kept in view by the taxing authorities in deciding the question of fact which was really for the assessing authorities to determine having regard to all the relevant evidence and the law laid down by this court. The High Court should have sent back the case to the assessing authorities for deciding the question of fact after stating the law correctly.

12. In *State of U.P. vs. Nand Kumar Aggarwal and others* AIR 1998 SC 473, the Supreme Court held that merely because that the land has been entered in the revenue record would not mean that the said land was being used for the purpose of agriculture.

13. In the light of the aforesaid, the word "land" has been defined u/s 3(14) of the U.P.Z.A. & L.R. Act. For facility, the said provision is extracted hereunder :-

3(14)- "Land" means land held or occupied for purposes connected with agriculture, horticulture or animal husbandry which includes pisciculture and poultry farming.

14. A perusal of the said definition indicates that the "land" means land held or occupied for purposes connected with agriculture. In *State of U.P. Vs. Smt. Sarjoo Devi and Others*, , the Supreme Court has explained the definition of the word "land" as contained in Section 3(14) of the U.P.Z.A. & L.R. Act to mean the land which is occupied for the purpose connected with agriculture.

15. The word "agriculture" has been explained by the Supreme Court in *S.P. Watel and Others Vs. State of U.P.*, to mean the science and the art of cultivating the soil including the gathering in of the crops, and the rearing of live-stock, etc. In *Commissioner of Wealth Tax, Andhra Pradesh Vs. Officer-in-charge (Court of Wards), Paigah*, , the Supreme Court held that "agriculture" means cultivation of a field which implies expenditure of human skill and labour upon land. The word "agriculture" has been explained in the decision of Lord Coleridge in *R. vs. Peters* [1886] 16 QBD 636 to mean that :-

If the term "agriculture" is thus understood as comprising within its scope the

basic as well as subsequent operations in the process of agriculture and the raising on the land of products which have some utility either for consumption or for trade and commerce, it will be seen that the term "agriculture" receives a wider interpretation both in regard to its operations as well as the results of the same. Nevertheless there is present all throughout the basic idea that there must be at the bottom of it cultivation of land in the sense of tilling of the land, sowing of the seeds, planting, and imilar work done on the land itself. This basic conception is the essential sine qua non of any operation performed on the land constituting agricultural operation. If the basic operations are there, the rest of the operations are wanting the subsequent operations do not acquire the characteristic of agricultural operations.

16. In the light of the aforesaid, the facts which has been placed on record indicate that the land in question was recorded as an agricultural land in the revenue records, namely, the Khatauni, which is a substantial piece of evidence, but the mere recording of the land as agricultural land does not mean that the land is being used only for agricultural purposes. The petitioner has themselves admitted that this land was being used for educational purposes and that they applied for a term loan with the respondent Bank to set up an educational institution for running an M.B.A. course. The record also suggests that the petitioner had applied u/s 143(1) of the U.P.Z.A. & L.R. Act for change in the user of the land, i.e., from agricultural purposes to non-agricultural purposes and that their application is pending consideration. In the light of the aforesaid facts which has come on record, it is clear beyond a reasonable doubt that the land in question is not being used for agricultural purposes and that the land is being used for an educational purpose, i.e., for running a college. It is no longer an agricultural land. The words "agricultural land", as given in Section 31 (i) of the Act has to be literally understood, i.e., land in which agricultural operations are going on, i.e., where the land is being tilled and human labour is involved with or without the aid of mechanical power. All these things are absent. The Court is of the opinion that a wide meaning to the words "agricultural land" could not be given in Section 31(i) in the light of the judgments of the Supreme Court which has been referred to above. Consequently, the Court is of the opinion that in the present facts and circumstances of the case, the Act is applicable and that the initiation of the proceedings by the respondent Bank on the default committed by the petitioner is not barred and that the respondent Bank had rightly issued the notice u/s 13(2) and 13(4) of the Act. The contention of the petitioner that the Act was not applicable is patently erroneous.

17. The contention of the petitioner that the land still remains agricultural land since no declaration as yet has been made by the competent authority u/s 143(1) of the U.P.ZA & LR. Act is patently misconceived. In the opinion of the Court, till such time as the requisite declaration is not made by the competent authority u/s 143(1), the land continues to be governed by the provision of the U.P.Z.A. & L.R. Act. It does not mean that the land remains agricultural land. This view is fortified by the decision of the Allahabad High Court in the case of

Ahuddin alias Makki vs. Hamid Khan 1971 R.D. 160, wherein the Court held :-

It is plain that till such time that a Bhumidhar does not get the requisite declaration he continues to be governed by the provisions of the U.P.Z.A. and L.R. Act irrespective of the fact as to whether he uses his land for purposes connected with agriculture, horticulture etc. or not.

18. The submission of the learned counsel for the petitioner that the representation purported to be u/s 13(3-A) has not been decided and consequently, issuance of the notice u/s 13(4) could not have been issued in violation of the provision of the Act and that the provision of the guidelines and directions of 2003 has not been considered cannot be considered in a writ jurisdiction. The Court is of the opinion that for this purpose, the petitioner has an efficacious remedy of filing an appeal u/s 17 of the Act as held by the Supreme Court in United Bank of India vs. Satyawati Tandon and others 2010 (2) D.R.T.C. 457 (S.C.) and in the case of Mardia Chemicals vs. Union of India J.T. 2004 (4) SC 308. In this regard, the learned counsel for the respondent Bank has also placed reliance upon a decision of the Madras High Court in Kalpesh P.C. Surana vs. Indian Bank through its Authorised Officer, 2010 (2) DRTC 253 and a decision of the Calcutta High Court in Suchanda Chowdhury vs. UCO 13 Bank & others 2011 (1) DRTC 322 and a decision of the Supreme Court in Shri Bimal N. Desai Vs. State of Karnataka and Others, , which are applicable to the present facts and circumstances of the case.

19. In the light of the aforesaid, the writ petitions fail and are dismissed. In the circumstances of the case, parties shall bear their own costs.