(2011) 08 BOM CK 0198

In the Bombay High Court

Case No : Writ Petition No. 7543 of 2010

Housing Development Finance Corporation Ltd. (HDFC Ltd.) APPELLANT

Vs

State of Maharashtra and Others RESPONDENT

Date of Decision : 30-08-2011

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), 14, 14, 14

Citation : AIR 2012 Bom 19 : (2011) 7 ALLMR 428 : (2012) 2 BC 478 : (2012) 3 BomCR 910 : (2011) 6 MhLj 758

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Atul Daga with Ms. Jyoti Ghag and Nikhil Mengde instructed by M/s Thakore Jariwala and Associates, for the Appellant; R.P. Behre, AGP for respondent Nos. 1 to 3, for the Respondent

Judgement

Dr. D.Y. Chandrachud, J.—These proceedings under Article 226 of the Constitution have been instituted by the Housing Development Finance Corporation Ltd., which is a financial institution within the meaning of section 2(1)(m)(iv) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, read with a notification dated 10 November, 2003 issued by the Union Government in the Ministry of Finance (Department of Economic Affairs Banking Division). The petitioner during the course of its business has disbursed housing loans. The loans are secured inter alia by mortgage of immovable properties and the petitioner claims to have an enforceable security interest. Upon a default by a borrower, the loan account is classified as a non-performing asset. Under the Act, which was enacted by Parliament in 2002, statutory provisions have been enacted to provide a speedy mechanism for the recovery of amounts due to financial institutions without the intervention of the Court.

2. Section 14 of the Act empowers the secured creditor to move the Chief

Metropolitan Magistrate or the District Magistrate within whose jurisdiction a secured asset or other documents relating thereto may be situated to take possession of a secured asset, if the asset is required to be sold or transferred under the provisions of the Act. The second and third respondents are District Magistrates respectively at Thane and Raigad, who have been vested with the responsibility of discharging functions u/s 14.

3. The petitioner invoked the provisions of section 13(2) against several borrowers. Despite repeated notices, the borrowers having failed and neglected to repay the dues, the petitioner sought to initiate measures u/s 13(4), but was unable to do so as a result of resistance offered by the borrowers, or as the case may be, occupants of immovable properties. Accordingly, second and third respondents were moved for initiating action u/s 14. It has been averred that the petitioner furnished copies of the loan documents, title deeds/documents in support of the creation of mortgage and of the demand notices issued u/s 13(2) together with postal acknowledgement cards and newspaper publication, with each application. At Exhibit "B" to the Petition is a list of applications which have been filed u/s 14. Exhibit ''D'' is tabulated statement containing a list of applications which are pending for a period of less than one year; for a period between 1 and 2 years; and for between 2 and 3 years. Exhibit ''E'' contains a tabulated statement of cases where orders have been passed u/s 14, but the orders are as yet not executed. The tabulated statement would show that in certain cases, orders have been passed less than a year ago, while in others, orders were passed between 1 and 2 years prior to the institution of the proceedings. In three cases though orders were passed over two years ago, they are still not executed. One order has been passed over three years prior to the institution of these proceedings. The grievance of the petitioner is that an amount of Rs. 15.73 crores is held up as a result of the failure of the second respondent and an amount of Rs. 7.63 crores has been held up as a result of the failure of the third respondent to initiate and pursue steps in accordance with law. Similarly, though orders have been passed, they are still pending execution before the second and third respondents involving an aggregate debt of Rs. 11.70 crores and Rs. 97.21 lakhs respectively.

4. The object and purpose underlying the enactment of the Securitization Act was to provide an expeditious mechanism for the realization of dues of Banks and Financial Institutions without the intervention of the Court. The rationale underlying the enactment of the legislation was to enable banks and financial institutions to realize long term assets, manage problems of liquidity and asset liability mismatches and to improve recovery by exercising the power to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. In Trade Well v. Indian Bank, 2007(2) Mh.L.J. (Cri) 412 : 2007 (1) Bom.C.R. (Cri) 783 a Division Bench of this Court has laid down detailed guidelines to facilitate expeditious compliance of the provisions of section 14 by the Collector, or as the case may be, the District Magistrate. The directions issued by the Division Bench were in the following

terms :

1. The bank or financial institution shall, before making an application u/s 14 of the NPA Act, verify and confirm that notice u/s 13(2) of the NPA Act is given and that the secured asset falls within the jurisdiction of CMM/DM before whom application u/s 14 is made. The bank and financial institution shall also consider before approaching CMM/DM for an order u/s 14 of the NPA Act, whether section 31 of the NPA Act excludes the application of sections 13 and 14 thereof to the case on hand.

2. CMM/DM acting u/s 14 of the NPA Act is not required to give notice either to the borrower or to the 3rd party.

3. He has to only verify from the bank or financial institution whether notice u/s 13(2) of the NPA Act is given or not and whether the secured assets fall within his jurisdiction. There is no adjudication of any kind at that stage.

4. It is only if the above conditions are not fulfilled that the CMM/DM can refuse to pass an order u/s 14 of the NPA Act by recording that the above conditions are not fulfilled. If these two conditions are fulfilled, the cannot refuse to pass an order u/s 14.

5. Remedy provided u/s 17 of the NPA Act is available to the borrower as well as the third party.

6. Remedy provided u/s 17 is an efficacious alternative remedy available to the third party as well as to the borrower where all grievances can be raised.

5. The judgment in Trade Weil emphasises the limited scope of the enquiry that is contemplated u/s 14. The enquiry before the Competent Authority u/s 14 is not in the nature of an adjudication. Despite this, it has been repeatedly brought to the attention of the Court that Collectors or, as the case may be, District Magistrates, are not taking expeditious steps to effectuate compliance with the provisions of section 14. The delay on the part of the authorities having jurisdiction u/s 14 frustrates the very object and purpose underlying the enactment of the Securitization Act. The due process of law u/s 14 should not be allowed to be thwarted by borrowers who peddle local influence in the area of jurisdiction of Collectors and District Magistrates. Recently, in a judgment in The Saraswat Cooperative Bank Limited Vs. The State of Maharashtra and Another, this Court had issued directions to the Collectors having jurisdiction to expeditiously conclude all the pending applications. The Court also issued the following directions :

We also direct that in all future cases, all Collectors and District Magistrates shall maintain a record of applications received and endeavour to conclude the hearing of those applications and pass final orders thereon as expeditiously as possible and in any event within a period of two months. We clarify that we have not entered upon the merits of the individual applications concerning borrowers in the present case who are not parties to these proceedings. We have entered upon the grievance of the petitioner since it related to the failure of the Collector to adhere to the legal principles enunciated in the judgment of this Court in relation to the exercise of the powers u/s 14.

Since there is a genuine grievance on the part of Banks and Financial Institutions on the delay that occurs in the disposal of their applications u/s 14 of the Securitization Act as well as in the execution of the orders which have been passed u/s 14, this Court is constrained to exercise its writ jurisdiction under Article 226 of the Constitution, in order to ensure that the provisions of the law enacted by Parliament are not rendered nugatory. We are of the view that the State of Maharashtra must be directed to issue a circular to all the Collectors in the State to whom powers u/s 14 are delegated to take up applications u/s 14 expeditiously and to deal with them in accordance with the law enunciated in the judgment in Trade Well. The State Government shall, while issuing a circular for immediate compliance, issue the following directions :

(i) The Competent Authority shall maintain a record of all applications received u/s 14;

(ii) Every application must be taken up initially for directions within one week of the date on which it is filed;

(iii) Applications shall be disposed of expeditiously and in any event no later than within a period of two months of the date on which the application is filed;

(iv) Upon an order being passed under sub-section (1) of section 14, the District Magistrate shall take expeditious steps in accordance with sub-section (2) of section 14 for securing compliance with the order; and

(v) Where the assistance of law enforcement authorities is sought for enforcing the order in accordance with law, such assistance shall be furnished expeditiously.

6. We direct that a comprehensive circular for facilitating compliance by Collectors/District Magistrates shall be issued by the State Government within a period of four weeks from today.

7. As regards the second and third respondents against whom a specific grievance has been made in this case, we direct that within a period of one month from the date on which an authenticated copy of this order is produced before them, the second and third respondents shall dispose of all the pending applications listed out in Exhibit ''B'' to the Petition. Similarly in the case of those applications where orders have been passed as stated in Exhibit ''C'' to the present proceedings, necessary steps shall be taken for the enforcement of the orders expeditiously. Since sub-section (2) of section 14 provides that for securing compliance with an order passed under sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or caused to be taken such steps and use or caused to be used, such force, as may, in his opinion, be necessary, we direct that necessary assistance shall be rendered by the law and enforcement authorities whenever a requisition is made for securing compliance.

The Registrar General of this Court shall also circulate a copy of the present directions to the Chief Metropolitan Magistrate, Mumbai for information.

8. The Petition shall stand disposed of in the aforesaid terms. There shall be no order as to costs.

