
(2009) 05 AHC CK 0473

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 26893 of 2009

ICICI Bank Limited

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 25-05-2009

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 14, 17(3), 31

Citation : (2009) 05 AHC CK 0473

Hon'ble Judges : Sunil Ambwani, J and Virendra Singh, J

Final Decision : Allowed

Judgement

1. Heard Shri Ashish Mishra, learned counsel for ICICI Bank Limited the petitioner in the writ petition. Learned Standing Counsel appears for, the respondent Nos. 1 and 2.

2. The ICICI Bank Limited (in short the Bank) has approached the Court to set aside the orders passed by the Chief Metropolitan Magistrate (CMM) Kanpur Nagar dated 7.1.2009 and 2.4.2009 in Misc. Application No. 948 of 2008; to expedite the process for appointment of receiver and to take possession of the property under Section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short the Act of 2002).

3. Brief facts leading in filing the writ petition are that the respondent No. 2a partnership firm entered into an agreement of overdraft facility of Rs. 24 lacs from the bank against security of mortgage of the immovable (residential) property bearing No. W177, M.I.G, Keshav Nagar, KanpurCity, besides executing personal guarantees in favour of the bank. The respondent No. 3 failed to maintain financial discipline and made defaults in payment on which as per terms and conditions of the agreement the authorised officer of the bank issued a notice under Section 13 (2) of the Act of 2002 to the defaulter borrower firm M/s Ludhiana Agencies and it's partners Mr. Narendra Kumar Graver and Smt. Santosh Kumari Graver, giving details of the amount payable by them and to

repay the outstanding dues within the statutory period of sixty days, failing which the bank will take possession of the mortgage properties to recover the secured credits. The notice dated 13.7.2007 was received and acknowledged by them. The debtor did not make any effort to pay the money, nor has replied to the notice or filed any appeal under Section 17 of the Act of 2002 in Debt Recovery Tribunal.

4. The bank moved an application before the Chief Metropolitan Magistrate under Section 14 of the Act of 2002 for appointment of the receiver and for taking possession. The application was filed on 5.7.2008 and was fixed for hearing on 4.8.2008. It was adjourned thereafter from time to time and that lastly on 7.1.2009 the Chief Metropolitan Magistrate observed that the notices have not been served upon the respondents. He found that it would be in the interest of justice to issue notice and to hear the other side, and directed the notices to be issued fixing 7.2.2009 for hearing. The bank filed a recall application on 19.3.2009 objecting that under Section 14 of the Act of 2002, there is no provision for issuing notice to the respondent before appointing a receiver or taking possession. The application has been rejected by the Chief Metropolitan Magistrate, Kanpur Nagar on 2.4.2009 with observations that the principles of natural justice require a person to be heard in the matter before issuing an order against his interest, and that his earlier order dated 7.2.2009 has not been complied with, and cannot be reviewed by him.

5. Shri Ashish Mishra, learned counsel for the bank submits that the scheme of the Act of 2002 does not provide under Section 14 to issue notice by the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the Act of 2002 to the borrower. The orders under Section 13 (4) can be challenged under Section 17 of the Act of 2002 before the Debt Recovery Tribunal. Under subsection (3) of Section 17 the Debt Recovery Tribunal can restore the possession, if it has been taken over illegally by the bank. He submits that the validity of the provisions of the Act has been upheld in *Mardia Chemicals Limited v. Union of India*, (2004) 4 SCC 311, and that thereafter in *Transcore v. Union of India and another*, (2008) 1 SCC 125, the Supreme Court has interpreted the provisions of the Act. He has referred to the discussion on point No. 2 in para 12, on the question of possession in paragraph 72 to 74 in which the Supreme Court held:

"72. We do not find any merits on the above contentions for the following reasons.

73. The word possession is a relative concept. It is not an absolute concept. The dichotomy between symbolic and physical possession does not find place in the Act. As stated above, there is a conceptual distinction between securities by which the creditor obtains ownership of or interest in the property concerned (mortgages) and securities where the creditor obtains neither an interest in nor possession of the property but the property is appropriated to the satisfaction of the debt (charges). Basically, the NPAA Act deals with the former type of securities

under which the secured creditor, namely/the bank/FI obtains interest in the property concerned. It is for this reason that the NPAAct ousts the intervention of the Courts/tribunals.

74. Keeping the above conceptual aspect in mind, we find that Section 13 (4) of the NPAAct proceeds on the basis that the borrower, who is under a liability, has failed to discharge his liability within the period prescribed under Section 13 (2), which enables the secured creditor to take recourse to one of the measures, namely taking possession of the secured assets including the right to transfer by way of lease, assignment or sale for realising the secured assets. Section 13 (4A) refers to the word "possession" simpliciter. There is no dichotomy in subsection (4A) as pleaded on behalf of the borrowers. Under Rule 8 of the 2002 Rules, the authorised officer is empowered to take possession by delivering the possession notice prepared as nearly as possible in Appendix IV to the 2002 Rules. That notice is required to be affixed on the property. Rule 8 deals with sale of immovable secured assets. Appendix IV prescribes the form of possession notice. It inter alia states that notice is given to the borrower who has failed to repay the amount informing him and the public that the bank/FI has taken possession of the property under Section 13 (4) read with Rule 9 of the 2002 Rules. Rule 9 relates to time of sale, issue of sale certificate and delivery of possession. Rule 9 (6) states that on confirmation of sale, if the terms of payment are complied with, the authorised officer shall issue a sale certificate in favour of the purchaser in the form given in Appendix V to the 2002 Rules. Rule 9 (9) states that the authorised officer shall deliver the property to the buyer free from all encumbrances known to the secured creditor or not known to the secured creditor, (emphasis supplied). Section 14 of the NPA Act states that where the possession of any secured asset is required to be taken by the secured creditor or if any of the secured asset is required to be sold or transferred, the secured creditor may, for the purpose of taking possession, request in writing to the District Magistrate to take possession thereof. Section 17 (1) of the NPA Act refers to the right of appeal. Section 17 (3) states that if DRT as an appellate authority after examining the facts and circumstances of the case comes to the conclusion that any of the measures under Section 13 (4) taken by the secured creditor are not in accordance with the provisions of the Act, it may by order declare that the recourse taken to any one or more measures is invalid, and consequently, restore possession to the borrower and can also restore management of the business of the borrower. Therefore, the scheme of Section 13 (4) read with Section 17(3) shows that if the borrower is dispossessed, not in accordance with the provisions of the Act, then DRT is entitled to put the clock back by restoring the status quo ante. Therefore, it cannot be said that if possession is taken before confirmation of sale, the rights of the borrower to get the dispute adjudicated upon is defeated by the authorised officer taking possession. As stated above, the NPAAct provides for recovery of possession by nonadjudicatory process; therefore, to say that the rights of the borrower would be defeated without adjudication would be erroneous. Rule 8, undoubtedly,

refers to sale of immovable secured asset. However, Rule 8 (4) indicates that where possession is taken by the authorised officer before issuance of sale certificate under Rule 9, the authorised officer shall take steps for preservation and protection of secured assets till they are sold or otherwise disposed of. Under Section 13(8), if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the creditor before the date fixed for sale or transfer, the asset shall not be sold or transferred. The costs, charges and expenses referred to in Section 13 (8) will include costs, charges and expenses which the authorised officer incurs for preserving and protecting the secured assets till they are sold or disposed of in terms of Rule 8 (4). Thus, Rule 8 deals with the stage anterior to the issuance of sale certificate and delivery of possession under Rule 9. Till the time of issuance of sale certificate, the authorised officer is like a Court Receiver under Order 40 Rule 1, CPC. The Court Receiver can take symbolic possession and in appropriate cases where the Court Receiver finds that a thirdparty interest is likely to be created overnight, he can take actual possession even prior to the decree. The authorized officer under Rule 8 has greater powers than even a Court Receiver as security interest in the property is already created in favour of the banks/FIs. That interest needs to be protected. Therefore, Rule 8 provides that till issuance of the sale certificate under Rule 9, the authorised officer shall take such steps as he deems fit to preserve the secured asset. It is well settled that thirdparty interests are created overnight and in very many cases those third parties take up the defence of being a bona fide purchaser for value without notice. It is these types of disputes which are sought to be avoided by Rule 8 read with Rule 9 of the 2002 Rules. In the circumstances, the drawing of dichotomy between symbolic and actual possession does not find place in the scheme of the NPAAct read with the 2002 Rules."

6. Shri Ashish Mishra has relied upon a judgment of Bombay High Court in *Trade Well, a Proprietorship firm v. Indian Bank*, 2007 Cri LJ 2544, in which, interpreting the provisions of Section 14 of the Act of 2002 and the jurisdiction of the Chief Metropolitan Magistrate or the District Magistrate under Section 14 of the Act of 2002 it was held in para 77 and 90:

"77. In our opinion, to secure its object the NPAAct has by necessary implication ruled out giving hearing either to the borrower or third parties till the application is filed under Section 17. As observed by the Supreme Court in *Transcore's* case (supra) Section 6 of the NPAAct inter alia states that the bank or financial institution may, if it considers appropriate give a notice of acquisition of financial assets by any securitisation company or reconstruction company to the borrower and to any other concerned person but they may or may not give notice to the borrower regarding acquisition of financial assets the reason being that assets are transferable overnight. Section 13 (2) contemplates a notice to the borrower calling upon him to discharge his liabilities. Section 13 (3A) requires the secured creditor to communicate to the borrower reasons for not accepting his representation or objection any proviso thereto states that such communication

shall not confer right on the borrower to make an application under Section 17 at that stage. Section 14 with which we are concerned here does not contemplate any notice to the borrower or a third party. It is only Section 17 which states that any person including borrower can make an application to DRT being aggrieved by any measure taken under Section 13 (4). Explanation to Section 17 clarifies that reasons communicated to a borrower at the stage of communication will not confer on the person including borrower any right to make an application to DRT under Section 17 (1). Section 18 again confers right on any person aggrieved by an order of DRT under Section 17 to file an appeal before the Appellate Tribunal against the said order. Therefore, third party was in the mind of the legislature when it enacted the NPAAct. Wherever necessary reference is made to third party. Nothing prevented the legislature from specifically making a provision in Section 14 for notice to the borrower or third party. It purposely did not make provision for notice or hearing being given to the borrower or third party at the stage of Section 14. Looking to the scheme of the NPAAct, we are of the opinion that notice or hearing to the borrower or third party is excluded at the stage of Section 14 by necessary implication.

90. Following conclusions emerge from the above discussion:

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

(2) CMM/DM acting under Section 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 under Section 13 (2) of the NPA Act is given or not and whether the secured assets fall within his jurisdiction. There is no adjudication of.

(4) It is only if the above conditions are not fulfilled that the CMM/DM can refuse to pass an order under Section 14 of the NPAAct by recording that the above conditions are not fulfilled. If these two conditions are fulfilled, he cannot refuse to pass an order under Section 14.

(5) Remedy provided under Section 17 of the NPAAct is available to the borrower as well as the third party.

(6) Remedy provided under Section 17 is an efficacious alternative remedy available to the third party as well as to the borrower where all grievances can be raised.

(7) In view of the fact that efficacious alternative remedy is available to the to borrower as well as to the third party, ordinarily, writ petition under Articles 226

and 277 of the Constitution of India should not be entertained.

(8) In exceptional cases of gravest injustice, a writ petition could be entertained by this Court.

(9) Great care and caution must be exercised while entertaining a writ petition because in a given case it may result in frustrating the object of the NPA Act.

(10) Even if a writ petition is entertained, as far as possible, the parties should be relegated to the remedy provided under Section 17 of the NPA Act before the DRT by passing an interim order which will protect the secured assets. Adjudication and final order should be left to the DRT as far as possible."

7. In *Bank of India v. Pankaj Dilipbhai Mennani and others*, AIR 2007 Guj 201, the Gujarat High Court has also taken same view. The paragraph 9 of the judgment is quoted:

"9. Hence, the authority who is called upon to act under Section 14 of the Securitisation Act can only assist, nay, is bound to assist the secured creditor in taking possession of the secured asset. Any dispute between the parties regarding the secured asset raised before the authority cannot be gone into by the authority; the authority has to relegate the aggrieved person to seek statutory remedy under the Securitisation Act after taking possession and handing over to the secured creditor. The Authority cannot be permitted to read anything beyond this in Section 14 of the Securitisation Act."

8. In *Bhartiya Traders Pvt. Ltd. v. UCO Bank*, AIR 2007 Cal 105; *Hutchison Essar South Ltd. v. Union Bank of India*, AIR 2008 Kant 14; *Vysya Cooperative Bank Ltd. v. M/s Gkeerthana and others*; *Kottakal Cooperative Urban Bank v. I Balakrishnan and others*, AIR 2008 Ker 179; and *Sosamma Abraham v. Chief Manager, State Bank of Travancore*, AIR 2008 Ker 183, the High Courts have held that the secured creditor can under Section 13 (4), take possession of secured asset without following the procedure under Section 14 of the Act of 2002. In *Transcor's* case it was held that Section 13 (4) does not contemplate taking of mere notional possession, but actual physical possession. The Chief Metropolitan Magistrate/District Magistrate are bound to assist the secured creditor in taking possession of the secured asset. They do not possess any adjudicatory powers. The jurisdiction of Civil Courts is barred under Section 34 of the Act of 2002. If there is any dispute between the parties regarding any secured asset, the authority has to relegate the aggrieved person to seek statutory remedy under the Act, after handing over possession to the secured creditor. It will be in the wisdom and freedom of the secured creditor as to whether in a given case, it would in exercise of his authority take over under Section 13 (4), de jure and de facto possession at one go or it would let the secured creditor to continue to hold de facto possession after taking over only de jure possession in accordance with the rules and to proceed with sale under Section 13 of the Act. It is not necessary that the secured creditor can sell the secured asset only after taking over actual possession de facto.

9. Sections 13, 14 and 17 of the Act of 2002 interpreted by the Supreme Court in Transcore's case (supra) and other judgments of the high Courts cited by learned counsel for the petitioner have held that Section 14 has been enacted to assist the secured creditors in taking possession of the secured assets. The CMM/DM under Section 14 is not required to enquire or adjudicate any dispute between the bank and the borrower and third parties. Even otherwise the CMM or the District Magistrate do not have and cannot be conferred with the powers to adjudicate any dispute. While exercising powers under Section 14 the Chief Metropolitan Magistrate/District Magistrate, as the case may be, is only required to see if the notice under Section 13 (2) was given, and that the secured asset falls within his jurisdiction. They are also required to verify whether the provisions of Section 31 of the Act of 2002 providing for exclusion of Sections 13 and 14 are applicable to the case. After making this limited enquiry, the CMM/DM is not required to give any notice to the borrower or any third party. He is not required to hear the respondents to serve the principles of natural justice, as no adjudication is required to be made nor they have been conferred with any jurisdiction to decide any questions or facts or law at this stage.

10. In the present case the Chief Metropolitan Magistrate has also observed in his order dated 2.4.2009, that his order dated 7.1.2009 has not been set aside and that he has no power to review his order. Subsection (3) of Section 14 of the Act of 2002, provides that no act of the CMM or DM done in pursuance of this Section shall be called in question in any Court or before any authority. The order of the CMM/DM under Section 14 is not appealable or revisable by the superior Court. The order passed by the Chief Metropolitan Magistrate on 7.1.2009 was not passed under any provision of the Criminal Procedure Code. His observation, therefore, that his order cannot be reviewed, is not sustainable in law. He was not required to issue notices to the borrower, who has remedies under the Act to protect his rights. The order issuing notice as such was in erroneous exercise of his jurisdiction vested in him under Section 14 (1) of the Act of 2002.

11. We may add here that apart from the remedies available under the Act in exceptional and rare cases of hardships the extraordinary remedy of approaching the High Court under Article 226 of the Constitution of India for judicial review is available. If any third party complains of exceptional hardships the High Court may in a given case issue necessary directions to allow notional possession to be taken, allowing such third party to approach Debt Recovery Tribunal to seek the remedies at the first instance. The CMM/DM, however do not have such powers under the Act of 2002.

12. The writ petition is allowed. The orders dated 7.1.2009, by which the Chief Metropolitan Magistrate, Kanpur Nagar had issued notices to the opposite party and the order dated 2.4.2009, by which he has rejected the application to recall the order, are set aside. The Chief Metropolitan Magistrate, Kanpur Nagar will consider the application afresh very expeditiously preferably within a period of one month after taking into consideration the legal position and the conditions

specified in the judgments referred to as above and the observations made by us. He will confine the exercise of his jurisdiction under Section 14 of the Act of 2002 and would pass appropriate orders in accordance with the law, taking into account the observations made by the Supreme Court in *Transcore v. Union of India*, 2008 (1) SCC 125. We also consider it appropriate to direct that where applications are made by the bank under Section 14 of the Act of 2002 or are pending the Chief Metropolitan Magistrate or the District Magistrate as the case may be, shall pass orders on these applications very expeditiously and preferably within sixty days of such applications made by the bank in accordance with the observations made by us in this judgment.