

(2011) 02 GUJ CK 0166

In the Gujarat High Court

Case No : Special Civil Application No. 215 of 2011

IDBI Bank Ltd.

APPELLANT

Vs

District Magistrate and Another

RESPONDENT

Date of Decision : 18-02-2011

Acts Referred:

Companies Act, 1956 — Section 14
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 14, 17, 2

Citation : AIR 2011 Guj 147 : (2011) 4 BC 655 : (2011) 2 GLH 12

Hon'ble Judges : S.J. Mukhopadhaya, C.J.; J.B. Pardiwala, J

Bench : Division Bench

Advocate : P.M. Dave and Asit B. Joshi, for the Appellant; Krina Calla, AGP for Respondent 1 and S.K. Patel, for Respondent 2, for the Respondent

Judgement

J.B. Pardiwala, J.—This petition has been preferred by IDBI Bank Limited, a company incorporated under the provisions of the Companies Act, 1956, through its authorized signatory with the following prayers:

"(A) Your Lordships be pleased to issue a writ or any other appropriate writ, order or direction, by quashing and setting aside order/communication dtd.09/06/2009 of the Respondent authority and further be pleased to direct the Respondent authority to pass an order for providing assistance to maintain law and order while taking over the possession of the secured assets of the principal borrower for implementation of sec 14(1) and the said secured asset is to be forwarded to the Petitioner in accordance with law in the interest of justice and equity forthwith;

(B) Your Lordships be pleased to direct the Respondent authority to forthwith reconsider the application of the Petitioner bank submitted u/s 14 of the Securitization considering the ratio laid down in various decisions of this Hon'ble Court as well as considering the provisions of Section 14 of the Act and pass the appropriate order within such time as may be deemed fit by this Hon'ble Court in

the interest of justice and equity."

2. The factual background under which this petition has been preferred is that Respondent No. 2 availed of a housing loan of Rs. 2 lakhs from the Petitioner Bank and executed necessary documents in favour of the Petitioner Bank. It is not in dispute that the loan was sanctioned in favour of Respondent No. 2, who is the principal borrower. At the time of availing the loan amount Respondent No. 2, as the principal borrower, mortgaged his immovable residential property towards the security with the Petitioner Bank by executing necessary documents. The description of the mortgaged immovable residential property is as under:

"A residential property situated on Revenue Survey No. 288/p, Mouje: Gam Chhapra, District - Sub District: Navsari, Plot area 116.26 sq.meters (660 sq.ft.), constructed area 540 sq.ft., House No. 36/H, Panchvati Society, Chhapra Road, Chhapra, Navsari"

Thus, Respondent No. 2 is a borrower u/s 2(f) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "the Securitisation Act") and the Petitioner Bank is a secured creditor u/s 2(zd) of the Securitisation Act. It is also not in dispute that Respondent No. 2 failed in making payment of installments and as on 10th December 2006 the total outstanding dues payable by him to the Bank was Rs. 1,55,595=00.

3. The Petitioner Bank required police assistance for taking over the physical possession of the property in question. The Bank, therefore, applied to the District Magistrate, Navsari, by filing application dated 26th February 2009. The grievance made by the Bank is to the effect that an application which was preferred with the District Magistrate, Navsari u/s 14 of the Securitisation Act, praying that necessary protection be afforded to the Bank for taking over possession of the property in question, which has been mortgaged, has been wrongly rejected. The application preferred by the Bank is at Annexure-"F". Collector, Navsari i.e. Respondent No. 1 informed the Bank that the request which has been made cannot be acceded u/s 14 of the Securitisation Act for the reason that the defaulter i.e. principal borrower - Respondent No. 2 has made construction of 540 sq.feet in a plot area of 660 sq.feet in the land bearing Revenue Survey No. 288/p situated at Mouje Chhapra, which is not in accordance with law. Respondent No. 1 further informed the Bank that it would not be proper to get the possession of the property having unauthorized construction to submit to the Bank.

4. The principal contention on behalf of the Petitioner Bank is that Respondent No. 1 as a District Magistrate has no power u/s 14 of the Securitisation Act to adjudicate any issue on merits. It is also submitted that the District Magistrate cannot refuse to assist the Bank in taking over possession on any other grounds. Per contra, it has been submitted by learned Counsel appearing for Respondent No. 2 that he is ready and willing to make the payment to the Bank whatever is

due and outstanding as on today if he is given an opportunity by the Bank for the same.

5. So far as the first principal contention of the Petitioner is concerned, the same merits consideration because the Chief Metropolitan Magistrate and the District Magistrate, u/s 14 of the Securitisation Act are not empowered to decide the question of legality and propriety of any of the actions taken by the secured creditor u/s 13(4), which can be assailed u/s 17 of the Securitisation Act by the aggrieved person. Under Sub-section (3) of Section 14, the act of the Chief Metropolitan Magistrate or District Magistrate done in pursuance of the said section cannot be called in question in any court or before any authority. From the aforesaid provisions of law, it is evident that Chief Metropolitan Magistrate or District Magistrate is bound to assist the secured creditor in taking possession of the secured assets.

6. The Authority who is called upon to act u/s 14 of the Securitisation Act can only assist, nay, is bound to assist the secured creditor in taking possession of the secured asset. As the Chief Metropolitan Magistrate and District Magistrate u/s 14 is not empowered to decide the question of legality and propriety of any of the actions taken by the secured creditor u/s 13(4), which may be assailed u/s 17 of the Act by the aggrieved person, under Sub-section (3) of Section 14 of the Securitisation Act, the act of the Chief Metropolitan Magistrate or District Magistrate done in pursuance of said Section cannot be called in question in any court or before any authority. It is evident from the provisions of law that the District Magistrate while bound to assist the secured creditor in taking possession of the secured assets and to take the possession of the documents relating thereto and forward such assets and documents to the secured creditor, he is not empowered to decide the question of genuinity or propriety of such documents, including the document signed or agreed between the borrower and the secured creditor.

7. Division Bench of this High Court has, in Special Civil Application No. 15084/2010, in the matter between IDBI Bank Limited v. Hytaisun Magnetics Limited and Ors. (unreported decision dated 9th February 2011) settled the entire position of law so far as the subject matter of the present petition is concerned.

8. In paragraph 20 of the unreported judgment, the Hon"ble Division Bench held as under:

"(i) Under Chapter III of the Securitization Act, a secured creditor has right to enforce security interest without the intervention of the Court or Tribunal in accordance with the provisions of the said Act. [Section 13(1)]

(ii) The borrower, who is under liability to the secured creditor under a secured agreement, is entitled to take a notice u/s 13(2) of the said Act.

(iii) The secured creditor who intends to enforce the secured asset is bound to

give details of amount payable by the borrower and the secured assets intended to be enforced. [Section 13(3)]

(iv) u/s 13(3A), the borrower has right to make representation or raise objection. If any objection is there with regard to the secured asset, that can be raised only at the stage of Section 13(3A). Under the said provision, only the secured creditor will determine the objection and not any Court or Tribunal.

(v) No cause of action takes place even after the decision taken by the secured creditor u/s 13(3A) till the secured creditor takes recourse of one or more measures including the measure to take possession of the secured asset of the borrower u/s 13(4) of the Act.

(vi) The secured creditor is competent to take possession of all the secured assets of its own following the procedure laid down under Rule 8 of the Security Interest (Enforcement) Rules, 2002.

(vii) Only when the secured creditor finds difficulty to take possession of the secured asset, it may take assistance of the Chief Metropolitan Magistrate or the District Magistrate u/s 14 of the Act.

(viii) The measures taken u/s 14 amounts to measures taken u/s 13(4) of the Act.

(ix) As the measures taken u/s 14 amount to measures taken u/s 13(4) of the Act, u/s 14(3) such measures cannot be called in question before any Court or Tribunal.

(x) If such measures taken u/s 14 which amount to measures taken u/s 13(4) is not in accordance with the Securitization Act or the Rules framed thereunder, including the objection, if any, raised that the asset is not a secured asset to be taken u/s 13(4), the aggrieved person has a remedy u/s 17 before the Debts Recovery Tribunal to show that the measures taken are against the Act [Section 13(4)] or the Rules framed thereunder.

(xi) All such determination is to be made by the Debts Recovery Tribunal including the question whether the asset is a secured asset or not and the Chief Metropolitan Magistrate or the District Magistrate has not been empowered to adjudicate such dispute, but is directed only to assist the secured creditor in taking possession of the secured asset. If they are not empowered to adjudicate the dispute, they cannot also call for the secured creditor to produce any document to decide whether the asset is secured asset or not, which will be futile exercise in absence of power to adjudicate such issue.

Under Clauses (a) and (b) of Section 14(1), the Chief Metropolitan Magistrate or the District Magistrate and on request, are bound to take possession of the secured assets as also the documents relating thereto. If the documents are to be obtained by them, the question of asking the secured creditor to produce the document in all cases does not arise. Therefore, they do not have jurisdiction even to call for the documents."

9. In view of the settled position of law, u/s 14(2) of the Securitisation Act, for the purpose of securing compliance with the provisions of Sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

10. We are of the view that the District Magistrate has failed to discharge his statutory duties as he is obliged u/s 14(2) of the Securitisation Act and was not right in rejecting the application preferred by the Petitioner Bank u/s 14 of the Securitisation Act.

11. For the reasons stated above, we quash and set-aside the communication dated 22nd October 2010 (page 42 dated 9th June 2009) and we direct Respondent No. 1 to fully comply with the provisions of Section 14(2) of the Securitisation Act and to provide the necessary assistance and protection to the Petitioner Bank for taking over possession of the secured assets of the principal borrower.

12. At this stage, we deem it fit to clarify that the order which we have passed shall not come in the way of Respondent No. 2 if he is ready and willing to make the payment to the Bank as per his liability.

13. u/s 13(8) of the Securitisation Act, if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured assets shall not be sold or transferred by the secured creditor and no further steps shall be taken by him for transfer or sale of the secured assets. If Respondent No. 2 wants to avail of the benefit of Section 13(8), it shall be open for him to make the necessary payment to the Bank as per Section 13(8) of the Securitisation Act.

14. We also like to clarify that we have not expressed any opinion so far as the measures taken by the Petitioner Bank u/s 13(4) of the Securitisation Act are concerned. If Respondent No. 2 is aggrieved in any manner for non-compliance of the Act or rules thereunder, it will be open for him to proceed u/s 17 of the Securitisation Act, which provides for an appeal before the Debts Recovery Tribunal.

15. With these observations, the petition stands disposed of.

Direct service is permitted.