

(2009) 12 GUJ CK 0030

In the Gujarat High Court

Case No : Special Civil Application No's. 1900 and 2057 of 2009 and Civil Application No. 4209 of 2009 in Special Civil Application No. 2057 of 2009

Iqbal I. Jamindar

APPELLANT

Vs

Syndicate Bank

RESPONDENT

Date of Decision : 02-12-2009

Acts Referred:

Constitution of India, 1950 — Article 12, 226, 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4), 17, 18, 19

Citation : (2009) 12 GUJ CK 0030

Hon'ble Judges : Jayant Patel, J

Bench : Single Bench

Advocate : Ketan D. Shah, for the Appellant; Vibhuti Nanavati and Mayurika B. Suthar, for the Respondent

Judgement

Jayant Patel, J.—Rule. Mr. Nanavati, learned Counsel for the respondent No. 1 waives service of notice of Rule.

2. As both the matters are inter-connected and common aspects are arisen for consideration, they are being considered by this common judgement.

3. Special Civil Application No. 1900 of 2009 has been preferred by the petitioner for appropriate writ to restrain the Bank from dealing with the property of the petitioner, in any manner whatsoever, on payment being made by the petitioner to respondent of an amount of Rs.6,45,000/- and it is also prayed by the petitioner for appropriate writ to direct the respondent Bank to hand over the possession of the property with the title deeds and to release the said property from its charge upon the petitioner paying the amount of Rs. 6,45,000/-. The petitioners has also prayed to quash and set aside the action taken by the Bank under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "Securitisation Act" for

short).

4. Special Civil Application No. 2057 of 2009 has been preferred by the petitioners seeking appropriate writ to restrain the Bank from dealing with the property, in any manner whatsoever, on payment of the amount of Rs. 15,13,090.70 and it is prayed by the petitioners that the appropriate writ be issued to direct the respondent bank to hand over the possession of the property with the title deeds and to release the property from its charge upon the petitioners paying the amount of Rs. 15,31,090.70. The petitioners have also challenged the action under the Securitisation Act vide Notice dated 16.1.2009.

5. Heard Mr. Shah, learned Counsel for the petitioners and Mr. Nanavati, learned Counsel appearing for the respondent Bank.

6. It appears that it is an undisputed question that the property is mortgaged in a loan transaction, for which the amount outstanding as on 9.9.2009 is Rs. 5,95,313.46. It also appears that this Court on 6.3.2009 had passed the following order:

Heard Mr. Ketan D. Shah, learned advocate for the petitioner and Mr. Vibhuti Nanavati, learned advocate for the respondent-Syndicate Bank appearing on caveat. Mr. Shah submitted that the petitioner undertakes to pay the amount mentioned in the notice dated 16th January 2009, i.e. Rs. 21,76,090.07 paise with interest till the date of actual payment. He further submitted that to show his bona fides, he will deposit a Demand Draft for Rs. 6,45,000/- today. The same will be deposited in the Bank during the business hours today.

Mr. Shah, learned advocate for the petitioner requested that out of two residential premises which are taken possession of and sealed by the Bank, the Bank be directed to open one of the premises to enable the petitioner to reside therein, that too without prejudice to all the rights and contentions of the Bank and with an understanding that the Bank will not be required to release any of the two premises from the mortgage; and possession of the second premises. The mortgage of both the premises will be released only after the petitioner makes full payment of the amount as stated in the aforesaid notice along with accrued interest thereon from the date of notice till the actual payment.

2. On the condition that the petitioner deposits the amount of Rs. 6,45,000/- by Demand Draft today, and on condition that the petitioner will file undertaking to the aforesaid effect, on or before 13th March 2009, the Bank is directed to open the seal of the premises of A/7/2, 1st Floor, Elite Flats, Elite Cooperative Housing Society in Survey No. 202/2, 209/1, Final Plot No. 261, Town Planning Scheme No. 14, Mouje Dariyapur Kazipur sim in the Registration District, Ahmedabad and Sub-District Ahmedabad.

Adjourned to 23rd March 2009.

A copy of this order be made available to Mr. Nanavati for its onward communication for compliance. Direct service is permitted today.

7. Thereafter, on 8.4.2009, following order was passed:

Learned advocate Mr. Ketan D. Shah for the petitioner submitted that in Special Civil Application No. 1900 of 2009 the petitioner has already deposited Demand Draft for Rs. 6,45,000/- and in Special Civil Application No. 2057 of 2009 he is able to arrange for Rs. 3,00,000/- in cash which is paid to Mr. Nanavati, learned advocate for respondent No. 1-Bank.

A cheque bearing No. 457923 dated 09.04.2009 drawn on Kalupur Cooperative Bank Limited of Savings Bank Account No. 19064 for an amount of Rs. 1,25,000/-; and another cheque bearing No. 894646 dated 13.04.2009 drawn on State Bank of India of Savings Bank Account No. 10107022849 for an amount of Rs. 50,000/- signed by Mr. Jayantilal Kachrabhai are handed over to learned advocate for respondent No. 1-Bank.

2. The matters are adjourned to 13th April 2009 for passing further orders.

8. It is an admitted position that pending the petition, the amounts as declared were paid and thereafter, as observed earlier, as on 9.9.2009 the amount outstanding is of Rs. 5,95,313.46.

9. Under these circumstances, qua the loan transaction, for which the security interest is created on the property, the Bank can claim the amount of Rs. 5,95,313.46 and if such amount is paid by the petitioner, the Bank will lose to have any security interest over the property and the property as the mortgagee and it will be required for the Bank to release the property from its charge. It is hardly required to be stated that once a mortgage is created towards the loan transaction and the amount of such loan is fully paid, the mortgage would stand foreclosed and it will be required for the mortgagee to close all such loan account and to release the property by putting an end to the security interest created over the property. The said being the legal position such would be more expected on the part of nationalized Bank - respondent herein, which is the "State" within the meaning of Article 12 of the Constitution of India and the approach on the part of the Bank has to be just and fair.

10. However, learned Counsel appearing for the respondent Bank raised two contentions; one is that the petition is not maintainable under the Securitisation Act, for challenging the action of the Bank under the Securitisation Act since express remedy is available to the Bank for challenging the action of the bank before the Debts Recovery Tribunal; and another contention raised on behalf of the respondent Bank by Mr. Nanavati, learned Counsel is that the Bank has filed other suits against the petitioners, wherein, either the petitioners are principal debtors or guarantors and he also submitted that in the proceedings of O.A. No. 47 of 2009, the prohibitory order is passed against one of the petitioners, restraining him from transferring or alienating the property. He, therefore, submitted that it is not possible for the bank to release the property even if the amount of loan, for which the security interest is created, is fully paid off.

11. The examination of the first contentions shows that at the time when earlier orders were passed the bank has accepted the amounts, which were offered by the petitioners towards the loan transaction in question. Not only that but pursuant to the interim arrangement, after accepting the sizable amount, the possession of the property has been re-entrusted to the petitioners and as on today, the petitioners are in possession of the property. If the approach on the part of the banker in capacity as the mortgagee is to sit over its obligation to discharge the property on the ground that it has filed other suits for recovery of the amount against the mortgagor, though there is decree in favour of the banker, such an approach would be perverse on the face of it and it would create absurd result in law. Not only that, but the petitioner, who is mortgagor will not be in a position to seek a direction from the DRT under the Securitisation Act for release of the property upon the full payment of the loan amount on the basis of which security interest was created over the property. Therefore, keeping in view the aforesaid aspects, including the conduct on the part of the Bank, the object raised for maintainability of the petition does not deserve to be accepted. The reference may be made to the decision of this Court in the case of Apex Apex Electricals Ltd. Vs. ICICI Bank Ltd., and more particularly the observations made at paragraph 65.6 of the aforesaid decision, which reads as under:

65.6 All financial institutions covered by the Act exercising statutory rights and the measures as provided under the present Act are amenable to jurisdiction of this Court under Article 226 of the Constitution of India, but as the present Act itself provides for efficacious alternative remedy by way of self-imposed restrictions, this Court would not entertain a petition challenging the action of the secured creditors of contemplating to undertake the measures as per the Section 13(4) of the Act unless the action is perverse on the face of it or it creates absurd result or situation which cannot be remedied by the forum provided under Sections 17, 18 read with the powers u/s 19 of the Act or there is inherent lack of right/power with the secured creditor.

12. Hence, in view of the aforesaid, the petition can be said as maintainable under Article 227 of the Constitution of India, more particularly in view of the fact that the action taken under the Securitisation Act for taking over the possession is nullified pursuant to the interim order passed in the present proceedings on the basis of which the possession has been re-entrusted by the Bank to the petitioners.

13. The second contention raised for declining the release of the property after the payment of the full amount by the mortgagor - petitioner herein on the ground that the bank has filed other suits against the petitioners either in capacity as the borrower or as principal debtor or there is prohibitory order of DRT restraining the petitioner from transferring or alienating the property in question, also lacks merits. The reason being that each transaction of mortgagee and the security interest created therein so far as the Securitisation Act is concerned is to be considered as separate and distinct. Once the loan is fully

paid, which was the basis for creation of the security interest, the rights of the mortgagee would come to an end and the mortgage would stand foreclosed. Upon the foreclosure of the mortgage, it will be required for the bank to release the property and by handing over the title deeds of the property to the mortgagor. In view of the Scheme of the Securitisation Act, it would not be required for the mortgagor or the loanee or borrower to file a suit for foreclosure of the mortgage separately and in the event if the mortgagor is ready to pay the full amount of the loan transaction with the accrued interest and consequently the Bank in capacity as the mortgagee has been able to release the full security interest over the property. Once, the Bank having resorted to the proceedings under the Securitisation Act it can assert the right under the Securitisation Act over the property for which the security interest is created. If the loan is fully paid, the respondent Bank, which is the nationalized Bank and being the instrumentality of "State" fails to release the property though no legal rights exists as the mortgagee, such an approach on the part of the Bank would be not only arbitrary, but also absurd on the face of it and would be also perverse to the rights as exists of the Bank as mortgagee in law. It is not open to any mortgagee to maintain the security interest over the property or to decline the release of the property after the amount of loan is fully paid on the face of which the security interest was created and the situation has resulted of foreclosure of the mortgage. The Bank in respect of other loan transactions, wherein the property is not mortgaged may pursue the rights, as may be available in law through the process known to law and Bank cannot take undue benefits of the possession as mortgagee, so as to create a situation that the property is not released out of the mortgage even if the loan amount is fully paid, merely because it has filed suits for recovery of the amount in respect of other loan transactions, where such mortgagor - petitioner herein is either loanee or guarantor. If such an approach is permitted on the part of the Bank, who is a nationalized Bank being the instrumentality of the State within the meaning of Article 12 of the Constitution, the same would result into permitting exploitation of the situation by the bank, which is uncalled for and not warranted under the law. Hence, the second contention also cannot be accepted.

14. In view of the aforesaid the following directions deserve to be issued, hence issued:

(a) The petitioner shall be at liberty to pay the remaining amount of Rs. 5,95,313.40 plus accrued interest, if any, on the said loan amount within a period of two months and upon the payment of such amount by the petitioners, the respondent Bank shall release the property from its charge/security interest and shall also hand over the original title deed to the petitioners within two weeks thereafter.

(b) In view of the aforesaid, no further action will be required to be taken by the Bank under the Securitisation Act for enforcement or realization of the security interest over the property, unless the petitioner fails to pay the aforesaid amount

as per the earlier direction within the prescribed period.

(c) It is observed that the aforesaid directions shall not prejudice the rights of the Bank to pursue the other proceedings pending before the other forum, including for seeking injunction against the petitioners concerned from transferring or alienating the property in question and if any injunction is granted by any forum known to law, such injunction would prevail even if the property is realized by the Bank in capacity as the mortgagee after the payment of full amount as per the earlier directions. However, the rights and contentions of the petitioners in such proceedings shall also remain open.

15. The petitions are disposed of in terms of the aforesaid directions. Rule is made absolute to the aforesaid extent. No order as to costs.

16. In view of the order passed in the main Special Civil Applications, no orders are required to be passed in the Civil Application separately and the rights of the parties shall stand governed accordingly. The Civil Application is disposed of accordingly.