(2009) 08 MP CK 0102

In the Madhya Pradesh High Court

Case No : Writ Petition No. 5851 of 2008

Jagdamba Traders APPELLANT

Vs

Vyavisaydc Evam Audhyogik Sahakari Bank Ltd., Sheopur and another RESPONDENT

Date of Decision : 07-08-2009

Acts Referred:

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

Citation : (2009) 4 MPLJ 277

Hon'ble Judges : S.C. Sharma, J

Bench : Single Bench

Advocate : M.P. Agrawal, for the Appellant; M.P.S. Raghuvanshi and Gajendra Bhargava, for the Respondent

Judgement

S.C. Sharma, J.

The petitioner before this Court has filed this present writ petition being aggrieved by the action of the respondent-Bank in issuing notice u/s 13(2)

under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The contention of the petitioner is that the petitioner-Company has availed financial assistance from the respondent-Bank and as the account

became irregular a notice was issued on 2-9-2008 u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of

Security Interest Act, 2002 directing him to discharge his full liability by depositing Rs. 4,86,766/- . The petitioner has further stated that the

provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 are not at all applicable in the case of petitioner and Learned Counsel for the petitioner has relied upon a judgment delivered by the Apex Court in the case of Greater

Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others, . Learned Counsel for the petitioner has also stated before this Court that

the action of the respondent-Bank is per se illegal and arbitrary and they have violated the guidelines framed by the Reserve Bank of India and the

account of the petitioner cannot be classified as NPA. The petitioner has also contended that the action of the respondent-Bank is an unilateral

action and without deciding the objection raised by the petitioners, the Bank is proceeding ahead in the matter. Besides this other grounds have

also been raised regarding maintainability of the proceeding under the Securitization and Reconstruction of Financial Assets and Enforcement of

Security Interest Act, 2002. The petitioner has prayed for following reliefs before this Court:-

(i) In view of the facts and grounds mentioned in the writ petition and further in view of the document annexed thereto the humble petitioners most

respectfully prays that this Hon ''ble Court may kindly be allowed the writ petition and issue a writ of mandamus and or/any other appropriate

writer or direction against the respondents and quashing the impugned notice of 13(2) of Securitization and Reconstruction of Financial Assets and

Enforcement of Security Interest Act, 2002 dated, 2-9-2008 and Annexure P-3 and the entire proceeding/action initiated against the petitioner

under the Act, 2002 with the further directions to the respondent to allow the petitioner to repay the loan amount in instalment.

(ii) That passing any other order or direction, which this Hon ''ble Court may deem fit and proper in the facts and circumstances of the case.

(iii) That the respondents be directed not to auction or took possession of the petitioner''s house and time to deposit the balance amount may

kindly be granted.

(iv) That the respondent be directed to recalculate the amount of interest on the basis of circular and guidelines issued by the RBI and RRB and

also directed to adjust the amount which was deposited by the petitioner with the respondent-Bank.

(v) That the cost of petition may kindly be allowed to the petitioner.

A reply has been filed on behalf of respondent No. 2 Bank and it has been stated in the reply that the respondent No. 2 Bank a Co-operative

Bank and it is the Bank for the purpose of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The respondents have further stated that the proceedings were initiated against the petitioner under subsections (3) and (4) of the section 13 of the

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the petitioner is certainly having an

alternative remedy u/s 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the

present writ petition is not at all maintainable before this Court. The respondents have also stated that the account of the petitioner became irregular

and was declared as NPA and the respondent-Bank has demanded the outstanding dues from the petitioner for closing the entire account. It has

also been stated that in spite of repeated requests the petitioner did not deposit the amount and therefore, a notice u/s 13(2) was issued to the

petitioner on 2-9-2008 for depositing outstanding dues of Rs. 4,58,981/- as on 31-8-2008. It has been further stated that the petitioner did not

deposit the aforesaid outstanding amount and therefore, after expiry of 60 days period as provided in the said notice u/s 13(2) of the Securitization

and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, further notice was issued to the petitioner u/s 13(4) of the

Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for taking peaceful possession of the relevant

property under the security of said account. The respondents have further stated that the present writ petition was filed by the petitioner and by

virtue of an interim order passed by this Court on 30th January, 2009, no further action has been taken in the matter. The respondents have prayed

for dismissal of the writ petition and have relied upon a judgment delivered by the Division Bench of Kerala High Court in the case of George

Kutty Abraham and Others Vs. Secretary, Kottayam District Co-operative Bank Ltd. and Others, . The respondents have also relied upon a

judgment delivered by the Division Bench of this Court in the case of Hafiz Zakir Hussain Vs. Akola Janta Commercial Co-operative Bank Ltd., .

Learned Counsel for the respondents has also relied upon a judgment delivered by a Division Bench of Bombay High Court in the case of M/s

Khaja Industries and etc. vs. State of Maharashtra and anr. etc., AIR 2008 (NOC) 44 (Bom.). In the aforesaid case the Division Bench has

dismissed the writ petition filed challenging the Constitutional validity of sections 13 and 17 of the Act, 2002 and has also held the action of the

Bank in consonance with the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002.

The Division Bench has also held that the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 is

applicable in respect of the Co-operative Bank, and respondent have prayed for dismissal of the writ petition.

Heard Learned Counsel for the parties at length and perused the record.

In the present case, the petitioner has not disputed the financial assistance extended by the respondent-Bank which is certainly a Co-operative

Bank registered under the provisions of M.P. Co-operative Societies Act, 1960. It is also not been disputed by the petitioner that the account of

the petitioner became NPA and a notice was issued to the petitioner under the provisions of Securitization and Reconstruction of Financial Assets

and Enforcement of Security Interest Act, 2002. The return filed by the Bank reflects that a notice was initially issued u/s 13(2) of the Securitization

and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 on 2-9-2008 directing the petitioner to deposit the

outstanding amount of Rs. 4,58,981/- , however, the same amount was not deposited by the petitioner, therefore, a notice was issued u/s 13(4) of

the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for taking peaceful possession of the

relevant property. The Apex Court while dealing with the case of Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others,

has held as under :-

59. The RBD Act was passed in 1993 when Parliament had before it the provisions of the BR Act as amended by Act No. 23 of 1965 by

addition of some more clauses in section 56 of the Act. The Parliament was fully aware that the provisions of the BR Act apply to co-operative

societies as they apply to banking companies. The Parliament was also aware that the definition of ''banking company'' in section 5(c) had not been

altered by Act No. 23 of 1965 and it was kept intact, and in fact additional definitions were added by section 56(c). ""Co-operative bank"" was

separately defined by the newly inserted clause (cci) and ""primary cooperative bank"" was similarly separately defined by clause (ccv). The

Parliament was simply assigning a meaning to words; it was not incorporating or even referring to the substantive provisions of the BR Act. The

meaning of ''banking company'' must, therefore, necessarily be strictly confined to the words used in section 5(c) of the BR Act. It would have

been the easiest thing for Parliament to say that ''banking company'' shall mean ''banking company'' as defined in section 5(c) and shall include ''co-

operative bank'' as defined in section 5(cci) and ''primary cooperative bank'' as defined in section 5(ccv). However, the Parliament did not do so.

There was thus a conscious exclusion and deliberate commission of co-operative banks from the purview of the RBD Act. The reason for

excluding co-operative banks seems to be that co-operative banks have comprehensive, self-contained and less expensive remedies available to

them under the State Co-operative Societies Acts of the States concerned, while other banks and financial institutions did not have such speedy

remedies and they had to file suits in Civil Courts.

A Division Bench of this Court while dealing with a similar issue wherein action was initiated by the Co-operative Bank by invoking provisions of

the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 has held that section 2(c) of section 13

includes a Cooperative Bank within the definition of Bank by virtue of the notification of the Central Government and a Co-operative Bank can

take action under the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 for

recovery of advance loan. The Division Bench of this Court in the case of Hafiz Zakir Hussain Vs. Akola Janta Commercial Co-operative Bank

Ltd., in paragraphs 6, 7, 8, 9, 10, 11, 12 and 13 had held as under :-

From the aforesaid rival submissions raised at the Bar it is luminescent that the centripodal question that emerges for that emerges for adjudication

whether the learned Single Judge is justified in holding that the respondent a co-operative bank, is entitled under law to take action under the 2002

Act against the appellant herein. Submission of Mr. Yadav, Learned Counsel for the appellant is that if the principles laid down in Manoj Tarwala (supra) are properly understood and appreciated there can be no trace of doubt that a co-operative bank being not a banking company cannot

take recourse to the provisions engrafted under 2002 Act. In the case of Manoj Tarwala (supra) a Division Bench of this Court while answering

the reference made by the learned Single Judge in respect of the issue whether the co-operative Bank comes within the ambit and sweep of the

1993 Act has opined as under :

We agree within the aforesaid reasons of the Division Bench of the Rajasthan High Court and hold that Parliament did not intend to include

recovery of debts due to the co-operative bank within the ambit and sweep of the 1993 Act. With great respect, we are unable to persuade

ourselves to accept the view of the Division Bench of the Bombay High Court in the case of Shamrao Vithal Co-operative Bank Ltd. Vs. Star

Glass Works, and the view of the Full Bench of the Bombay High Court in the case of Narendra Kantilal Shah Vs. Joint Registrar, Co-operative

Societies (Appeal) and Others, that debts due to a co-operative bank would also come within the ambit and sweep of the 1993 Act. The

conclusions in the Division Bench and the Full Bench judgments of the Bombay High Court are based on section 56 in Part V of the 1949 Act, but

as we have held above, by section 56 in Part V of the 1949 Act only are made applicable to co-operative societies carrying on banking business

and the said section 56 of the 1949 Act cannot be construed to mean that the provisions of the 1993 Act are also applicable to co-operative

societies carrying on a banking business. For the aforesaid reasons, we are also unable to persuade ourselfto accept the conclusions of the Full

Bench of the Andhra Pradesh High Court in M. Babu Rao, AIR 2005 (NOC) (AP) 661 (supra) that recovery of debt to Rs. 10 lakhs or more by

a co-operative bank is within the exclusive jurisdiction of the Tribunal constituted under the 1993 Act. The first question of law referred to us is

answered accordingly.

In Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others, the Apex Court was dealing with the facet whether debts due

to the co-operative banks constituted under the Co-operative Societies Act of the Maharashtra and Andhra Pradesh could be covered under the

provisions of the 1993 Act. Their Lordships in paragraphs 88 and 89 have expressed the opinion as under :

For the reasons stated above and adopting pervasive and meaningful interpretation of the provisions of the relevant Statutes and Entries 43, 44 and

45 of List I and Entry 32 of List II of the Seventh Schedule of the Constitution, we answer the Reference as under :-

Co-operative banks'' established under the Maharashtra Cooperative Societies Act, 1960 (MCS Act, 1960); the Andhra Pradesh Co-operative

Societies Act, 1964 (APCS Act, 1964) and the Multi-State Co-operative Societies Act, 2002 (MSCS Act, 2002) transacting the business of

banking, do not fall within the business of banking, do not fall within the meaning of ""banking company "" as defined in section 5(c) of the Banking

Regulation Act, 1949 (BR Act). Therefore, the provisions of the Recovery of Debts Due to Bank and Financial Institutions Act, 1993 (RDB Act)

by Invoking the Doctrine of incorporation are not applicable to the recovery of dues by the co-operatives from their members.

The field of Co-operative Societies cannot be said to have been covered by the Central Legislation by reference to Entry 45, List I of the Seventh

Schedule of the Constitution. Co-operative Banks constituted under the Co-operative Societies Act enacted by the respective states would be

covered by co-operative societies by Entry 32 of List II of Seventh Schedule of the Constitution of India.

Form the aforesaid decision is it vivid that the Co-operative Bank is not a banking company and therefore, it cannot recover its debts or dues by

taking recourse to the 1993 Act as it is not a bank within the dictionary clause and the scheme of the 1993 Act. The fulcrum of the matter is

whether the said decision can be taken aid of by Learned Counsel for the appellant to build an edifice for the conclusion that the 2002 Act is not

applicable. Mr. Vipin Yadav, Learned Counsel for the appellant has invited our attention to paragraphs 30 and 31 of the decision rendered in

Greater Bombay Co-operative Bank Ltd. (supra) in which their Lordships were dealing with the 2002 Act. For the proper appreciation it is

thought appropriate to reproduce both the paragraphs:

The Parliament had enacted the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (''the

Securitisation Act'') which shall be deemed to have come into force on 21st day of June, 2002. In section 2(d) of the Securitisation Act same

meaning is given to the word ''banking company'' as is assigned to it is clause (e) of section 5 of the BR Act. Again the definition of ''banking

company'' was lifted from the BR Act but while defining ''bank'', Parliament gave five meaning to it u/s 2(c) and one of which is ''banking

company''. The Central Government is authorized by section 2(c)(v) of the Act to specify any other bank for the purpose of the Act. In exercise of

this power, the Central Government by Notification dated 28-1-2003, has specified ""co-operative bank"" as defined in section 5(cci) of the BR Act

as a ""bank"" by lifting the definition of ''co-operative bank'' and ''primary co-operative bank'' respectively from section 56 Clauses 5(cci) and (ccv)

of Part V. The Parliament has thus consistently made the meaning of ''banking company'' clear beyond doubt to mean ''a company engaged in

banking, and not a cooperative society engaged in banking'' and in Act No. 23 of 1965, while amending the BR Act, it did not change the

definition in section 5(c) or even in 5(d) to include co-operative banks; on the other hand, it added a separate definition of ''co-operative bank'' in

section 5 (cci) and ''primary co-operative bank'' in section 5(ccv) of section 56 of Part V of the BR Act. Parliament while enacting the

Securitisation Act created in residuary power in section 2(c)(v) to specify any other bank as a bank for the purpose of that Act and in fact did

specify ''co-operative banks'' by Notification dated 28-1-2003. The context of the interpretation clause plainly excludes the effects of a reference

to banking company being construed as reference to a co-operative bank for three reasons: firstly, section 5 is an interpretation clause; secondly,

substitution of ''co-operative bank'' for ''banking company'' in the definition in section 5(c) would result in an absurdity because then section 5(c)

would read thus : ""co-operative bank"" means any company, which transacts the business of banking in India; thirdly, section 56(c) does define

cooperative bank"" separately by expressly deleting/inserting clause (cci) in section 5. The Parliament in its wisdom had not altered or modified the

definition of ''banking company'' in section 5(c) of the BR Act by Act No. 23 of 1965.

As noticed above, ""Co-operative bank"" was separately defined by the newly inserted clause (cci) and ""primary co-operative bank"" was similarly separately defined by clause (ccv). The meaning of ''banking company'' must, therefore, necessarily be strictly confined to the words used in

section 5(c) of the BR Act. If the intention of the Parliament was to define the ''co-operative bank'' as ''banking company, it would have been the

easiest way for the Parliament to say that ''banking company'' shall mean ''banking company'' as defined in section 5(c) and shall include ''co-

operative bank'' and ''primary co-operative bank'' as inserted in clauses (cci) and (ccv) in section 5 of Act 23 of 1965.

Submission of Mr. Alok Aradhe, learned Senior Counsel for the respondent is that the said paragraphs in fact, support the contention of the

respondent-bank. It is urged by him that the Central Government has been authorised u/s 2(c)(v) of the 2002 Act to specify any other bank for the

purpose of the Act and in exercise of the said power the Central Government by notification dated 28-1-2003 has specified co-operative bank'' as

defined in section 5(c) (cci) of the BR Act bank by lifting definition of the ""co-operative bank.

Section 2(c) of the 2002 Act defines ''bank'' as under:-

(i) a banking company;

(ii) a corresponding new bank; or

(iii) the State Bank of India; or

(iv) a subsidiary bank; or

(v) such other bank which the Central Government may by notification, specify for the purpose of this Act.

Thus clause (v) empowers the Central Government by a notification to specify any other bank for the purposes of this Act. Thus, power has been

conferred on the Central Government in the 2002 Act for including any other bank within the definition by issuing a notification and the Central

Government has issued a notification and included co-operative banks for the purposes of the said Act. In this context, we may refer with profit to

a Division Bench judgment of the Bombay High Court in M/s Khaja Industries (supra) wherein the Division Bench after referring to the decision

rendered in Greater Bombay Co-operative Bank Ltd. (supra) and after referring to paragraphs 30, 34 and 59 has expressed the opinion to the

effect that the co-operative banks can take action under the 2002 Act.

We are in entire agreement with the view expressed in the said decision.

In view of the aforesaid premises, we are of the considered opinion that the view expressed in Manoj Tarwala (supra) is not applicable as it was

not a case relating to 2002 Act but with regard to forum under the 1993 Act and the status of the bank. In the case at hand the power has been

exercised by the Central Government under the 2002 Act and the Apex Court has clearly stated that the Central Government is authorized by

section 2(c)(v) of the Act to specify any other bank for the purpose of the said Act.

It has been held by the Division Bench of this Court that the Central Government is authorised by section 2(c) to specify any bank for the purposes

of the Act, 2002. A similar view has been expressed by a Division Bench of Kerala High Court in the case of George Kutty Abraham and Others

Vs. Secretary, Kottayam District Co-operative Bank Ltd. and Others, paragraphs 7 and 8 of the aforesaid judgment reads as under :-

The main contention of the Learned Counsel for the appellants was that the decision in Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex.

Pvt. Ltd. and Others, will, on all fours, apply to the provisions of the Securitisation Act. We find it difficult to accept the said contention. In the said

case, the Apex Court found that the co-operative bank is not a bank as defined u/s 2(d) of the RDDB Act and therefore, the provisions of the said

Act and therefore, the provisions of the said Act are not applicable. The definition of bank in the said Act contained in section 2(d) thereof reads

as follows :-

bank means -

(vi) a banking;

(vii) a corresponding new bank;

(viii) State Bank of India;

(ix) a subsidiary bank; or

(x) a Regional Rural Bank.

Unless a co-operative bank comes under clause (1) of the above definition, the provisions of the Act are not applicable to it. Analysing the

provisions of the RDDB Act, the Apex Court held a co-operative bank can never be treated as a banking company. But, as noticed by the Apex

Court, in the said decision itself in the definition of bank in section 2(1)(c) under the Securitisation Act, which we have already quoted above, there

is clause (v), which enables the Central Government to notify other banks also as banks for the purposes of the Act. The Central Government, in

fact invoked the said power and issued a notification to the effect that a co-operative bank is also a bank for the purpose of the Securitisation Act.

The said notification dated 28-1-2003 reads as. follows :

S.O. 105(H) -In exercise of the powers conferred under item (v) of clause (c) of sub-section (1) of section 2 of the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002), the Central Government hereby specifies ""Co-

operative Bank "" as defined in clause (cct) of section 5 of Banking Regulation Act, 1949 (10 of 1949) as ''bank'' for the purpose of the

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (54 of 2002).

In the absence of any challenge to the said notification, the contention of the appellants that the provisions of the Securitisation Act are not

applicable to co-operative banks, cannot be accepted. The remedy of filing a petition u/s 17 of the Securitisation Act can be invoked by the loanee

aggrieved by the actions of the secured creditor u/s 13(4) of the Securitisation Act. Always, it is the loanee, who invokes the said provision, while

enacting the Securitisation Act, the Parliament has provided a remedy of filing a petition u/s 17 of the Securitisation Act to the aggrieved persons.

Instead of providing a separate machinery, the Parliament in its wisdom provided that the aggrieved party can move the machinery provided under

the RDDB Act. The decision of the Apex Court in Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others, disables a co-

operative bank from moving the DRT for the recovery of loans. The said decision cannot, in any way, affect the remedy provided u/s 17 of the

Securitisation Act. Therefore, the contention in this regard are plainly untenable.

In the absence of any challenge to any of the provisions of the Securitisation Act or the notification issued thereunder, we feel that it is unnecessary

to consider the contentions raised by the learned senior counsel for the appellants concerning legislative competence etc. Since the point whether a

writ will lie against a co-operative bank was not seriously raised or canvassed, we are leaving the said question open. But, even assuming a writ

will lie against a co-operative bank this Court can decline jurisdiction in view of the alternative remedy available to the aggrieved loanee under the

provisions of section 17 of the Securitisation Act. In this case, since a substantial question, of law concerning the applicability of the Securitisation

Act to Co-operative Banks has been raised for the consideration of this Court, we did not relegate the appellants to invoke the statutory remedy at

the threshold and decided the question by ourselves. In the result, the writ appeals fail and they are accordingly dismissed. But, it is clarified that

this Judgment will not affect the rights, if any, of the appellants to invoke the statutory remedy available to them. No costs.

The Division Bench of Kerala High Court has held that an alternative remedy is available to the loanee/person aggrieved u/s 17 of the Securitization

and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and therefore, even if a writ will lie against a Cooperative

Bank, the High Court can decline to exercise jurisdiction in view the alternative remedy available to the aggrieved loanee under the provisions of

section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 in the facts and

circumstances of the case.

The Division Bench of Kerala High Court has also considered the judgment delivered by the Apex Court in the case of Greater Bombay Co-op.

Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others, . The definition of Bank as defined u/s 2(c) empowers the Central Government to notify

such other Bank which the Central Government may, by notification, specify for the purpose of the Act and Central Government has specified Co-

operative Bank as defined in section 5(c)(cci) of the Bank Regulation Act, 1949 (10 of 1949) Bank vide notification dated 28th January, 2003

published in the gazette dated 28th January, 2003 and therefore, there remains no manner of doubt that the respondent-Bank though a Co-

operative Bank is a Bank within the meaning of Bank as defined u/s 2(1)(c) of the Act, 2002. Resultantly, no case for interference is made out in

the matter especially keeping in view the fact that the petitioner is having an alternative remedy under the Securitization and Reconstruction of

Financial Assets and Enforcement of Security Interest Act, 2002. The present writ petition stands disposed of with a liberty to the petitioner to

avail the alternative remedy available to him in accordance with law.

With the aforesaid observation, the present writ petition is disposed of. No order as to costs.

