(2015) 04 RAJ CK 0195

In the Rajasthan High Court

Case No : Civil Writ Petition No. 167/12

Kavita Soni APPELLANT

Vs

Punjab National Bank and Others RESPONDENT

Date of Decision : 29-04-2015

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(1), 13(2), 13(4), 14
Transfer of Property Act, 1882 — Section 69, 69A

Citation : (2015) 04 RAJ CK 0195

Hon'ble Judges : Sangeet Lodha, J

Bench : Single Bench

Advocate : Dron Kaushik, for the Appellant; O.P. Mehta, Vikas Balia and Jagdish Vyas, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Sangeet Lodha, J.—By way of this writ petition, the petitioner has questioned legality of the notice dated 14.10.11 issued by the Respondent-Punjab National Bank (''the Bank'') under Section 13(2) of Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the SARFAESI Act") for enforcement of security interest and the notice dated 29.12.11 issued under Section 13(4) of the SARFAESI Act for taking possession of the secured assets.

2. The relevant facts are that on the request of the borrower, M/s. Navkar Minechem (India) Private Limited, (''the borrower Company'') the Respondent Bank sanctioned Packing Credit Limit of Rs. 275 lacs and Post Shipment (FOBNLC/ FOUBNLC) Limit of Rs. 300 lacs with overall exposure/ceiling of Rs. 300 lacs. The petitioner herein alongwith Mahesh Mehta and Smt. Sushila Mehta stood as guarantor for the security of the said credit facilities sanctioned by the Respondent Bank in favour of the borrower Company. The petitioner as also Mr. Mahesh Mehta, who was a Director of the borrower Company, executed

agreement of guarantee for Rs. 300 lacs in favour of the Respondent Bank. Shri Mahesh Mehta mortgaged his immovable property by deposit of original title deeds and created security interest in favour of the Respondent Bank in respect of his residential house No. H-71, Shastri Nagar, Jodhpur. The petitioner also mortgaged her immovable property by deposit of title deeds and created security interest in favour of the Respondent Bank in respect of her immovable property situated at Sunaro Ki Ghati, Jodhpur. According to the petitioner, she stood as guarantor for Packing Credit Limit of Rs. 25 lacs only and not for Rs. 275 lacs. Since the borrower Company made default in re-payment of the loan, the Respondent Bank initiated recovery proceedings under the provisions of SARFAESI Act. The borrower Company as also the petitioner and other guarantor were served with the notice under Section 13(2) of the SARFAESI Act. The petitioner raised objections against the notice which stood disposed of by the Respondent Bank vide communication dated 1.12.11. Thereafter, the Respondent Bank issued notice dated 29.12.11 under Section 13(4) of the SARFAESI Act. Hence, this petition.

3. Learned counsel appearing for the petitioner contended that the petitioner is not directly associated with the borrower Company in any manner. Learned counsel submitted that the immovable property owned by the Director of the borrower Company, who is principal guarantor is sufficient to clear the outstanding dues of the Respondent Bank inasmuch as, its present market value is about Rs. 450 lacs. Learned counsel submitted that the Respondent Bank must first proceed to auction the mortgaged property belonging to Mr. Mahesh Mehta, who is the principal guarantor and cannot proceed to straightway auction the property of the petitioner.

4. On the other hand, the counsel appearing for the Respondent Bank submitted that in case of default in payment of outstanding dues, the liability of the borrower and the guarantors is co-extensive and therefore, the petitioner cannot escape from the liability and the Respondent Bank has absolute right to enforce the security interest. Learned counsel submitted that it is absolutely incorrect to state that the petitioner has created the security interest in favour of the Respondent Bank only with regard to Rs. 25 lacs. Drawing the attention of this court to the agreement of guarantee, learned counsel submitted that the petitioner has created the security interest for Rs. 300 lacs and therefore, the stand taken by the petitioner in the writ petition is false to her knowledge. Learned counsel submitted that the Respondent Bank having adopted the measures under Section 13(4), the effective and efficacious remedy by way of appeal to the Debt Recovery Tribunal is available to the petitioner under Section 17 of SARFAESI Act and therefore, there is absolutely no reason why the petitioner should be permitted to invoke the extra ordinary jurisdiction of this court under Article 226 of the Constitution of India.

5. I have considered the rival submissions and perused the material on record.

6. Indisputably, the petitioner has stood as guarantor against the loan advanced

to the borrower Company. It is settled law that the liability of the guarantor for repayment of the loan advanced is co-extensive with the principal borrower and therefore, the petitioner cannot escape the liability on the pretext that she is not the principal guarantor. In this view of the matter, the proceedings taken by the Respondent Bank for recovery of the outstanding dues against the petitioner under the provisions of SARFAESI Act cannot be faulted with.

7. It is to be noticed that Section 13(1) of the SARFAESI Act, which deals with enforcement of the security interest, specifically provides that notwithstanding anything contained in Section 69 or 69A of the Transfer of Property Act, 1982, any security interest created in favour of any secured creditor shall be enforceable without intervention of the court or tribunal, by such creditors in accordance with the provisions of the Act. Further, Section 13(2) of the SARFAESI Act provides that when a borrower who is under a liability to secured creditor makes any default in repayment of secured debts and his account in respect of such debt is classified by the secured creditor as NPA then the secured creditor may require the borrower by notice in writing to discharge the liabilities to the secured creditor within 60 days from the date of notice, failing which secured creditors shall be entitled to exercise all or any of the rights under sub-section (4) of Section 13. As per Section 13(4) of the SARFAESI Act, in case of borrower failing in discharging his liability within the period specified in Section 13(2), the secured creditor is empowered to take recourse to any of the actions as specified including taking possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured assets. In this view of the matter, the action of the Respondent Bank in initiating the proceedings under Section 13(2) and 13(4) of the SARFAESI Act, against the borrower Company and the guarantors, cannot be said to be initiated acting without jurisdiction.

8. Admittedly, any person including borrower and guarantor aggrieved by any of the measures adopted by the secured creditors referred to in sub-section (4) of Section 13 may make an application to the Debts Recovery Tribunal having jurisdiction in the matter within 45 days from the date on which such measures had been taken and therefore, if aggrieved by the measures adopted by the Respondent Bank as aforesaid, nothing prevented the petitioners from availing the remedy available under Section 17 of the SARFAESI Act. It is pertinent to note that in terms of Section 17(3) of the SARFAESI Act, if the Debts Recovery Tribunal after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditors are not in accordance with the provisions of the Act and Rules made thereunder, may require restoration of possession of the secured assets to the borrower and declare the recourse to any one or more measures referred to in sub-section (4) of Section 13 taken by the secured creditor as invalid and may pass such order as may consider appropriate and necessary in relation to any of the course taken by the secured creditor under sub-section (4) of Section 13. In this view of the

matter, the petitioners, if aggrieved by the action taken by the Respondent Bank under Section 13(4) of the SARFAESI Act, is entitled to avail the remedy available under Section 17 of the SARFAESI Act, before the Debt Recovery Tribunal.

9. In the matter of United Bank of India Vs. Satyawati Tondon and Others, AIR 2010 SC 3413 : (2010) 3 BC 495 : (2010) 3 CompLJ 585 : (2010) 7 SCALE 696 : (2010) 8 SCC 110 : (2010) 9 SCR 1 : (2010) 9 UJ 4395 : (2010) AIRSCW 7049 : (2010) AIRSCW 5267 , while dealing with the matter regarding the power of the creditor bank against the borrower/guarantor in terms of provisions of Section 13(2) and (4) and Section 14 of the Act, the Hon''ble Supreme Court observed as under:-

"Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc. the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

(emphasis added)

10. In the matter of GM, Sri Siddeshwara Co-operative Bank Ltd. and Another Vs. Sri Ikbal and Others, (2013) 116 CLA 110 : (2013) 5 CTC 200 : (2013) 11 JT 573 : (2013) 10 SCALE 396 : (2013) 10 SCC 83 , the Hon''ble Supreme Court inter alia relying upon its earlier decision rendered in Union Bank of India''s case (supra), categorically held that the remedy under Section 17 of the SARFAESI Act, 2002 is an efficacious remedy and the borrower must avail the remedy and cannot be permitted to directly approach the High Court in extra ordinary jurisdiction under Article 226 of the Constitution of India.

11. In view of the discussion above, this court is of the considered opinion that the present writ petition does not suggest any special feature warranting interference by this Court in exercise of its extra-ordinary jurisdiction under Article 226 of the Constitution of India, bypassing the effective and efficacious remedy available to the petitioners under the relevant statute.

12. In the result, the writ petition fails, it is hereby dismissed. However, the petitioner shall be at liberty to take recourse to the remedy of appeal available to it under Section 17 of the SARFAESI Act, against the measures adopted by the

Respondent Bank in terms of Section 13(4) of the SARFAESI Act. On the facts and in the circumstances of the case, since the petitioner was pursuing the present writ petition before this Court against the impugned action of the Respondent Bank, it is directed that if the petitioner files an appeal/application before the Debts Recovery Tribunal having jurisdiction in the matter, aggrieved by the measures adopted by the Respondent Bank under sub-section (4) of Section 13 of the SARFAESI Act, within a period of 30 days from the date of this order, the question of limitation will not come in their way and the appeal/ application, if any, filed within the stipulated period, shall be decided by the Tribunal on merits. Since the petitioner is being relegated to the remedy available under the relevant statute and therefore, it is further clarified that the appeal/application, if any, filed by the petitioner, shall be decided by the Debts Recovery Tribunal, uninfluenced by the observations, if any, made by this Court touching the merits of the case. No order as to costs.