

(2009) 09 BOM CK 0108
In the Bombay High Court
Case No : Writ Petition No. 449 of 2009

La-Kozy, Lilaben Manibhai Patel, Sharadaben Parshottam
Patel and Chandrakant Kalidas Patel

APPELLANT

Vs

ING Vysya Bank Ltd. and Others

RESPONDENT

Date of Decision : 17-09-2009

Acts Referred:

Constitution of India, 1950 — Article 226
Limitation Act, 1963 — Section 5
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 17, 17(1)

Citation : (2010) 4 BC 82 : (2010) 2 BomCR 398

Hon'ble Judges : Swatanter Kumar, C.J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : Birendra Saraf, instructed by, Yogesh Adhia, for the Appellant; Virag Tulzapurkar, instructed by , Bilawala and Co. for Respondent No. 1, Kevic Setalvad, S. Srivastava and Sachin Pandey, instructed by , D.H. Law for Respondent No. 11, for the Respondent

Final Decision : Dismissed

Judgement

1. This Writ Petition under Article 226 of the Constitution of India takes exception to the Order dated 29th July, 2008 passed by the DRAT, Mumbai in Misc. Appeal No. 81 of 2008, which in turn has affirmed the order passed by the Presiding Officer(In-charge), DRT-II, Mumbai on Interim Application No. 4 of 2008 filed u/s 5 of the Limitation Act praying for condonation of delay of 506 days in filing the Appeal u/s 17 of the Securitisation and Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002. The broad facts relevant to consider present Petition are as follows.

2. The Respondent Bank issued possession notice on 6th June, 2006 indicating that it would proceed to take possession of the mortgaged property of the borrowers and on the basis of the said notice proceeded to take possession of the property in question. Thereafter, auction notice was issued on 6th September,

2007 and the auction was held on 8th October, 2007. Significantly, the son of Petitioner No. 2 participated in the said bid process and was the second highest bidder. The sale was however, confirmed in favour of the highest bidder and on the basis of which sale certificate was issued on 13th November, 2007. The Respondent Bank made over possession of the property in question to the highest bidder, in whose favour sale was confirmed, on 16th November, 2007. The Petitioners however, filed Mis. Application before DRT for setting aside sale of the suit property only on 24th December, 2007, which was not accompanied by Application for condonation of delay on the assumption that the limitation would commence from the date of knowledge of the Petitioners about the sale of the suit property by the Respondent No. 1 Bank. However, in view of the office objection, the Petitioners filed formal application for condonation of delay, which according to the Office was 506 days. According to the Petitioners, the Petitioner No. 1 had sent letter to the Respondent No. 1 Bank informing that the partnership firm was the owner of the premises. That communication was sent on 5th August, 2006 which was followed by another communication dated 12th September, 2006. In spite of the said letters, no response was given by the Respondent No. 1 Bank. In the meantime, the auction of the property was precipitated. As a result, the Petitioner No. 4 wrote to the Respondent No. 1 Bank stating that the Respondent No. 7 to 10 were never owners of the suit premises and any action by the Respondent No. 1 Bank to sell the suit premises will not be binding. The Respondent No. 1 Bank sent letter on 4th December, 2007 intimating that the suit premises have already been sold and the Bank was desirous of shifting movables lying therein. Taking clue from this communication, the Petitioners rushed to the DRT and filed proceedings questioning the legality and validity of the action of sale by the Respondent Bank qua the suit property. According to the Petitioners, there was no delay at all and in any case, the delay was condonable, as sufficient cause was made out by the Petitioners.

3. The Application preferred by the Petitioners was resisted by the contesting Respondents. According to the contesting Respondents, the limitation would start running from 6th June, 2006 when possession of the suit property was taken over by the Respondent Bank. The communication sent by the Petitioners would be of no avail and cannot stop running of limitation. The ground stated by the Petitioners of no response by the Respondent Bank is only an excuse in the fact situation of the present case. In that, the Petitioners were fully aware about the factum of taking over of possession by the Respondent Bank as back as on 6th June, 2006. Moreover, the son of the Petitioner No. 2 himself participated in the auction process, which falsifies the tall claim of the Petitioners that they had no notice or knowledge about taking over possession of the suit property. After considering rival submissions, the DRT by a speaking order rejected the Application for condonation of delay for the following reasons, which can be discerned from paragraphs-6 and 7 of the Judgment under Appeal. The same read thus:

6. It is a matter of record, in the present case the Securitisation action was

started by defendant No. 1 bank to recover its amount of NPA(Non Performing Asset) from the borrowers. In that proceedings, process, Notices were issued under Sections 13(2), 13(4). In reply the defendant No. 1 states, the authorised Officer obtained possession of this property by order of Chief Metropolitan Magistrate dated 6.6.2006. The applicants case for condonation of delay is based on the ignorance of the Securitisation proceedings. They state that Notices of Securitisation proceedings were not served on them, which is denied by the defendants/respondents. If the situation of the suit property is considered, partnership firm of the applicants run its business at the ground floor of the suit property. The suit property is situated at the first floor. If possession of suit property was taken by order of Chief Metropolitan Magistrate dated 6.6.2006, then in that circumstance the applicants were certainly expected to have knowledge of the fact of taking possession. Such fact will not be in the secrete and unnoticeable manner. The possession was taken by dispossessing defendant Nos. 7, 8, 9, 10, who were occupying the suit property. That property was in possession of the defendant No. 1 bank from 6.6.2006. That was within the knowledge of the applicants. Learned advocate for the respondent bank argued, after taking possession it (the respondent) has put its big board on that property. He has produced xerox copy of that photograph at Exh.8. That board was sufficient to know possession of the bank. It appears during the pendency of the Securitisation proceedings the applicants informed to the respondent bank about their claim, case about that property against the respondent. There was no reply from the respondent bank for sale of that property. It is the case of the respondent, son of applicant No. 2 participated in the auction, sale and he was the second highest bidder. He produced that bid as Manager of the joint family of applicant No. 2. That way the applicants were aware about the sale process. If all these facts are considered together then it shows that the applicants had knowledge about this sale process at least from the date of taking possession of the property by order of the Chief Metropolitan Magistrate of the year 2006. Then after several steps were taken, public notices were published by the respondent bank in these Securitisation proceedings. The applicants will be deemed to have its knowledge. Possession itself was sufficient to given the knowledge.

Against this decision, the Petitioners carried the matter in Appeal before the Appellate Tribunal. Before the Appellate Tribunal the Petitioners virtually reiterated the same grounds urged before the Tribunal. The Appellate Tribunal opined that the legal position is well established that the limitation for the purpose of Section 17 of the Act would start running from the date of taking over possession of the suit property, i.e. 6th June, 2006. Whereas, the Application was filed on 24th December, 2007, which means there was delay of 506 days. Even the Appellate Tribunal reiterated the opinion recorded by the DRT that the case made out by the Petitioners was not substantiated. Whereas, the circumstances on record would clearly show that the Petitioners had full knowledge about the factum of taking over possession of the suit property by the Respondent Bank on 6th June, 2006 itself. The Appellate Tribunal further opined

that there was no legal obligation on the Respondent Bank to respond to the letters sent by the Petitioners from time to time. In any case, that would not extricate the Petitioners from the risk of running of limitation which had started from 6th June, 2006. The Appellate Tribunal has further noted that the son of the Petitioner No. 2 had participated in the auction process and that would belie the claim of the Petitioners that they had no notice or knowledge about taking over possession of the property or the fact of conducting of auction sale of the suit property. The Appellate Tribunal has also rejected the argument of the Petitioners that the limitation would commence from the date of sale as the Petitioners were challenging the sale of the suit property. The Appellate Tribunal has eventually concluded that no sufficient cause was made out by the Petitioners for condoning delay of 506 days. As a result, the Appeal has been dismissed by the impugned decision. This decision is made subject matter of challenge in this Writ Petition.

4. Even before this Court, the grounds urged before the lower authorities have been reiterated. In the first place, the question whether the Petitioners were duly served with the notice of possession or for that matter, had knowledge about the factum of taking over possession of the suit property by the Respondent Bank ? Both the Authorities have concurrently rejected the claim of the Petitioners and have positively found that the Petitioners had full knowledge about the factum of taking over possession of the suit property on 6th June, 2006 itself. The Authorities below have referred to the circumstances to justify the said finding. This is essentially a question of fact, which has been answered against the Petitioners by both the Authorities below. In the circumstances, it is not open for this Court in exercise of Writ jurisdiction to delve upon the said aspect and take a different view than the one taken by the two Authorities below, even if some other view was possible. In any case, we find force in the stand taken by the Respondents that the fact that the Petitioners had full knowledge of the factum of possession of the suit property taken over by the Respondent Bank on 6th June, 2006. That is reinforced from the admission of the Petitioners in the Application as filed before the Tribunal and from the tenor of the letters sent by the Petitioners to the Respondent No. 1 Bank from time to time even before the date of the auction sale of the suit property. Significantly, the fact that the son of the Petitioner No. 2 participated in the auction process is not in dispute at all. It is only after the Petitioners did not succeed in retrieving the property in auction sale, which was held on 8th October, 2007, consequent to which sale certificate was issued in favour of the highest bidder on 13th November, 2007 and Authority made over possession of the property on 16th November, 2007, the Petitioners resorted to the present action on 24th December, 2007. The explanation offered by the Petitioners, therefore, was clearly an afterthought. In this view of the matter, dismissal of the Application for condonation of delay was inevitable. Because, not only the Petitioners failed to make out sufficient cause but the cause made out by them was found to be false and not bonafide. We find no reason to interfere with the concurrent view taken by the two authorities below on the factual position adverted to in the respective decisions.

5. According to the Petitioners, the provisions of Section 5 of the Limitation Act are applicable to the proceedings u/s 17(1) of the Act, as has been observed in the case of UCO Bank Vs. Kanji Manji Kothari and Co. and Others, . This argument clearly overlooks the concurrent findings of fact recorded by the two Authorities below, which in our opinion, are unexceptionable. In the wake of those findings, it would necessarily follow that there was no sufficient cause made out to condone the delay, much less of 506 days. Thus understood, the fact that the DRT has jurisdiction to not only enquire into the illegality and irregularity in the action of the Bank under Sub-section (1) of Section 17 of the Act, but also to set aside the sale and even to order restoration of status quo ante by the parties as observed by the Apex Court in the case of Authorised Officer, Indian Overseas Bank and Anr. v. Ashok Saw Mill reported in CDJ 2009 SC 1434 does not mean that the DRT is obliged to entertain the proceedings even after the same has become hopelessly barred by limitation and no sufficient cause for condoning delay is made out by the Applicants. The onus is on the Applicants to make out sufficient cause for condoning delay. In the present case, it has been concurrently found that the case made out by the Petitioners was unacceptable.

6. In the circumstances, we have no hesitation in taking the view that no interference is warranted against the decisions of the lower authorities in absence of any manifest error or jurisdictional error committed by them.

7. Accordingly this Petition should fail being devoid of merits. Hence, dismissed.