

(2011) 05 DEL CK 0002

In the Delhi High Court

Case No : Writ Petition (C) 4031 of 2010

Maxim Lightech Pvt.Ltd.

APPELLANT

Vs

Small Industries Development Bank of India

RESPONDENT

Date of Decision : 18-05-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 34(2)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3A), 17, 37
Small Industries Development Bank of India Act, 1989 — Section 2, 35, 38

Citation : (2011) 3 BC 655 : (2011) 165 CompCas 59 : (2011) 181 DLT 248 : (2011) 124 DRJ 216

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : Rajeeve Mehra and Arvind Sharma, for the Appellant; Rakesh Kumar Khanna Sarvesh Bisaria, Seema Rao and Nebha Garg, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The question falling for adjudication in the present petition is, whether after the enactment of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (SARFAESI) Act, 2002, the Small Industries Development Bank of India (SIDBI) constituted under the Small Industries Development Bank of India Act, 1989 is, in case of default of repayment of loan, precluded from proceeding u/s 38 of the SIDBI Act and is required to necessarily proceed under the SARFAESI Act only.

2. It is not in dispute that the Petitioner had availed of loan / financial assistance from the Respondent SIDBI and the Respondent SIDBI on 7th December, 2009 recalled the loan and called upon the Petitioner to pay the amount of Rs. 3,41,67,167/- then claimed to be due; it is also not in dispute that the Respondent SIDBI vide its notice dated 24th May, 2010 impugned in this petition invoked the provisions of Section 38 of the SIDBI Act. The said Section 38 of the

SIDBI Act empowers SIDBI to take over the management or possession or both of an industrial concern in the small-scale sector which is in default of a liability to SIDBI under an agreement of repayment of loan or advance; the same also authorizes SIDBI to transfer by way of lease or sale and realise the property pledged / mortgaged to SIDBI. This writ petition was filed seeking to restrain the Respondent SIDBI from forcibly taking over possession of the assets of the Petitioner under the said provision.

3. The writ petition came up before this Court first on 3rd June, 2010 when after some arguments, the matter was adjourned to 7th June, 2010. Even though the writ petition was accompanied with an application for interim relief to restrain the Respondent SIDBI from taking over possession of the assets of the Petitioner but no interim relief was granted to the Petitioner. On 7th June, 2010, it was informed to this Court that the Respondent SIDBI had on 3rd June, 2010 itself taken over possession of the factory premises of the Petitioner at Rudrapur. In the circumstances, while adjourning the matter, it was directed that till the next date, the Respondent SIDBI shall not proceed any further in the matter in pursuance to the notice dated 24th May, 2010. The said order has continued in force. The Respondent SIDBI has filed a short affidavit.

4. The contention of the senior counsel for the Petitioner is:

(i) that Section 38 of the SIDBI Act is more onerous and draconian than the procedure prescribed u/s 13 of the SARFAESI Act, also for realising the security interest by taking over possession of the secured assets of the borrower and transfer thereof by way of lease, assignment or sale.

(ii) it is contended that while under the SARFAESI Act as interpreted in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others* Etc. Etc., , *Misons Leather Ltd. Vs. Canara Bank*, *Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others*, *Naresh Kumar Mittal Vs. State Bank of India and Others*, , *Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill*, , *T. Bhuvanendran Vs. LIC Housing Finance Ltd. and Others*, and *Kohinoor Creations and Others Vs. Syndicate Bank*, the debtor has an opportunity of showing cause and a right of hearing (under Sections 13(2) & 13(3A) of the SARFAESI Act) and right of appeal to the Debt Recovery Tribunal (under Section 17 of the SARFAESI Act), there is no such remedy available to the debtor under the SIDBI Act.

(iii) that the proceedings under the SIDBI Act are thus in derogation of the proceedings under the SARFAESI Act.

(iv) the provisions of the SARFAESI Act, by virtue of Section 35 thereof have an overriding effect over the SIDBI Act particularly since the SIDBI Act is inconsistent with the rights / remedies of the debtor/borrower under the SARFAESI Act.

(v) that while Section 34(2) of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 expressly provides that the procedure under the said Act is

in addition to the procedure under the SIDBI Act, thereby saving the procedure under the SIDBI Act, u/s 37 of the SARFAESI Act there is no mention of SIDBI Act and thus does not save the procedure under the SIDBI Act and after the coming into force of the SARFAESI Act, SIDBI is to proceed for enforcement of its security interest under the SARFAESI Act only and not u/s 38 of the SIDBI Act.

(vi) that SIDBI in other cases has been resorting to SARFAESI Act to enforce its security interest and is discriminating against the Petitioner by resorting to a more onerous Section 38 of the SIDBI Act against the Petitioner. Reliance in this regard is placed on notices issued by SIDBI to its other debtors and the notice published by SIDBI of sale of assets under the SARFAESI Act and also on the *K.K. Organics Pvt. Ltd. v. Small Industries Development Bank of India* where SIDBI had successfully opposed the claim that the provisions of SARFAESI Act were not available to it.

(vii) it is contended that the draconian powers under the SARFAESI Act of taking over possession were not allowed to be implemented when not providing for a notice and hearing and which led to the amendment of the SARFAESI Act.

5. The senior counsel for SIDBI has contended that:

(i) that the petition does not challenge the vires / validity of Section 38 of the SIDBI Act.

(ii) that the SARFAESI Act was enacted inter alia to regulate enforcement of security interest and to get over the delays hitherto before prevalent in the same; with reference to the objective and reasons of the SARFAESI Act, it is urged that the same was not enacted to vest any power in the debtors / borrowers.

(iii) had the intent of the SARFAESI Act been to repeal the modes provided under the SIDBI Act, of enforcement of security interest, u/s 42 of the SARFAESI Act, Section 38 of the SIDBI Act would also have been repealed and / or the SIDBI Act would have been amended u/s 41 of the SARFAESI Act. Thus SARFAESI Act cannot be read as a repeal of the SIDBI Act.

(iv) on enquiry, as to how SIDBI could be permitted to elect whether to proceed against its debtor / defaulter under the SARFAESI Act or u/s 38 of SIDBI Act, reliance was placed on *Andhra Pradesh State Financial Corporation Vs. M/s. GAR Re-Rolling Mills* and another, to contend that such right of election could be vested in a Financial Corporation so that they are not choked by the defaulting debtors adopting frustrating or dilatory tactics and the only bar was to availing two remedies simultaneously.

(v) the judgment aforesaid in *GAR Re-Rolling Mills* (supra) was also relied upon to contend that there is no equity in favour of a defaulting party which may justify interference by the Courts in exercise of equitable jurisdiction under Article 226 of the Constitution of India to assist such defaulter / debtor in not repaying the debts.

(vi) reliance was placed on Managing Director, Maharashtra State Financial Corporation and Others Vs. Sanjay Shankarsa Mamarde, to contend that the choice made by the Financial Institutions should not be interfered with.

(vii) reference was made to Transcore Vs. Union of India (UOI) and Another, to contend that the question of election does not arise in the case of parallel remedies.

(viii) reliance was lastly placed on Central Bank of India Vs. State of Kerala and Others, to contend that the non obstante clause in the SARFAESI Act gives overriding effect to the provisions of the said Act only if there is anything inconsistent contained in any other law and if there is no provision in any other enactment which is inconsistent to the provisions of the SARFAESI Act, then SARFAESI Act cannot override the other legislation.

(ix) that the Petitioner has not approached this Court with clean hands and has concealed facts and is not entitled to any discretionary relief on this ground. It is pleaded / contended that the Petitioner has concealed that it had committed defaults with effect from July, 2009 but Respondent SIDBI on the assurance of the Petitioner that it intended to settle including by sale of its assets, deferred action against the Petitioner but the Petitioner failed to give any concrete proposal; that the Respondent SIDBI on the request of the Petitioner had also granted re-schedulement of principal installment of the loan vide its letter dated 4th May, 2009 and granted extension of one year to the Petitioner for making the payment; that the Petitioner despite re-schedulement failed to make any payment and owing where to the provisions of Section 38 of the SIDBI Act were resorted to.

(x) that the Petitioner as a defaulting borrower has no right to direct the Respondent Bank to exercise its rights in a particular manner.

6. The senior counsel for the Petitioner in rejoinder sought to distinguish the judgments relied upon by the Respondent SIDBI.

7. The SIDBI Act was enacted to establish a Financial Institution for promotion and development in the small scale sector. It cannot possibly be doubted or controverted that the small scale sector of the industry constitutes a class by itself and for which class a special legislation can be enacted. Section 2(h) of the SIDBI Act defines an "industrial concern" in the small scale sector as meaning any concern engaged in businesses specified therein and u/s 13 thereof, SIDBI is to function as the principal financial institution for promotion, financing and development of industrial concerns in the small scale sector including by financing the industrial concerns in the said sector. It further cannot be disputed / controverted that unless such loans to industries in the small sector are repaid on time, the funds available being limited, SIDBI would be unable to finance / promote other small scale industries. Thus Section 38 of the Act, though vires thereof are not challenged has been enacted to provide for quick recovery of the loans from the defaulting small industries.

8. I would now proceed to consider whether SARFAESI Act, being a subsequent enactment can be said to be repealing / overriding Section 38 of the SIDBI Act. It does not expressly do so vide Section 42 thereof. Reliance on Section 37 is also found to be misconceived. Section 37, while providing that the provisions of the SARFAESI Act shall be in addition to and not in derogation of certain laws mentioned therein, does not expressly mention the SIDBI Act but ends with "or any other law for the time being in force"; SIDBI Act would thus be covered by the said expression and the SARFAESI Act can be said to be expressly laying down that the provisions of SARFAESI Act are in addition to and not in derogation of the SIDBI Act. Similarly, once it is held that small scale industries form a class by themselves and for which special legislation can be and has been made and in the absence of any challenge to the vires of Section 38 of the SIDBI Act, I am also unable to hold that the same would cease to apply because under the subsequent legislation a less onerous procedure for enforcement of security interest has been laid down.

9. The question which however bothers me and on which repeated questions during the course of hearing were put to the senior counsels is as to the availability of two alternative remedies, one under the SARFAESI Act and other under the SIDBI Act, to SIDBI for the same relief. There are no guidelines to guide the authorities / officials concerned of SIDBI as to which remedy to invoke against which defaulting debtor. The judgment in GAR Re-Rolling Mills cited by the Respondent is not found to answer the said doubt in as much as the same was concerned with the State Financial Corporations Act, 1951 wherein the legislature under the same statute has conferred a choice on the Financial Corporation as to the remedy to be availed of. Though the said judgment in para 15 records that the doctrine of election would not apply to cases where mode and scope of the two remedies is essentially different and held that it may otherwise lead to injustice and inconsistent results but proceeded to only hold that both remedies could not simultaneously be availed of.

10. Prior to the said two Judge judgment in GAR Re-Rolling Mills, a five Judge Bench of the Supreme Court in Northern India Caterers Private Ltd. and Another Vs. State of Punjab and Another, dealing with the Public Premises (Eviction of Unauthorized Occupants) Act, 1958, by a majority of 3:2 had held that the provisions leaving unguided discretion in the officials to resort to one or the other remedy by applying the more drastic procedure against some only, lent itself open to the charge of discrimination and was violative of Article 14 of the Constitution of India. The minority view of course held that since under neither of the procedures protection of law was denied to the occupants, merely because the government had the option of proceeding against the unauthorized occupants by way of either, did not make the law invalid; it was also observed that an unauthorized occupant has no Constitutional right to dictate that the government should not have choice of proceedings.

11. The said judgment led to the replacement of the 1958 Act by the Public

Premises (Eviction of Unauthorized Occupants) Act, 1971 and whereby the discrimination which so vested in the officials was done away with and only one procedure was left for action against the unauthorized occupants (and validity of the 1971 Act was upheld in Hari Singh and Others Vs. The Military Estate Officer and Another,

12. Even though the subsequent seven Judge judgment in Maganlal Chhaganlal (P) Ltd. Vs. Municipal Corporation of Greater Bombay and Others, overruled the earlier judgment in Northern India Caterers (supra) but also held that where a statute providing for a more drastic procedure different from the ordinary procedure covers the whole field covered by the ordinary procedure without any guidelines as to the class of cases in which either procedure is to be resorted to, the statute will be hit by Article 14. In the present case, the procedure prescribed u/s 38 of the SIDBI Act as well as u/s 13 of the SARFAESI Act, both cover the whole field of enforcement of security interest and without any guidelines as to the class of cases in which either procedure is to be resorted to. This, as aforesaid, is violative of Article 14.

13. The Respondent SIDBI in its counter affidavit, inspite of express pleas in the petition has not dealt with the aforesaid aspect. The Respondent SIDBI has not denied having invoked the provisions of the SARFAESI Act also against its creditors. There is no explanation whatsoever as to what guides the SIDBI as to the procedure to be adopted against the defaulting creditors for enforcement of the security interest whether under the SARFAESI Act or under the SIDBI Act. It has to be admitted that while the defaulting debtor has remedies of notice, hearing and appeal under the SARFAESI Act, he has none under the SIDBI Act. The defaulting creditor would thus certainly be at a disadvantage if proceeded against under the SIDBI Act rather than under the SARFAESI Act. Such unguided discretion cannot be vested in authorities and the authorities / officials cannot be allowed to at their whims and fancy decide as to which remedy is to be invoked against which debtor. Moreover, there is nothing to show that the legislature while enacting the SARFAESI Act intended to leave such discretion in the authorities / officials. Both Maganlal Chhaganlal (supra) & GAR Re-Rolling Mills were concerned with the discretion being vested under the same statute. In the present case, the occasion for exercising discretion arises owing to the applicability of two statutes. Thus, it cannot even be said that there is intentional vesting of such discretion. The Supreme Court in Nagpur Improvement Trust and Another Vs. Vithal Rao and Others, also held that if the existence of two statutes enables the State to give different treatment to similarly situated persons, the person who is discriminated against can claim the protection of Article 14. Similarly, in Ram Dial and Others Vs. The State of Punjab, there were two provisions in an Act for removal of member of Municipal Committee in public interest, while one provided for hearing to be given before removal and the other did not; it was held that arbitrary power had been given to invoke either provision, in violation of Article 14 of the Constitution of India. To the same effect is Jagdish Chand Radhey Shyam Vs. The State of Punjab and Others,

14. Be that as it may, even though the action of the SIDBI impugned in this petition is found to be arbitrary and in the teeth of Article 14 of the Constitution of India for the aforesaid reasons but I still do not find the Petitioner entitled to any relief. The Petitioner has not disputed that it is in default since July, 2009 i.e. for the last nearly two years. The Petitioner instead of making any efforts to repay the dues of Respondent SIDBI has been satisfied in merely restraining SIDBI from taking action. It has not shown any anxiety whatsoever of having its assets discharged / released and has not placed any proposal whatsoever for consideration. The Petitioner is thus found to be a chronic defaulter of public dues and not found entitled to any discretionary relief from this Court. The Apex Court also in *Maganlal Chhaganlal* as well as in *GAR Re-Rolling Mills* has reiterated that this Court in exercise of jurisdiction under Article 226 is not to come to the rescue of such defaulters. Reference in this regard may also be made to the dicta in *Khazan Chand and Others Vs. State of Jammu and Kashmir and Others*, , *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, *Orissa State Financial Corporation and Another Vs. Hotel Jogendra*, and *Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another*, .

15. Thus, while dismissing the writ petition, the Respondent SIDBI is warned that unless guidelines prescribing the mode of election aforesaid are made / framed, its action against its other debtors may become liable to challenge under Article 14 as aforesaid.

No order as to costs.