

(2011) 08 AHC CK 0289

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 38405 of 2009

Modern Times Industries and Others

APPELLANT

Vs

Debts Recovery Appellate Tribunal, Allahabad and Others

RESPONDENT

Date of Decision : 02-08-2011

Acts Referred:

Debts Recovery Tribunal Act, 1993 — Section 2, 34, 34(2), 35, 37

Limitation Act, 1963 — Article 136, 15, 62

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 24

Securitisation and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 13(6), 15

Citation : (2011) 7 ADJ 804 : AIR 2012 All 36 : (2011) 6 AWC 6089 : (2011) 114 RD 853

Hon'ble Judges : V.K. Shukla, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

V.K. Shukla, J.—Present writ petition has been filed by the Petitioners questioning the validity of order dated 6.3.2009 passed by Debts Recover/Appellate Tribunal, Allahabad, wherein preliminary objection raised on behalf of the Petitioners, that the proceedings u/s 13 of the SARFAESI Act, 2002, are barred by limitation, has been rejected, and the order dated 13.10.2008 passed by Debts Recovery Tribunal has been affirmed.

2. Brief of background of the case is that in the year 1986, Petitioner No. 2 had commenced business of manufacturing and sale of wrist watches under the name and style of M/s. Modern Times Industries, and in this direction he established Small Scale Industrial Unit at Ram Nagar Road, Kashipur, District Nainital. The Petitioners took financial assistance vide sanction of credit facility on 11.12.1987, mortgage Was agreed on 21.12.1987, repayment of which was to be done as per terms and conditions of the agreement. Petitioner availed the said facility, since the amount of loan could not be repaid as was agreed, the Bank in its turn filed suit for recovery of the amount in question on 18.9.1990 before the civil Court.

Said suit was decreed on 30.9.1991, and decree was prepared accordingly Said decree was put for execution in the year 1995 by means of application dated 29.10.1995, as date of preliminary decree is 30.9.1991 and that of final decree 20.5.1995. It was numbered as Execution Case No. 9 of 1995. After coming into force of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and constitution of Debts Recovery Tribunal at Jabalpur, Madhya Pradesh, execution case No. 9 of 1995 was transmitted to the said Tribunal vide order dated 31.7.1998. Subsequently, records of the said execution case were transmitted to the Debts Recovery Tribunal, Allahabad, where it was registered as Execution Case No. 15 of 2002. Record of Execution Case No. 15 of 2002 since 12.2.2002 remained pending before Debts Recovery Tribunal, Lucknow. The case was taken up and in furtherance of execution of decree, Recovery Certificate was issued. Thereafter, the Petitioners moved application for restoration of the case on 12.9.2003, and they were blessed with interim order also, but the same was in default on 9.5.2006, to which further recall was moved on 20.6.2006, which came to be rejected on 12.9.2006. Petitioners had preferred appeal, but as Appellate forum was not functional, at the said juncture, Petitioners filed writ petition before this Court. Said writ petition had been allowed/disposed of on 22.11.2006 with a direction to decide application dated 12.9.2003 on merits, and orders dated 9.5.2006 and 12.9.2006 were directed to be kept in abeyance. Thereafter Debts Recovery Tribunal on 15.12.2006 restored the execution case No. 15 of 2002. While said proceedings had been ongoing, as per provisions of " the SARFAESI Act, notice u/s 13 (2) had been given to the Petitioners on 25.9.2006; Petitioners submit that they submitted their reply on 27.11.2006. Petitioners had filed several applications before Debt Recovery Tribunal dated 10.1.2007, 11.1.2007 and 15.3.2007. Said applications were rejected, and against the same appeal had been preferred, and the same was allowed by the Appellate Tribunal, and directive was given for fresh disposal of application dated 15.3.2007, within fifteen days. Condition was also imposed that benefit of said order would be given, only if Rs. 15 lacs was deposited. Petitioner preferred writ petition No. 54117 of 2007, questioning the validity of condition imposed, and this Court on 5.11.2007, reduced the said amount to Rs. 5 lacs, to be deposited within a week, and even the said meagre amount has not been deposited. Thereafter notice u/s 13 (4) of the Act was issued on 11.4.2008 Petitioners submit that the moment notice was given reply to the same was filed, and thereafter issue was decided that the proceedings were held not to be barred by limitation on 30.10.2008 by Debts Recovery Tribunal. Against the said order appeal had been filed and the same has also been dismissed. At this juncture, present writ petition has been filed.

3. The aforesaid writ petition had been dismissed for want of prosecution vide order dated 24.11.2010. Restoration application seeking recall of the aforesaid order has been allowed by means of a separate order of date, said order has been recalled and the writ petition has been restored to its original number, and as pleadings inter se parties have been exchanged, thereafter present writ

petition has been taken up for final hearing and disposal with the consent of the parties.

4. Sri Swapnil Kumar, Learned Counsel for Petitioner, contended with vehemence that in the present case, the bank has no jurisdiction to initiate proceedings u/s 13 (4) of SARFAESI Act, same being barred by limitation as per Section 36 of the Act read with Articles 62 and 136 of Schedule to Limitation Act, 1963. In such a situation and in this background, the proceedings under SARFAESI Act are clearly unsustainable, and this Court should come to the rescue of Petitioners.

5. Countering the said submission, Smt. Archana Singh, Advocate, on the other hand, has contended, that in the present case totality of the circumstances would go to show that in no event the proceedings could be said to be barred by limitation, and rightful view has been taken by the Tribunal as well as Appellate Tribunal.

6. In order to appreciate the respective arguments, the provisions of Sections 13 (2), 13 (4), 13 (6) 36 and 37 of the SARFAESI Act are being quoted below:

13. Enforcement of Security interest--(1)...

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice, failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4).

(3)....

(4) In case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the following measures to recover the secured debt, namely:

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment, or sale for realising the secured asset;

(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment, or sale for realising the secured asset;

Provided that the right to transfer by way of lease, assignment, or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt;

Provided further that where management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security of the debt;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured

creditor;

(d) require at any time by notice in writing, any person who has acquired any or the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5)....

(6) Any transfer of secured asset after taking possession thereof or take over of management under Sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to the secured asset transferred as if the transfer had been made by the owner of such secured asset.

36. Limitation.--No secured creditor shall be entitled to take all or any of the measures under Sub-section (4) of Section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act, 1963.

37. Application of other laws not barred.--The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956, the Securities Contracts (Regulation) Act, 1956, the Securities and Exchange Board of India Act, 1992, the Recovery of Debts Due to Banks and other Financial Institutions Act, 1993 or any other law for the time being in force.

7. In the present case, the provisions quoted above, would go to show that secured creditor can take recourse to one or more of the measures to recover the secured debt as provided for under Sub-section (4) of Section 13 of the SARFAESI Act unless his claim in respect of financial asset is made finalized within the period of limitation as prescribed under the Limitation Act, 1963

8. The D.R.T. Act was introduced to establish Tribunals to provide for expeditious adjudication and recovery of debts due to banks and financial institutions and for matters connected therewith or incidental thereto. After introduction of such Act, all the suits and proceedings pending before various civil Courts, subject to its pecuniary limits, stood transferred to the DRT. As per Section 34 of the DRT Act, it has overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act excepting therein as provided u/s 34 (2) thereof. On the other hand, the purpose of introduction of Securitisation Act is to regulate securitisation and reconstruction of financial assets and enforcement of security interest and for matters connected therewith or incidental thereto. It particularly deals with non-performing assets within it. The description of non-performing asset has been given u/s 2(o) of such Act. As the recovery of dues of the Bank was a prolonged process before the civil Court for which a tribunal has been formed. Similarly, the recovery of debts specially with regard to non-performing assets before the tribunal has also become long lasting process due

to heavy backlog and non-availability of mechanism to recover the same. By virtue of Securitisation Act, the banks and financial institutions become well equipped to recover the amount qua N.P.A. Accounts.

9. Hon'ble Apex Court, in the case of *Transcros v. Union of India* 2008 (1) AWC 125, has extensively dealt with the requirement and necessity of implementation of SARFAESI Act, 2002 vis-à-vis D.R.T. Act proceedings pending before the Debts Recovery Tribunal, the proceedings under the SARFAESI Act is an additional remedy provided for recovery of the claim to the secured creditor to recover the secured debt, as provided for under Sub-section (4) of Section 13 of the SARFAESI Act, and the claim in respect of financial asset is made within the period of limitation as prescribed under Limitation Act.

10. According to the ratio of Supreme Court judgment, apart from the obligation to repay, the borrower undertakes to keep the margin and the value of the securities hypothecated so that there is no mismatch between the asset-liability in the books of the bank/financial institution. This obligation is different and distinct from the obligation to repay. It is the former obligation of the borrower which attracts the provisions of the Securitisation Act which seeks to enforce it by measures mentioned in Section 13 (4) of the Securitisation Act, which measures are not contemplated by the DRT Act and, therefore, it is wrong to say that the two Acts provide parallel remedies. The remedy under the DRT Act falls short as compared to the Securitisation Act which refers to acquisition and assignment of the receivables to the asset reconstruction company and which authorises banks/ financial institutions to take possession or to take over management which is not there in the DRT Act. It is for this reason that the Securitisation Act is treated as an additional remedy u/s 37 of such Act which is not inconsistent with the DRT Act. Therefore, both the remedies constitute one remedy and as such the question of doctrine of election of remedies does not arise. The doctrine of election of remedies is available only when there are two or more co-existent remedies at the time of election, which are repugnant and inconsistent. In any event, there is no repugnancy nor inconsistency between the two remedies, consequently, the doctrine of election has no application. Section 13 (1) and (2) of the Securitisation Act proceed on the basis that security interest in the bank/ financial institution needs to be enforced expeditiously without the intervention of the Court/Tribunal; that liability of the borrower has accrued and on account of default in repayment, the account of the borrower in the books of the bank has become non-performing. For the above reasons, the Securitisation Act states that enforcement could take place by non-adjudicatory process and that the said Act removes all fetters under the above circumstances on the rights of the secured creditor;

11. Division Bench of this Court, in the case of *Ace Media Advertisers v. Bank of Baroda* 2009 (4) ADJ 430 (DB), has summed up the *Transcros* (supra) as follows:

(a) NPA Act is enacted to enforce the interest in the financial assets which belongs to the bank/F1 by virtue of the contract between the parties or by

operation of common law, principle or by law and to recover the dues by non-adjudicatory process.

(b) NPA Act proceeded on the basis where credit interest of the bank/FI to be enforced expeditiously without the intervention of the Court/Tribunal.

(c) NPA Act proceeds on the basis that the liability of the borrower has crystallised and that his account is classified as non-performing asset in the hands of the bank/FI. It does not deal with disputes between the secured creditors and the borrower.

(d) Section 13 (2) proceeds on the basis that the account of the borrower in the books of bank/FI, which is an asset of the bank/FI, has become non-performing. Therefore, there is no scope of any dispute regarding the liability. There is a difference between accrual of liability, determination of liability and liquidation of liability. It also deals with liquidation of liability.

(e) Section 13 (2) deals with enforcement of security interest, therefore, the remedies of enforcement of security interest under the NPA Act and the DRT Act are complementary to each other.

(f) There is no inherent or implied inconsistency between these two remedies under the two different Acts. Therefore, the doctrine of election has no application in this case.

(g) Reading the Scheme of Section 13 (2) with Section 13 (4), it is clear that the notice u/s 13 (2) is not a mere show-cause notice and it constitutes, an action taken by the bank/FI for the purposes of the NPA Act.

(h) The bank/FI is not only free to move under the NPA Act with or without the leave of DRT, but having invoked the NPA Act, liberty is given statutorily to the secured creditors (banks/FIs) to move DRT under the DRT Act once again for recovery of the balance in cases where the action taken u/s 13 (4) of the NPA Act does not result in full liquidation of recovery of the debts due to the secured creditors.

(i) Remedies for recovery of debts under the DRT Act and the NPA Act are complementary to each other.

(j) Section 13(1) shows that the first proviso to Section 19(1) of the DRT Act is an enabling provision and that the said provision cannot be read as a condition precedent to taking recourse to the NPA Act.

(k) Section 17 (4) shows that the secured creditors is free to take recourse to any of the measures u/s 13 (4) notwithstanding anything contained in any other law for the time being in force.

(l) Section 35 of the NPA Act further clarified that all the provisions of NPA Act shall override all other laws which are inconsistent with the NPA Act. NPA Act is not inherently or impliedly inconsistent with the DRT Act in terms of remedies for

enforcement of securities. Section 35 also gives an overriding effect to the NPAAct with all other laws if such other laws are inconsistent with the NPA Act. Remedies are complementary to each other, therefore, the doctrine of election has no application. NPAAct is an additional remedy to the DRT Act together they constitute one remedy, therefore, the purpose of election does not apply.

12. Said Division Bench in the case of Ace Media Advertisers has further held as follows:

When the Supreme Court held that the process under the Securitisation Act is an additional remedy and a non-adjudicatory process, therefore, the doctrine of election of remedies cannot be available, we do not find the present case is principally different from the judgment and order passed by the Supreme Court on account of simultaneous proceeding. What is required to be clarified herein is whether the bank will be able to proceed under the Securitisation Act, for any amount or for the amount determined under the decree/order of DRT. To that extent we are of the view that determination of a claim under a non-adjudicatory process, cannot override the determined amount of adjudicatory process i.e. decree/order of DRT. Therefore, the recovery will be available under the Securitisation Act only with regard to the determined amount by the DRT subject to decision, if any by the higher Court/s. Reason behind saying so is that a decree or order of a judicial adjudicatory process will always have prevailing effect over and above that of the non-adjudicatory process and secondly, both under the Securitisation Act and DRT Act, the forum for adjudication is the same, either for original proceeding or for appeal. In this particular case, when the DRAT as an appellate forum has already tested the verdict of DRT and dismissed the appeal, further determination or test by the DRT as an appellate forum under the Securitisation Act, for the self same claim is futile in nature. Therefore, we are of the view that instead of dismissing the writ petition, the same can be disposed of in a limited manner by saying that process under Securitisation Act, during the pendency of proceeding under the DRT Act, cannot be a bar but if the decree/order is passed by DRT, the claim under the Securitisation Act will be confined to that extent. Thus, the writ petition is disposed of.

However, no order is passed as to cost.

13. Hon'ble Apex Court in the case of Indian Bank Vs. Blue Jagers Estates Ltd. and Others, has taken the view that Court cannot lose sight of the fact that the bank is Trustee of public, and those who take loan and avail financial facilities from the Bank are duty bound to repay the amount, strictly in accordance with the terms of contract. Bank is not entitled to compromise public interest for the benefit private individuals. Bank is entitled to and equally duty bound to recover the amount by adopting all legally permissible methods. SARFAESI Act has been introduced by the Parliament because it found that the legal mechanism available till then was wholly insufficient for recovery of outstanding dues of Bank and Financial institutions.

14. The term "debt" as detailed in the Recovery of Outstanding Dues of Bank and Financial Institutions Act, 1993 is found adopted in the SARFAESI Act by virtue of Section (2ha) inserted by Act No. 30 of 2004 with effect from 11.11.2004. Section 2(g) of the Recovery of Outstanding Dues of Bank and Financial Institutions Act, 1993; defines debt as follows: "debt" means any liability (inclusive of interest) which is claimed as due from any person by a bank or a financial institution or by a consortium of banks or financial institutions during the course of any business activity undertaken by the bank or the financial institution or the consortium under any law for the time being in force, in cash or otherwise, whether secured or unsecured, or assigned, or whether payable under a decree or order of any civil Court or any arbitration award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application.

15. A plain reading of the definition of the "debt" as contained in the The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 would exemplify and demonstrate that a "decree debt" could also be taken as a "debt". By composite meeting decree or order is not at all excluded from the zone of consideration as debt It is matter of common knowledge and quite obvious and axiomatic that for obtaining decree, considerable time is taken by a litigant and in some cages, it might exceed even ten years or fifteen years and in such a case, if twelve years period of limitation for enforcing mortgage is calculated from the date of accrual of the cause of action based on mortgage due under the bank, then the relevant portion of the definition of "debt", as contemplated under the "The Recovery of Debts Due to Banks and Financial Institutions Act, 1993" as well as SARFAESI Act would be rendered nugatory or otiose.

16. the question might arise as to whether the provisions of the SARFAESI Act, so to say Section 13(4) could be pressed into service for the purpose of executing a decree debt or the certificate issued under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. A plain reading of the definition of financial asset u/s 2(1) would reveal and connote that the term "financial asset" includes debt and thereby the definition as contained in Section 2(g) of the "The Recovery of Debts Due to Banks and Financial Institutions Act, 1993" is ushered in. As such, the phrase "financial as set and the term "debt" including "secured debt" are all interlinked and interwoven, interconnected and entwined with one another like a cobweb and the term "debt" envisages the "decree debt" as well as the "debt recovery certificate."

17. This Court is of the considered opinion that Section 13(4) as well as Sub-sections (1) and (2) of Section 13 are widely worded to include even mortgage debts, which got crystallized in the form of a decree and put up for execution or debt recovery certificate. No doubt, the term "debt recovery certificate" is not contemplated in the definition as contained u/s 2(g) of the "The Recovery of Debts Due to Banks and Financial Institutions Act, 1993", but still, the clause, "whether payable under a decree or order of any civil Court or any arbitration

award or otherwise or under a mortgage and subsisting on, and legally recoverable on, the date of the application" would amply make the point clear that the said clause is wide enough to include all live claims. View to this effect has been taken by Madras High Court in *M/s. Consolidated Consortium v. Indian Bank* AIR (Mad) 68.

18. Article 62 deals with institution of suit, to enforce payment of money accrued, within twelve years, when the money sued for becomes due. Similarly, Article 136 provides for limitation; for execution of any decree, and the limitation provided therein is also once again twelve years, from the point of time when the decree becomes enforceable or where decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods when default in making payment or delivery in respect of which execution is sought. Twelve years" period has to be reckoned, keeping in view the peculiar facts of the case as well as character of the case, and for this purpose, twelve years" period can be reckoned from the date of decree; in cases where decree has been put for execution before the competent forum before twelve years from the date of decree, it has to be accepted as live claim, till it culminates into issuance of Recovery Certificate by Tribunal; twelve years" period from the date of issuance of Recovery Certificate. Live claims under the provisions of 1993 Act, cannot be treated as time barred claims under the provisions of SARFAESI Act.

19. On the parameters noted above, the facts of the present case would clearly reflect that claim of Bank was live claim, as suit had been instituted, in terms of Article 62 well within the period of limitation, and same was decreed on 30.9.1991. Decree in question in terms of Article 136 had been put up for execution, well before twelve years, on 29.10.1995, after preparation of final decree on 20.5.1995. In terms of Section 31 (1) of 1993 Act, proceedings were transferred to Debts Recovery Tribunal, and accepted position is that said proceedings have been pending. This is not at all claim of Petitioner, that said proceedings in any way were barred by limitation, or that the said decree as on date is in-executable. Once decree is executable, borrower admittedly is under liability to secured creditor under security agreement, and has admittedly made default in repayment of secured debt, and his account has already been classified as non-performing asset, then additional remedy provided provided for under SARFAESI Act, has rightly been invoked in the present case, and proceedings in the facts of the case are not at all barred by limitation.

20. The two judgments cited at the Bar, by Petitioners" counsel is also being adverted to. In the case of *Indramati Patnaik v. Chief Manager* 2006 (1) Bank CLR 125 (Ori) loan was advanced, in the year 1981, and proceedings for enforcing the mortgage created was taken after twelve years, then view taken was that same is barred by limitation. In the case of *Raghunath Rai Bareja v. Punjab National Bank* 2007 (1) AWC 507 (SC), Hon"ble Apex Court noted Section 24 of 1993 Act, which applies provisions of Limitation Act, and as per the same

decree for execution could not have been put up after expiry of period of twelve years, which had expired on 15.1.1999. The debt was held to be time barred. Here, this is not at all the case of the Petitioners that debt had become time barred, and the reason is obvious, that Bank had been vigilant in perusing its remedy by filing suit, obtaining decree and putting the same for execution, all well within limitation. Date of final decree is 20.5.1995; execution of decree had been initiated on 29.10.1995; for more than three years with effect from 15.9.2003 to 22.11.2006, execution proceedings had been stayed, the said period has to be excluded in terms of Section 15 of Limitation Act, while computing limitation, and viewed from the said point of view also, proceedings u/s 13 (2) on 28.9.2006 and Section 13 (4) on 11.4.2008 were well within limitation, and the judgment rendered by Gujrat High Court in the case of IVEE Injecta Ltd. v. Junagarh Vibhagiya Nagarik Sahkari Bank Ltd. 2006 (129) Comp Cas 528, cited by Petitioner, in effect, helps the Bank, wherein view has been taken, that Bank was entitled to execute the decree, within the period of limitation prescribed for execution of decree, as decree passed was covered by the definition of "property" and "financial asset", and proceedings u/s 13 (2) were valid and well within limitation. Distinction has to be drawn vis-a-vis time barred claim and live claim. Accordingly, viewed from such point of view, it is the proceedings under Sections 13 (2) and 13(4) of the SARFAESI Act cannot be held to be one barred by limitation.

21. Consequently, writ petition sans merit and is, accordingly, dismissed.