
(2011) 10 P&H CK 0092

In the Punjab And Haryana At Chandigarh

Case No : Civil Writ Petition No. 11662 of 2010

Mohinder Pal Singh and another

APPELLANT

Vs

State Bank of India and another

RESPONDENT

Date of Decision : 20-10-2011

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 13(7), 34, 35
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 2, 8, 8(6)

Citation : (2012) 1 BC 304 : (2011) 164 PLR 605 : (2012) 1 RCR(Civil) 329

Hon'ble Judges : Hemant Gupta, J;G.S. Sandhawalia, J

Bench : Division Bench

Judgement

Hemant Gupta, J.—This order shall dispose of Civil Writ Petition No.11662 of 2010 and Civil Writ Petition No.299 of 2011, challenging the action of the Bank in taking possession of the secured assets, even though the amount of the financial assistance stands substantially paid.

2. For the facility of reference, the facts are taken from Civil Writ Petition No.11662 of 2010. The petitioner herein availed loan of Rs.10 lacs on 23.8.2006 and mortgaged the property, a piece of land, as collateral security. The petitioner defaulted in payment of the loan which led to the issuance of a notice u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act"). A copy of the said notice, produced by the respondent-Bank in Court, shows the outstanding amount as Rs.12,15,630/- as on 15.5.2008 along with further interest and incidental expenses. The Bank vide letter dated 12.9.2008 sought the assistance of an Enforcement Agency, namely, M/s Vrinda Corporate Services Ltd., to take possession of the immovable and movable property as an agent of the Bank. Subsequently, a notice for taking possession u/s 13(4) of the Act was issued on 4.2.2009 by the Authorized Officer of the Bank. Such notice was published in the newspaper "The Hindustan Times" on 9.2.2009. The petitioner failed to make

payment of the amount, which led to the issuance of another notice dated 27.5.2009 u/s 13(4) of the Act. Such notice u/s 13(2) of the Act, was published in the newspaper "The Tribune" (English Edition) and vernacular newspaper "Punjabi Tribune" dated 13.6.2009 proposing the date of auction as 17.7.2009. The amount mentioned in the sale notice was Rs. 12,15,630/- along with interest. The petitioner deposited a sum of Rs.2.00 lacs on 13.7.2009 and sought six months" time to deposit the balance amount.

3. Another public notice was published in the newspapers "The Tribune" (English Edition) and vernacular newspaper "Punjabi Tribune" dated 5.6.2010 proposing the date of sale as 7.7.2010. The petitioner deposited the balance amount in parts with last deposit of Rs.2,17,444/- on 25.6.2010. As per the petitioner, with the said deposit, there was only one rupee in the debit account, as per the statement of account Annexure P.4 appended with the writ petition. In view of the statement of account (Annexure P.4), it is argued that the entire amount, as mentioned in the notice under Sections 13(2) and 13(4) of the Act, stands paid, therefore, for the non deposit of the interest amount, the property cannot be sold.

4. This Court on 6.7.2010 permitted the Banks to receive bids, but it was ordered that it will not finalise the auction of the property. The respondent-Bank initially filed written statement on 25.9.2011 raising a plea that the jurisdiction of the Civil Court is barred in terms of Section 34 of the Act and that the provisions of the Act, have overriding effect on any other law in terms of Section 35 of the Act. It is also pointed out that the outstanding dues towards the petitioners as on 21.9.2011 are as under:-

(a)

Accrued interest upto 21.9.2011 amounting to

Rs.2,85,808/-

(b)

Charges of enforcement agency

Rs.1,28,600/-

(c)

Charges of publication of notices dated 13.6.2011

Rs.24,192/-

(d)

Charges of publication of notices dated 5.6.2010

Rs. 18,432/-

(e)

Legal fee

Rs.20,400/-

Total outstanding dues

Rs.4,77,432/-

5. The writ petition was taken up for hearing on 29.9.2011 on the aforesaid date along with CWP No. 299 of 2011, which is also being decided by the present order. In the aforesaid case also, the Bank has engaged recovery/enforcement agency and is said to have paid a sum of Rs. 1,28,608/- even before issuance of the notice u/s 13(2) of the Act, to such agency. The Chief General Manager of the Bank was called to explain the conduct of the officers of the Bank in claiming the amount paid to the enforcement agency, even before notice u/s 13(2) of the Act, was issued. Shri S.K. Sehgal, Chief General Manager of the State Bank of India, explained on 30.9.2011 that the Bank has issued instructions to claim charges of the Enforcement Agencies only at the stage of taking over possession i.e. after the action u/s 13(4) of the Act is taken. The counsel for the Bank thereafter, sought time to furnish additional affidavit to explain the claim of the charges paid to the enforcement agencies.

6. In CWP No.11662 of 2010, an additional affidavit has been filed to the effect that the recovery case of the borrower was handed over to the recovery/enforcement agent on 12.9.2008 and possession of the secured assets i.e. plot measuring 403 square was taken on 4.2.2009 and a notice u/s 13(4) of the Act, was served on 4.2.2009. The notice was published in the newspapers on 9.2.2009. Since the borrower did not make payment of the outstanding dues, notice of sale was issued on 27.5.2009. After the deposit in part by the borrower, it is explained that the balance in the account of the borrower as on 5.6.2010 was Rs.2,17,445/- and that the borrower was also liable to pay the accrued interest and actual expenses incurred by the Bank in effecting the recovery. The borrower deposited an amount of Rs.2,17,444/- on 25.6.2010, but did not pay the accrued interest amounting to Rs.2,48,461/- as on 25.6.2010 and also an amount of Rs.1,71,224/- towards the expenses incurred by the Bank in effecting recovery. The details of the payments are as under:-

(i)

Publication of notices paid to M/s Raghuvanslii Advertising on 21.7.2009

Rs.24,192/-

(ii)

Paid to M/s Vrinda Corporate Services Limited, the Enforcement Agent on 17.8.2009

Rs.40,000/-

(iii)

Publication of notices paid to M/s Design Matters Advertising on 2.7.2010

Rs.18,432/-

(iv)

Paid to M/s Vrinda Corporate Services Limited, the Enforcement Agent on 10.7.2010

Rs.44,300/-

(v)

Paid to M/s Vrinda Corporate Services Ltd.

Rs.44,300/-

Thus, it is pointed out that an amount of Rs.4,19,685/- is still due and payable to the petitioner.

7. Shri Pathela, has also filed documents such as the circulars dated November 3, 2006 and April 24, 2011 issued by Reserve Bank of India as well as the copies of the bills, submitted by the enforcement agency, M/s Vrinda Corporate Services Ltd. Vide circular dated 3.11.2006, the Reserve Bank of India has issued "Guidelines on Managing Risks and Code of Conduct in Outsourcing of Financial Services by Banks". Para 5.5 of the said circular deals with "The Outsourcing Agreement". It is contemplated that every such agreement should address the risks and risk mitigation strategies. Para 5.7 of the said circular deals with the responsibilities of the recovery agents. Shri Pathela also relies upon the Bank's Outsourcing Policy, 2011 contained in a master circular issued by the Banking Operations Department Corporate Centre, Mumbai. It is pointed out that the recovery agencies are carrying out a financial activity, which is covered under the outsourcing arrangement permitted as per the guidelines issued by the Bank.

8. Reliance was also placed upon circular dated 16.11.2002 issued by the office of the Chief General Manager of the Bank. The said circular deals with the procedure after issuance of notice under the Act. Clause (g) deals with taking possession of the immovable property, which reads as under:-

6. Procedure after issue of notice

xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx xxx

D. The guidelines that follow mainly cover the procedure for taking possession/sale of secured assets and appointment of Enforcement Agencies to assist the branches.

(a) xx xx xx xx xx xx xx xx xx xx xx xx xx

(g) Taking possession of immovable property

i) Where the secured asset is an immovable property, the authorized officer may

take, or cause to be taken possession by delivering a Possession Notice to the borrower as per format given in Annexure 6.

ii) The notice should also be affixed on the outer door, or at such conspicuous place of the property.

iii) The possession notice should also be published in two leading newspapers, one in vernacular language, having sufficient circulation in that locality.

iv) The property should be kept in the custody of the Authorized Officer or in the custody of any person appointed/authorized by him, who shall take due care as a man of ordinary prudence would, under the similar circumstances, take of such property.

v) The Authorised Officer shall take steps for preservation and protection of secured assets and insure them, if necessary, till they are sold or otherwise disposed of.

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(o). Appointment of Enforcement Agencies (EAs)

It has been decided that, where warranted, Authorised Officers may enlist the services of Enforcement Agencies (EAs) for assisting them in enforcing security rights under the Ordinance (i.e. taking possession of the assets, maintenance and eventual sale). The Agencies so enlisted will be an Agent of the Authorised Officer. The salient features of the arrangement will be as under.

9. In the circular dated 10.3.2005 issued by the Bank, attached as Annexure R-2 with CWP 299 of 2005, the remuneration structure for the enforcement agents is as under:

For recoveries above Rs.20 lacs and upto Rs.50 lacs

Rs.2 lacs plus 2.5% of the amount recovered in excess of Rs.20 lacs.

For recoveries above Rs.50 lacs upto Rs.5 crores

Rs.2.75 lacs plus 1.5% of the amount recovered in excess of Rs.50 lacs.

For recoveries above Rs.5 crores

Rs.9.50 lacs plus 1% of the amount recovered in excess of Rs.5 crores.

10. It is pointed out that after such circular, the remuneration payable to the enforcement agency has been revised vide Circular Letter No.CirCFO/Adv/358/2006-07 dated 23.2.2007. The relevant extracts are as under:-

Sr.

Item No.

Remuneration Payable

a)

For recoveries upto Rs.1 lac

@ 20% of the amount recovered

b)

For recoveries above Rs.1 lac and upto Rs.20 lacs

Rs.20,000/- plus 10% of the amount recoveries in excess of Rs. 1 lacs.

c)

For recoveries above Rs.20 lacs and upto Rs.50 lacs

Rs.2 lacs plus 2.5% of the amount recoveries in excess of Rs. 20 lacs.

d)

For recoveries above Rs.50 lacs and upto Rs.5 crores

Rs.2.75 lac plus 1.5% of the amount recoveries in excess of Rs.50 lacs.

e)

For recoveries above Rs.5 crores

Rs.9.50 lacs plus 1% of the amount recovered in excess of Rs. 5 crores.

11. Vide circular dated 5.5.2010, Annexure R-4 with CWP 299 of 2011, the remuneration structure for the enforcement agencies has further been revised, which reads as under:-

Proposed Fee Structure

Situation

A

B

C

a) For recoveries upto Rs. 10.00 lacs

4% of the amount recovered maximum Rs.40,000/- (Minimum Rs.12,000/-)

Rs.10,000/-

Rs.5,000/-

b) For recoveries above Rs. 10.00 lacs and upto Rs.50.00 lacs

Rs.40,000/-plus 2.5% of the amount recovered in excess of Rs. 10.00 lacs

Rs.15,000/-

Rs.5,000/-

c) For recoveries above Rs.50.00 lacs and upto Rs. 1.00 crore

Rs.1,40,000/-plus 2.00% of the amount recovered in excess of

Rs.20,000/-@TAB9 =

Rs. 10,000/-Rs.50.00 lacs

d) For recoveries above Rs.1.00 crore and upto Rs.5.00 crores

Rs.2,40,000/- plus 1.25% of the amount recovered in excess of Rs. 1.00 crore

Rs. 25,000/-

Rs.15,000/-

e) For recoveries above Rs.5.00 crores and upto Rs.10 crores

Rs.7,40,000/- plus 0.75% of the amount recovered in excess of Rs.5.00 crores

Rs.30,000/-

Rs.20,000/-

f) For recoveries above Rs.10 crores

Rs.11,15,000/- plus 0.50% of the amount recovered in excess of Rs.10.00 crores

Rs.30,000/-

Rs.20,000/-

Situation A: In case physical possession has been taken and recovery is made whether before or after auction.

Situation B: In case recovery is made before possession but after obtaining DM permission and visit made by Enforcement Agents (EAs).

Situation C: In case recovery/settlement is made before possession and before DC permission but before case entrusted to EAs.

11. It is, thus, contended by Shri Pathela that the procedure for enforcement agents is in accordance with the circulars issued by the Reserve Bank of India and also the guidelines issued by the Bank.

12. Learned counsel for the petitioner has controverted the said contention and relied upon circular dated 24.4.2008 issued by the RBI, after the judgment of the Apex Court in *Manager, ICICI Bank Ltd. Vs. Prakash Kaur and Others*, wherein the following is the condition:-

Taking possession of property mortgaged/hypothecated to banks.

(xii) In a recent case which came up before the Honourable Supreme Court, the Honourable Supreme Court observed that we are governed by rule of law in the

country and the recovery of loans or seizure of vehicles could be done only through legal means. In this connection it may be mentioned that the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) and the Security Interest (Enforcement) Rules, 2002, framed thereunder have laid down well defined procedures not only for enforcing security interest but also for auctioning the movable and immovable property after enforcing the security interest. It is, therefore, desirable that banks rely only on legal remedies available under the relevant statutes while enforcing security interest without intervention of the Courts.

13. On the basis of such facts, learned counsel for the petitioner has argued that enforcement agents may be permissible for Bank to be engaged, but such enforcement agents are not contemplated under the Act, much less before the stage of taking of actual physical possession. It is argued that in all other actions for the recovery of the dues by the Banks, the Bank has to seek intervention of either the Court or the Tribunal but an action under the Act is permissible to be taken by the Bank through its authorized officers, therefore, the Bank cannot take assistance of an enforcement agency while taking action under the Act.

14. It is contended that the actions under the Act are contemplated by an Authorized Officer, as defined under Rule 2(a) of the Security Interest (Enforcement) Rules, 2002 (for short "the Rules") to mean an Officer not less than a Chief Manager of a Public Sector Bank. In the present case, the notices under Sections 13(2) and 13(4) of the Act, have been issued by such authorized officer. The process of sale of assets is to be initiated after such deemed possession, by way of publication in the newspaper. The process of sale of immovable secured assets is regulated by Rule 8 of the Rules. The deemed possession is to be taken by the Authorized Officer by delivering a possession notice on the outdoor or at such conspicuous place of the property or in the newspaper. Before the property is put to sale, a 30 days notice is required to be served under Sub Rule 6 of Rule 8 of the Rules. It is argued that since the property mortgaged in favour of the Bank was an open plot, therefore, the act of taking possession does not require any preparation of inventory or any other expenses to secure the same. The Bank has claimed the dues to the enforcement agents even before notice u/s 13(4) was served upon the petitioner and published in the newspapers. It is contended that the claim of the enforcement agents is the fixed amount on the amount recovered and not for any services provided, which is apparent from the bill raised and produced by Counsel for the Bank. The enforcement agents have raised the bills, with the following particulars:-

In the case of Sh. Mohinder Pal Singh

Bill dated

Particulars

Amount (Rs.)

10.8.2009

Charges for enforcement as per Bank's rates (on the recovery of First Rs.3,00,000/-)

Rs.40,000.00

08.7.2010

Charges for enforcement as per Bank's rates (on the recovery of Rs. 11,86,000/-)

Rs. 1,28,600.00

Less amount received Net Amount

Rs.40,000.00

Rs.88,600.00

18.3.2011

Charges for enforcement (pending amount)

Rs.44,300.00

15. Thus, on the basis of circular dated 23.2.2007 and the aforesaid bills, it is argued by the learned counsel for the Petitioner that the amount paid to the enforcement agent is a reward to the enforcement agencies and not reimbursement of the expenses and thus, such amount, cannot be charged from the petitioner. It was explained by the counsel for the Bank that the recovery case of the petitioner was entrusted to enforcement agency on 12.11.2008 i.e., after issuance of notice u/s 13(4) of the Act on 15.5.2008, though the notices u/s 13(4) of the Act were issued on 4.2.2009 and 27.5.2009. Therefore, such charges have been rightly claimed from the petitioner as reasonable expenses to realize the security permissible u/s 13(7) of the Act as such amount has been claimed after notices u/s 13(4) were issued and published.

16. We have heard learned counsel for the parties at some length and find that the action of the Bank in engaging enforcement agency and claiming amount paid to such agency as unjustified and untenable.

17. Though the Reserve Bank of India, as per the circular dated 3.11.2006 has permitted outsourcing of certain financial services, but some safeguards are to be kept in view while giving effect to the agreement engaging such enforcing agencies. Such agreement restricts the rights of the commercial bank in engaging enforcement agents for effecting recoveries under the Act as per clause (xii) of the Circular dated April 24, 2008. The process of recovery through the process of the Civil Court or the Debt Recovery Tribunal stands at a different footing. But in the case, where the recovery process is to be initiated under the Act, it is the Bank, the secured creditor, who is permitted to realize its security

without the intervention of the Court or the Tribunal. Keeping in view the aforesaid fact, though the circular dated 3.11.2006 permits outsourcing of certain services, but such outsourcing is restricted in case, if the process of recovery is to be initiated under the Act. The Act and the Rules contemplate an action by the secured creditor through its authorized officer. It is Authorized Officer who has taken action under the Act, when notice u/s 13(4) of the Act, was published for deemed possession of the property. Before the issuance of the notice u/s 13(4), the enforcement agency is not expected to take any action. In fact that is the stand of the Chief General Manager of the Bank. Even after the possession in terms of Section 13(4) of the Act is taken, the secured creditors can claim such expenses as are properly incurred in terms of Section 13(7) of the Act. The said provisions contemplated for reimbursement of expenses which the secured creditors have incurred. There cannot be any fixed expenses payable to the Enforcement Agents, irrespective of the costs, charges and expenses incurred by such Enforcement Agents. Therefore, the fixed amount claimed by the Enforcement Agency, without proof of actual expenses, is beyond the scope of Section 13(7) of the Act or the guidelines issued by the Reserve Bank of India.

18. Even otherwise, from the circular issued by the Bank and the bills submitted by the Enforcement Agencies, it transpires that the charges are claimed in relation to the amount recovered. Thus, the amount paid to the Enforcement Agencies is a reward for the services. The amount of reward cannot be passed on to anyone else. Such amount has to be paid to the Enforcement Agencies out of the assets realized or by the Bank out of funds at its disposal. Section 13(7) of the Act, authorizes the secured creditors to claim charges, costs and expenses, which are actually incurred. The actual expenses incurred have no co-relation with the amount recovered or recoverable. Therefore, the claim of fixed charges in view of the amount recovered is beyond legislative sanction and not admissible.

19. Apart from the said fact, the Bank has claimed legal fee. The notices under Sections 13(2) and 13(4) of the Act are the notices on the performa circulated on 16.11.2002. The Authorised Officer of the Bank does not require any legal opinion in issuing such notices. There is no justification to claim such legal charges from the borrower, which is not related to any professional services rendered by an Advocate to the Bank. There was no occasion for any legal advice in issuing notice under Sections 13(2) or 13(4) of the Act.

20. Learned counsel for the petitioner has further argued that the Bank has claimed interest on the amount of expenses including the charges of enforcement agencies, legal fee and advertisement expenses, which is not permissible in view of the judgment of this Court in *Paramjit Singh v. UCO Bank Ghudani Kalan and another* (2007) 148 P.L.R. 747, wherein, similar expenses claimed by the Bank has been disallowed as not permissible in law. In view of the said fact, we are of the opinion that the Bank cannot claim interest on the expenses.

21. In CWP 299 of 2011, it is averred in the written statement that Rs.64,528/-

is the due amount as on 22.8.2011 in the loan accounts of the petitioner whereas another sum of Rs. 2,28,516 is payable on account of recovery agents fee, publication in newspapers and legal fee etc even after the petitioner has deposited a sum of Rs. 5,00,000/- in terms of the interim order passed by this court to restore possession of the house on deposit of the said amount. The amount of deposit shows that the meager amount is due from the borrower towards interest, whereas, the major amount is towards the expenses allegedly incurred.

22. Consequently, we dispose of the present writ petitions with direction to the respondent-Bank to recalculate amount payable by the borrower by deleting the charges/expenses of the Enforcement Agencies, legal fee and the interest on the amount of expenses. The Bank shall communicate within two weeks the due amount as on 6.7.2010 i.e. when the petitioner in CWP 11662 of 2010 made the last payment; and as on 31.5.2011 in CWP 299 of 2011, the date of last payment. The petitioners are granted one month thereafter to deposit the said amount so communicated. The deposit of the amount by petitioners shall give complete discharge of the dues of the Bank and the title deeds etc. shall be returned to the borrower within next two weeks.