(2017) 07 KL CK 0028

In the High Court Of Kerala

Case No : 1363 of 2017 () IN WP(C) 7625 of 2017

MR.AJI MATHEW APPELLANT

Vs

THE FEDERAL BANK LTD RESPONDENT

Date of Decision : 04-07-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 482 - Saving of inherent powers of High Court

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002,

Citation : (2017) 07 KL CK 0028

Hon'ble Judges : Navaniti Prasad Singh, Raja Vijayaraghavan V

Bench : DIVISION BENCH

Advocate : JOY GEORGE,?PRAICY JOSEPH,?RAJU JOSEPH,?TANYA JOY, JOSEPH P.ALEX, JACOB P.ALEX

Final Decision : Disposed

Judgement

1. This intra Court appeal has been filed by the appellant being aggrieved by the judgment dated 21.6.2017 passed in W.P(C). No. 7625 of 2017. The appellant was the writ petitioner. He had challenged the actions taken by the first respondent Bank ie., the Federal Bank Ltd. before the Chief Judicial Magistrate, Kottayam in purported exercise of powers under section 14 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act (" SARFAESI Act " for brevity).

2. We have heard learned counsel for the appellant and

the learned counsel for the Bank and we dispose of this appeal

at this stage itself.

3. It is not in dispute that the appellant had taken an

Agricultural Cash Credit Loan from the first respondent Bank. ?Initially it was of Rs.15,00,000/-, which was enhanced in the

year 2010 to Rs.20,00,000/-. The appellant had offered two

securities. First was an agricultural land and second was a

residential house. In the year 2014, the loan having been

categorised as a Non Performing Asset, notice under section 13

(2) of the SARFAESI Act was issued. There being no adequate

response, steps were then taken by the Bank under Section 13

(4) of the SARFAESI Act to take possession of both the

securities. This led to an appeal being filed before the Debt

Recovery Tribunal in terms of Section 17 of the Act. The Debt

Recovery Tribunal after hearing the parties disposed of the

matter by order dated 5.12.2016. The operative portion

whereof is quoted hereunder:

"19. For the forgoing reasons, possession notice dated 26.11.2014 stands quashed upon resorting the symbolic possession of item No.1 to the applicant and there is no impediment for the respondent to enforce its mortgage rights over the said land in accordance with any other law now in force for recovery of its dues. The respondents are at liberty to proceed afresh with their further SARFAESI measures under the Act as against item No.2 property in accordance with law."

4. From the above, it could be seen that in so far as item

No.1 property is concerned, which was agricultural land, the

proceeding was set aside in view of section 31(i) of the ? SARFAESI Act . But while doing so, liberty was granted to the

Bank to proceed afresh with their further SARFAESI measures

in accordance with law. From the above, it is evident that the

interference was at the stage of section 13(4) of the SARFAESI

Act.

5. Learned counsel for the appellant submits that once the tribunal had set aside proceedings against both the properties in the manner aforesaid, then the Bank could not resort to proceedings under Section 14 by moving the Chief Judicial Magistrate, Kottayam and obtain orders for possession. His submission would be that once the matter received the attention of the Debt Recovery Tribunal, which set aside the proceedings, then the Bank ought to have proceed afresh ie., by issuing notice under Section 13(2) of the Act. According to the learned counsel, the entire proceedings before the Chief Judicial Magistrate, Kottayam is wholly without jurisdiction. It is further contended that the possession taken must be restored to the appellant. It was their only residential house, in which he resided with his family including his aged father.

6. It appears that this was the same argument which was advanced before the learned Single Judge, albeit, without success. It may also be noted that the learned Single Judge did grant some latitude to the appellant to make repayment to enable him to save his property. But apparently the appellant defaulted in his undertaking. Hence the writ petition was dismissed and hence the appeal.

7. Before dealing with the matter of relief to be granted we deem it appropriate to deal with the question of law as raised. In our view, the question has been considered and appropriately answered by the Apex Court in the case of Standard Chartered Bank v. Noble Kumar and Others [(2013) 9 SCC 620] and the problem in issue has been answered in paragraph 26, which is quoted in extenso with emphasis supplied by us:

"26. It is in the above mentioned background of the legal frame of Sections 13 and 14, we are required to examine the correctness of the conclusions recorded by the High Court. Having regard to the scheme of Sections 13 and 14 and the object of the enactment, we do not see any warrant to record the conclusion that it is only after making an unsuccessful attempt to take possession of the secured asset, a secured creditor can approach the Magistrate. No doubt that a secured creditor may initially resort to the procedure under Section 13(4) and on facing resistance, he may still approach the Magistrate under Section 14. But, it is not mandatory for the secured creditor to make attempt to obtain possession on his own before ? approaching the Magistrate under Section 14. The submission that such a construction would deprive the borrower of a remedy under Section 17 is rooted in a misconception of the scope of Section 17."

8. We can only repeat what has been emphatically

stated by the Apex Court. Once default has been committed,

the creditor has a right to move under the SARFAESI Act . A

notice is initially issued in terms of Section 13(2), being a

notice intending to assume jurisdiction and also calling upon

the debtor to discharge his complete liability. Upon cause

being shown, the same is to be considered and order has to be

passed by the creditor briefly giving reasons. Proviso to

section 13(3A) clearly stipulates that the reasons so

communicated or the likely action of the secured creditor

would not confer any right upon the borrower to prefer an

application before the Debt Recovery Tribunal under Section 17

or the Court of the District Judge under section 17 A. Thus, the

initial jurisdiction is assumed and proceedings initiated by

virtue of Section 13(2) brings the matter at a cross road. The

Bank then decides to proceed under Section 13 (4) to take

possession of the property. Various alternatives are

contemplated therein ie., taking over possession, taking over ? management, handing over possession to someone to run the

unit or ultimately to sell the security. But as noticed by the

Supreme Court, lot of resistance is shown by the debtors.

Section 13(4) proceedings are subject to appellate proceedings under section 17 of the Act. It may become time consuming and dilatory, thus, defeating the object of expeditious recovery. In view of the resistance being offered, as noted by the Apex Court, the creditor may abandon the proceedings and then come to a criminal court under Section 14 of the Act and seek for possession through the process of criminal court. Thus to say that if section 13(4) proceedings is struck down by the DRT under Section 17, the Bank then could not resort to section 14 is patently wrong nor is it correct to say that once the proceedings are quashed, then Bank has to re-initiate proceedings from the stage of section 13(2) of the Act. As we have quoted above, from the order of the DRT, it is evident that it was not the initiation of the proceeding that has been set aside. What was set aside were the steps taken under Section 13(4) of the Act. Thus the objections cannot be sustained.

9. Learned counsel for the appellant submits that in ?respect of proceedings under Section 13(4) of the Act a person has a remedy under section 17 of the Act but as against actions taken under Section 14 by the Chief Judicial Magistrate is left remediless. According to the learned counsel, that never could have been the intention of the legislature.

10. In our view, the appreciation of law is wrong. When Section 14 makes reference to the Chief Judicial Magistrate, it is not as a persona designata. It is as a criminal Court. The reason, as already been noticed by the Apex Court is that, once there is a resistance, then considering the law and order situation, it is more appropriate for the criminal court to get involved in the matter. Once the criminal court is designated as the authority who would exercise the power, then the

person would have all the remedies available as against orders of that court. The designated Court, which is the court of the Chief Judicial Magistrate, is not a persona designata but exercises power and functions as a Chief Judicial Magistrate duly appointed and notified in terms of the Code of Criminal Procedure. We can refer to the decision of the Apex Court reported in Thakur Das v. State of Madhya Pradesh and Another (AIR 1978 Supreme Court 1). There the question involved was that the appellate remedy from an order of confiscation by the District Collector was before the Sessions Judge. The Sessions Judge was a pre-existing judicial authority and that being so, it was held that the appellate authority ie., the Sessions Judge was amenable to the criminal revisional jurisdiction of the High Court. In the given case, the order passed by the Chief Judicial Magistrate may also be challenged under Section 482 of the Code of Criminal Procedure or may be subject to judicial review in a proceeding under Article 227 of the Constitution. Hence, the appellant cannot be said to be remedy less, notwithstanding the fact that Section 17 is available in matters where proceedings under Section 14 are taken up.

11. Another line of argument as made by the learned counsel for the appellant is that in such an event who would make compliance of the provisions of Rule 8 of the Security Interest (Enforcement) Rules, 2002. The answer is clear because Rule 8 deals with a situation where possession having been taken over, or otherwise, the security is required to be sold. That is a different stage altogether from the stage of either Section 13(4) or Section 14 of the Act. In the present case, we have not reached the stage of Rule 8 as yet. Thus,

we do not find any substance in the submissions as made by the learned counsel for the appellant.

12. On behalf of the appellant the last argument was made based on the facts. It was submitted that this agricultural loan was taken for slaughter tapping of rubber trees. This is a process wherein after the rubber trees have outlived its age they are tapped vigorously to extract the remaining latex and then the trees are cut and removed. The income is both from the rubber so tapped and the timber. While doing so, re-plantation is systematically done. This is a regular practice and a regular form of business, though predominantly in the agricultural field. It is pointed out that in the past few years, the markets in relation to rubber have steadily fallen affecting the viability of operations. The imports have become cheaper with no countervailing duties. The agriculturists are facing enormous losses. It is because of this there had been consistent defaults. However, out of the loan of about Rs.20,00,000/- as noted above, in course of the proceedings before this Court, already about Rs.22,00,000/-, being the outstanding interest dues have been paid. But notwithstanding that, the total outstanding ie., principal plus accrued interest is still about Rs.25,00,000/-. The appellant seeks reasonable time to repay the amount, considering substantial payments having been made in the past six months as noticed above. So far as Bank is concerned, they have made their position clear. They are not interested in the security. What they are primarily interested is in liquidation of their dues and that too as soon as possible, for the said loan is standing in their inventory as NPA since 2014.

13. We have considered this aspect of the matter. We

have also considered that substantial payments to the tune of about Rs.22,00,000/- on a loan of Rs.20,00,000/- has been made in the past six months. We have also taken into account the fact that this is the only residential house of the appellant and his family and is lying contiguous to the agricultural land. Considering the aforesaid we are of the view that if the appellant pays and continues to pay Rs.2,00,000/- per month within the first week of every month without fail, then the Bank would not in any manner proceed against the properties.

14. To us, the position is clear. There is an outstanding default of Rs.25,00,000/-. The annual interest for the next ? year at best would be Rs.5,00,000/-. Thus, the total liability which the appellant would be required to discharge would come to about Rs.30,00,000/-. If the appellant regularly pays Rs.2,00,000/- per month, he would be able to liquidate the entire liability within a period of 15 months ie., less than 11/2 years. To the contrary, if there is a default, for any reason whatsoever in any of the monthly instalments, the Bank would proceed in the matter as if this court had passed no order from the stage of having obtained orders from the Chief Judicial Magistrate under Section 14 of the Act. The appellant would not be entitled to any remedy from any Court. Till such time, the appellant makes payments as per our orders aforesaid, the Bank would not interfere with the possession of the appellant.

15. We may note here that pursuant to the orders as obtained from the Chief Judicial Magistrate, the appellant had been dispossessed and the Bank has taken physical possession. Allegedly in violation of the orders, the appellants re-entered into possession, concerning which certain other

proceedings, including one before this Court are pending. In

view of the order passed in this proceedings, all those ? proceedings would become infructuous subject to compliance

of the undertaking given by the appellant before this Court.

The Bank would not disturb the possession of all the properties

as with the appellant except upon breach of the undertaking as

recorded herein above and as in the manner recorded herein

above.

The writ appeal is accordingly disposed of with the above

observations and directions.

