(2017) 01 GUJ CK 0066

In the Gujarat High Court

Case No : 15799 of 2016

M/S CURE LIFE CARE PVT. LTD. & ANR. APPELLANT

Vs

AUTHORISED OFFICER & ANR. RESPONDENT

Date of Decision : 12-01-2017

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 13(2), Section 13(4) - Enforcement of security interest - Enforcement of security interest

Citation : (2017) 01 GUJ CK 0066

Hon'ble Judges : N.V.Anjaria

Bench : Single Bench

Advocate : KAMAL TRIVEDI, VISHWAS K SHAH,?SANDIP C BHATT

Final Decision : Dismissed

Judgement

1. The first prayer in this petition is to set aside notice dated 08th July, 2016 given by the first

respondent under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. By second prayer, Notice under Section 13(4) of the said Act issued on 08th September, 2016 is prayed to be set aside. It is further prayed to direct respondent-Bank to provide all the documents as asked for in the objections by the petitioners.

2. The petitioners pray that the action taken by the respondents under the Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) be declared as without authority in law.

3. The first petitioner company took financial

assistance by way of Cash Credit and Term Loan from the respondents. The petitioner No.2 is Director of the company who guaranteed the loan of the borrower. Upon failure of repayment, the respondent Bank invoked the provisions of the SARFAESI Act, proceeding to issue notice dated 05th July, 2016 under Section 13(2) of the Act demanding the amount of Rs.18,35,32,088.25 Ps. as due on the date of the notice with interest accrued. It appears that the petitioners filed objections to the said notice on 05th September, 2016. The Bank thereafter issued notice under Section 13(4) on 08th September, 2016.

4. Assailing the impugned notices and the impugned action of the Bank, learned senior advocate Mr.Kamal Trivedi with la Mr.Vishwas Shah for the

petitioners submitted that the Bank proceeded to issue notice under Section 13(4) without complying with the mandatory requirement of sub-section (3A) of Section 13 of the Act. According to him, decision on the objections was not communicated. He submitted that under sub-section (2) of Section 13 it was incumbent upon the Bank to serve 60 days notice before proceeding to take measures under Section 13(4) . He submitted that when there was no communication of the decision on the objections, the whole action was vitiated and that notice under Section 13(4) dated 08th September, 2016 was without dealing with the objections.

4.1 Learned senior counsel further submitted that the disputes regarding classification of entry should be considered by internal mechanism. He relied on the observations by the Supreme Court in paragraphs 44 and 45 of the decision in Mardia Chemicals Limited Vs Union of India [(2004) 4 SCC 311] and buttressed his point. He next relied on decision in Keshavlal Khemchand & Sons Private Limited Vs Union of India [(2015) 4 SCC 770] for the observations in its paragraphs 34 and 35 to submit that under the guidelines of Reserve Bank of India, financial assets were required to be sub0divided into categories and such assets are classified as Non-Performing Assets. He submitted that the action of the Bank in declaring the account in question as NPA was without application of mind. A decision of Jharkhand High Court in M/s.Stan Commodities Private Limited Vs Punjab and Scind Bank [AIR 2009 Jharkhand 14] was relied on to

submit that classification of NPA was not proper and the petitioner was entitled to be informed before such action.

4.2 Learned senior counsel thereafter questioned the legality of action of the respondent Bank in acting through an advocate while rejecting the objections under Section 13(3A) . He submitted that the rejection was not only mechanical, but the same was by advocate on the instructions of the Bank, for which the advocate was not competent person under the scheme of the Act and the Rules. It was submitted that the advocate did not act under the instructions of the authorised officer who was the statutory authority supposed to exercise his powers. It was submitted that the authorised officer could not have delegated his powers to the advocate and could not have appointed the advocate as the law require the authorised officer deal with the objections himself. It was therefore submitted that the action was in contravention of law.

4.3 Decision of the Supreme Court in M. Chandru Vs Member Secretary, Chennai

Metropolitan Development Authority [(2009) 4 SCC 72] was pressed into service on behalf of the respondents for its paragraphs 10 and 18 to highlight the concept of delegation, to assert that there could not have been delegation in favour of advocate and the objections ought to have been dealt with by the authorised officer. For emphasising the proposition that only the authorised officer could have dealt with, decision of the Kerala High Court in Bobby Sabestian Vs Authorised Officer being Writ Petition (C) No.2372 of 2013 decided on 11th April,

2014 as well as the decision of the Andhra Pradesh High Court in Sampoorna Battu Vs ICIC Bank being Writ Petition No.28734 of 2010 decided on 16th February, 2012 were cited.

4.4 On the other hand, learned advocate Mr.Sandeep Bhatt for the respondents relied on contentions and averments in the affidavit-in-reply and contended that this Court may not entertain the present petition.

5. Proceeding to consider the contorversy and the issue raised, challenge to the notice under Section 13(4) of the SARFAESI Act must terminate at this stage in view of the stand taken by the respondents in their affidavit-in-reply. The respondent Bank has stated that it has sought to withdraw notice under Section 13(4), averring and stating as under on oath.

"... the Petitioners had given their objection/ representation through their advocate on 05.09.2016 by way of RPAD, to the 13(2) notice dated 08.07.2016, which was served upon the respondent bank on 08.09.2016 at 5:14 pm as shown in the track record down loaded from the website of Indian Postal department. ... ..."

"... before receipt of the objection raised by the petitioners, the respondent bank had issued the 13(4) notice dated 08.09.2016 demanding possession of the properties in question, which was served upon the petitioners by hand delivery on the very same date i.e. 08.09.2016 in the morning and therefore, the objection raised by the petitioners has no substance in the eye of law as the same is subsequent to 13(4) measures. ... ... "

"... upon receipt of the objection raised by the petitioners, the respondent bank had immediately replied to the same through their advocate, which was served upon the petitioners on 13.09.2016 by hand delivery and the said reply of the bank was also sent

to the advocate of the petitioners on 13.09.2016. However, the petitioners while filing the present petition had made false statement that the respondent bank had taken the measures under section 13(4) of the Act, 2002 without considering their objection/representation and only on this ground this Hon''ble Court had granted the interim relief in favour of the petitioners vide order dated 15.09.2016. ... ..."

"... the petitioners had filed an addition affidavit on 19.09.2016 before this

Hon''ble Court and thereby declared that the reply of the bank was served upon their advocate on 15.09.2016 at 17:30 p.m. to the objection raised by the petitioners against the 13(2) notice dated 08.07.2016. In this circumstances, without going into the controversy, the respondent bank is withdrawing notice dated 08.09.2016 issued by the respondent bank demanding possession of the properties in question and request to permit the respondent bank for taking the further measures under section 13(4) of the Act, 2002 by issuing fresh notice for possession as the bank had complied the section 13(4) of the Act, 2002. ... ..."

5.1 Though it is the stand of the Bank as evinced in the aforesaid averments as well as from paragraph 5.2 of the affdiavit that the Bank had issued notice demanding possession of the secured assets on 08th September, 2016 which was served on the petitioners by hand delivery on the same day and further that the respondent Bank had considered the objections of the petitioners and replied the same by letter dated 10th September, 2016 which was also served on the petitioners as per the endorsement and seal of acceptance of respondent No.1 sought to be relied on (Page 91) and further that the same was also served upon the advocate by Registered Post A.D. On 13th September, 2016. It was stated that without admititng the contentions of the petitioners and without going into the controversy, it was withdrawing notice dated 08th September, 2016 issued under Section 13(4) of the

Act, it was further stated to request the Court to permit the respondents to issue fresh notice for taking possession.

5.2 In the aforesaid view, the prayer against notice under Section 13(4) and to set aside the same does not survive as the Bank woudl be issuing fresh notice as stated by it. Now, there is no gainsaying that the stage obtained in the proceedings under the SARFAESI Act is one where the petitioners would have available a statutory alternative remedy of preferring appeal before the Debt Recovery Tribunal under Section 17 of the SARFAESI Act, 2002, and raising all the contentions in the appeal. There is no gainsaying that the said remedy is efficacious remedy and it would be possible to lead evidence before the Tribunal.

5.3 In Authorised Officer, Indian Overseas Bank Vs Ashok Saw Mill [(2009) 8 SCC 366], the Apex Court held that remedy by of appeal under Section 17 is available not only upto the stage referable to Section 13(4), but even in respect of measures taken post-13(4) stage. In the present case, the stage at which the petitioner is beset with, is such stage. The petitioner is aggrieved person for the purpose of Section 17 of the Act.

5.4 Notice demanding possession is also construed as a measure under and in relation to Section 13(4) of the Act. The remedy would be available when the petitioners faces fresh notice under Section 13(4) which would be issued by the

respondent Bank.

5.5 In Union Bank of India Vs Satyavati Tondon [(2010) 8 SCC 110], the Supreme Court while underlining the principle that remedy under Section 17 has to be availed and the straightway entertainment of writ petition has to be desisted from, observed thus,

"There is another reason why the impugned order should be set aside. If respondent No.1 had any tangible grievance against the notice issued under Section 13(4) or action taken under Section 14, then she could have availed remedy by filing an application under Section 17(1) . The expression `any person used in Section 17(1) is of wide import. It taken within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken under Section 13(4) or Section 14 . Both the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."

(Para 17)

6. Adverting to the submission of learned senior counsel about the aspect that rejection of objections of the petitioners was through advocate and

not by the authorised officer himself which was not permissible in law. The similar contention was dealt with by the Division Bench in Pareshbhai Parbatbhai Kothiya Vs Authorised Officer, HDFC Bank Limited being Letters Patent Appeal No.194 of 2016 decided on 29th March, 2016 which arose from the decision dated 18th February, 2016 in Special Civil Application No.18757 of 2015, in which the Court has rejected such contention of the said advocate-appellant as per observations in paragraphs 6.1, 6.2 and 6.3 of the order. The Division Bench noted the contention in paragraph 2 of the order.

"After initiating proceedings on behalf of the respondent-Bank demand as contemplated under section 13(2) of SARFAESI Act, to the tune of

Rs.8,04,12,494/- was raised. On receipt of such notice, on behalf of the appellant- petitioner objections were filed through advocate. On receipt of objections which were filed through advocate, the respondent-Bank has passed order rejecting the objections. Aggrieved by such rejection of objections, through communication from advocate, the appellant-petitioner approached this Court mainly on the ground that there was no consideration of objections filed by the appellant- petitioner by the competent authority as contemplated under section 13(3A) of SARFAESI Act. It is the case of the appellant- petitioner that Authorized Officer of the respondent-Bank shall alone consider, but not by way of communication by advocate, in absence of any consideration by the competent authority. The learned Single Judge has rejected the claim of the appellant- petitioner basing on earlier judgment of this Court in the case of Fab Tech Manufacturing P. Limited Vs Authorized Officer, State Bank of India (SBI) in Special Civil Application No.1670 of 2015, dated 30.01.2015." (Para 2)

6.1 Thereafter the Bench stated and held,

"In this appeal also reiterating submissions the learned counsel for the appellant has pointed out that under the scheme of the SARFAESI Act, it is obligatory on the part of the Authorized Officer to consider the objections and take appropriate decision and communicate reasons even in cases where representation

or objection is not acceptable. It is submitted that in absence of order by Authorized Officer, mere communication made through advocate is not in compliance of section 13 (3 A) of SARFAESI Act . On the other hand, learned counsel appearing for the respondent-Bank submits that after rejection of objections under section 13(3A) of SARFAESI Act further measures were also taken under section 13(4) of SARFAESI Act. As such if the appellant- petitioner is aggrieved it is always open for him to question the same by way of appeal under section 17 of SARFAESI Act before the Debt Recovery Tribunal. It is further submitted that there is no reason for the appellant- petitioner to approach this Court bypassing the remedy of appeal." (Para 3)

"It is true that petition was filed immediately after rejection of objection under section 13(3A) of SARFAESI Act, before measures were taken under section 13(4) of SARFAESI Act. At the same time, it is not in dispute that the respondent-Bank has taken measures under section 13(4) of SARFAESI Act, which is appealable under section 17 of SARFAESI Act. Even measures taken under section 13(4) of SARFAESI Act is in continuation of rejection of objection under section 13(3A) of SARFAESI Act. In that view of the matter, even correctness of the order passed under section 13(3A) of SARFAESI Act also can be canvassed by filing appeal under section 17 of SARFAESI Act, after measures were taken under section 13(4) of SARFAESI Act." (Para 4)

"In view of remedy provided under section 17 of SARFAESI Act, we deem appropriate to dispose of the appeal permitting the appellant- petitioner to pursue remedy available under section 17 of SARFAESI Act. If correctness of the order passed under section 13(3A) of SARFAESI Act is canvassed before the Appellate Authority, it is open for the Appellate Authority to consider such objections independently uninfluenced by the impugned order passed by the learned Single Judge. Subject to the above clarification and observation this Letters Patent Appeal stands disposed of. No order as to cost." (Para 5)

6.2 Therefore in view of the above decision of the Division Bench, even this contention namely whether reply to the objections could have been given by the authorised officer acting through advocate, could also be examined in the remedy of appeal which the petitioner may avail. As per the binding

observations of the Division Bench referred to above, it is left open for the petitioners to raise the aforesaid contention as well along with all other contentions which may be raised in accordance with law.

6.3 The petition is therefore not liable to be entertained. As the notice under Section 13(4) would be issued afresh, question of taking possession of the properties by the Bank does not arise at this stage. Therefore, interim relief passed on 15th September, 2016 by this Court granting relief in terms of paragraph 9(E) is not required to be continued.

7. For the foregoing discussion and reasons, the present petition is not accepted for its any of the prayers. The same is disposed of by observing that the respondent Bank may proceed to issue a fresh notice under Section 13(4) of the SARFAESI Act against the petitioner as it has withdrawn the earlier notice dated 08th September, 2016 as stated in the affiavit- in-reply mentioned hereinabove. While permitting the respondent Bank to issue fresh notice as above, liberty is reserved for the petitioners to avail statutory alternative remedy of appeal before the Debt Recovery Tribunal challenging the action of the Bank on all available contentions including the above and those others raised in this petition.

8. This Court has not gone into the merits of any such contentions herein.

9. Petition is dismissed subject to above.

Notice is discharged.

