
(2016) 07 AHC CK 0221

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 9978 of 2016

M/S Gadeo Electronics

APPELLANT

Vs

Oriental Bank of Commerce

RESPONDENT

Date of Decision : 21-07-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 13, 13(3A)

Citation : (2016) ACD 1092 : (2016) 11 ADJ 554 : (2016) AIR(Allahabad) 170 :
(2017) 3 AILJ 553 : (2017) 120 ALR 360 : (2017) 2 BC 437 : (2016) 133 RD 206

Hon'ble Judges : Tarun Agarwala and Vipin Sinha, JJ.

Bench : Division Bench

Final Decision : Dismissed

Judgement

Tarun Agarwala, J.—The petitioner no.1 is a partnership firm in which petitioner nos.2, 3 and 4 are partners. Petitioner no.5 took a loan from Oriental Bank of Commerce against collateral securities. Petitioner no.5 wanted additional bank limits for a short period for which purpose, petitioner no.5 approached petitioner no.1 and its partners to provide collateral security. The partners of petitioner no.1 apparently agreed to provide additional security and bank guarantees to petitioner no.5. Accordingly, in 2011 the cash credit limit of petitioner no.5 was enhanced upon mortgaging the property of petitioner no.1 situate at B-60, Sector 57, Noida and upon furnishing guarantees by its partners. In 2012, one of the partners of petitioner no.1 died. The surviving partners of petitioner no.1 decided to wind up the firm and requested petitioner no.5 to return their guarantees and release the mortgage on the property. Petitioner no.5 accordingly, wrote a letter to the Oriental Bank of Commerce on 22nd June, 2015 requesting for substitution of the mortgaged property and for release of the property of petitioner no.1.

2. The Oriental Bank of Commerce accepted in principle the substitution of the properties vide their letter dated 29th June, 2015 contending that the

substitution of the property could be substituted by an equal amount of immovable property as well as FDRs in the name of Directors/guarantors apart from fulfilment of other conditions. Based on the tentative approval granted by the Oriental Bank of Commerce, petitioner no.5 provided the alternate properties for mortgage. The Oriental Bank of Commerce vide their letter dated 29th June, 2015 directed the petitioners to take concurrence from the Canara Bank since they also held a parri passu charge over the collateral securities submitted by petitioner nos.1, 2, 3 and 4. Petitioners, accordingly, approached the Canara Bank for a no objection certificate. In the consortium meeting of the banks held on 8th July, the Canara Bank informed that the proposal has been sent to the higher authorities. By a letter dated 4th September, 2015, the Oriental Bank of Commerce informed Canara Bank that they have created equitable mortgage on the substituted properties given by petitioner no.5 and requested Canara bank to grant a no objection certificate. In the consortium meeting held on 4th November, 2015, the issue of substitution of the mortgaged property was taken into consideration. The Canara bank informed that the account of petitioner no.5 with their bank had been declared a Non Performing Asset (NPA) in July 2015 and that the borrower was required to deposit the over due amount and regularise the account and only thereafter, the request for substitution of the property be considered and a no objection certificate be issued. The Oriental Bank of Commerce consequently, by a letter dated 17th November, 2015 informed the borrower, namely, petitioner no.5 that they should clear the over due account not only of the Canara bank but also with their bank and regularise the account before considering the request for substitution of the properties. Since nothing was done by the petitioners", the Oriental Bank of Commerce vide letter dated 14th December, 2015 rejected the request for substitution of the properties.

3. The Oriental Bank of Commerce held that the petitioner no.5 was not maintaining financial discipline and the account of the company was drifting towards NPA and, consequently, in the changed circumstances, the bank was not bound to honour the concurrence given earlier for substitution of the properties. The petitioner, being aggrieved by the action of the bank vide their letters dated 17th November, 2015, 14th December, 2015 has filed the present writ petition for its quashing as well as for a writ of mandamus commanding the respondents to release the mortgaged property of petitioner no.1. The petitioners has also prayed for the quashing of the notice dated 8th January, 2016 issued under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the Act) as in the meantime, the accounts of petitioner no.5 had been declared NPA and the loan amount was recalled requiring the borrower to pay the loan amount.

4. Writ Petition No.18073 of 2016 has been filed by petitioner nos.1, 2, 3 and 4 praying for the quashing of the order dated 16th March, 2016 passed by the Oriental Bank of Commerce rejecting the objection filed under Section 13(3A) of the Act as well as for the quashing of the notice dated 6th April, 2016 issued

under Section 13(4) of the Act.

5. An amendment application has also been filed in the said writ petition for the quashing of the order of the respondent-banks classifying the account of the borrower company as NPA with effect from 31st December, 2015.

6. We have heard Sri Manish Goyal along with Sri Rohan Gupta, the learned counsels for the petitioner and Sri Tarun Varma, the learned counsel for the Oriental Bank of Commerce and Sri Siddharth, the learned counsel for Canara Bank.

7. Sri Manish Goyal, the learned counsel for the petitioner submitted that the action of the respondent bank in not releasing the mortgaged property at B-60, Sector 157, Noida and substituting it with the properties offered was wholly arbitrary and violative of Article 14 of the Constitution of India. The learned counsel submitted that one of the banks had agreed to accept the substituted properties as collateral security and, consequently, there was no reason for the second bank, who only holds a parri passu charge to not give a no objection certificate. The learned counsel contended that the contention that the borrowers account had become NPA and, therefore, such request for substitution of the mortgaged property not take place till such time as the accounts are regularised was arbitrary which should be quashed by the Court and a mandamus should be issued to the said bank to substitute the properties since they not suffer any loss. The learned counsel contended that the action of the respondents in issuing the notice under Section 13(2) and 13(4) of the Act was wholly illegal. It was contended that the declaration of the borrower's account as NPA was illegal and without any authority of law and was liable to be quashed as a consequence thereof the proceedings initiated under the Act for the issuance of notice under Sections 13(2) and 13(4) of the Act was also liable to be quashed. It was further urged that the deposit of title deeds of the properties does not create a charge and, therefore, it is not a secured asset and, consequently, the action of the Debts Recovery Tribunal in restraining the petitioners" from alienating the property was misconceived and erroneous, inasmuch as under the Act a restraint order could only be passed against a secured asset.

8. On the other hand, Sri Tarun Varma, the learned counsel for the Oriental Bank of Commerce submitted that the petitioners" have an efficacious remedy of filing an application under Section 17(1) of the Act before the Debts Recovery Tribunal. In support of his submission, the learned counsel has placed reliance upon a decision of the Supreme Court in United Bank of India v. Satyawati Tandon and others, 2010 (8) SCC 110. It was urged that after the declaration of the account of the borrower as NPA the bank has already filed a suit before the Tribunal for recovery of its amount and that the Tribunal has also issued an interim order restraining the borrower from alienating the properties including the properties, which is sought to be released through the present writ petition. The learned counsel contended that the appropriate remedy for the petitioner is to move an appropriate application before the Debts Recovery Tribunal, which be considered

and appropriate orders be passed by the Tribunal. The learned counsel contended that consequently, it was not a fit case for the writ Court to entertain such petitions. The learned counsel submitted that the concurrence given by the Oriental Bank of Commerce for release of the property of petitioner no.1 was subject to fulfilment of certain terms and conditions at the time when the account of the borrower was standard and regular but during the consideration of the matter, the borrower did not maintain financial discipline and the account of the borrower became NPA. As such in the changed circumstances, the bank was not bound to honour the concurrence since the conditions were not fulfilled by the petitioners. The learned counsel submitted that the borrower has failed to maintain the financial discipline and have made no effort to regularise the account and, consequently, the request for substitution of the mortgaged properties could not be acceded to. The learned counsel further submitted that the account of the borrower was declared NPA as per the Reserve Bank of India guidelines and since the borrower did not make any effort to regularise its accounts, proceedings under the Act was initiated. The learned counsel contended that a valid notice under Section 13(2) of the Act has been issued and the objection of the borrower's and other guarantors were considered and rejected under Section 13(3A) of the Act and only thereafter, a notice under Section 13(4) of the Act was issued and now an application for recovery of the amount has been filed under Section 19 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. The learned counsel submitted that the plea of the petitioners that the respondents-bank had wrongly declared the account of the borrower as NPA is misconceived, inasmuch as such plea could not be raised for the first time in a writ jurisdiction as the said plea was never raised before the bank nor was raised in their objection filed under Section 13(3A) of the Act.

9. Having heard the learned counsel for the parties, the moot question that arises for consideration for which the Court has entertained the petition on a limited jurisdiction is, whether the action of the bank is fair and proper? It cannot be denied that the banks owe a duty to act fairly and in good faith. There has to be a fair dealing between the parties complying with their part of the obligations under the contract. The Securitization Act cannot be read to be a one sided affair shutting out all possible and reasonable remedies to the other party, namely, the borrowers and assume all drastic powers for speedier recovery of the loan amount. Possessing more drastic powers calls for exercise of higher degree of good faith and fair play. The petitioners" cannot be left remediless in case they have been wronged or subjected to unfair treatment violating the terms and conditions of the contract. It is only on this limited purpose that the Court has entertained the writ petition to judge the fairness of the action taken by the respondent-bank.

10. We find from a perusal of various documents that the action of the respondent-banks is not arbitrary. A commercial contract has been entered between the parties. Additional loan was taken for which additional security was given by the borrower. The property of petitioner no.1 was placed as collateral

security and guarantees given by petitioners nos.2 to 4 was accepted by the respondent-banks purely as part of the commercial transaction. Such commercial transaction, which was done with open eyes by all the relevant parties cannot be termed as an arbitrary exercise. Such commercial contract executed between the parties cannot be questioned in a writ jurisdiction.

11. Financial discipline is required to be maintained by all the parties. Liquidity of finance and flow of money is essential for any healthy and growth oriented economy. If the liquidity of finance is not maintained by one of the party, it is open to the other party to refuse till such time as remedial measures are not taken by the defaulting party to correct the default. The stand thus taken by the respondent-banks in refusing to release the mortgage property or to substitute it with new properties cannot be termed as an arbitrary action. The action of the respondent-banks cannot be termed as unfair or unreasonable. Admittedly, petitioner no.5 did not maintain financial discipline and their accounts became NPA. In such changed circumstances, the respondent banks were justified in not acceding to the request of the petitioners for substitution of the mortgaged property. The respondent-banks were justified in directing the petitioners" to first regularise their accounts before they consider the request of substitution of the mortgaged properties. Such action on the part of the banks cannot be termed as a arbitrary decision.

12. Once we find that the action of the respondent banks was neither arbitrary nor unreasonable, the Court is consequently, not inclined to dwell upon the other arguments raised by the learned counsel for the petitioner. We are of the opinion that such grounds could be asserted by moving an appropriate application under Section 17(1) of the Act before the Debts Recovery Tribunal.

13. The contention that the action of the respondent banks in declaring the accounts of the petitioner as NPA was wholly illegal and against the guidelines of Reserve Bank of India seemed to be an attractive proposition for the Court to entertain and dwell upon it but the Court finds that such contention cannot be considered at this stage. The Court finds that such plea cannot be raised at this stage, since the petitioner did not raise this plea in their objection filed under Section 13(3A) of the Act. Admittedly, the petitioners" account became irregular and the banks declared their accounts as NPA and thereafter, issued a notice under Section 13(2) of the Act calling upon the petitioners" to pay the entire amount within the stipulated period. It was at this stage the petitioners could have raised an objection with regard to the arbitrary action of the bank in declaring the accounts as NPA and in violation of the RBI guidelines but this was not done. The petitioners" did not raise this ground in their objection filed under Section 13(3A) of the Act. Such grounds thus cannot be raised at this stage by filing an amendment application in the writ petition. The amendment application is patently erroneous and is rejected.

14. The question as to whether there is a charge on the mortgaged property is a question of fact, which can be best adjudicated by the Tribunal. The Tribunal has

already restrained the petitioners from alienating the secured assets. If the mortgaged properties of the petitioners is not a secured asset, it is always open to the petitioners to move an appropriate application before the Debts Recovery Tribunal for vacation of the interim order. If such an application is filed, the Tribunal will consider and decide the question accordingly. It is not for this Court to go into such questions of fact and decide whether a particular property is a secured property or not. Admittedly, the respondent-banks after issuance of a notice under Section 13(2) of the Act and after rejecting the objection of the petitioners under Section 13(3A) of the Act have adopted the measures available to them by filing an application for recovery of the amount before the Tribunal. It is open to the petitioners to contest the matter before the Tribunal and raise questions with regard to the declaration of the bank of the petitioners account as NPA or question the correctness of the issuance of notice under Section 13(2) of the Act and measures taken under Section 13(4) of the Act. It is open to the petitioners" to also question as to whether any property is a secured asset or not. Such questions can easily be adjudicated in proceedings before the Tribunal.

15. In this background, we are of the opinion that an efficacious remedy is available to the petitioners to ventilate their grievances before the Debts Recovery Tribunal. Under the Act before taking action a creditor is required to give a notice of 60 days to the borrower and after the measures under Section 13(4) of the Act have been taken, an efficacious mechanism has been provided under Section 17 of the Act to the aggrieved person to approach the Debts Recovery Tribunal. The said provision is for the purpose of giving some reasonable protection to the aggrieved person.

16. Consequently, we find that the other grounds as raised by the petitioner do not require any consideration to be tackled in a writ jurisdiction. The appropriate remedy for the petitioner is to approach the Debts Recovery Tribunal.

17. In the light of the aforesaid, we do not find any merit in both the writ petitions. The writ petitions fail and are dismissed.