

(2019) 09 JH CK 0052

In the Jharkhand High Court

Case No : Writ Petition (c) No. 3585 Of 2019

M/s Jamshedpur Fine Chemicals Private Limited And Ors

APPELLANT

Vs

Authorised Officer, Canara Bank And Ors

RESPONDENT

Date of Decision : 16-09-2019

Acts Referred:

Securitisation And Reconstruction Of Financial Assets And Enforcement Of Security Interest Act, 2002 — Section 13(1), 13(2), 13(4), 13(8), 17
Transfer Of Property Act, 1882 — Section 60
Security Interest (Enforcement) Rules, 2002 — Rule 8(1)
Code Of Civil Procedure, 1908 — Order 21 Rule 64
Constitution Of India, 1950 — Article 14, 21, 300A

Citation : (2019) 09 JH CK 0052

Hon'ble Judges : H.C. Mishra, J;Deepak Roshan, J

Bench : Division Bench

Advocate : Pandey Neeraj Rai, Indrajit Sinha, Suraj Singh, Niraj Kumar, Rajiv Sinha

Final Decision : Dismissed

Judgement

Deepak Roshan, J

In the instant writ application, the petitioner has prayed for following reliefs:

(i) Striking down sub section (8) of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as 'SARFAESI ACT') to the extent it purports to limit the right of redemption of the petitioners with the issuance of notice of the public auction as being violative of Articles 14, 21 and 300A of the Constitution of India besides being arbitrary and discriminatory;

(ii) Quashing/setting aside the judgment and order dated 03.06.2019 (Annexure-18) passed in Appeal Sr. No. 62/2018 by Sri R.S. Kulhari, Chairperson, Debts Recovery Appellate Tribunal, Allahabad (hereinafter referred to as 'DRAT') whereby and where under the order dated 22.03.2018 passed by

Sri B.N. Dash, Presiding Officer, Debts Recovery Tribunal, Ranchi in S.A. No. 96/2017 (Annexure-12), allowing it, has been set aside;

(iii) Quashing/setting aside the notice dated 09.07.2019 (Annexure19) issued in SARFAESI Case No. 4/2019-20 by the respondent Deputy Commissioner.

2. The petitioner No. 1 is Private Limited Company and petitioner No. 2 is its Director.

3. The relevant facts in brief are that the respondent- Bank granted credit facilities to the petitioner No.1-company through its Director. The loan was secured by mortgage of immovable property. Since the borrower failed to maintain the financial discipline, the account was classified as NPA on 01.05.2016 and the respondent- Bank initiated the proceedings for recovery of loan by issuing demand notice dated 27.07.2016 followed by possession notice dated 03.11.2016. The sale notice was issued on 30.01.2017 for auction of the mortgaged property, but the same could not be materialized. However, the second auction sale notice was issued on 06.09.2017 and published in the newspapers on 11.09.2017 scheduling the auction of the mortgaged property on 27.09.2017. As a result thereof, immovable property was sold for a sum of Rs.1,21,40,000/- and the sale certificate was duly issued on 13.10.2017 in favour of the auction purchaser who is respondent No. 2 herein.

4. Being aggrieved by e-auction notice dated 06.09.2017, the petitioners preferred an application under Section 17 of the SARFAESI Act on 12.10.2017 being S.A. No. 96 of 2017 praying inter alia that the borrowers are ready to pay the entire loan amount, the proceeding initiated vide e-auction notice dated 06.09.2017 under the SARFAESI Act is illegal, the Bank did not allow disbursal of entire loan amount and there is violation of Rule 8(1) of the SARFAESI Act as there has been no affixation of notice dated 03.11.2016 on the outer door at conspicuous place. Further, the petitioners also filed an amendment application challenging the sale and subsequently issued sale certificate in terms of e-auction notice dated 06.09.2017.

The said amendment application stood allowed by the learned DRT, Ranchi vide its order dated 18.10.2017. In the said SA, the Bank filed its objection on 30.10.2017. The learned DRT in view of the undertaking given the petitioners-Company directed the respondent-Bank to take Rs.28 lakhs which is intended to be paid by the borrower and the Bank was directed to hold the amount, if deposited, in a 'no lien account' till final disposal of SA. Accordingly, the petitioners deposited the said sum of Rs.28 lakhs before the Bank vide covering letter dated 24.10.2017. In view of aforesaid deposit made by the petitioners, the DRT vide its order dated 30.10.2017 directed for maintaining status quo. On 12.03.2018 the auction purchaser (respondent No.2 herein) filed his objection after becoming successful in auction, in delaying the proceeding for one or the other frivolous grounds. It has been contended by the auction purchaser that the petitioners were not entitled for redemption after issuance of sale certificate in

his favour by the Bank.

5. Learned counsel for the petitioners submitted that besides the property in question, the plant and machinery and other movable goods were also hypothecated with the Bank but the Bank has not proceeded for sale of plant and machinery and hypothecated goods, which were sufficient to satisfy the dues of the Bank. It was also contended that the sale of the part property was sufficient to liquidate the outstanding loan. Thus, the Bank has violated the provisions in selling the property for Rs.121.30 Lakhs for the outstanding amount of Rs.28 lakhs only. It has further been submitted by learned counsel for the petitioners that the property was taken on lease in the year 2007, whereas new regulations of Jharkhand Industrial Area Development Authority came in force in the year 2016, whereby the part sale was restricted. Thus, the regulations are not applicable in sale of property.

6. Learned counsel for the petitioners has also contended that by introducing an amendment in Sub-section 8 of Section 13 of the SARFAESI Act, 2002 with effect from 01.09.2016 right of redemption to the borrowers has been limited to the stage 'at any time before the date of publication of notice for public auction.... or private treaty for transfer by way of Sale of the secured assets' instead of earlier position which was to the effect 'at any time before the date fixed for sale or transfer'. The earlier position, pre-amendment, in Section 13(8) of the SARFAESI Act was similar to that contained in Section 60 of the Transfer of Property Act. The amendment introduced in the Act is ultra vires the Constitution of India. It has further been contended that the said amendment is also violative of Articles 14, 21 and 300A of the Constitution of India besides being arbitrary and discriminatory. The amendment caused two classes; one in which the mortgagor or lessee redemption right is lost merely on the issuance of notice of public auction and the other losing such right on other condition. Both sets of mortgagor are those, to whom mortgagee has lent money, which lending has been followed by failure in repayment. He has further contended that there is no intelligible differentia between the two classes and there is absence of nexus to achieve the object. He has further contended that the amendment in any case would not apply retrospectively to the cases of loan taken prior to the amendment. He has concluded his argument by saying that the learned Debts Recovery Appellate Tribunal (DRAT) has committed a gross error in allowing the appeal filed by the auction purchaser (respondent No.2 herein). Without deciding the contention raised by the petitioner, only on the ground that since after the amendment the borrower is required to tender the amount of dues together with all costs, charges and expenses to the creditor before the date of publication of notice for public auction and since in the instant case, the same notice was published on 11.09.2017, auction was held on 27.09.2017 and sale certificate was issued on 30.10.2017, no relief could be granted to the borrower. In support of his argument, he has relied on the decision passed by the Hon'ble Apex Court in the case of Sai Enterprises Vs. Bhimreddy Laxmaiah And Another reported in (2007) 13 SCC 576 at paragraph Nos. 8 and 9, which is quoted hereinbelow:

"8. Order 21 Rule 64 reads as follows: "64. Power to order property attached to be sold and proceeds to be paid to person entitled.-Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."

9. The provision contains some significant words. They are "necessary to satisfy the decree". Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See *Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma* [(1977) 3 SCC 337 : AIR 1977 SC 1789] .) In all execution proceedings, court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decreeholder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion but an obligation imposed on the court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. (See *Ambati Narasayya v.M. Subba Rao* [1989 Supp (2) SCC 693] .) The duty cast upon the court to sell only such portion or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in *S. Mariyappa v. Siddappa*[(2005) 10 SCC 253] . The position was also highlighted in *Balakrishnan v. Malaiyandi Konar* [(2006) 3 SCC 49] ."

He has further relied upon the decision passed in the case of *Dwarika Prasad Vs. State of Uttar Pradesh And Others* reported in (2018) 5 SCC 491 at paragraph Nos. 8, 9 and 10 as under:

" 8. Section 13(8) of the SARFAESI Act provides as follows:

"13. (8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset."

These provisions have fallen for interpretation before this Court in *Mathew Varghese* [*Mathew Varghese v. M. Amritha Kumar*, (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254] . Dwelling on Section 60 of the Transfer of the Property Act, 1882 this Court held that the right of redemption is available to a mortgagor unless it stands extinguished by an act of parties. The right of the mortgagor to redeem the property survives until there has been a transfer of the mortgagor's interest by a registered instrument of sale. Applying these principles in the context of the

SARFAESI Act this Court held as follows: (SCC p. 638, para 39)

"39. When we apply the above principles stated with reference to Section 60 of the TP Act in respect of a secured interest in a secured asset in favour of the secured creditor under the provisions of the SARFAESI Act and the relevant Rules applicable, under Section 13(1), a free hand is given to a secured creditor to resort to a sale without the intervention of the court or tribunal. However, under Section 13(8), it is clearly stipulated that the mortgagor i.e. the borrower, who is otherwise called as a debtor, retains his full right to redeem the property by tendering all the dues to the secured creditor at any time before the date fixed for sale or transfer. Under sub-section (8) of Section 13, as noted earlier, the secured asset should not be sold or transferred by the secured creditor when such tender is made by the borrower at the last moment before the sale or transfer. The said sub-section also states that no further step should be taken by the secured creditor for transfer or sale of that secured asset. We find no reason to state that the principles laid down with reference to Section 60 of the TP Act, which is general in nature in respect of all mortgages, can have no application in respect of a secured interest in a secured asset created in favour of a secured creditor, as all the above stated principles apply on all fours in respect of a transaction as between the debtor and secured creditor under the provisions of the SARFAESI Act."

9. In the present case, the appellant failed to comply with the provisions of Section 13(8). The statute mandates that it is only where the dues of the secured creditor are tendered together with costs, charges and expenses before the date fixed for sale or transfer that the secured asset is not to be sold or transferred. The appellant was aware of the proceedings initiated by the Bank for asserting its right to recover its dues by selling the property. The appellant moved the DRT in Securitisation Application No. 176 of 2015. During the pendency of those proceedings, orders were passed by the Tribunal on 1-2-2016 and 3-2-2016. The appellant moved the Allahabad High Court which by its order dated 9-3-2016 [Dwarika Prasad v. State of U.P., 2016 SCC OnLine All 2564] restrained the Bank and the auction-purchaser from executing the sale deed until 15-3-2016. The stay was extended till 28-3-2016 by which date the appellant was to deposit an amount of Rs 7,00,000. The balance was required to be deposited by 30-4-2016. While the appellant deposited an amount of Rs 7,00,000 with the Bank, he failed to deposit the balance in accordance with the provisions of Section 13(8). Even after the writ proceedings before the High Court were withdrawn, the appellant did not deposit the balance due together with the costs, charges and expenses. The sale was confirmed, a sale certificate was issued and a registered sale deed was executed on 12-4-2016. The appellant failed to ensure compliance with Section 13(8). The right to redemption stands extinguished on the execution of the registered sale deed. This is also the view which has been expressed in the judgment in Mathew Varghese[Mathew Varghese v. M. Amritha Kumar, (2014) 5 SCC 610 : (2014) 3 SCC (Civ) 254] .

10. The appellant, is however, entitled to a refund of his deposit of Rs 7,00,000 with interest at 9% per annum from the date of deposit till payment. The Bank has in its counter-affidavit stated that it was at all times ready and willing to do so. The Bank shall refund this amount of Rs 7,00,000 with interest at 9% per annum within 8 weeks. For the above reasons, save and except for the above direction to refund Rs 7,00,000 with interest, we find no merit in the appeal. The appeal shall accordingly stand disposed of. There shall be no order as to costs."

7. Per contra, the learned counsel for the auction purchaser vehemently opposed the prayer of the borrower/petitioner contending that after the amendment made in Section 13(8) of the SARFAESI Act with effect from 01.09.2016, the petitioner is having no case and as per the present Act, after the publication of notice of public auction, the borrower is having no right in the mortgage property and the learned DRAT has rightly appreciated the present provision of law and directed the Bank to hand over the possession of the immovable property in his favour. The learned counsel for the auction purchaser further contended that the prayer of the petitioner that the amendment is retrospective in nature and/or is ultra vires to the Constitution of India is misconceived as economic legislation is to be viewed with great latitude. He further referred the decision passed in the case of Dharani Sugars And Chemicals Limited Vs. Union of India And Others reported in (2019) 5 SCC 480.

8. Heard learned counsel for the petitioner/borrower, counsel for the respondent-Bank, and the counsel for the auction purchaser. From the entire records it appears that the learned DRT vide its order dated 22.03.2018 quashed the sale notice and the sale certificate dated 13.10.2017 on the ground of excessive execution. Being aggrieved by the said order quashing the sale notice and certificate, the auction purchaser filed an appeal before the learned DRAT which was registered as Appeal No. 62 of 2018. The learned DRAT allowed the appeal filed by the auction purchaser and set aside the judgment passed by the learned DRT and directed the respondent-Bank to take further necessary steps required for delivering the possession of immovable property to the auction purchaser. Being aggrieved by the said order passed by the learned DRAT, the petitioners filed the instant writ application.

9. For better appreciation of the instant case, section 13(8) of the SARFAESI Act is referred herein below:

"13(8) if the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor and no further step shall be taken by him for transfer or sale of that secured asset."

10. Thus as per the present provision of law, there is no ambiguity in the proposition that the entire payment must be paid by the borrower on or before the date fixed for sale or transfer and not beyond that date. From the aforesaid

section it clearly transpires that from the date of its incorporation i.e. with effect from 01.09.2016, the instant section will apply and section 13(8), the pre-amended, will not be enforced as nothing has been brought on record by the petitioner to show that the instant section will not be acted upon in the cases in which loan was granted prior to this amendment.

11. In the instant case, the petitioners have not been able to point out as to how there is any irrationality in the amendment. They failed to point out as to how the amendment is manifestly arbitrary. Much have been argued by the petitioner about the pre-amended section 13(8) of the SARFAESI Act but we failed to understand that he has not argued that how the amended provision i.e. Section 13 (8) is ultra vires to the Constitution of India.

12. It is a settled law that economic legislation is to be viewed with great latitude. The test of manifest arbitrariness must be something done by the legislature capriciously, irrationally and/or without adequate determining principle and when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary.

13. In the instant case, none of the point has been pointed out by the counsel for the petitioner. Further, in our considered opinion, the amendment has certainly been brought to prevent the delaying tactics of the borrower.

14. The instant case is one of the examples. In the instant case, the petitioner did not file any application till the date of sale notice i.e. after issuance of section 13(2) or section 13(4) notice of the SARFAESI Act, no objection was filed. It is only when sale certificate was issued on 30.10.2017, the petition was filed by the petitioner on 13.10.2017 which was decided on 18.10.2017. This clearly transpires that the petitioner was having the sole objective to delay and defeat justice. The Hon'ble Apex Court in the case of Dharani Sugars And Chemicals Limited Vs. Union of India And Others as reported in (2019)5 SCC 480 has held at paragraph Nos. 25 and 26 as under:-

"25. The petitioners have argued that the aforesaid Ordinance and Amendment Act are unconstitutional on two grounds;

(i) that the Sections introduced are manifestly arbitrary; and

(ii) that they suffer from absence of guidelines.

Insofar as the first challenge is concerned, this Court has, in a recent judgment in Swiss Ribbons [Swiss Ribbons (P) Ltd. v. Union of India, (2019) 4 SCC 17] , made it clear that economic legislation is to be viewed with great latitude. After referring to the Lochner era and its aftermath in para 7 of the aforesaid judgment, this Court referred to various judgments of this Court in para 8, and concluded as follows:

"120. The Insolvency Code is a legislation which deals with economic matters and, in the larger sense, deals with the economy of the country as a whole.

Earlier experiments, as we have seen, in terms of legislations having failed, "trial" having led to repeated "errors", ultimately led to the enactment of the Code. The experiment contained in the Code, judged by the generality of its provisions and not by so-called crudities and inequities that have been pointed out by the petitioners, passes constitutional muster. To stay experimentation in things economic is a grave responsibility, and denial of the right to experiment is fraught with serious consequences to the nation. We have also seen that the working of the Code is being monitored by the Central Government by Expert Committees that have been set up in this behalf. Amendments have been made in the short period in which the Code has operated, both to the Code itself as well as to subordinate legislation made under it. This process is an ongoing process which involves all stakeholders, including the petitioners."

It is in this background that legislation affecting the economy is to be viewed.

26. This Court, in *Shayara Bano v. Union of India* [*Shayara Bano v. Union of India*, (2017) 9 SCC 1 : (2017) 4 SCC (Civ) 277] has made it clear that Article 14 may be infringed by legislation on the ground of such legislation being manifestly arbitrary. This Court has said in this behalf:

"101. It will be noticed that a Constitution Bench of this Court in *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* [*Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India*, (1985) 1 SCC 641 : 1985 SCC (Tax) 121] stated that it was settled law that subordinate legislation can be challenged on any of the grounds available for challenge against plenary legislation. This being the case, there is no rational distinction between the two types of legislation when it comes to this ground of challenge under Article 14. The test of manifest arbitrariness, therefore, as laid down in the aforesaid judgments would apply to invalidate legislation as well as subordinate legislation under Article 14. Manifest arbitrariness, therefore, must be something done by the legislature capriciously, irrationally and/or without adequate determining principle. Also, when something is done which is excessive and disproportionate, such legislation would be manifestly arbitrary. We are, therefore, of the view that arbitrariness in the sense of manifest arbitrariness as pointed out by us above would apply to negate legislation as well under Article 14."

15. In view of the aforesaid facts and discussions and judicial pronouncements, the petitioners have failed to point out any error in the order passed by the learned DRAT so as to warrant any interference by this Court. The decisions relied by the learned counsel for the petitioners is of pre-amended era of 13(8) of SARFAESI Act, and hence is not applicable to the facts of the instant case. We, hereby, hold that section 13 sub-section 8 of the SARFAESI Act is *intra vires*. There is no arbitrariness and the same is also not irrational and/or excessive and disproportionate. We further hold and declare that the amended section 13(8) of SARFAESI Act shall also govern the cases in which, loan were granted prior to the date of amendment, because of the obvious reason that the action under the SARFAESI Act has nothing to do with the grant of loan as the cause of action is

with the issuance of notice under the SARFAESI Act, as such by no stretch of imagination it can be said that the present section 13 (8) of the SARFAESI Act will not apply in cases where the loan was granted to the borrower prior to the amendment and this contention of the petitioner is wholly misconceived.

16. As a result thereof, this writ application is dismissed with no order as to costs.

17. The respondent-Bank is directed to take further necessary steps required for delivering the possession of immovable property to the auction purchaser.