

(2017) 10 AHC CK 0005
In the Allahabad High Court
Case No : 46425 of 2017

M/S Kanika Swami

APPELLANT

Vs

State Of U.P. And 2 Others

RESPONDENT

Date of Decision : 11-10-2017

Acts Referred:

Constitution of India, Article 226, Article 227 - Power of High Courts to Issue certain writs - Power of superintendence over all courts by the High Court
Transfer of Property Act, 1882, Section 69, Section 69-A - Power of sale when valid
Recovery of Debts Due to Banks and Financial Institutions Act, 1993, Section 20, Section 20 - Appeal to the Appellate Tribunal
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, Section 13, Section 18, Section 17(1), Section 17, Section 13(2), Section 13(4), Section 13(13-A) - Enforcement of security interest - Appeal to Appellate Tribunal - Right to appeal - Right to appeal - Enforcement of security interest - Enforcement of security interest - Enforcement of security interest
Security Interest (Enforcement) Rules, 2002, Rule 4, Rule 6, Rule 8 -
State Financial Corporations Act, 1951, Section 29 - Right of Financial Corporation incase of default

Citation : (2017) 10 AHC CK 0005

Hon'ble Judges : Bharati Sapru, Siddharth

Bench : Division Bench

Advocate : Ratnesh Kumar Srivastava, Sanjai Singh

Judgement

1. Heard Shri Ratnesh Kumar Srivastava, learned counsel for the petitioner, learned Standing counsel for the respondent No.1 and Shri Sanjai Singh, learned counsel for the respondent Nos. 2 and 3.

2. The above noted writ petition has been filed by the petitioner praying for

quashing of the possession notice dated 26.9.2017 issued under Section 13(4) of the Secularization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "SARFAESI Act, 2002").

3. The brief facts of the present petition are that the petitioner availed cash credit facility from the respondent No. 2 for setting up the business of trading of LED Bulb through a firm in the name and style of " M/s Kanika Swami" situated at Swami Pada Aggrawal Complex, Chandan Bhawan, Meerut.

4. The petitioner has stated that the above noted credit facility was accorded to her by the bank on 30.9.2016 for a limit of Rs.93,00,000/-. Due to demonetization goods purchased by her could not be sold out and after the enforcement of Goods and Service Tax (GST), her business further suffered losses and her account with the respondent No. 2 became irregular.

5. The respondent No.2, bank issued a notice under Section 13 (2) dated 05.07.2017 under SARFAESI Act, 2002 for payment of the outstanding dues of Rs.96,35,,532.00 and then the impugned possession notice dated 26.9.2017 has been issued by the bank under Section 13 (4) of the SARFAESI Act, 2002 read with Rule 8 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "Rules" only).

6. The petitioner has stated that she is willing to deposit Rs.3,50,000/- but the bank is not accepting the same and she is willing to pay the balance amount for regularization of her account in the respondent-bank.

7. The learned counsel for the respondent No.2, Sri Sanjai Singh, has argued that against the possession notice dated 26.9.2017 issued by the bank under Section 13(4) of the SARFAESI Act, 2002, the petitioner has efficacious and alternative remedy under Section 17(1) of the SARFAESI Act, 2002 and this Hon"ble Court should not interfere with the proceedings of recovery initiated by the bank against the petitioner. He has further submitted that after the notice dated 05.7.2017 issued by the bank, under Section 13 (2) of the SARFAESI Act, 2002, the petitioner did not turn up to clear her liability and, therefore, after the expiry of period of 60 days given in the notice, the bank has proceeded to take possession of the property under Section 13, Sub Clause (4) of the SARFAESI Act, 2002 and the petitioner is unable to point out any illegality in the same. He has further stated that since the account of the petitioner has been declared Non Performing Asset (NPA) by the Bank as per the prudential norms of Reserve Bank of India, therefore, unless outstanding dues are cleared, the account of the petitioner cannot be regularized.

8. We have given thoughtful consideration to the rival submissions made at the bar. Before we examine the submissions made at the bar, a brief look at the purpose of enactment of SARFAESI Act, 2002 may be useful.

9. The accumulation of the "Non-Performing Assets" (NPAs), a glorified terminology used in the banking circles to refer to "bad loans", has always been

an eye sore for the banks. The prudential norms applicable to banking companies stipulate the stage at which an asset should be classified as an NPA. The prudential norms require the banks to categorize NPAs and make provisions accordingly.

10. The enactment of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (RDB Act) is a watershed event. Banks and other lending institutions have had enough in the prolonged litigations before civil courts. Alarming level of NPAs in the country paved way for the establishment of "Debts Recovery Tribunals (DRT). The DRTs offer a simple and speedy recovery mechanism.

11. Despite establishment and decade of operations of DRTs, banks and financial institutions felt the need for direct enforcement mechanism in certain cases without intervention by courts. As per Sections 69 and Section 69-A of the Transfer of Property Act, 1882 only an English Mortgage could be enforced without court intervention. Section 29 of the State Finance Corporation Act, 1951 empowered State Finance Corporations (SFCs) to enforce their security without intervention by courts. Such a measure was considered to be essential for recovering dues from borrowers who are wilful defaulters.

12. The Committees constituted by the Central Government, inter alia, for dealing with Recovery of Debts were unanimous in providing powers to the banks to takeover the securities provided to them and to realize the dues without the intervention of the courts as a means for the reduction of the monies locked up a NPAs. This has resulted in the drafting of the Secularization and Reconstruction of Financial Assets and Enforcement of the Security Interest Bill which was promulgated as an ordinance twice by the President of India before it finally became an Act on 21st day of June, 2002.

13. Adverting to the case in hand, it is clear from the pleadings on record, that the account of the petitioner has been classified as NPA on account of her failure to maintain financial discipline in the operation of her cash credit account with respondent-bank. The respondentbank has initiated proceedings for recovery as per the provisions of SARFAESI Act, 2002 against the petitioner in its normal course of business. As per the judgment of the Apex Court in the case of United Bank of India Vs. Satyawati Tandon and other (2010) 8 SCC 110 the remedy of the petitioner against the proceedings under Section 13 (4) of the SARFAESI Act, 2002 lies before Debts Recovery Tribunal under Section 17 of the SARFAESI Act, 2002. Earlier, in the case of Mardia Chemical Ltd. Vs. Union of India (2004) 4 SCC 311, the Apex Court had already held that the borrower can challenge the action of the secured creditor taken under Section 13 (4) of the SARFAESI Act, 2002 by filing an application under Section 17 (1) of the Act itself.

14. A Constitution Bench of the Apex Court in K.S. Rashid & Sons Vs. Income Tax Investigation Commission, AIR 1954 SC 207 held that Article 226 of the Constitution of India confers on all the High Courts very wide powers in the

matter of issuing writs. The said powers are limited. However, the remedy of writ is an absolutely discretionary remedy and the High Court always has the discretion to refuse to grant any writ if it is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere. Similar view has been reiterated by the Apex Court in the case of Sangram Singh Vs. Election Tribunal, Kotah, AIR 1955 SC 425 holding that the power of issuing writs shall not be exercised unless substantial injustice has been caused or likely to be caused and in other cases the parties must be relegated to the course of appeal or revision to set right mere errors of law which do not occasion injustice in a broad and general sense.

15. Again a Constitution Bench of Supreme Court in the case of Union of India Vs. T.R. Varma, AIR 1957 SC 882, held that when an alternative and equally efficacious remedy is open to a litigant, he should be required to pursue that remedy and not invoke the special jurisdiction of the High Court to issue a prerogative writ. The Apex Court held that existence of another remedy does not affects the jurisdiction of the High Court to issue a writ, but the existence of an adequate legal remedy is a thing to be taken into consideration before grant of writs, where the statutory remedy has not been exhausted.

16. Similar view has been taken in the case of Thansingh Nathmal and others Vs. A. Mazid Superintendent of Taxes, AIR 1964 SC 1419.

17. In Panjab National Bank Vs. O.C. Krishnan, AIR 2001 SC 3208, the Supreme Court while considering the provision of appeal under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 held that the special act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions and it cannot be derailed by taking recourse to proceedings under Articles 226 and 227 of the Constitution and the High Court should refrain from exercising its jurisdiction.

18. It is settled law that writ does not lies merely because it is lawful to do so. A person should exhaust statutory/alternative remedy available to him in law prior to it. (Rajasthan State Industrial and Investment Corporation and another Vs. Diamond and Gem Development Corporation Ltd., AIR 2003 SC 1241).

19. In view of the above legal position, the writ petition filed by the petitioner cannot be entertained by this court.

20. It is further notable that the invoking of the jurisdiction of the High Court by the defaulters of the banks and financial institutions against the proceedings under SARFAESI Act, 2002 is not in their larger interest since in most of the cases, the petitioner offers to deposit the amount in installments and in the process, they admit the outstanding liability without any demur before this Court. It is detrimental to the interest of the borrowers and guarantors in the long run since the scope of Section 17 of the SARFAESI Act, 2002 is akin to a court of appeal competent to go into the questions of facts and law, both, for the first time, at the behest of the borrower, or the guarantor, against the action taken by the secured creditor.

21. The SARFAESI Act, 2002 casts a heavy burden on the secured creditor of proceeding with the recovery against the borrower with strict compliance of the provisions of the act. The relevant provisions of Section 13 are as follows:- "13. Enforcement of security interest.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as nonperforming asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub section (4).

[Provided that-

(i) the requirement of classification of secured debt as nonperforming asset under this subsection shall not apply to a borrower who has raised funds through issue of debt securities; and].

(ii) in the event of default, the debenture trustee shall be entitled to enforce security interest in the same manner as provided under this section with such modifications as may be necessary and in accordance with the terms and conditions of security documents executed in favour of the debenture trustees],

(4) In case the borrower fails to discharge his liability in full within the period specified in subsection (2), the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

[(b) take over the management of the business of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset:

Provided that the right to transfer by way of lease, assignment or sale shall be exercised only where the substantial part of the business of the borrower is held as security for the debt:

Provided further that where the management of whole of the business or part of the business is severable, the secured creditor shall take over the management of such business of the borrower which is relatable to the security for the debt;]

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money

as is sufficient to pay the secured debt."

22. A perusal of the above provisions of the Act prove that starting point of the proceedings for recovery under the SARFAESI Act, 2002 is classification of the account of the borrower as NPA as per the prudential norms of the Reserve Bank of India. The inquiry into the correctness and manner of classification of the account of borrower as NPA by the secured creditor by going through the operation of the account of the borrower cannot be done under Article 226/227 of the Constitution of the India by the High Court. It requires scrutiny of the manner of operation of account by the borrower and compliance of prudential norms of RBI by the secured creditor is classifying it as N.P.A.

23. Further perusal of the above provisions of the act shows that the notice under Section 13 Sub Clause (2) of the SARFAESI Act, 2002 is issued by the secured creditor to the borrower after his account gets classified as NPA. The borrower is required to discharge his full liabilities within 60 days from the date of notice failing which the secured creditor becomes entitled to exercise all or any of the rights under Section 13 Sub Clause (4). Therefore, the secured creditor is bound by law to wait for 60 days before exercising any of his right under Section 13, Sub Clause (4) of the SARFAESI Act, 2002.

24. Further Rule 4 of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as "Rules") provides that Authorized Officer of the secured creditor is required to take possession of movable property of the borrower in the presence of two witnesses after a panchnama drawn and signed by witnesses as clearly as possible in Appendix I of these rules.

25. Secondly, after taking possession under Rule 4 of the Rules of the movable assets, the authorized officer shall make or caused to be made an inventory of the property as clearly as possible in the form given in Appendix II of these rules and deliver or caused to be delivered a copy of such inventory to the borrower, or to any person entitled to receive on behalf of the borrower.

26. Thirdly, the borrower shall be intimated by a notice enclosing the panchanama drawn in Appendix I and the inventory in Appendix IV.

27. Fourthly, all the notices under these Rules may also be served through electronic mode of service in addition to the modes specified under Rule 3.

28. Fifthly, the authorized officer is required to keep the property taking in possession either in his own custody or in the custody of any person authorized or appointed by him, who shall take as much care of the property as the owner himself. Similarly, detailed procedures have been provided under Rule 8 Sub Clauses (i) (ii) (iii) (iv) & (v) of the Security Interest (Enforcement) Rules, 2002 regarding the immovable secured assets, regarding their possession by the secured creditor. Publication of notices in two leading newspapers intimating the factum of possession and service of notice through electronic mode on the borrower in addition to the other modes is also provided. Regarding the sale of

the movable and immovable secured assets, the provisions have been made in Rules 6 and 8 of the aforesaid Rules which are as under:- 6. Sale of movable secured assets. (1) The authorised officer may sell the movable secured assets taken possession under subrule (1) of rule 4 in one or more lots by adopting any of the following methods to secure maximum sale price for the assets, to be so sold--

(a) obtaining quotations from parties dealing in the secured assets or otherwise interested in buying such assets; or

(b) inviting tenders from the public ; or

[(c) holding public auction including through e-auction mode; or]

(d) by private treaty.

(2) The authorised officer shall serve to the borrower a notice of thirty days for sale of the movable secured assets, under subrule (1):

Provided that if the sale of such secured assets is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers, one in vernacular language, having sufficient circulation in that locality by setting out the terms of sale, which may include,--

(a) details about the borrower and the secured creditor;

(b) description of movable secured assets to be sold with identification marks or numbers, if any, on them;

(c) reserve price, if any, and the time and manner of payment;

(d) time and place of public auction or the time after which sale by any other mode shall be completed;

(e) depositing earnest money as may be stipulated by the secured creditor;

(f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of movable secured assets.

[Provided further that if sale of movable property by any one of the methods specified under subrule (1) fails and the sale is required to be conducted again, the authorised officer shall serve, affix and publish notice of sale of not less than fifteen days to the borrower for any subsequent.]

(3) Sale by any methods other than public auction or public tender, shall be on such terms as may be settled [between the secured creditors and the proposed purchaser].

8. Sale of immovable secured assets(1) Where the secured asset is an immovable property, the authorised officer shall take or cause to be taken

possession, by delivering a possession notice prepared as nearly as possible in AppendixIV to these rules, to the borrower and by affixing the possession notice on the outer door or at such conspicuous place of the property.

(2) The possession notice as referred to in subrule (1) shall also be published, as soon as possible but in any case not later than seven days from the date of taking possession, in two leading newspapers, one in vernacular language having sufficient circulation in that locality, by the authorised officer.

[(2A) All notices under these rules may also be served upon the borrower through electronic mode of service, in addition to the modes prescribed under subrule (1) and subrule (2) of rule 8.]

(3) In the event of possession of immovable property is actually taken by the authorised officer, such property shall be kept in his own custody or in the custody of any person authorised or appointed by him, who shall take as much care of the property in his custody as an owner of ordinary prudence would, under the similar circumstances, take of such property.

(4) 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.

(5) Before effecting sale of the immovable property referred to in subrule (1) of rule 9, the authorised officer shall obtain valuation of the property from an approved valuer and in consultation with the secured creditor, fix the reserve price of the property and may sell the whole or any part of such immovable secured asset by any of the following methods:--

(a) by obtaining quotations from the persons dealing with similar secured assets or otherwise interested in buying the such assets; or

(b) by inviting tenders from the public;

(c) by holding public auction including through e-auction mode; or

(d) by private treaty.

[Provided that in case of sale of immovable property in the State of Jammu and Kashmir, the provisions of Jammu and Kashmir Transfer of Property Act, 1977 shall apply to the person who acquires such property in the State.]

(6) The authorised officer shall serve to the borrower a notice of thirty days for sale of the immovable secured assets, under subrule (5):

Provided that if the sale of such secured asset is being effected by either inviting tenders from the public or by holding public auction, the secured creditor shall cause a public notice in two leading newspapers; one in vernacular language having sufficient circulation in the locality by setting out the terms of sale, which shall include,--

- (a) the description of the immovable property to be sold, including the details of the encumbrances known to the secured creditor;
 - (b) the secured debt for recovery of which the property is to be sold;
 - (c) reserve price, below which the property may not be sold;
 - (d) time and place of public auction or the time after which sale by any other mode shall be completed;
 - (e) depositing earnest money as may be stipulated by the secured creditor;
 - (f) any other thing which the authorised officer considers it material for a purchaser to know in order to judge the nature and value of the property.
- (7) Every notice of sale shall be affixed on a conspicuous part of the immovable property and may, if the authorised officer deems it fit, put on the website of the secured creditor on the Internet.
- (8) Sale by any method other than public auction or public tender, shall be on such terms as may be settled between the parties in writing.

29. A perusal of the above provisions of the SARFAESI Act, 2002 and the Security Interest (Enforcement) Rules, 2002 clearly prove that the sufficient checks have been imposed upon the secured creditor while proceeding with the possession and sale of the secured assets of the borrower. When the action of the secured creditor is challenged by the borrower under Section 17 (1) of the SARFAESI Act, 2002, the secured creditor is required to prove the compliance of all the mandatory provisions of the Act and the Rule before the Debt Recovery Tribunal. If any of the requirements of Act and the Rule is not found to be complied by the Debt Recovery Tribunal, the action of the secured creditor fails against the borrower.

30. The SARFAESI Act, 2002 is a strict act which requires strict compliance of the provisions provided therein and any deviation in compliance of the provisions renders the action of the secured creditor bad and unsustainable. The Debt Recovery Tribunal is fully empowered to go into the record of the secured creditor regarding the compliance of the provisions of the Act and Rule and the borrower gets an opportunity to see the record of the proceedings initiated and conducted by the bank against him in recovery of debt from him before the Debts Recovery Tribunal.

31. In the writ petitions filed under Article 226 of the constitution before the High Court, the borrower never gets the opportunity to rebut the action taken by the secured creditor against him and by accepting the liability alleged by the secured creditor, he gets estopped from raising any objection against the action of the secured creditor, in future, since he admits the liability and thereby ratifies all the actions done by the secured creditor against the borrower. Therefore, the remedy under Section 17 of the SARFAESI Act, 2002 before the Debts Recovery Tribunal is a broad remedy available to the borrower/guarantor vis-a-vis the jurisdiction

of the High Court under Articles 226 and 227 of the Constitution and he has further opportunity to file further appeal under Section 18 of the Debt Recovery Appellate Tribunal against the order of Debts Recovery Tribunal in case he fails to get any relief under Section 17 of the SARFAESI Act, 2002 from the Debts Recovery Tribunal. The remedy of appeal under Section 18 of the SARFAESI Act, 2002 also eludes a borrower who approaches the High Court under Article 226/227 of the Constitution of India directly against the proceedings under SARFAESI Act, 2002 where the scope of inquiry regarding the action of the secured creditor is very limited. The remedy under Article 226/227 of the Constitution is still available to the borrower after exhaustion of remedies under the SARFAESI Act, 2002.

32. The Apex Court has interfered and disapproved the action of the secured creditor in proceeding under the SARFAESI Act, 2002 in the case of Mathew Varghese Vs. M. Amritha Kumar and others (2014) 5 SCC 610 ; J. Rajiv Subramaniam and another Vs. Pandiyas and others (2014) 5 SCC 651. In Mathew Varghese (supra), the Supreme Court disapproved the action of the secured creditor of not notifying the borrower afresh of 30 days clear individual notice of the fresh date of sale after the first sale could not take place and held that the subsequent sale was invalid. Oasis Dealcom Pvt. Ltd. Vs. Khazana Dealcom Pvt. Ltd., (2016) 10 SCC 214.

33. In J. Rajiv Subramaniam and another (supra), the sale of the secured assets conducted by the secured creditor by means of a private treaty as required by Rule 8(8) of Rules, 2002 was set aside being violative of the Rule.

34. In the present case, the petitioner has not made any representation under Section 13 (13-A) of the SARFAESI Act, 2002 before the bank and has approached this Court by-passing statutory mechanism which has been disapproved by the Supreme Court in the case of Devi Ispat Limited and another Vs. State Bank of India and other (2014) 5 SCC 762.

35. Therefore, in view of the legal position stated above this writ petition is being dismissed on the ground of alternative remedy available to the petitioner under Section 17 of the SARFAESI Act, 2002.

36. There shall be no order as to costs.