(2016) 04 BOM CK 0187

In the Bombay High Court

Case No : Writ Petition No.770 of 2016

M/s. Mour Marbles Industries Pvt. Ltd. APPELLANT

Vs

Bank of India RESPONDENT

Date of Decision : 05-04-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4)

Citation : (2016) 5 AIRBomR 351

Hon'ble Judges : S.C. Dharmadhikari and G.S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Mr. Pravin Samdani, Senior Counsel with Mr. Mayur Khandeparkar & Mr. M.G. Agre i/by Mr. Girish B. Kedia, Advocates, for the Petitioner; Mr. S.U. Kamdar, Senior Counsel with Mr. O.A. Das, Advocate, for the Respondent No. 1 Bank; Mr. Nitin Thakkar, Senior C

Final Decision : Allowed

Judgement

S.C. Dharmadhikari, J.(Oral)—This petition under Article 226 of the Constitution of India is directed against an interim order which has been passed on 25-2-2016 by the Presiding Officer of the Mumbai Debts Recovery Tribunal-III, below Exhibit 01 in Securitisation Application No.77 of 2016.

2. Since we have extensively heard the senior counsel appearing for the parties and perused the pleadings with their assistance, we formally admit this petition. Rule. All respondents waive service. With their consent, we pass this final order.

3. This order shall be taken as continuation of the earlier directions issued by us, but so as to complete the chain of events we are narrating some essential facts.

4. The petitioners before us are a private limited company and its shareholders/ Directors. They had availed of various credit facilities from the first respondent-Bank and created mortgage and hypothecation in respect of the properties, more particularly described in the Schedule annexed and marked as Annexure-A to the

securitisation application.

5. The first respondent to this petition is the Bank of India, which is a nationalised Bank and the second respondent is its authorised officer. The third respondent is the auction purchaser and claiming to have a right vested in him by virtue of a concluded sale of the immoveable property.

6. The petitioners received a notice under section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short, "Sarfaesi Act") dated 3-4-2014. The amount demanded thereunder is Rs. 10,83,80,819/. The petitioners claim to have paid Rs. 90.26 lakhs after receipt of this notice.

7. Be that as it may, we are not concerned with the factual materials as the matter is still pending before the Debts Recovery Tribunal, Mumbai. The petitioners claim to have made a proposal for settlement and on receipt of the same the respondent-Bank, through its officer, has sought to take formal possession in respect of residential premises at Vile Parle, Mumbai and factory premises on 30-4-2015 and 14-5-2015.

8. Thereafter, some meetings are stated to have been held and the settlement proposal was followed by another letter of 9-5-2015, under which a sum of Rs. 1,00,00,000/- was deposited/paid by the petitioners through a wellwisher. The petitioners'' proposal was pending and there was some correspondence. Eventually, on 19-9-2015 a communication from the Bank, copy of which is at page 45 of the paper book, was received and which, according to the petitioners, stipulates the amount and dates of payment. The last instalment of Rs. 300 lakhs and interest @ 9.95% simple from 15-9-2015 had to be paid by 31-3-2016. Thereafter, a postdated cheque was to be submitted for balance One Time Settlement (OTS) amount on acceptance of the letter. Thus, the Bank informed the petitioners that the compromise offer of Rs. 10.50 crores towards the settlement is accepted by the Competent Authority on the terms and conditions stated in this letter. This letter itself is addressed without prejudice.

9. The petitioners state that they were in the process of arranging funds. They were raising funds by meeting some prospective purchasers and they admitted that they could not release the instalments as per the letter dated 19-9-2015, but they were ready and willing to pay the compromise amount along with interest for the delayed period on or before 31-3-2016.

10. In the meanwhile, action under Section 14 of the Sarfaesi Act was initiated by filing an application to the Collector & District Magistrate, Diu and Daman at Silvassa. The petitioners are also not disputing that a letter was addressed by the Bank on 23-11-2015 (page 46 of the paper book) informing them that if the petitioners failed to pay the stipulated amount of Rs. 200 lakhs within seven days from the date of receipt of that letter, their compromise proposal will stand revoked and necessary recourse for recovery of dues will be taken.

11. The petitioners state that they made necessary attempts but the Bank was unwilling to accommodate them. In the meanwhile, on 11-1-2016 a notice under Rule 8(6) of the Sarfaesi Rules was issued in respect of the land and building and factory premises along with open plot of land situated at Village Naroli, Dadra & Nagar Haveli, Silvassa. ExhibitJ to the paper book is a copy of this notice. The petitioners also relied on a public notice issued on 15-1-2016, and particularly para 2 thereof to claim that physical possession was not taken by the Bank in accordance with law, they were intending to dispose of the property and invited bids and proposal for the same. The petitioners claim that they objected to this e-auction, scheduled on 15-2-2016, by their letter dated 4-2-2016 and asserted that the physical possession having not been taken, they would be in a position to clear the dues, as agreed, on or before 31-3-2016. Then reliance is placed upon a letter dated 6-2-2016, copy of which is at page 54 of the paper book, and it states that since the petitioners have failed to abide by the terms and conditions of the OTS, that one time settlement proposal is rejected/the offer in that behalf is revoked. Nothing, therefore, binds the Bank. However, reliance is placed on para 5 of this letter which, according to the petitioners, gave them time to pay the dues till 14-2-2016.

12. The petitioners claim that despite their readiness and willingness, the Bank purported to go ahead with the e-auction. The Bank has failed to respond to the petitioners'' letter dated 16-2-2016. The petitioners also relied upon a personal visit to the Bank. They also relied upon some arrangement which the Bank Officer suggested of opening another account in the Sion Branch of the Bank and to deposit the amount in separate Savings Account of the said Bank and upon the offer of one time settlement being revived and/or considered, the amount will be accepted by the Bank. The petitioners assert that despite earlier letters the petitioners were allowed to open such a Bank account and they have deposited therein a sum of Rs. 5 crores on 23-2-2016, much prior to the impugned order.

13. It is in these circumstances, that the petitioners filed the securitisation application on 22-2-2016 and an affidavit-in-reply was filed by the Bank to the same in which the Bank claimed that it has sold the factory premises along with the plant and machinery of the petitioners for Rs. 5,42,84,000/- and the open piece of land for Rs. 1,98,90,000/- and the purchasers have paid the entire consideration of Rs. 5,42,84,000/- and part payment in respect of the open land. Exhibit-O is a copy of this reply. Thereafter, there is a further affidavit filed by the Bank and in which, according to the petitioners, the Bank disclosed the valuation of the properties. The petitioners complain that though as per the OTS proposal the amount is Rs. 9,50,00,000/- and interest @ 9.95% p.a. for the delayed payment, a sum of Rs. 5 crores having been deposited, the Bank acted unreasonably and unfairly. The Presiding Officer, in these circumstances, should have protected the petitioners. More so, when the physical possession of the immoveable properties is still with the petitioners and the same has not been obtained.

14. When this petition was moved on the earlier occasion, namely, on 8-3-2016, we heard the counsel appearing for the parties and recorded that a sale certificate which was to be issued has not been issued. It could not have been issued till 18-3-2016. That is how the petitioners request to continue the order of protection against dispossession was granted.

15. After having considered this request and noted the statement of Mr. Samdani, learned senior counsel appearing for the petitioners, that the Bank can utilise and credit the sum kept in a no lien account by the petitioners, namely, a sum of Rs. 5 crores and the Bank would not be bound by any condition imposed by the petitioners on it, each of such conditions are given up as not pressed. This Court also recorded the statement of Mr. Samdani, that on or before 15-3-2016 the petitioners would be depositing a sum of Rs. 1.5 crores with the Bank of India. It is on this basis that the direction not to issue sale certificate and no steps be taken to dispossess the petitioners was issued. That direction was issued in terms of the order passed on 8-3-2016, and particularly para 8 thereof.

16. On 23-3-2016 we noted the request of the parties that the Chairperson of the Debts Recovery Appellate Tribunal, Mumbai, is not available. If the petitioners desire to approach that Tribunal, even then the appointment of such Chairperson being not notified, the request to continue the protection in terms of the earlier order was considered. The petitioners were to deposit a sum of Rs. 3.47 crores in this Court on or before 2-4-2016.

17. The matter was posted today.

18. Today, we are informed by Mr. Samdani, learned senior counsel appearing for the petitioners, that a sum of Rs. 3.47 crores has been deposited by a Pay Order drawn in the name of the Prothonotary & Senior Master. Mr. Samdani has submitted that the order passed by the Presiding Officer is erroneous on facts and in law. The learned Presiding Officer should have appreciated that there is no compliance with Section 13(8) of the Sarfaesi Act, inasmuch as no physical possession was taken by the Bank before the sale was announced. He next submitted that as far as the earnest money instalments are concerned, the determination thereof is against a distress value. The sale itself is not held in pursuance of the Rules nor there is a valuation obtained of the immoveable properties, as also the moveables. Thus, unless physical possession is taken, there could have been any sale and assuming, without admitting, that the same could have been announced, in any event, the sale without prior valuation is bad in law. He also submits that the conduct of the Bank is such that even though the sale certificate has not been issued, it having been restrained from taking physical possession of the properties, it does not wish to allow the petitioners to redeem the mortgage debt. Although the petitioners have brought in Rs. 10.97 crores, which is the original OTS amount, the petitioners would also arrange to deposit a sum of Rs. 69.97 lakhs, which is the amount said to have been sacrificed by the Bank. That would be deposited and conditional upon the same the petitioners should be protected, meaning thereby, the ad interim protection

by this Court should be continued till the matter is decided by the Debts Recovery Tribunal.

19. Mr. Kamdar, learned senior counsel appearing for the respondent-Bank submitted that writ jurisdiction cannot be utilised to claim revival of a one time settlement proposal, which has been revoked by the Bank as far back as on 23-11-2015. It has now come to an end. The petitioners are, admittedly, defaulters. The defaulters cannot now insist on an opportunity being given to them to redeem the mortgage debt, that could not have been sought in the light of Section 13 of the Sarfaesi Act, and particularly the language of subsection (8) thereof. Mr. Kamdar emphasised that if the dues of the secured creditors together with costs, charges and expenses incurred are secured at any time before the date fixed for sale or transfer, the secured assets shall not be sold or transferred by the secured creditors and no further steps shall be taken by him for transfer or sale of that secured assets. Mr. Kamdar submits that there were two valuation reports which were obtained. The petitioners whole conduct should be evaluated wherein instead of abiding by the terms and conditions of the OTS, they deposit a sum in a no lien account, and that too much after the revocation date. Once the sale is concluded, there is no question of redemption of the debt. Now only a formal act remains to be completed. There is no right in the property upon confirmation of the sale. Mr. Kamdar has submitted that if defaulters are allowed to utilise the Court process in this manner, that would send a wrong message. Once the Bank is making a sincere and genuine effort to recover huge amounts which are outstanding and payable, then, this Court in its writ jurisdiction should not intervene.

20. Mr. Kamdar has also relied upon the affidavit filed in reply to the petition, as also the additional affidavit tendered today. Mr. Kamdar submits that by the additional affidavit, the petitioners'' attempt to now revive the OTS proposal has been turned down. Mr. Kamdar submits that an interim order has been passed by the Presiding Officer and which is based on relevant and germane factors. There is no prima facie case in favour of the petitioners nor is there any balance of convenience. The Bank and the purchaser will suffer irreparable loss and injury if this Court were to intervene in its discretionary, equitable jurisdiction at such a belated stage. Consequently, the writ petition be dismissed.

21. Mr. Thakkar, learned senior counsel appearing for respondent No.3 auction purchaser relies upon a Judgment of the Hon''ble Supreme Court in the case of Sagar Mahila Vidyalaya, Sagar v. Pandit Sadashiv Rao Harshe and others, reported in (1991) 3 SCC 588 to submit that now the sale stands concluded and confirmed. The issuance of a sale certificate in favour of the auction purchaser is mandatory but the granting of this certificate is a ministerial act and not a judicial one. In such circumstances, no extension can be granted of time to redeem the debt. The facts as on the date of the sale are relevant and once this indicate that all opportunities to settle the dues of the Bank are offered but they were not available, then, the OTS cannot be revived. Then the auction

purchaser''s right also deserves to be protected. For these reasons, he submits that the petition be dismissed.

22. We have extensively considered these contentions only because the petitioners had no opportunity to challenge the interim order of the Presiding Officer in appeal before the Debts Recovery Appellate Tribunal. Though such a Tribunal is in existence at Mumbai, presently it is without any Chairperson. We have impressed upon the Government in distinct proceedings that in a City like Mumbai it is extremely important that appointment to the post of Chairperson should be made well in advance. If it is anticipated on account of illness or death of a Chairperson holding the office, then within a reasonable time of such an event steps ought to be taken and the Chairperson appointed. We are assured by none other than the learned Additional Solicitor General in those proceedings that steps would be taken to appoint a regular Chairperson and in the absence thereof, the learned Chairperson from the other Debts Recovery Appellate Tribunal would hold a sitting in Mumbai to dispose off urgent cases. Unfortunately, that Chairperson has also demitted office. Presently, the Debts Recovery Appellate Tribunals at Mumbai, Delhi and Chennai are stated to be without such Chairperson and the selection process is on but the appointment is yet not notified. It is in these circumstances, that any ad hoc tentative arrangement in the present matter is bound to prejudice the parties. Once the remedy under Section 18 of the Sarfaesi Act is not available in the above circumstances, then, it would not be proper for us to express any conclusive opinion on the rival contentions.

23. However, it is important to bear in mind and the learned Presiding Officer appears to have missed the same that this is a case where prima facie arguable issues have been raised. The learned Presiding Officer had before him affidavits and pleadings and he has passed an eight page interim order. Rather he would have been well advised to dispose off the proceedings themselves and finally. He could have by the process that we are now contemplating balanced the rights and equities.

24. The issues that arise for consideration are that there was admittedly a default by the petitioners, but the Bank was ready and willing to consider, without prejudice to its legal rights, a one time settlement proposal. That was conditional. The terms and conditions thereof are set out in a communication to the petitioners and equally the OTS amount is determined. That was to be cleared in instalments. The Bank, on 23-11-2015, revoked this proposal and which was in any event, according to it, conditional. Even thereafter what we find is and as rightly emphasised by Mr. Samdani, correspondence has been entertained at the behest of the petitioners and the petitioners were informed that if they abide by their statements made earlier and make arrangement to deposit an amount by 16-2-2016, no steps would be taken in pursuance of the notice under Section 13(2) of the Sarfaesi Act. The physical possession of the immoveable property was not taken, and undisputedly. As to what impact can it

have on a sale and which was conducted on account of the alleged default of the petitioners will have to be considered by the Tribunal and finally. Whether the petitioners are right in their contention that the sale cannot be announced and finalised when such physical possession of the immoveable property is not taken, or whether the Bank is not required to take such steps, must be decided in the backdrop of the facts and circumstances peculiar to this case and the applicable legal provisions. Today, even if the Bank claims that the sale is conclusive and there is no violation of the legal provisions in that behalf, still it is for the Presiding Officer to determine whether right of redemption, as claimed by the petitioners, is lost or whether Section 13(8) can be construed to mean that such a right is available despite the sale and till there is a transfer in favour of the auction purchaser of the secured assets. That transfer prima facie has to be brought about by issuance of a sale certificate. As far as the legal provisions and prevalent in the State of Maharashtra are concerned, such a certificate requires registration. We do not know whether such provisions as are in force in the State of Maharashtra would apply to the present sale or not. All these are, as noted above, vital issues and which would have to be considered by the Presiding Officer. Once they are required to be considered and also the impact of the legal provisions, so also whether the issuance of such a sale certificate is a ministerial act only or otherwise, then, we are of the view that the rights and equities can be balanced and protected by continuing the ad interim order passed by this Court which restrains the Bank from issuing the sale certificate, as also taking physical possession of the properties, till the Securitisation Application No.77 of 2016 is heard and disposed off. We order accordingly. We direct that the learned Presiding Officer to whom this matter is assigned shall make an endeavour and dispose off the application finally within a period of three months from the date of receipt of a copy of this order.

25. Though we continue our earlier orders, we impose one more condition on the petitioners and that in addition to the amounts which they have paid/deposited without prejudice to the rights and contentions of the parties before us, they must deposit a sum of Rs. 70 lakhs within a period of four weeks from today. If this condition is complied with, then, our order passed on 8-3-2016 shall continue and will remain operative till the securitisation application is disposed off in accordance with law. A default in compliance with the statement made shall result in an automatic vacation of our ad interim protection.

26. We clarify that we have expressed no opinion on any of the contentions raised before us. They are noted and emphasised only to determine the issues and which, to our mind, make out a prima facie case. Since these were arguable points, we, in order to continue the ad interim protection have made certain observations. Each of them would be treated as tentative and prima facie for the purpose of disposal of the petition. They shall not bind the Presiding Officer in any manner. He shall decide the application strictly in accordance with law.

27. At this stage, Mr. Thakkar, appearing on behalf of the auction purchaser,

states that this Court should incorporate a condition even on the petitioners if the petitioners demand justice. Even their conduct, according to him, should not be free from any blemish. They should not abuse this order or the earlier orders and induct somebody else in the property or allow some third parties the use of the factory premises and the moveables. He emphasises that the tenor of the petition is such that money has been raised by the petitioners from some private parties, stated to be wellwishers, it can very well be that they have been inducted in the premises.

28. This sentiments are also echoed by Mr. Kamdar. When all this was put to Mr. Samdani, he stated that the petitioners have not inducted anybody else in possession of the properties which are mortgaged to the Bank nor will they transfer the immoveable properties or the properties which are the subject-matter of the sale notice, nor induct any third parties in possession of the same. When we impose such a condition based on the statement of Mr. Samdani, we direct that within a period of one week from today the petitioners and each of them shall file written undertaking in this Court to the above effect that no third party rights have been created in relation to the secured properties or the properties which are the subject-matter of the sale notice nor would they create any third party rights in any manner until the proceedings before the Tribunal are disposed off finally. Let such an undertaking be filed and copies thereof be duly supplied to the Bank as also to the auction purchaser. This would be without prejudice to the rights and contentions of the parties. However, our order passed today shall be conditional upon furnishing such an undertaking. In order to enable Mr. Samdani and the petitioners to file such an undertaking, we would continue our ad interim order for a period of ten days. On furnishing of the undertaking, the ad interim order would continue till compliance of the condition to deposit the additional sum of Rs. 70 lakhs. If both the conditions are complied with, the ad interim order shall continue to operate as an interim order during the pendency of the securitisation application.

29. The petitioners shall also implead the auction purchaser as party respondent to the securitisation application. The petitioners are also permitted to add grounds to the securitisation application in terms of the I.A. No.806 of 2016, handed in. If this application is on the file of the Tribunal, then that stands allowed in the above terms. All proceedings and copies of the amended application shall be served on the contesting parties within one week from today. We are passing this order only to avoid multiplicity of proceedings and simply because both Mr. Kamdar and Mr. Thakkar complain that copy of this application was never served on them or their clients. If we allow now this application to be taken up first, that would only delay the proceedings and to the detriment, particularly of the interest of the auction purchaser.

30. The Tribunal shall decide the securitisation application uninfluenced by any of the tentative prima facie observations in its own order.

31. The writ petition is allowed in the above terms. No costs.

