
(2013) 01 P&H CK 0138
In the Punjab And Haryana At Chandigarh
Case No : C.W.P. No. 1315 of 2012

M/s Nippo Foods	Vs	APPELLANT
State of Punjab and Others		RESPONDENT

Date of Decision : 14-01-2013

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(3A), 14

Citation : AIR 2013 P&H 89

Hon'ble Judges : Ritu Bahri, J; Hemant Gupta, J

Bench : Division Bench

Advocate : Kamal Kapoor, Petitioner in Person, for the Appellant; Radhika Suri, Addl. AG, Punjab for Respondent Nos. 1, 3 and 4 and Mr. Aalok Jagga, Advocate for Respondent No. 5 - J and K Bank, for the Respondent

Final Decision : Dismissed

Judgement

Hemant Gupta, J.—Challenge in the present writ petition is to an order dated 06.12.2011 (Annexure P-2), whereby the District Magistrate, Jalandhar has allowed an application u/s 14 of the Securitization & Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act"). The petitioner has challenged the said order on the following grounds:

(i) That the petitioner has taken loan in the year 1999, whereas the Act was enacted in the year 2002, therefore, the loan already availed by the petitioner does not fall within the scope of the Act;

(ii) The notice u/s 13(2) of the Act was issued on 03.02.2005, wherein the petitioner filed his objections on 06.04.2005. The reasons rejecting the objections were communicated on 03.05.2005. The argument is that such reasons should have been communicated within 7 days. Since the reasons have not been communicated within 7 days, the Bank is precluded from continuing with the proceedings under the Act;

(iii) That the Bank has not proved any mortgage, therefore, in the absence of proof of mortgage, the proceedings cannot be initiated by the Bank under the Act; and

(iv) That though at one stage notice u/s 13(2) of the Act was issued to the guarantors, but subsequently the Bank has not initiated any proceedings against the guarantor. It is contended that the amount should be recovered from the guarantor, who is none else, but Shri Surjit Singh Sood, an Advocate.

2. On the other hand, Mr. Jagga has pointed out that the Bank has filed a suit for recovery of Rs. 6,79,749.31 before the learned Civil Court on 16.09.2005. The suit was for the recovery of said amount by sale of mortgaged property. The said suit was decreed vide judgment & decree dated 27.01.2007. The operative part of the decree reads as under:

It is ordered that the present suit succeeds and a decree for the recovery of Rs. 6,79,749.31 is passed in favour of the plaintiff and against the defendants with costs. The plaintiff will also be entitled to get interest @ 13.75% per annum with monthly rests, on the suit amount, from the date of filing of the suit till realization. The defendants are given three months time to pay the decretal amount failing which the plaintiff will be entitled to recover the same by sale of mortgaged property, as detailed in the head note of the plaint as well as by sale of other movable and immovable property of the defendants.

3. The petitioner filed an appeal against the said judgment & decree before the learned Additional District Judge, Jalandhar. Such appeal was dismissed on 17.12.2009. Therefore, the Petitioner cannot be permitted to dispute the decree of the Civil Court by way of the writ petition. It is contended that in any case the petitioner had a remedy to invoke the jurisdiction of the Debt Recovery Tribunal against the action of the Bank to proceed against the petitioner under the Act. But having failed to do so, the petitioner cannot be permitted to raise such questions before this Court by way of present writ petition.

4. Mr. Jagga further contends that the validity of the Act has been upheld by the Hon'ble Supreme Court in *Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc.*, and as explained in *Transcore Vs. Union of India (UOI) and Another*, Therefore, the argument that the Act has no applicability to the mortgages prior to promulgation of the statute is not tenable.

5. It is pointed out that the period of 7 days to communicate reasons for not accepting the objections is a directory. The petitioner has not suffered any prejudice on account of communicating the reasons after 7 days i.e. on 03.05.2005. It is further argued that it is the choice of the creditor to recover the loan amount from the borrower or from the guarantor or from both jointly and severally, but the borrower cannot be permitted to assert that the loan amount should be recovered from the guarantor alone.

8. We have heard the petitioner as well as the learned counsel for the

respondents at length but we do not find any merit in the present writ petition. In respect of the first argument, suffice is to state that the validity of the Act has been upheld by the Hon'ble Supreme Court in Mardia Chemicals Ltd. case (supra). It was held that the Act is applicable to all the transactions of mortgage. The Court observed as under:

36....One of the measures recommended in the circumstances was to vest the financial institutions through special statutes, the power of sale of the assets without intervention of the court and for reconstruction of assets. It is thus to be seen that the question of non-recoverable or delayed recovery of debts advanced by the banks or financial institutions has been attracting attention and the matter was considered in depth by the Committees specially constituted consisting of the experts in the field. In the prevalent situation where the amounts of dues are huge and hope of early recovery is less, it cannot be said that a more effective legislation for the purpose was uncalled for or that it could not be resorted to. It is again to be noted that after the Report of the Narasimham Committee, yet another Committee was constituted headed by Mr Andhyarujina for bringing about the needed steps within the legal framework. We are therefore, unable to find much substance in the submission made on behalf of the petitioners that while the Recovery of Debts Due to Banks and Financial Institutions Act was in operation it was uncalled for to have yet another legislation for the recovery of the mounting dues. Considering the totality of circumstances and the financial climate world over, if it was thought as a matter of policy to have yet speedier legal method to recover the dues, such a policy decision cannot be faulted with nor is it a matter to be gone into by the courts to test the legitimacy of such a measure relating to financial policy.

9. In respect of the second argument that the reasons were not communicated within 7 days, suffice is to state that the petitioner has not suffered any prejudice for not communicating the reasons within 7 days. In fact, a reading of Section 13(3A) would show that such period is only directory. No penal consequences are contemplated by the aforesaid statutory provisions. Therefore, in the absence of any prejudice and the fact that such provision is only directory, we do not find any merit in the argument raised.

10. The argument that the Bank has no document of mortgage and, therefore, invocation of jurisdiction of the District Magistrate is misconceived, is again not tenable. The Civil Court has categorically granted a decree for sale of the mortgaged property. Such decree has attained finality. The petitioner cannot be permitted to dispute the decree of the civil suit in the extra ordinary writ jurisdiction of this Court, when the petitioner had remedy to file second appeal. Still further, the question; whether there was a mortgage or not, is a disputed question. Such disputed question of fact cannot be permitted to be raised before the writ Court in the first instance.

11. In respect of the last argument that the Bank is not seeking to recover the amount from the guarantor is misconceived. The liability of the guarantor is

dependent upon the liability of the borrower, but the converse is not true. The borrower is the principal debtor and that the guarantor is liable for payment of the loan amount in terms of the guarantee jointly or severally with the borrower. It is for the creditor to choose as to at what stage the amount is to be recovered from the guarantor. The petitioner as a principal borrower cannot be permitted to say that the amount should be recovered from the guarantor and not from the principal borrower. In view of the above, we do not find any merit in the present writ petition. The same is accordingly dismissed.