(2024) 10 KL CK 0100

In the High Court Of Kerala

Case No : Original Petition (DRT) No.370 Of 2023 & WPC No.14421 Of 2023

M/s Parthas Textiles — APPELLANT

Vs

Asset Reconstruction Company (India) Ltd. (Arcil) — RESPONDENT

Date of Decision : 25-10-2024

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002 — Section 13(2), 13(4), 14, 17, 17(1)
Transfer of Property Act, 1882 — Section 65A

Citation : (2024) 10 KL CK 0100

Hon'ble Judges : D.K.Singh, J

Bench : Single Bench

Advocate : K.V.Sree Vinayakan, George Poonthottam, Sunil Shanker, Vidya Gangadharan, George Poonthottam

Final Decision : Dismissed

Judgement

D.K.Singh, J

1. These two cases have been filed by the same petitioners.

The O.P.(DRT) has been filed impugning the order in Ext.P6 dated 7th July 2023 passed by the Debt Recovery Tribunal-I, Ernakulam in I.A.Nos.1311/2023 and 2010 of 2023 in S.A.No.519 of 2022 filed by the petitioners. Dismissal of both petitions/applications has been challenged in O.P.(DRT) No.370/2023.

2. The learned counsel for the respondents has raised preliminary objections regarding the maintainability of the O.P.(DRT) and they have submitted that the Securitisation & Reconstruction of Financial Assets & Enforcement of Security Interest Act, 2002 ('SARFAESI Act' for short) has been enacted to regularise the enforcement of security interest. Considering the objectives sought to be achieved under the Act and Rules made thereunder, it provides complete, effective and alternate remedies within the statute itself and therefore, Writ

Petition is not maintainable.

3. The Supreme Court has, on certain occasions, observed that the attempt to interdict securitisation measures in writ jurisdiction ought not to be countenanced. The learned counsel for the respondents has placed reliance on a few judgments, particularly, in view of the judgment in Varimadugu Obi Reddy v B.Sreenivasulu and Ors (2023) 2 SCC 168. He further submits that the petitioners have an alternate efficacious remedy of filing an appeal against the impugned order as far as the jurisdiction of the High Court under Article 226 of the Constitution of India is not an appellate jurisdiction. Therefore, the O.P.(DRT) is liable to be dismissed on this preliminary issue itself.

4. Ordinarily, this Court should have dismissed the O.P.(DRT) on this preliminary ground, but this Court had entertained this O.P.(DRT), and an interim order was granted. This O.P.(DRT) has remained pending on the files of this Court from September 2023. Pleadings are exchanged and therefore, at this stage, this Court will go into the merits of the case instead of dismissing the O.P.(DRT) on the ground of alternate remedy.

5. Before adverting to the contentions raised by the learned Senior Counsel for the petitioners, it would be apt to take note of a few relevant facts. The petitioners had challenged the notice issued by the Advocate Commissioner under Section 13(4) in WP(C) No.30981/2022. This Court disposed of the Writ Petition delegating the petitioner to take recourse to the statutory remedy under Section 17 of the SARFAESI Act. However, this Court protected the petitioners from taking physical possession of the secured assets till 25th October 2022 in order to enable the petitioners to move to the Debts Recovery Tribunal for appropriate relief. The petitioners, thereafter, filed a Securitisation Application, SA No.519 of 2022 along with a stay petition, I.A.No.2509 of 2022. The Debt Recovery Tribunal vide order dated 4th November 2022 has dismissed the stay petition. The said order dated 4th November 2022 was challenged before this Court by the petitioners in O.P.(DRT) 441 of 2022 and this Court vide order dated 25.11.2022 passed an interim order to the effect that the petitioners should have deposited an amount of Rs.75 lakhs on or before 19th December 2022 and subject to making deposit of the said amount, coercive proceedings against the petitioners should be put on hold till 20th December 2022. This Court also observed that if the said amount was deposited, the court would consider the grant of an instalment facility. The said condition was complied with by the petitioners on 22nd December 2022. The interim order was extended till 20th January 2023 on condition that the petitioners should pay a further amount of Rs.75 lakhs on or before 16th January 2023. This order of further payment of Rs.75 lakhs was not complied with and this Court on 27th February 2023 vacated the interim order and posted the matter in the first week of April 2023. As there was no interim order restraining the respondent from proceeding with the securitization measures, the Commissioner issued a fresh notice for taking physical possession of the secured asset. The petitioners thereafter filed WP(c)

No.14421 of 2023 challenging the said Section 14 proceedings. However, this Court has not stayed the securitisation measures. The petitioners thereafter approached the DRT by filing an application to amend the Securitisation Application. Because of the non-cooperation of the Advocate Commissioner, the respondent requested the Additional Chief Judicial Magistrate to recall the warrant and appoint another Advocate Commissioner. The new Advocate Commissioner issued a notice on 3rd June 2023.

6. This Court disposed of O.P.(DRT) No.441 of 2023 on 15.06.2023 directing the Tribunal to consider the amendment application in accordance with law as expeditiously as possible preferably, within a period of one month.

7. Thereafter the petitioners had approached the DRT by filing a Stay Petition I.A.No.1311 of 2023 in S.A.No.519 of 2022 to which notice dated 3rd June 2023 was issued by the Advocate Commissioner. The petitioners also filed a Stay Petition I.A.No.2010 of 2023 in SA No.519 of 2022 to stay all further proceedings against the properties detailed in the demand notice. The Tribunal vide Ext.P6 impugned order dated 7.7.2023 dismissed both the stay petitions and the said order is the subject matter of challenge before this Court. It may be taken note of the fact that physical possession of the extent of 19.669 cents (7.96 Ares) of land with commercial building in Sy.No.735/5 and 737/12, Ernakulam village, Kanayannoor Taluk, Ernakulam District was taken on 13.09.2023 and the physical possession of the extent (4.42 cents actual possession 1.79) in Sy.No.701/1, Ernakulam Village, Kanayannoor Taluk, Ernakulam District with Building therein with first floor and ground floor bearing Door Nos.40/641 and 40/640 of Kochi Corporation was taken on 14.09.2023. Pursuant to the interim orders of this Court, the extent of 21.89 cents (8.89 Ares) of land with residential building and with right of way through 90 sq.metres in Sy.No.726/6 and 726/9, Ernakulam Village, Kanayannoor Taluk, Ernakulam District has not been taken possession.

8. It may also be taken note of the fact that around 50 crores is the outstanding liability of the petitioners in respect of the cash credit facility availed by the petitioners from the respondent bank. The bank accounts of the petitioners were classified as NPA on 24th March 2021 and the bank has not been able to recover the said amount due to it till date.

9. The learned Senior Counsel Mr.George Poonthottam has submitted that after amendment of the said S.A., the petitioners' case have got substantially improved as the petitioners were not aware of the assignment agreement entered into between the bank and the first respondent company. The assignment agreement would disclose that the assignment was only for the financial assets and not the claims of the bank. The Tribunal did not consider this aspect and has dismissed the Stay Applications, I.A.Nos.1311 of 2023 and 2010 of 2023 by the impugned order on the ground that since the earlier stay application was dismissed vide order dated 4.11.2022 passed in I.A.No.2509 of 2022 in S.A.No.519 of 2022, these applications would not be maintainable. He,

therefore, submits that the impugned order may be set aside and the matter be remitted back to the Tribunal for taking a fresh decision in accordance with law after considering the said aspect.

10. The learned counsel for the respondent company has supported the impugned order. The deed was assigned to the respondent Asset Reconstruction Company (India) Ltd. vide agreement dated 28th September 2019. The assignment agreement cannot be challenged before the Debt Recovery Tribunal as the DRT did not have the jurisdiction to entertain such a plea. The jurisdiction of the Tribunal is provided under Section 17 of the SARFAESI Act, on re-production it reads as under:

17. Application against measures to recover secured debts (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date which such measure had been taken:

PROVIDED that different fees may be prescribed for making the application by the borrower and the person other than the borrower.

Explanation: For the removal of doubts, it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.

(1A) An application under sub-section (1) shall be filed before the Debts Recovery Tribunal within the local limits of whose jurisdiction-

(a) the cause of action, wholly or in part, arises;

(b) where the secured asset is located; or

(c) the branch or any other office of a bank or financial institution is maintaining an account in which debt claimed is outstanding for the time being.

(2) The Debts Recovery Tribunal shall consider whether any of the measures referred to in sub-section (4) of section 13 taken by the secured creditor for enforcement of security are in accordance with the provisions of this Act and the rules made thereunder.

(3) If, the Debts Recovery Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that any of the measures referred to in sub-section (4) of section 13, taken by the secured creditor are not in accordance with the provisions of this Act and the rules made thereunder, and require restoration of the management or restoration of possession of the secured assets to the borrower or other aggrieved person, it

may, by order,-

(a) declare the recourse to any one or more measures referred to in sub-section (4) of section 13 taken by the secured creditor as invalid; and

(b) restore the possession of secured assets or management of secured assets to the borrower or such other aggrieved person, who has made an application under sub-section (1), as the case may be; and

(c) pass such other direction as it may consider appropriate and necessary in relation to any of the recourse taken by the secured creditor under sub-section

(4) of section 13.

(4) If, the Debts Recovery Tribunal declares the recourse taken by a secured creditor under sub-section (4) of section 13, is in accordance with the provisions of this Act and the rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor shall be entitled to take recourse to one or more of the measures specified under sub-section (4) of section 13 to recover his secured debt.

(4A) Where_

i) any person, in an application under sub-section (1), claims any tenancy or leasehold rights upon the secured asset, the Debt Recovery Tribunal, after examining the facts of the case and evidence produced by the parties in relation to such claims shall, for the purposes of enforcement of security interest, have the jurisdiction to examine whether lease or tenancy,-

(a) has expired or stood determined; or

(b) is contrary to section 65A of the Transfer of Property Act, 1882 (4 of 1882); or

(c) is contrary to terms of mortgage; or

(d) is created after the issuance of notice of default and demand by the Bank under sub-section (2) of section 13 of the Act; and

(ii) the Debt Recovery Tribunal is satisfied that tenancy right or leasehold rights claimed in secured asset falls under the sub-clause (a) or sub-clause (b) or sub-clause (c) or sub-clause (d) of clause(i), then notwithstanding anything to the contrary contained in any other law for the time being in force, the Debt Recovery Tribunal may pass such order as it deems fit in accordance with the provisions of this Act.

(5) Any application made under sub-section (1) shall be dealt with by the Debts Recovery Tribunal as expeditiously as possible and disposed of within sixty days from the date of such application:

PROVIDED that the Debts Recovery Tribunal may, from time to time, extend the said period for reasons to be recorded in writing, so, however, that the total period of pendency of the application with the Debts Recovery Tribunal, shall not exceed four months from the date of making of such application made under sub-section (1).

(6) If the application is not disposed of by the Debts Recovery Tribunal within the period of four months as specified in sub-section (5), any party to the application may make an application, in such form as may be prescribed, to the Appellate Tribunal for directing the Debts Recovery Tribunal for expeditious disposal of the application pending before the Debts Recovery Tribunal and the Appellate Tribunal may, on such application, make an order for expeditious disposal of the pending application by the Debts Recovery Tribunal.

(7) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the application in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 and the rules made thereunder.)

11. Section 17 clothes the Debts Recovery Tribunal with the jurisdiction on an application by an aggrieved person by any of the measures referred to in sub section 4 of section 13 taken by the secured creditor or his authorised officer under Chapter-III of the Securitisation Act subject to the limitation and other provisions as prescribed in Section 17 itself and the Rules made thereunder. By Sub-section 4 of Section 13 the secured creditor is entitled to take recourse to one or more of the measures as prescribed in sub section 4 of section 13 which are as under:

"(4) In case the borrower fails to discharge his liability in full within the period specified in sub-section (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 or 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.”

Thus, it is evident that the Tribunal does not have the power to look into the legality or otherwise of the assignment deed between the secured creditor and a financial reconstruction company.

12. This Court, in its judgment dated 10th January 2024 in W.P.(C)No.33707 of 2023, has observed that the transfer of the loan would result in the transfer of economic interest without being accompanied by any change in underlined terms and conditions of the loan contract usually. Paragraph 20 of the said judgment reads as under:

“20. Direction No.11 gives a general condition applicable for all loan transfers and provides that loan transfers should result in transfer of economic interest without being accompanied by any change in underlining terms and conditions of the loan contract usually. Direction 12 makes it clear that in loan participation transactions, by design, the legal ownership completely remains with the transferor even after economic interest has been transferred to the transferee. Proviso to Direction 5 mandates that in cases of loan transfers other than loan participation, legal ownership of the loan shall be mandatorily transferred to the transferee to the extent of economic interest transferred only.

13. Therefore, considering the aforesaid fact and the judgment of this Court, I am of the view that the Tribunal does not have jurisdiction to go into the legality or otherwise of the assignment deed between the secured creditor and the financial reconstruction company. Under the said deed of assignment, the liability of the borrower is transferred to the Asset Re-construction Company for realisation from the borrower as per the terms and conditions of the loan contract, and there is no transfer of assets as contended by the learned Senior Counsel for the petitioners. Thus, I find no substance in O.P.(DRT) which is hereby dismissed.

WPC No.14421 of 2023

In view of the dismissal of O.P.(DRT) No.370 of 2023, nothing survives in this Writ Petition which is also hereby dismissed.