

(2012) 01 AP CK 0031

In the Andhra Pradesh High Court

Case No : Writ Petition No. 1567 of 2012

M/s. Rupesh Mines and Minerals

APPELLANT

Vs

State Bank of India, And Another

RESPONDENT

Date of Decision : 24-01-2012

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Foreign Exchange Management Act, 1999 — Section 35
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 14, 17, 17(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 3, 4, 5, 6, 8(5)

Citation : (2012) 3 ALD 699 : (2012) 4 BC 253

Hon'ble Judges : V.V.S. Rao, J;G. Krishna Mohan Reddy, J

Bench : Division Bench

Advocate : C. Raghu, for the Appellant; Ambadapudi Satyanarayana, for the Respondent

Judgement

V.V.S. Rao

1. The loan availed by the petitioner herein from the respondent bank became Non Performing Asset. The latter initiated action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act), by issuing a demand notice u/s 13(2) followed by the possession notice u/s 13(4) of the SARFAESI Act. Sequentially, the property was brought to sale by issuing a paper publication dated 02.01.2012 inviting the sealed tenders and participation in the public auction to sell the property mortgaged by the petitioner. Aggrieved by the same, the petitioner filed the instant Writ Petition praying the following relief. For the reasons stated in the accompanying affidavit, it is hereby prayed that this Hon"ble Court may be pleased to issue a Writ of Mandamus, or any other appropriate writ, order or direction, declaring the action of the Respondent in conducting auction vide Notice Dt. 2.1.2012 in relation to the loan account No. 30727456884 of the

Petitioner notifying to sell three (3) items as illegal, arbitrary and contrary to Sub-Rule-5 of Rule-8 of Security Interest Enforcement Rules, 2002, and set aside the same and pass such other order or orders as may deem fit and proper in the circumstances of the case.

It is well settled that when any action initiated by the Nationalised Banks and other Financial Institutions either under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993, or the SARFAESI Act, the High Court, ordinarily, should not interfere in judicial review at the instance of an aggrieved person. Such a person can always avail the remedy provided under Sections 17 and 18 of the SARFAESI Act. A reference may be made to the three recent decisions of the Supreme Court hereunder. 2. In *Raj Kumar Shivhare Vs. Assistant Director, Directorate of Enforcement and Another*, the Supreme Court laid down as follows.

When a statutory forum is created by law for redressal of grievance and that too in a fiscal statute, a writ petition should not be entertained ignoring the statutory dispensation. In this case the High Court is a statutory forum of appeal on a question of law. That should not be abdicated and given a go-by by a litigant for invoking the forum of judicial review of the High Court under writ jurisdiction. The High Court, with great respect, fell into a manifest error by not appreciating this aspect of the matter. It has however dismissed the writ petition on the ground of lack of territorial jurisdiction.

No reason could be assigned by the appellant's counsel to demonstrate why the appellate jurisdiction of the High Court u/s 35 of FEMA does not provide an efficacious remedy. In fact there could hardly be any reason since the High Court itself is the appellate forum.

3. In *United Bank of India Vs. Satyawati Tondon and Others*, the Supreme Court laid down that when a fiscal statute provides an effective alternative remedy to an aggrieved person, such person cannot invoke the forum of judicial review of the High Court under writ jurisdiction. The relevant observations are as follows.

Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are a code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi-judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, the High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute. ... It is a matter of serious

concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their debts. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection.

4. In a recent decision of the Supreme Court in *Kanaiyalal Lalchand Sachdev and Others Vs. State of Maharashtra and Others*, after referring to *Satyawati Tondon*, the Supreme Court upheld the order of the High Court of Judicature at Bombay dismissing the petition under Article 226, which was filed assailing the action of the State Bank of India Officials in dispossessing the appellants therein from the secured property under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Second) Ordinance, 2002. The Supreme Court observed as follows.

We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action u/s 14 of the Act constitutes an action taken after the stage of Section 13(4), and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the Act itself contemplates an efficacious remedy for the borrower or any person affected by an action u/s 13(4) of the Act, by providing for an appeal before the DRT.

In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants u/s 17 of the Act. It is well settled that ordinarily relief under Articles 226 / 227 of the Constitution of India is not available if an efficacious alternative remedy is available to any aggrieved person. (See *Sadhana Lodh Vs. National Insurance Company Ltd. and Another*, *Surya Dev Rai Vs. Ram Chander Rai and Others*, and *SBI v. Allied Chemical Laboratories* (2006) 9 SCC 252).

5. The Counsel, however, vehemently contends that an appeal is not a remedy provided u/s 17(1) of the SARFAESI Act, as the action taken by the first respondent pursuant to notice u/s 13(4) of the SARFAESI Act has not reached its logical end. The submission cannot be countenanced.

6. We quote hereunder Section 17 (1) and (2) of the SARFAESI Act for ready reference.

17. Right to appeal:-(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 on which such measures 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 this sub-section.

(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.

7. A plain reading of the same would show that any person including the borrower is given a right of appeal against "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". The said Chapter contains Sections 13 to 19 and these have to be read with Rules 3, 4, 5, 6, 9 and other Rules of the Security Interest Enforcement Rules, 2002 (the Rules). The immovable property which is a secured asset is brought to sale in accordance with Rules 8(5) and (6) of the Rules. Therefore, this is certainly a measure referred to u/s 13(4) of the SARFAESI Act, and an appeal to the Debts Recovery Tribunal is not barred.

8. In view of the above, we are not inclined to admit the Writ Petition. Liberty is, however, given to the petitioner to approach the Debts Recovery Tribunal u/s 17(1) of the SARFAESI Act, in which event, the learned Debts Recovery Tribunal may entertain the appeal and pass appropriate orders in accordance with law. Subject to the above observations, the Writ Petition shall stand disposed of accordingly. There shall be no order as to costs.