
(2014) 02 MAD CK 0031

In the Madras High Court

Case No : W.P. No. 26072 of 2011 and M.P. No. 1 of 2013

N. Santhanam

APPELLANT

Vs

Authorised Officer, Punjab and Sind Bank and Others

RESPONDENT

Date of Decision : 28-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 14, 14(3A)

Citation : (2014) 4 BC 449 : (2014) 3 MLJ 328

Hon'ble Judges : M. Jaichandren, J;K. Kalyanasundaram, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

K. Kalyanasundaram, J.—This writ petition is filed to quash the order, in R.A.(SA) No. 58 of 2011, made by the Debts Recovery Appellate Tribunal, Chennai and consequently, direct respondents 1 and 2 to restore the possession of the petitioner property. Jayalaxmi Enterprises, the third respondent herein, had availed loan from the first respondent/Punjab & Sind Bank. Due to default in repayment of the loan amount, the first respondent bank had instituted a proceedings, in O.A. No. 1059 of 1998, before the Debts Recovery Tribunal-I, Chennai, to realise a sum of Rs. 85,98,636/-, under the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (hereinafter referred to as the RDDB & FI Act, in short). The first respondent bank, having felt that the procedure was ineffective, had issued a notice, u/s 13(2) of the SARFAESI Act, dated 10.2.2005, demanding payment of Rs. 3,22,87,583/-. No reply or objection was made to the said notice, by the petitioner or by the other borrowers. Subsequently, on 17.6.2005, the authorised officer of the first respondent bank had issued a notice u/s 13(4) of the SARFAESI Act, for taking symbolic possession of the secured assets, which was also not challenged by the parties.

2. The petitioner laid a civil suit, in C.S. No. 481 of 2007, before this Court,

questioning the invocation of the SARFAESI proceedings against him and the sale of his property, by the respondent bank. In the suit, injunction was granted, on 30.5.2007 and subsequently, it was vacated, on 2.11.2007. The appeal, in O.S.A. No. 264 of 2008, filed against the said order was dismissed, on 16.7.2010.

3. In the meanwhile, the respondent bank had moved an application, u/s 14 of the SARFAESI Act, before the Chief Metropolitan Magistrate, Chennai, in Crl.M.P. No. 2801 of 2009, to take possession of the secured asset. In pursuant to the order of the learned Chief Metropolitan Magistrate, Chennai, the respondent bank took possession of the property, on 30.6.2010.

4. In Securitisation Application No. 175 of 2010, before the Debts Recovery Tribunal-I, Chennai, the petitioner challenged the notice issued u/s 13(4) of the Act, principally contending that the respondent bank acted illegally and highhandedly while taking possession, without taking inventory in his residential premises; that the demand notice, dated 10.2.2005, did not contain the details of non performing account, as mandated u/s 32 of the SARFAESI Act; that he had made a complaint against the respondent bank for their fraudulent and other criminal acts, in taking possession of the property and when the enquiry is pending, the respondent bank ought not have resorted to forcible eviction and dispossession of the petitioner's family; that the respondent bank had no authority to invoke SARFAESI Act, when it had opted to get a decree in a proceeding initiated under RDDB & FI Act and the proceedings initiated u/s 13(4) of the SARFAESI Act is barred by limitation. The respondents 1 and 2 had resisted the Securitisation Application by filing detailed counter.

5. The Debts Recovery Tribunal-I, Chennai, had framed the points for consideration and held that as per the judgment of the Honourable Apex Court, reported in Transcore Vs. Union of India (UOI) and Another, even pending proceedings under Sec. 19(1) of the RDDB & FI Act, the secured creditors can invoke proceedings under the SARFAESI Act, to recover the dues. The Tribunal further held that in the proceedings initiated by the respondent bank, in O.A. No. 1059 of 1998, the petitioner herein was the 6th defendant. On 13.5.2002, he assisted Mr. Karunanidhi, advocate, who represented all the defendants had stated that the defendants consented for the sale of the schedule mentioned properties, including the properly mortgaged by the petitioner herein. The Tribunal further held that the petitioner, who is a guarantor, is equally liable to pay the debts of the principal borrower. The Tribunal also held that there is no violation in obtaining orders, by the respondent bank, u/s 14 of the SARFAESI Act, to take physical possession of the property, on 30.6.2010. The Tribunal held that at the time of taking physical possession, an inventory and Panchanama was prepared, by the Advocate Commissioner, giving details of all the articles found in the house of the applicant and the wife of the applicant-Mrs. Suganthi has acknowledged the inventory, by signing as house owner. The possession notice was also served to the wife of the applicant and published in two daily newspapers, in accordance with the provisions of the Act. Eventually, the Tribunal

found that there is no violation of the mandatory procedure or requirement, while taking physical possession of the secured asset, on 30.6.2010. Holding so, the Tribunal dismissed the S.A. on 29.3.2011.

6. Aggrieved by the said order, the petitioner filed an appeal in R.A.(SA). No. 58 of 2011, before the Debts Recovery Appellate Tribunal, Chennai. The Appellate Tribunal, in its precise order, has held that the authorised officer has not contravened any of the provisions, while taking physical possession and issuance of sale notice, under the SARFAESI Act or Rules made thereunder and finally dismissed the appeal. Challenging the said order, the present writ petition has been filed.

7. Heard Mr. N.S. Nandakumar, the learned counsel appearing on behalf of the petitioner and Mr. A.P.S. Kasthuri Rangana, for Sampath Kumar Associates, appearing on behalf of the first and second respondents, Mr. Haja Mohideen Gisthi, the learned counsel appearing on behalf of the third respondent and Mr. A. Krupakaran, the learned counsel appearing on behalf of the fourth respondent.

8. Mr. N.S. Nandakumar, learned counsel appearing on behalf of the petitioner submitted that the respondent bank has not followed the mandatory provisions of the SARFAESI Act, while taking physical possession of the property; that there are defects in the preparation of the panchanama and inventory; that in the O.A. No. 1059 of 1998, the Tribunal had issued direction for sale of the assets of the principal borrower, but the bank did not take any further action and therefore, the sale is not valid.

9. The learned counsel further submitted that the respondent bank had entered into a settlement with the principal borrower under One Time Settlement scheme and in view of the settlement, the bank is estopped from taking proceedings under the SARFAESI Act. The primary security, worth of Rs. 52.56 lakhs, was available with the principal borrower and the material was not secured by the respondent bank and therefore, the respondent bank cannot proceed against the property of the guarantor. The learned counsel further submitted that the respondent bank did not give the particulars as to the classification of the non-performing account, in the notice, issued u/s 13(2) of the SARFAESI Act, and even after classification of the account as NPA, the respondent bank had released funds to the principal borrower and hence, the petitioner/guarantor is not liable to pay any amount; further the respondent bank has not properly accounted the amounts realised from the principal borrower; that the conduct of the respondent bank would establish that they are not entitled to initiate the SARFAESI proceedings. The learned counsel has relied on the judgments of the Honourable Apex Court and High Courts reported in (i) Dwarakanath v. Income Tax Officer, Special Circle Kanpur, AIR 1966 SC 8191, (ii) State Bank of Saurashtra v. Chitranjan Ranganath Raja and Another, 1980 SCS (4) 516, (iii) Transcore v. Union of India and Another, (supra), (iv) Misons Leather Ltd. Vs. Canara Bank, , (v) Indian Overseas Bank Vs. G.S. Rajshekar, , (vi) Lakshmi Shankar Mills v. Indian Bank, 2008 (2) CTC 529 : LNIND 2008 MAD 1071 : (2008) 3 MLJ 1345,

(vii) Shyam Kishore Prasad and Another Vs. Bank of Baroda and Others, , (viii) Swastik Agency and Others Vs. State Bank of India, Main Branch and Others, , (ix) Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill, , (x) Eureka Forbes Limited Vs. Allahabad Bank and Others, , (xi) Signal Apparels Pvt. Ltd. and Signal Export Vs. Canara Bank and Reserve Bank of India, .

10. Per contra, Mr. A.P.S. Kasthuri Rangan, the learned counsel appearing on behalf of the respondent bank submitted that the petitioner is a guarantor for the loan availed by the third respondent Jayalakshmi Enterprises and he executed a guarantee bond, dated 3.1.1995 and also a memorandum of deposit of title deeds, dated 3.1.1995. Due to the default made by the principal borrower, the respondent bank had issued notice, u/s 13(2) of the SARFAESI Act, date 10.2.2005, and the same was received by the petitioner, on 12.2.2005, but admittedly neither the principal borrower nor the guarantors paid the dues, within 60 days of the said notice. Hence, the bank had initiated proceedings u/s 13(4) of the SARFAESI Act and subsequently invoked Section 14 of the Act, to take physical possession of the property. The respondent bank had followed the mandatory provisions, contained under Sections 13(4) and 14 of the SARFAESI Act. Therefore, there is no violation in issuing the sale notice and taking physical possession of the property.

11. The learned counsel further submitted that the petitioner herein, who was the 6th defendant, in O.A. No. 1059 of 1998, appeared through an advocate, namely, Mr. Karunanidhi, and also consented for the sale of the property. Therefore, the petitioner is estopped from challenging the sale proceedings. The learned counsel further submitted that the amounts received from the principal borrower have been given credit to the account of the principal borrower and after giving credit to all the amounts received, the bank had issued notice u/s 13(2) of the SARFAESI Act, claiming Rs. 3,22,87,583/-. The petitioner having admittedly received the notice did not send any objection, as provided u/s 14(3A) of the SARFAESI ACT, and therefore, he cannot now challenge the claim made by the respondent bank, in the notice.

12. The learned counsel also submitted that though the respondent bank had laid the original application in the year 1998, the petitioner and other defendants in the OA had been successfully dragging on the proceedings for some reason or other till 2005. In that fact situation, the bank had initiated proceedings, under the SARFAESI Act, in the year 2005, which cannot be found fault, in the light of the judgment of the Supreme Court in Transcore case.

13. The learned counsel for the petitioner has relied upon the judgment of the Honourable Apex Court in Dwarkanath v. income tax Officer, Special Circle, D Ward, Kanpur and Another, (supra) to substantiate his contention that under Article 226 of the Constitution of India, every High Court shall have power to enforce the rights conferred by Part III of the Constitution of India, to reach injustice wherever it is found.

14. It is noted that the Honourable Apex Court in the judgment in *Transcore v. Union of India and Another* (supra), has upheld the action of the respondent bank to initiate proceedings under the SARFAESI Act, even when the original applications, initiated under the RDBB & FI Act, were pending before the Tribunals. The Honourable Apex Court has held that u/s 17 of the SARFAESI Act, the Debts Recovery Tribunals have power to see as to whether the measures taken by the Financial Institutions and the Banks are in accordance with the SARFAESI Act and in the case of failure, the Tribunals can set aside the sale and put the borrower or guarantor or mortgagor in possession of the secured asset.

15. It is noted that the same view has been followed by the First Bench of this Court in *Misons Leather Ltd., rep. by its Managing Director v. Canara Bank, rep. by its Chief Manager*, (supra) wherein, the Bench has held that all grounds, which rendered the action of the Bank/Financial Institutions illegal, could be raised in the proceedings u/s 17 of the SARFAESI Act, before the Debts Recovery Tribunal.

16. In *Lakshmi Shankar Mills (P.) Ltd., and Others v. Authorised Officer/Chief Manager, Indian Bank and Others*, (supra) the Full Bench of this Court had an occasion to consider the jurisdiction of the Tribunals, u/s 17 of the SARFAESI Act. Paragraph No. 12 of the judgment would run thus:

12. On a plain reading of Section 17, it is seen that the Tribunal has wide powers to restore possession in favour of the borrower, if such action taken under sub-section (4) of Section 13 is declared invalid. Even where the property is sold or dealt with, pending hearing of the Application u/s 17, the Tribunal is not rendered powerless to restore possession in favour of the borrower, if such action taken under sub-section (4) of Section 13 is declared invalid. In such an eventuality, sub-section (3) of Section 17 gives ample powers to the Tribunal to direct restoration of the possession or restoration of management, as the case may be or to pass such other order, as it may consider proper and necessary in relation to any of the recourse taken by the secured creditor under sub-section (4) of Section 13.

17. In the case on hand, the petitioner has alleged that the respondent Bank has committed fraud in securing orders from the Chief Metropolitan Magistrate, Chennai, u/s 14 of the SARFAESI Act, and the Bank did not execute the direction issued by the Debts Recovery Tribunal-I, Chennai, for sale of the assets of the principal borrower, in the proceedings initiated by the Bank, in O.A. No. 1059 of 1998. The main contention of the learned counsel for the petitioner is that the Debts Recovery Tribunal-I, Chennai, had issued direction, to the Bank, to sell the property of the principal borrower, to recover the dues to the bank and the said direction has not been complied with by the respondent bank. Further, due to the fault of the bank, Granite blocks, belonging to the principle borrower, worth of Rs. 52.56 lakhs have disappeared. The learned counsel further contended that even after the classification of the account as "non performing asset", the bank had permitted the principal borrower to operate the account.

18. It is noted that in the judgments referred to supra, the Honourable Apex Court and this Court have repeatedly held that u/s 17 of the SARFAESI Act, the Tribunals have wide power to see the measures taken by the Banks and the Financial Institutions, in accordance with law. It is trite law that when a person is making an allegation of fraud, he should specifically plead and prove the fraud committed by the opposite party. In the case on hand, the petitioner had made only vague allegations and did not produce any material to substantiate his contention. The Debts Recovery Tribunal-II, Chennai, had considered in detail and rejected the contention of the petitioner. We agree with the findings of the Tribunal.

19. The next point urged by the learned counsel for the petitioner is that when the original application filed by the Bank, under the RDDB & FI Act, was pending before the Debts Recovery Tribunal, the Banks/Financial Institutions have no authority to initiate proceedings under the SARFAESI Act. It is noted that in the judgment in Transcore v. Union of India (supra), the Honourable Apex Court has upheld the action taken by the Banks/Financial Institutions. In the light of the said judgment, the contention raised by the petitioner cannot be countenanced.

20. The learned counsel for the petitioner has assailed the measures taken by the respondent bank, contending that the secured creditor has not followed the procedure prescribed under sub-sections (1) and (2) of Section 4 of the Security Interest (Enforcement) Rules, 2002, an obligation to take inventory. Though the learned counsel has contended that inventory was not taken in the presence of the borrower and the list of inventory was not given, the respondent Bank had produced the inventory taken, at the time of taking possession of the property in question, which contains the signature of the wife of the petitioner. The fact of taking possession of the secured asset, in the presence of the wife of the petitioner, is not disputed and her signature in the inventory slip also is not disputed, by the petitioner. The learned counsel for the respondent bank has also submitted that the inventory was given to the wife of the petitioner. Therefore, the contention of the petitioner that Sub-rules (1) and (2) of Rule 4 of the Security Interest (Enforcement) Rules, 2002, have been violated, by the respondent Bank, does not merit acceptance of this Court.

21. The learned counsel further contended that the Bank had reported collection of 5698 US \$ on 24.8.1998 and the same has not been given credit to by the respondent Bank and the entrustment of Bills valuing Rs. 82895.12 US \$ were not adjusted towards the loan account. This contention was disputed by the respondent Bank. Further, the petitioner has not produced any material to substantiate his allegation. The Debts Recovery Tribunal-II, Chennai, has considered this aspect in paragraph Nos. 10 to 12 of its order, dated 29.3.2011, which does not warrant interference by this Court.

22. The learned counsel also contended that when the original application O.A. No. 1059 of 1998, filed under the RDDB & FI Act, was pending, the borrower had offered to settle the dues under One Time Settlement with the Bank and the

same was also accepted by the Bank and in view of the agreement for One Time Settlement, the Bank is estopped from initiating proceedings under the SARFAESI Act. To substantiate his contention, the learned counsel has relied upon the judgment of this Court in *Raja Kumara Venkata Perumal Raja Bahadur, minor, by Guardian Mr. W.A. Varadachariar v. Thatha Ramasamy Chetty*, 35 ILR 75 : LNIND 1911 MAD 71 : (1911) 1 MLJ 709.

23. It is noted that in the cited judgment, pending the suit, a settlement was arrived between the parties and a compromise decree was passed and in that factual situation, this Court has held that the compromise was a lawful compromise and was accepted by the Court as a lawful and has embodied in its decree. In the above facts, this Court has held that the plaintiff in the subsequent suit is estopped from contesting the validity of the mortgage. But in the case on hand, there is no material to show that there was One Time Settlement between the principal borrower and the Bank and further on that basis, the Tribunal did not pass any decree. Hence, we are of the view that the said judgment is not applicable to the facts of this case and the petitioner's contention does not merit acceptance of this Court. In view of our above findings, we are not inclined to interfere with the orders passed by the Debts Recovery Tribunal-II, Chennai and the Debts Recovery Appellate Tribunal, Chennai. Accordingly, the writ petition is dismissed as de-void of merits. No costs. Consequently, connected miscellaneous petition is dismissed.