
(2013) 09 KL CK 0091
In the High Court Of Kerala
Case No : O.P. (Criminal) No. 4322 of 2012

Nalinkshan A.

APPELLANT

Vs

Abulaise and Another

RESPONDENT

Date of Decision : 09-09-2013

Acts Referred:

Citation : (2014) CriLJ 101 : (2013) 4 KHC 284

Hon'ble Judges : K. Ramakrishnan, J

Bench : Single Bench

Advocate : T. Sethumadhavan, Pushparajan Kodoth, K. Jayesh Mohankumar and Vandana Menon, for the Appellant; V.H. Jasmine, Public Prosecutor, for the Respondent

Judgement

K. Ramakrishnan, J.

-This is an application filed by the petitioner, who is the respondent in Crl. MP to quash Ext. P1 proceedings (Crl. MP 1161/2012), pending before the Chief Judicial Magistrate, Palakkad under Article 227 of the Constitution of India. It is alleged in the petition that the petitioner is presently holding the post of Chief Manager, State Bank of Travancore, Urakom Branch, Thrichur. Formerly he was the Chief Manager (Advances) of the same Bank at Palakkad. The first respondent and his wife availed two housing loans and a loan under the Traders Special Scheme from the Alathur Branch of State Bank of Travancore. Since, the payments under three loans were irregular, they were declared as Non Performing Asset (NPA) and Ext. P3 notice was issued u/s 13(2) of The Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the "SARFAESI Act") calling upon the first respondent herein to remit an amount of Rs. 10,06,680/- due under the three loans and in the notice itself, it was mentioned that if the amount is not paid, they will initiate proceedings under the SARFAESI Act. The first respondent did not send any reply to this notice. So, the petitioner who was the Authorized Officer of the Bank filed the petition u/s 14 of the SARFAESI Act to take possession of the security interest before the Chief

Judicial Magistrate Court, Palakkad and Ext. P4 petition has been filed for that purpose. After considering the documents and allegations in Ext. P4, the Chief Judicial Magistrate, Palakkad passed Ext. P5 order appointing an Advocate Commissioner to take possession of the secured asset as provided under the said Act. The first respondent filed the writ petition before this Court challenging the order of the Chief Judicial Magistrate as WP (C) No. 19748/2011(P) and this Court by Ext. P6 judgment disposed of the petition giving an opportunity to the first respondent to pay of the debt in 12 equal monthly installments starting from 01/08/2011 and during this period the proceedings as per Ext. P5 order of the Chief Judicial Magistrate was directed to be kept in abeyance. It is also mentioned in Ext. P6 judgment and if any default was committed by the first respondent herein, it is open to the Bank to continue proceedings. Thereafter, the first respondent sent Ext. P7 lawyer notice to the present petitioner and another Manager stating that, he had given a false evidence before the Chief Judicial Magistrate Court showing incorrect details and obtained Ext. P5 order and thereby committed an offence under Sections 191, 193, 196 and 200 of IPC and called upon the addresses in that notice to close the transaction or he will be proceeding against them criminally. The Bank sent Ext. P8 reply notice to them stating that still some amount is due under the two housing loans taken which was secured by the mortgage created. It is thereafter that the first respondent had filed Ext. P1 complaint before the Chief Judicial Magistrate Court for taking action against the petitioner u/s 195 and Sections 340 and 190 of the Code of Criminal Procedure (in short "Code"). After taking the statement of the first respondent, who is the complainant in Ext. P1, the learned Magistrate had issued notice to the petitioner herein asking him to appear before that Court. It was served on the petitioner herein and he appeared before that Court and it is thereafter he filed this petition to quash the proceedings to Ext. P1 complaint claims the following relief:

- i. call for the records leading to Ext. P1 petition (CMP No. 1161/2012) on the file of the Chief Judicial Magistrate Court, Palakkad and to quash the same; and
- ii. to grant such other relief as this Honourable Court may deem fit and proper in the circumstances of the case.

As directed by this Court, State was impleaded as additional second respondent as per order in IA 17015/2012 dated 15/01/2013.

2. Heard the counsel for the parties and the learned Public Prosecutor.

3. The counsel for the petitioner submitted that the first respondent herein had taken two housing loans and another loan and all the three loans became NPA and thereafter they issued notice u/s 13(2) of the SARFAESI Act showing the amount due and calling upon the first respondent herein to pay the amount. But he did not send any reply nor had he made any arrangements to pay the amount as well. So, the petitioner, as Authorized Officer of the Bank, initiated proceedings u/s 14 of the SARFAESI Act for taking possession of the security

provided by the first respondent and after considering the documents, the learned Chief Judicial Magistrate has passed Ext. P5 order. Without questioning the order u/s 17 of the SARFAESI Act, the first respondent approached this Court by filing a writ petition and in that writ petition he never questioned the legality of the act or the quantum of amount due from him to the Bank and on that basis he obtained Ext. P6 order from this Court for payment of the amount on installment basis. It is thereafter that he sent Ext. P7 notice for which Ext. P8 reply was sent. Even thereafter he did not file any appeal as provided in the Statute but filed Ext. P1 complaint with a view to harass the petitioner. It is merely an abuse of process of Court and no offence has been committed by the petitioner and so the proceedings has to be quashed.

4. On the other hand, the learned Public Prosecutor submitted that there is no illegality committed by the learned Magistrate in taking cognizance of the complaint and issuing notice to the petitioner. He can very well appear before that Court and submit that no offence has been committed by him. It is not a fit case to invoke Section 482 of the Code or Article 227 of the Constitution of India to quash the proceedings.

5. It is an admitted fact that the first respondent herein had availed two housing loans and another loan from State Bank of Travancore, Alathur Branch, Palakkad District. It is also an admitted fact that the two housing loans were secured by equitable mortgage of the property belonging to the first respondent. There is no dispute that the first respondent and his wife who are the borrowers committed default in payment of the amount and the loans were transferred to NPA account. There is no dispute that the Bank had issued Ext. P3 notice u/s 13(2) of the SARFAESI Act mentioning the amount due under three loans and requesting the first respondent to pay the amount and also mentioned in the notice itself that if the amount is not paid, they will be forced to proceed against the security invoking Section 14 of the Act. No objection was raised to the same by the first respondent. It is also an admitted fact that it is thereafter that the Bank filed Ext. P4 petition u/s 14 of the SARFAESI Act and obtained Ext. P5 order passed by the Chief Judicial Magistrate, Palakkad. It is also an admitted fact that after knowing about Ext P5 order, the first respondent approached this Court by filing the writ petition as WP (C) No. 19748/2011 seeking to quash the proceedings and obtained Ext. P6 judgment by which the writ petition was disposed of as follows:

This is opposed by the learned counsel for the bank. However, taking a lenient view, I disposed of this writ petition with the following directions:

The respondent shall permit the petitioner to pay off the balance amount in twelve equal monthly installments starting from 01/08/2011. Every subsequent installment shall be paid on the first working day of every succeeding month. If the petitioner pays the installments on due dates without default, further proceedings under the Act shall be kept in abeyance. However, if the petitioner commits default in payment of any one of the installments, it would be open to

the respondent to continue proceedings as now initiated without having to issue any fresh notice or proceedings in that regard.

It is thereafter that Ext. P7 notice was issued by the first respondent followed by Ext. P8 reply by the Bank and filing of Ext. P1 complaint happened.

6. Section 13 and 14 of the SARFAESI Act read as follows:

13. Enforcement of security interest.--(1) Notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of the Court or Tribunal, by such creditor in accordance with the provisions of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or any installment thereof, and his account in respect of such debt is classified by the secured creditor as non-performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub-section (4).

(3) The notice referred to in sub-section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of nonpayment of secured debts by the borrower.

[3(A) If, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within one week of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower:

Provided that the reasons so communicated or the likely action of the secured creditor at the stage of communication of reasons shall not confer any right upon the borrower to prefer an application to the Debts Recovery Tribunal u/s 17 or the Court of District Judge u/s 17A.]

(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 releasing 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 releasing 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.

(5) Any payment made by any person referred to in clause (d) of sub-section (4) to the secured creditor shall give such person a valid discharge as if he has made payment to the borrower.

(6) Any transfer to secured asset after taking possession thereof or take over of management under sub-section (4), by the secured creditor or by the manager on behalf of the secured creditors shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of subsection (4), all costs, charges and expenses which, in the opinion of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment of such costs, charges and expenses and secondly, in discharge of the due of the secured creditor and the residue of the money so received shall be paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the secured creditor, and no further step shall be taken by him for transfer or sale of that secured asset

(9) In the case of financing of a financial asset by more than one secured creditor or joint financing of a financial asset by secured creditors, no secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursuant to sub-section (4) unless exercise of such right is agreed upon by the secured creditors representing not less than three-fourth in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors:

Provided that in the case of a company in liquidation, the amount realized from the sale of secured assets shall be distributed in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956):

Provided further that in the case of a company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realize his security instead of relinquishing his security and proving his debt under proviso to sub-section (1) of Section 529 of the Companies Act, 1956 (1 of 1956), may retain the sale proceeds of his secured assets after depositing the workmen's due with the liquidator in accordance with the provisions of Section 529A of that Act:

Provided also that the liquidator referred to in the second proviso shall intimate the secured creditors the workmen's due in accordance with the provisions of Section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen's dues cannot be ascertained, the liquidator shall intimate the estimated amount of workmen's dues under that section to the secured creditor and in such case the secured creditor may retain the sale proceeds of the secured assets after depositing the amount of such estimated dues with the liquidator:

Provided also that in case the secured creditor deposits the estimated amount of workmen's dues, such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited by the secured creditor with the liquidator:

Provided also that the secured creditor shall furnish an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

Explanation.--For the purpose of this sub-section

(a) "record date" means the date agreed upon by the secured creditors representing not less than three fourth in value of the amount outstanding on such date;

(b) "amount outstanding" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent Court, as the case may be, for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the guarantors or sell the pledged assets without first taking any of the measures specified in clause (a) to (d) of sub-section (4) in relation to the secured assets

under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub-section (2), transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice, without prior written consent of the secured creditor.

14. Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.--(1) Where the possession of any secured assets is required to be taken by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any such secured asset, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or, as the case may be, the District Magistrate shall, on such request being made to him--

(a) take possession of such asset and documents relating thereto; and

(b) forward such assets and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub-section (1), the Chief Metropolitan Magistrate or the District Magistrate may take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any Court or before any authority.

7. Further, Section 17 of the SARFAESI Act gives a right to the debtor to file an appeal against the order passed u/s 14 or any proceedings initiated u/s 13 of the Act. Section 32 of the SARFAESI Act protect the action taken by the Officers under this Act in good faith which reads as follows:

32. Protection of action taken in good faith.--No suit, prosecution or other legal proceedings shall lie against any secured creditor or any of his officers or manager exercising any of the rights of the secured creditor or borrower for anything done or omitted to be done in good faith under this Act.

8. Even assuming that there was some mistake made by the officers in making calculation of the amount, that cannot be said to be a false evidence given. If the first respondent was aggrieved by the calculation made, he could have filed objection u/s 13(3) which would have given an opportunity to the Bank to give a reply to that objection as provided u/s 13(4) of the SARFAESI Act. On the other hand, without filing any objection to the notice issued u/s 13(2) of the Act after

getting an adverse order u/s 14 of the Act from the Chief Judicial Magistrate Court, he moved this Court for quashing the proceedings and obtained Ext. P6 order in which also this Court has observed that there was no dispute regarding the liability to pay or the quantum of amount mentioned in the proceedings. It is on that basis and at the request of the petitioner, installment facilities was given to clear all the debt. But after that he had made some payment and again committed default and issued Ext. P7 notice with a view to cover up his default and prolong the matter and then filed Ext. P1 complaint. He had not filled any statutory appeal available to him invoking Section 17 of the Act. All these things will further to show that the attempt of the first respondent is to prolong the matter and nothing more. Merely because there was some calculation mistake, if at all admitted, committed by the Officer of the Bank, it cannot be said that it was done with mala fides so as to proceed against him personally invoking Section 340 of the Code.

9. It cannot be said that if any bona fide mistake has been made in the calculation if at all, though not admitted by the counsel for the petitioner, it will not amount to offence u/s 191 of Indian Penal Code. Section 191 of Indian Penal Code reads as follows:

191. Giving false evidence.--Whoever, being legally bound by an oath or by an express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false or does not believe to be true, is said to give false evidence.

Explanation 1.--A statement is within the meaning of this section, whether it is made verbally or otherwise.

Explanation 2.--A false statement as to belief of the person attesting is within the meaning of this section, and a person may be guilty of giving false evidence by stating that he believes a thing which he does not believe, as well as by stating that he knows a thing which he does not know.

So even going by the averments in the petition, it cannot be said that any offence was made out against the petitioner. He had only acted in good faith as instructed by the Bank as an Authorised Officer to proceed against the securities when the first respondent borrower committed the default in payment of the amount. So it cannot be said that he had committed any offence as alleged in the complaint and he is protected u/s 32 of the SARFAESI Act.

If the Magistrate has committed any illegality in entertaining the complaint, then this Court has got power under Article 227 to quash that proceedings. In this case even if the allegations in Ext. P1 complaint are true, even then no offence is made out against the petitioner as he acted in good faith representing the Bank, as instructed by the Bank on the basis of the documents available in the Bank in respect of the transaction. So under the circumstances, the Chief Judicial Magistrate was not justified in entertaining Ext. P1 complaint u/s 340 of the Code

and no purpose will be served by allowing that proceedings to continue in view of the discussions made above and so the proceedings initiated u/s 340 of the Code on the basis of Ext. P1 complaint filed by the first respondent is not maintainable and the same liable to be quashed and it is hereby quashed.

In the result, the petition is allowed and the proceedings initiated by the Chief Judicial Magistrate, Palakkad on the basis of Ext. P1 complaint is hereby quashed. The Office is directed to communicate the order to the concerned Magistrate Court forthwith.