
(2015) 06 BOM CK 0017
In the Bombay High Court
Case No : Writ Petition No. 25 of 2014

Naresh

APPELLANT

Vs

The Authorised Officer and Others

RESPONDENT

Date of Decision : 29-06-2015

Acts Referred:

Maharashtra Co-operative Societies Act, 1960 — Section 91
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(3), 13(4), 17

Citation : (2015) 4 ALLMR 866 : (2015) 5 MhLj 603 : (2015) 131 SCL 677

Hon'ble Judges : V.A. Naik, J;P.B. Varale, J

Bench : Division Bench

Advocate : J.B. Kasat, for the Appellant; S.S. Ghate, Advocates for the Respondent

Final Decision : Allowed

Judgement

V.A. Naik, J.—Rule. Rule made returnable forthwith. The petition is heard finally with the consent of the learned counsel for the parties.

2. By this petition, the petitioner challenges the judgment of the Debts Recovery Tribunal, dated 18.03.2008, dismissing an application filed by the petitioner for condonation of delay in filing the appeal under Section 17 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as "the Act of 2002" for the sake of brevity). The petitioner also challenges the judgment of the Debts Recovery Appellate Tribunal, Mumbai, dated 16.09.2013, confirming the judgment of the Debts Recovery Tribunal and dismissing the appeal filed by the petitioner.

3. Few facts giving rise to the present petition are stated thus :

The petitioner was the joint owner of the immovable property along with Jaiprakash Pahelwan and Nirmala Pahelwan. In the year 2000, Jaiprakash Pahelwan had applied to the respondent-bank for loan and the joint property of

the petitioner, Jaiprakash and Nirmala was mortgaged towards security. Jaiprakash Pahelwan expired in the year 2001. The respondent-bank filed a dispute in the Cooperative Court under Section 91 of the Maharashtra Cooperative Societies Act, seeking declaration that the legal heirs of Jaiprakash Pahelwan were liable to pay the dues mentioned in the dispute. The petitioner was not made a party to the said proceedings. The said dispute was decided by the Cooperative Court and it was held that the respondent-bank was entitled to receive the outstanding loan amount from the legal heirs of Jaiprakash. Before the dispute was decided, the respondent-bank issued notice to the legal heirs of Jaiprakash under Section 13(2) of the Act of 2002. So also, the notices under Section 13(3) and (4) of the Act of 2002, were issued to the legal heirs of Jaiprakash. Though, it is the case of the respondent-bank that the petitioner was served with the notice under Section 13(4) of the Act of 2002, the petitioner disputes the same. After taking the steps under the provisions of Section 13 of the Act of 2002, the respondent-bank published an auction notice on 19.05.2005 in a local newspaper "Pratideen", circulated in Amravati region. The auction was scheduled to be held on 28.05.2005. It is not in dispute that the auction was not held on 28.05.2005 and without issuing any other auction notice, the property was auctioned in favour of the respondent nos.2 and 3 on 19.07.2006 i.e. more than a year later. It is the case of the petitioner that the petitioner became aware about the sale of the property in the auction in May, 2007 and hence, the petitioner filed a writ petition challenging the auction of the property. In view of the existence of the alternate remedy, the writ petition was permitted to be withdrawn and the petitioner filed an appeal under Section 17 of the Act of 2002 along with an application for condonation of delay in filing the appeal. The application for condonation of delay was rejected, resulting in the dismissal of the appeal filed by the petitioner. The petitioner challenged the judgment of the Debts Recovery Tribunal before the Debts Recovery Appellate Tribunal, but the appeal was dismissed.

4. Mr. Kasat, the learned counsel for the petitioner submitted that the Tribunal was not justified in dismissing the application for condonation of delay in filing the appeal. It is submitted that the petitioner had challenged the auction sale of the property in favour of the respondent nos.2 and 3 in the appeal under Section 17 of the Act of 2002. It is stated that there was a delay of hardly one year in filing the appeal. It is stated that the petitioner had secured the knowledge of the auction sale only in May, 2007 when the petitioner did not receive the rent from the property and was informed by the office of the Assistant Labour Commissioner in respect of the same. It is submitted that there is a clear violation of the provisions of the Act of 2002 and the Security Interest (Enforcement) Rules, 2002, specially Rules 8 and 9 thereof, which require the issuance of 30 days clear notice before conducting an auction and also the service of notice on the borrower. It is stated that the definition of word "borrower" under Section 2(f) of the Act of 2002 encompasses within its ambit, a guarantor or any person who mortgages or pledges as security, towards the

financial assistance by the bank or financial institution. It is stated that before conducting the public auction on 19.07.2006, the petitioner was not served with a notice though, he falls within the ambit of the term "borrower". It is stated that a notice was also not served on the petitioner in respect of the auction that was scheduled on 28.05.2005 by the public notice dated 19.05.2005. It is submitted that the Hon'ble Supreme Court had an occasion to consider the provisions of Rules 8 and 9 of the Security Interest (Enforcement) Rules 2002 in the judgment reported in Mathew Varghese Vs. M. Amritha Kumar and Others, AIR 2015 SC 50 : (2014) AIRSCW 5581 : (2014) 3 JT 151 : (2014) 2 SCALE 331 : (2014) 5 SCC 610 , and it is held by the Hon'ble Supreme Court that it is necessary for the bank to issue a public notice of auction sale in the newspapers and also serve a personal notice on the borrower. It is submitted that the Hon'ble Supreme Court has interpreted the word "or" in Rule 9(1) of the Security Interest (Enforcement) Rules 2002 to hold that the said term should be read as "and". It is submitted that the Tribunal has erroneously rejected the application filed by the petitioner, without noticing that the petitioner was not served with the notice under Rules 8 and 9 of the Security Interest (Enforcement) Rules 2002, and that there was no occasion for the petitioner to secure the knowledge about the auction sale, dated 19.07.2006. The learned counsel relied on the decision of the Hon'ble Supreme Court to substantiate his submission that it would be mandatory for the respondent-bank to issue clear 30 days notice to the borrower before conducting the auction. It is stated that the petitioner had published the notice only once on 19.05.2005 in regard to the auction that was proposed on 28.05.2005. It is stated that the said auction notice was bad as the auction was scheduled before the completion of the period of 30 days. It is stated that if the auction was postponed, it was necessary for the bank to re-issue a public notice in the newspaper and also serve a notice on the petitioner in regard to the postponement of the auction. It is stated that no notice was either published in the newspaper or served on the petitioner before the property was auctioned on 19.07.2006. It is stated that these aspects of the matter were not considered by the Tribunal while considering whether the petitioner was prevented by "sufficient cause" in filing the appeal within the prescribed period of limitation. It is stated that in the absence of any knowledge in regard to the auction, dated 19.07.2006, the petitioner could not have filed the appeal within the prescribed period. It is stated that the petitioner had filed the appeal within a short time from securing the knowledge about the auction sale of the property in favour of the respondent nos.2 and 3, in the month of May, 2007. It is stated that the time spent by the petitioner in prosecuting the matter before the High Court in the writ petition should have been excluded by the Tribunal while considering the delay.

5. Shri Ghate, the learned counsel for the respondent no.1 and Shri Mohta, the learned counsel for respondent nos.2 and 3, opposed the prayers made in the petition and submitted that the impugned judgments may not be interfered with, in exercise of the writ jurisdiction. It is stated that the Tribunal has rightly held

that the petitioner had not explained the inordinate delay in filing the appeal. It is stated that the petitioner was served with the notices under the provisions of Section 13 of the Act of 2002. It is submitted that there are some material contradictions in the affidavits filed by the petitioner, inasmuch as in one of the affidavits, the petitioner has stated that the tenancy in respect of the property was monthly, whereas in the application for condonation of delay, it is stated that the tenancy was yearly, starting from June-2006. The learned counsel sought for the dismissal of the writ petition.

6. On hearing the learned counsel for the parties, it appears that the impugned judgments are unsustainable and are liable to be set aside. The property was valued at Rs.36.16 lacs at the time of mortgage of the same with the respondent-bank in the year 2000 and after a lapse of six years i.e. on 19.07.2006, the property is sold by the respondent no.1-bank to the respondent nos.2 and 3 in the auction for a sum of Rs.14 lacs only. Though, it is stated on behalf of the respondent-bank that there is a likelihood that the respondent-bank may have issued the personal notice under Rules 8 and 9 of the Security Interest (Enforcement) Rules, 2002 to the petitioner, we do not find that an affidavit to that effect, is filed either before the Tribunal or in this Court. It was not the case of the respondent-bank before the Tribunal and it is not the case of the respondent-bank in this Court that before selling the property to the respondent nos.2 and 3 in the auction, dated 19.07.2006, the petitioner was served with a notice. There is no public notice issued by the respondent-bank before selling the valuable property to the respondent nos.2 and 3 in the auction, dated 19.07.2006. It prima facie appears that there is a clear violation of the provisions of Rules 8 and 9 of the Security Interest (Enforcement) Rules 2002 while conducting the auction. However, while considering "sufficient cause", we are not concerned with the violation of the provisions of the Security Interest (Enforcement) Rules 2002. The absence of service of notice on the petitioner under Rules 8 and 9 of the Security Interest (Enforcement) Rules 2002 is, however, relevant and significant while considering whether the petitioner had knowledge about the auction sale, dated 19.07.2006. Since, the respondent-bank had neither published an auction notice in the newspaper in respect of the auction dated 19.07.2006 nor had the bank served a personal notice on the petitioner in respect of the same, there was no occasion for the petitioner to become aware about the sale of the property in the auction on 19.07.2006. The petitioner has satisfactorily explained the delay. The auction was held on 19.07.2006. The appeal was filed in the Debts Recovery Tribunal under Section 17 of the Act of 2002 on 29.09.2007 along with the application for condonation of delay. Before filing of the appeal in September, 2007, the petitioner had approached the High Court in the month of June, 2007, challenging the auction sale. The writ petition was, however, withdrawn by the petitioner in view of the existence of the alternate remedy. The reasons mentioned in the application for condonation of delay are worthy of acceptance. It is stated in the application that since the petitioner did not receive the rent for the year commencing from

June-2006, he enquired with the office of the Assistant Labour Commissioner in May-2007 and was informed that the land and the building was sold in auction to the respondent nos.2 and 3. There is reason to believe the statement of the petitioner that he became aware about the sale of the property only in May, 2007, especially when the petitioner was never served with the notice under Rules 8 and 9 of the Security Interest (Enforcement) Rules 2002. When the property, that is claimed to be worth Rs.45 lacs at the time of auction sale was sold for a pitiful sum of Rs.14 lacs, the Tribunal ought not have rejected the application for condonation of delay for the reasons recorded in the judgment. Merely, because it is mentioned by the petitioner in one of the affidavits that there was monthly tenancy in respect of the property and in the application for condonation of delay the petitioner had stated that he had not received the rent for the year commencing from June-2006, the Tribunal could not have held that there were material contradictions in the statements made by the petitioner. The approach of the Debts Recovery Tribunal in deciding the application is not just and proper. The Tribunal did not consider the matter in the right perspective and took an extremely pedantic approach in deciding the application filed by the petitioner. The Debts Recovery Appellate Tribunal has mechanically confirmed the judgment of the Debts Recovery Tribunal. The learned counsel for the petitioner has rightly relied on the judgment of the Hon'ble Supreme Court reported Mathew Varghese Vs. M. Amritha Kumar and Others, AIR 2015 SC 50 : (2014) AIRSCW 5581 : (2014) 3 JT 151 : (2014) 2 SCALE 331 : (2014) 5 SCC 610 to substantiate his submissions.

7. In the result, the writ petition is allowed. The impugned judgments are quashed and set aside. The application filed by the petitioner for condonation of delay in filing the appeal under Section 17 of the Act of 2002 is allowed. The Debts Recovery Tribunal is directed to register the appeal of the petitioner immediately.

The rule is made absolute in the aforesaid terms with no order as to costs.