(2009) 04 BOM CK 0133

In the Bombay High Court

Case No : Writ Petition No. 6041 of 2008

Nashik Merchant''s Co-operative Bank Ltd. APPELLANT

Vs

Aditya Hotels Pvt. Ltd. RESPONDENT

Date of Decision : 20-04-2009

Acts Referred:

Citation : (2009) 04 BOM CK 0133

Hon'ble Judges : Mridula Bhatkar, J.;V.C. Daga, J.

Bench : Division Bench

Judgement

V.C. Daga, J.—Rule, returnable forthwith.

2. Mr. Kshirsagar, learned Counsel appearing for respondent waives service. Heard finally by consent of parties.

INTRODUCTION ------------

3. This petition, filed under Article 226 and 227 of the Constitution of India, is seeking to challenge the order dated 21st February, 2008 passed by Learned Presiding Officer of the Debt Recovery Tribunal, Pune (for short "DRT") in Securitisation Application No. 41 of 2007 together with judgment and order passed by the Debts Recovery Appellate Tribunal, Mumbai (for short "DRAT") dated 24th August, 2007 in Appeal No. 300 of 2007 and Miscellaneous Application No. 856 of 2007 and seeking directions against the respondent calling upon it to deposit an amount of Rs. 2 crores in DRT, Pune or with the petitioner bank as indicated in the impugned order by the DRAT.

FACTUAL MATRIX --------------

4. The factual matrix giving rise to the present petition is, that the petitioner is a Cooperative Bank registered under the provisions of the Multi State Cooperative Societies Act,2002 (for short "the Act of 2002") as Multi State Cooperative Society (@the Cooperative bank@ for short) and carrying on business of banking under the license issued to it by the Reserve Bank of India under Section 22 of

the Banking Regulation Act,1949 (for short "the Banking Regulation Act").

5. The respondent is a private limited company and borrower of the petitioner cooperative bank.

6. The respondent has borrowed loan in the sum of Rs. 1,25,00,000/- from the petitioner bank on 11th August, 1999 agreeing to repay the same in monthly installment of Rs. 2,80,000/-. The respondent, by way of security executed a deed of mortgage and thereunder mortgaged land and building bearing No. 322 situated at Pune cantonment, Pune Camp (for short "said property").

7. The respondent failed to repay the installments regularly and fell in arrears to the tune of Rs. 2,19,19,099.50 as on 11th July, 2003. The petitioner, therefore, issued a notice of demand under Section 13(2) and (4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "Securitisation Act").

8. The respondent, in spite of receipt of the notice, did not comply with the notice of demand. Consequently, the petitioner took symbolic possession of mortgage property on 21st October, 2003, and thereafter, issued a public notice of auction sale to sell the said property in the local news papers.

9. The aforesaid action of the petitioner was the subject matter of challenge in the Writ Petition No. 1448 of 2004 before this Court, wherein the declaration was sought that the provisions of the Securitisation Act including Section 13 thereof are unconstitutional and declaration was sought that the auction notice dated 28th January, 2004 was bad and illegal.

10. The said petition came to be disposed of vide order dated 29th June, 2006, in view of the judgment of the Apex Court in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., , wherein, the constitutional validity of the Securitisation Act was upheld. The petitioner was relegated to the remedy of appeal under Section 17 of the Securitisation Act before the DRT.

11. The respondent, pursuant to the aforesaid order, invokved appellate jurisdiction of the DRT, Mumbai.

12. The petitioner, pending above appeal, issued another public notice to auction of the said property. The respondent was, therefore, required to prefer an application for urgent relief praying for stay of auction sale. The DRT, Pune vide its order dated 9th August, 2007 was pleased to reject the prayer for interim relief holding that the bank was justified in taking action to sell the property by public auction.

13. Being aggrieved by the aforesaid order rejecting prayer for interim relief, the respondent preferred an appeal under Section 18 of the Securitisation Act before the DRAT along with Miscellaneous Application for waiver of pre-deposit under third proviso to Section 18 of the Securitisation Act.

14. The respondent, in the said appeal urged that the provisions of Securitisation

Act were not applicable to the Multi State Cooperative Banks, in view of the judgment of the Apex Court in the case of Greater Bombay Co.Operative Bank Ltd. AIR 2007 SCW 232. The respondent, however expressed its readiness and willingness to deposit Rs. 2 crores and prayed for directions against the petitioner-Bank directing it to consider the proposal of the respondent for one time settlement (for short "OTS").

15. The petitioner appeared before the DRAT and opposed the above appeal including prayer for interim relief and prayed for direction to respondent to deposit fifty percent of the amount due as required under second proviso to Section 18(1) of the Securitisation Act.

16. The DRAT, after hearing the parties, vide its judgment and order dated 24th August, 2007 allowed the appeal as well as the application for interim relief which was rejected by the DRT. In the said order, it is observed that on deposit of Rs. 2 crores in DRT, it would be expedient for the petitioner bank to consider OTS proposal of the respondent. At this juncture, it is relevant to note that no time schedule was provided in the order for deposit of Rs. 2 crore in DRT. In other words, blanket interim order was passed without imposing any condition on the respondent.

17. After having obtained the aforesaid order dated 24th August, 2007 from the DRAT, the respondent, instead of depositing Rs. 2 crores backed by the proposal for OTS, chose to move an application for reference to High Court by moving an application under Section 113 of Code of Civil Procedure read with Article 141 of the Constitution of India contending therein that the provisions of the Securitisation Act are not applicable to the Multi State Cooperative Societies.

18. Being aggrieved by the judgment and order dated 24th August, 2007 passed by the DRAT allowing the appeal and granting interim stay to the action of recovery and stay to the appellate proceedings by the DRT, observing that the issue with regard to applicability of the Securitisation Act is pending before the Apex Court in the case of Rama Steel Industries and Others Vs. Union of India (UOI) and Another, and Khaja Industries v. State of Maharashtra and Anr. decided on 20th September, 2007 in Writ Petition No. 2672 of 2007 by the unreported) Division Bench (unreported), the petitioner has invoked writ jurisdiction of this Court to challenge the said order.

RIVAL SUBMISSIONS: ------------------

19. Mr. Joshi, learned Counsel appearing for the petitioner submits that the Securitisation Act is very much applicable not only to the Cooperative Societies but also to the Multi State Cooperative Societies, registered under the Multi State Cooperative Societies Act, 2002. In support of his submission, reliance is placed on the Notification dated 28th January, 2003 issued by the Central Government in exercise of powers under Section 2(e)(v) of the Securitisation Act, whereunder Central Government has specified "Cooperative Banks" as defined in Clause (cci) of Section 5 of the Bombay Republic Act, 1949 (Act 10 of 1949) as "Bank". In

order to buttress his submission, reliance is also placed on the division bench judgments of this Court one in M/s.Khaja Industries (cited supra) and another in M/s.Rama Steel Industries (cited supra).

20. Mr. Joshi also pointed out that the SLP preferred by M/s.Rama Steel Industries Ltd. being SLP (Civil) No. 19685 of 2007 has been dismissed by the apex Court on 10th December, 2008. He, thus, submits that the judgment of the Division Bench of this Court in the case of Rama Steel Industries (supra) has received approval of the Apex Court.

21. Mr. Joshi further submits that though the SLP preferred by M/s.Khaja Industries being SLP (Civil) No. 17573 of 2007 is pending in the Apex Court, however, the effect and operation of the judgment has not been stayed. In his submission, the interim relief granted by this Court in favour of the petitioner has been extended until further orders. He, thus, submits that the law laid down by two Division Benches of this Court is still holding the field wherein applicability of the Securitisation Act to the cooperative societies is ruled by a well reasoned judgment. In his submission, the DRT has wrongly construed the interim order of the Apex Court passed in the case of Khaja Industries (cited supra) and has wrongly exercised discretion to stay all the proceedings relating to the cooperative societies, pending before it.

22. Mr. Joshi, further attacked the order of the DRAT contending that the said order is not only casual and perfunctory but it suffers from non application of mind to the facts involved. He further submits that if the DRAT desired that the petitioner bank should consider the OTS proposal of the respondent, then it was expected from the DRAT to direct respondent to deposit sum of Rs. 2 crores with the bank or DRT within reasonable time to show its bonafides. He further submits, that at any rate, the DRAT ought to have imposed certain conditions on the respondent while granting stay, such unconditional stay should not have been granted by the DRAT. He further submits in fitness of the things, DRAT should not have straightway allowed the application for stay filed by respondent. The DRAT ought to have remanded the proceedings back to the DRT with certain directions or laying down certain guide-lines so as to enable the DRT to exercise its discretion properly in accordance with law, following principles of natural justice. He, thus, submits that the impugned order passed by the DRAT is unsustainable and liable to be quashed and set aside.

23. Mr. Joshi, in support of his submission with respect to the applicability of the Securitisation Act to the Multi State Cooperative Societies is concerned, placed reliance on the provision of Section 2(c)(v) of the Securitisation Act and notification dated 28th January, 2003 issued in exercise of that power and Section 56 of the Banking Regulation Act,1949 in general and sub clauses (cci) and (cciiia) thereof in particular to contend that the provisions of the Securitisation Act are very much applicable to the Multi State Cooperative Societies, since they are "primary cooperative banks".

24. Learned Counsel Mr. Joshi urged that pending the consideration of appeal before the DRT, the respondent be directed to deposit an amount of Rs. 2 crores so as to enable the petitioner bank to consider the proposal for OTS, if any.

25. Per contra, learned Counsel appearing for respondent strongly opposed this petition contending that no unconditional stay could have been ordered by the DRAT in view of the observations of the Apex Court in paragraph No. 60 of the judgment in Mardia Chemicals (supra). In his submission, the order passed by the DRAT is in consonance with the judgment of the Apex Court in the case of Mardia Chemicals Ltd. (supra), wherein Section 17(2) of the Securitisation Act was declared ultra vires holding that the condition of pre-deposit is unreasonable and arbitrary. He submits that the respondent had been approaching the petitioner from time to time for one time settlement but the petitioner did not give any response to it. In support of his submission, reliance is placed on the correspondence exchanged between the respondent and petitioner bank. He further submits that the amount for payment was kept ready but the bank did not accept it.

26. Learned Counsel for respondent further submits that the Division Benches of this Court in M/s.Rama Steel Industries and Khaja Industries (cited supra) held that the Securitisation Act is applicable to the cooperative banks but, none of these judgments considers the issue with regard to the applicability of the Securitisation Act to the Multi State Cooperative Societies established under the Act of 2002. In his submission, the Cooperative Societies are registered under the Maharashtra Cooperative Societies Act,1960 (the State Legislation); whereas the Multi State Cooperative Societies are registered under the Multi State Cooperative Societies Act,2002 (the Central Legislation). He, thus, submits that the ratio of the Division Bench judgments in the case of M/s.Rama Steel Industries and M/s.Khaja Industries will not be applicable to the Multi State Cooperative Societies, since the petitioner is a Multi State Cooperative Society, it cannot take resort to the provisions of the Securitisation Act.

27. The Learned Counsel for the respondent, without prejudice to the aforesaid contention urged that the Division Bench judgment of this Court, in the case of M/s.Khaja Industries is the subject matter of challenge in the apex Court, as such the DRT was perfectly justified in directing the stay of all the proceedings related to the Cooperative Banks established under the Maharashtra State Cooperative Societies Act,1960 as well as Multi State Cooperative Societies Act,2002. The learned Counsel for the respondent heavily relied on the statement made in the counter affidavit dated 29th March, 2009 to contend that the respondent was and is willing for one time settlement.

28. The learned Counsel for the respondent submits that the impugned order not being perverse or arbitrary; cannot be quashed and set aside. In his submission, the petition is without any merit and the same is liable to be rejected.

THE ISSUES ----------

29. Having heard both sides, the following issues arise for our consideration:

a. Whether the provisions of Securitisation Act are applicable to the Multi State Cooperative Societies ?

b. Whether the impugned order passed by the DRAT, Mumbai dated 24th August, 2007 allowing Appeal No. 300 of 2007 and stay application is legal and valid ?

c. Whether the order dated 21st February, 2008 passed by the DRT staying the appeal proceedings is legal and valid ?

30. Before considering the rival submissions, it would be appropriate to turn to the provisions of Securitisation Act and to simultaneously read the provisions of the Banking Regulation Act,1949 so as to understand the legal controversy raised and adjudicate upon the issues giving rise to the present petition.

STATUTORY PROVISIONS --------------------

31. Section 2(1)(c) of the Securitisation Act reads as under:

2.Definitions : (1) In this Act, unless the context otherwise requires -

(a) ----------

(b) ----------

(c) "bank" means -

(i) a banking company; or

(ii) a corresponding new bank; or

(iii) the State Bank of India; or

(iv) a subsidiary bank; or

(v) such other bank which the Central Government may, by notification, specify for the purpose of this Act.

32. In exercise of powers conferred under Section 2(1)(c)(v), the Central Government issued a Notification published in the Gazette of India, Ext., Pt.II, S3(ii) dated 28th January, 2003, which reads as under:

NOTIFICATION UNDER SECTION 2(1)(c)(v): ------------------------------------

NOTIFICATION No. SO 105(E) Dated 28th January, 2003 in exercise of the powers conferred under item (v) of Clause (c) of Sub-section(1) of Section 2 of the Securitisation and Reconstruction of Financial Asset and Enforcement of Security Interest Act, 2005 (54 of 2002), the Central Government hereby specifies "Co-operative Bank" as defined in Clause (cci) of Section 5 of Banking Regulation Act,1949 (10 of 1949) as ''bank'' for the purpose of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (54 of 2002). 33. Having read the Notification, it is necessary to go to the

Section 56 of the Banking Regulation Act,1949, which reads as under:

APPLICATION OF THE ACT TO CO-OPERATIVE BANKS

56. Act to apply to co-operative societies subject to modifications:

The provisions of this Act, as in force for the time being, shall apply to, or in relation to, co-operative societies as they apply to or in relation to, banking companies subject to the following modifications, namely;

(c) in Section 5 -----

(i) after Clause (cc), the following clauses shall be inserted, namely"-

(cci) "Co-operative Bank means a State Co-operative Bank, a Central Cooperative Bank and a Primary Co-operative Bank".

(cciiia) "multi-State co-operative bank" means a multi-State cooperative society which is a primary co-operative bank;

(ccv) "primary co-operative bank" means a co-operative society, other than a primary agricultural credit society, -

(1) the primary object or principal business of which is the transaction of banking business;

(2) the paid-up share capital and reserves of which are not less than one lakh of rupees; and

(3) the bye-laws of which do not permit admission of any other co-operative society as a member:

Provided that this sub-clause shall not apply to the admission of a co-operative bank subscribing to the share capital of such co-operative society out of funds provided by the State Government for the purpose; CONSIDERATION -------------

34. The reading of Section 2(1)(c)(v) of the Securitisation Act and the Notification dated 28th January, 2003 extracted hereinabove in the light of Section 5(cci) of the Banking Regulation Act, it would be clear that the Securitisation Act applies to the Cooperative Banks.

35. So far as the Multi State Cooperative Bank defined under Section 5 (cciiia) is concerned, it means a "Multi State Cooperative Society" which is a "primary cooperative bank". Sub Clause (cci) of Section 5 defines "cooperative bank" means a state cooperative bank, central cooperative bank and a primary cooperative bank. So the Multi State Cooperative Bank is a primary cooperative bank. A primary cooperative bank is a cooperative bank. As such petitioner is well within the sweep of the cooperative bank as referred to in the Notification of 28th January, 2003. If the Cooperative banks established under Maharashtra Cooperative Societies Act come within the sweep of Securitisation Act, then on

the same footing, Multi State Cooperative Bank will be well within the sweep of the Securitisation Act. This view finds support from the Division Bench judgments of this Court, one in the case of Khaja Industries (cited supra) and another in the case of Rama Steel Industries (cited supra).

36. The Division Bench judgment of this Court in the case of Rama Industries (cited supra) found approval of the Apex Court, as stated hereinabove. So far as the stay extended by the Apex Court from time to time in the case of M/s.Khaja Industries is concerned, it does not have true affect of staying the effect and operation of the judgment. What is stayed is only further action under Section 18(4) of the Securitisation Act. In this view of the matter, the impugned order dated 21st February, 2008 passed by the DRT below Exhibit-1 in Securitisation Application No. 41 of 2007 staying appeal proceedings is totally unsustainable and the same is liable to be quashed and set aside. Accordingly, the same is hereby set aside. We expect the DRT to proceed with the hearing of appeal on merits with expeditious despatch following principles of natural justice.

37. Having set aside the order dated 21st February, 2008, it is necessary to consider the legality and validity of the order passed by the DRAT allowing appeal together with an application for stay. One has to examine the order of the DRAT, that too, paragraph Nos. 4 to 7 thereof in particular which read as under:

4. The learned advocate for the appellants states that the appellants have made offer to the respondent bank to settle the matter under the OTS scheme and in order to show their bonafides they are prepared to deposit a sum of Rs. 2 crores. It is stated that the appellants have already made offer to the respondent bank for OTS and on their deposit of Rs. 2 crores they may be allowed to present their OTS proposal to the respondent bank.

5. On the deposit of Rs. 2 crores in the DRT it would be expedient for the bank to consider the OTS proposal given by the appellants.

6. If any amount is deposited by the appellants it should be invested in F.D.R. in the respondent bank.

7. In the result, this appeal is allowed so also the application at Exhibit 16 fled by the appellants before the DRT for interim stay.

38. The aforesaid order in general and paragraph Nos. 4 to 7 in particular, make a reference to the respondent''s offer for OTS and desire to deposit Rs. 2 crores. Whereas, in paragraph No. 5, the DRAT observes that it would be expedient for the bank to consider proposal of the respondent for OTS on deposit of Rs. 2 Crores in DRT and in the event of deposit, directions to invest the same in F.D.R. in respondent bank were issued, and, finally in the result, the appeal was allowed together with application for stay.

39. Having examined the above order, it was expected on the part of the DRAT to issue direction to the respondent to deposit sum of Rs. 2 crores or part thereof before certain date or within a reasonable time schedule. In other words, it was

expected on the part of DRAT to pass a conditional order while granting interim stay rather than granting blanket interim order or in alternative the stay application could have been remanded to the DRT with direction to consider the stay application giving certain guide-lines so as to channelize the exercise of the discretion by the DRT. None of these routs were followed by the DRAT. It washed its hands by granting blanket stay order staying the auction sale and thereby stalled the recovery of the bank. A person, who was ready and willing to deposit an amount of Rs. 2 crores as per the statement appearing in the impugned order, was permitted to walk with unconditional blanket stay order. In our considered view, the DRAT has faulted in granting blanket stay and in not fixing a time schedule for deposit of Rs. 2 crores.

40. Having said so, we must deal with contention of the respondent that no pre-deposit could be insisted to entertain appeal, since it is held to be first instance approach to the DRT. As per the judgment of the Apex Court in Mardia Chemicals Ltd. (supra), it is no doubt true that the DRT cannot insist upon for pre-deposit to entertain appeal but it can certainly impose reasonable conditions while granting interim stay. Power to grant interim relief carries with it power to put or impose conditions. In other words power to grant conditional stay is implicit, which by no means can be construed as pre-deposit to entertain appeal. If one is not to ask for interim relief, then appeal can certainly be entertained by DRT without insisting upon pre-deposit.

41. At this juncture, we may place it on record that during the course of hearing, in order to test the bonafides of the respondent, we did ask the respondent through its Advocate appearing before us as to when the amount of Rs. 2 crores could be deposited by it, so as to direct the bank to consider one time settlement proposal. The learned Counsel for respondent was granted time to take instructions and to make statement in this behalf.

42. In response, one Mr. Kanhaiyalal Motilal Talera, one of the Directors of respondent-Company filed an affidavit dated 2nd April, 2009 to place on record the terms and conditions of the alleged OTS without indicating any time schedule to deposit Rs. 2 crores. No positive statement in this behalf was made. On being asked by this Court, the learned Counsel for respondent virtually expressed inability to deposit Rs. 2 crores. This Court would be well within its jurisdiction to record that the OTS proposal sought to be thrown by the respondent before the DRAT was not a bonafide proposal. It was given only to gain time and to protract litigation by hook or crook.

43. The DRAT, by accepting the OTS proposal of the respondent, which was not bonafide, has allowed the respondent borrower not only to protract litigation but also to delay the recovery of the outstanding dues almost by a period of more than 15 months and allowed interest liability to pile up on the outstanding dues. Had the DRAT been careful in passing the order, not only the interest of the petitioner bank but that of the respondent would have been protected. In the present economic scenario of recession neither mortgage property will fetch

proper value nor the borrower will be able to meet bank''s liability. The impugned order has caused substantial prejudice to the bank as well as respondent borrower. In the result, the impugned order dated 24th August, 2007 needs modification so as to give one more chance to the respondent to avail advantage of OTS scheme, if advised.

44. In the result, petition is partly allowed. The application (Exhibit-16) filed by the respondent and decided by the DRAT vide order dated 24th August, 2007 is modified and it is declared that the interim stay granted shall be subject to deposit of Rs. 2 crores within four weeks from the date of receipt of this order by DRT, failing which the interim stay shall stand automatically vacated and the petitioner bank shall be entitled to proceed to dispose of the security under Section 18(4) of the Securitisation Act. The order dated 21st February, 2008 passed by DRT staying progress of the Securitisation appeal No. 41 of 2007 is set aside. The DRT is directed to decide the appeal with expeditious despatch, at any rate within 3 months from the date of receipt of this judgment. All rival contentions on merits are kept open.

45. In the result, Rule is made absolute in terms of this order with costs quantified in the sum of Rs. 25,000/- payable to the petitioner bank within four weeks.

