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(2007) 03 GAU CK 0006

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 1711 of 2006

Noorbari Tea Co.(P) Ltd.and Anr — APPELLANT

Vs

UCO Bank and Ors — RESPONDENT

Date of Decision : 21-03-2007

Acts Referred:

Constitution of India, 1950 — Article 226, 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2), 13(4)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4)

Citation : AIR 2007 Guw 135 : (2007) 3 GLT 876

Hon'ble Judges : B. K. SHARMA, J

Bench : Single Bench

Advocate : D. Baruah, P. C. Goswami, Advocates appearing for Parties

Judgement

1. The challenge in this writ petition is to the threatened action of the respondent bank to take action under Section 13(4) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 without serving notice upon the petitioners under Section 13(2) of the Act.

2. The petitioner No. 1 is a company incorporated under the provisions of the Companies Act, 1956 having its registered office situated at Guwahati. The company is engaged in the business of manufacturing and sale of tea and for the purpose it owns a tea garden, which stands in the name and style of "Noorbari Tea Estate" situated at Tezpur, Assam.

3. The petitioner No. 1 company represented by the petitioner No. 2, one of the Directors, took a loan from the respondent No. 1 i.e. UCO Bank in the year 2001. The petitioners have admitted that there was lapse on their part towards repayment of the loan amount. In the writ petition, the petitioners have not furnished the details of the loan taken and the outstanding liability. It is the case of the petitioners that on 2522006, a person namely Sri S. K. Roy, Manager of

the respondent No. 4 company informed the petitioners that the company has been authorized by the respondent bank to take action against the petitioner company as per the provisions of the aforesaid Act. According to the petitioners, they were not

aware of any such move of the Bank as they did not receive any communication.

4. It is the further case of the petitioner that on receipt of the intimation from the representative of the respondent No. 4, they contacted the respondent bank and upon such contact could come to know that the notice under Section 13(2) of the Act was in fact issued to the petitioners. They were also informed that since the notice was not responded to, the respondent Bank proposed to take action against the petitioner company as per the provisions of the Act. Situated thus, the petitioners made AnnexureB communication dated 1332006 to the respondent bank making a request to provide with the notice under Section 13(2) of the Act enabling it to submit reply to the same. The petitioners have asserted that although no reply has been furnished to them, but on the other hand the respondent bank has threatened to take action as per the provisions of the Act.

5. Referring to the decision of the Apex Court in Mardia Chemicals Limited v. Union of India, reported in (2004) 4 SCC 311 : (AIR 2004 SC 2371) the petitioners have contended that they are entitled to reply to the notice under Section 13(2) of the Act to which the authority must apply its mind. According to the petitioners, this right having been denied to them, the Bank is precluded from taking action under Section 13(4) of the Act.

6. The respondent Bank has filed its affidavit denying the contention raised by the petitioners. In the affidavit, the Bank apart from dealing with the merit of the case has also questioned the maintainability of the writ petition in view of the remedy available to the petitioners under the inbuilt provisions of the Act. Referring to the AnnexureA letters dated 1352005, 2062005 and 2172005, in which the respondent Bank had given the details of the charge against the petitioners, it has been contended in the affidavit that the petitioners have suppressed material fact and have also neglected to regularize their accounts and/or hanour its obligation towards the respondent Bank.

7. In paragraph 3(g) of the counteraffidavit, it has been stated that under the circumstances, the respondent Bank was compelled to issue notice dated 3092005 under Section 13(2) of the Act demanding the amount of Rs. 3,74,52,775/ being the outstanding liability as on 3092005. The details of the liability were indicated in Schedule A to the notice. In Schedule B to the notice the details of the security documents were also indicated, while the details of the secured assets were mentioned in Schedule C. Copies of the notices were sent by registered post to the petitioners and also the other guarantors. The copy of the notice has been annexed to the counteraffidavit as AnnexureB. The respondent Bank has also annexed the receipts relating to registered post of the notice. The

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petitioners in their affidavitinreply have denied receipt of the notice.

8. I have heard Mr. D. Baruah, learned counsel for the petitioner as well as Mr. P.C. Goswami, learned counsel representing the respondent bank. While Mr. Barua, learned counsel for the petitioner highlighting the above aspects of the matter has contended that the impugned action is uncalled for in the given fact situation of the case, Mr. Goswami, learned counsel for the bank placing reliance on the decisions of the Apex Court and this Court submitted that the writ petition is not maintainable and that the action of the respondent bank being in accordance with the provisions of the Act, the writ Court will be reluctant to interfere with the said action. He has placed reliance on the decisions reported in (2004) 4 SCC 311 : (AIR 2004 SC 2371) (Mardia Chemicals Ltd. v. Union of India), 2006 (4) GLT 492 (Kanak Udyog (India) v. State of Assam), 2006 (4) GLT 601 (Sushil Kumar Agarwalia v. State of Assam) and the unreported judgment of the Apex Court dated 29112006 in Civil Appeal Nos. 908/2006 (Transcor v. Union of India) : (AIR 2007 SC 712).

9. The only contention raised by the petitioners is that since they did not receive any notice under Section 13(2) of the Act, their valuable right to have their say in the matter by way of responding the notice has been infringed. While it is the case of the Bank that the notices were duly served, the petitioners have contended that they did not receive any notice. The bank could not have done anything more than to send the notice to the petitioners and their representative by registered post. It is unbelievable that the petitioners were not aware of the same. In the affidavit the respondent bank has stated that the copies of the notices were also sent to the guarantors. The petitioners cannot thwart the proceeding under the Act on

ground of nonreceipt of notice. Even assuming that they did not receive notice, the respondent Bank having enclosed the copy thereof in their counteraffidavit, it was always open for the petitioners to respond to the same by furnishing their reply. Instead, they kept on insisting that they did not receive the notice. It is only on this ground, the petitioners have invoked the writ jurisdiction of this Court and the matter is now pending for about one year with interim stay.

10. The Bank has complied with the necessary requirements of Section 13(2) of the Act and upon failure to discharge their liability in full, the petitioners have now apprehended action under Section 13(4) of the Act. In the event of being dissatisfied with the action taken under Section 13 (4) of the Act, it will be open for the petitioners to prefer an appeal under Section 17 of the Act. This statutory remedy cannot be bypassed by invoking the writ jurisdiction. Moreover, the stage has not yet ripened for initiating any proceeding. It is only at the notice stage and it will be open for the bank to take action as per the provision of the Act upon failure of the petitioners to comply with the requirement under Section 13(2) of the Act.

11. Under somewhat similar circumstances, this Court by judgment and order

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dated 1392006 passed in M/s. Barak Valley Tea Company v. Union of India ((2006) 133 Com Cas 937) has dismissed the writ petition. In that case, the decision dated 222006 of the Madras High Court in W.P. No. 250/2006 (D. Ravichand v. Manager, Overseas Bank) has also been referred to. In the decision of the Madras High Court, which has been passed placing reliance on the earlier Division Bench judgment, it has been held that the writ petition of this nature is premature as the case as in the instant case was only at the stage of Section 13(2) notice.

12. In view of the above, I am of the considered opinion that the writ petition does not disclose any material warranting interference under Article 226 of the Constitution of India. It fails on all Counts i.e. being statutory remedy of appeal in case of initiation of proceeding under Section 13(4) of the Act and also on merit, in view of the own admission of the petitioner regarding its liability to the loan amount. In this connection, the observation of the Apex Court in Punjab National Bank v. O. C. Krishnan, reported in 2001 AIR SCW 2993 : (AIR 2001 SC 3208) are quoted below :

"5. In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under S. 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short the Act). The High Court ought not to have exercised its jurisdiction under Art. 227 in view of the provision for alternative remedy contained in the Act. We do not propose to go into the correctness of the decision of the High Court and whether the order passed by the tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under S. 20 and this fast track procedure cannot be allowed to be deralied either taking recourse to proceedings under Arts. 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision under an Act cannot expressly oust the jurisdiction of the Court under Acts. 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the Court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Art. 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

13. It will, however be open for the petitioners to furnish their reply to the notice under Section 13(2) of the Act, copy of which has been annexed to the counteraffidavit. If the petitioners want to submit their reply to the notice, it will be open for them to do so within the time stipulated in the notice taking the date of notice from today. Thereafter, the Bank upon consideration of the reply may take the follow up action. It is made clear that, if the petitioners remained

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aggrieved by the decision of the respondent Bank, it will be open for them to take recourse to the course of action under the provisions of the Act. It has already been held

above, that the petitioners cannot invoke the writ jurisdiction without pursuing their remedy under the Act itself.

14. Subject to the above liberty to the petitioners, the writ petition is dismissed. There shall be no order as to costs.

Petition dismissed.

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