(2023) 11 KL CK 0137

In the High Court Of Kerala

Case No : Writ Appeal No. 1730 Of 2023

N.P. Abdul Nazer — APPELLANT

Vs

Union Bank Of India — RESPONDENT

Date of Decision : 30-11-2023

Acts Referred:

Code of Civil Procedure, 1908 — Order 47 Rule 1
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 14, 14(1), 17, 26E
Recovery of Debts and Bankruptcy Act, 1993 — Section 19(1)
Micro, Small and Medium Enterprises Development Act, 2006 — Section 8, 9, 10, 29(3)

Citation : (2023) 11 KL CK 0137

Hon'ble Judges : A. J. Desai, C.J;V.G. Arun, J

Bench : Division Bench

Advocate : Maria Nedumpara, Asp.Kurup, Sadchith.P.Kurup, C.P.Anil Raj, Siva Suresh, Reshma Raj, Mathews J. Nedumpara, T.K.Vipindas

Final Decision : Dismissed

Judgement

V.G.Arun, J

1. The appellant had availed an overdraft cash credit facility to the tune of Rs.10,00,000/- from the first respondent bank (the erstwhile Corporation Bank) in the year 2011. The credit limit was subsequently enhanced and certain other loans sanctioned. The appellant defaulted repayment, resulting in the first respondent initiating recovery proceedings by filing an Original Application before the Debts Recovery Tribunal, Ernakulam. Pending that Original Application, the bank initiated recovery measures under the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (the 'SARFAESI Act' for short). In the course of such measures, the bank obtained an order under Section 14 of the SARFAESI Act, appointing an Advocate Commissioner to take over possession of the secured assets. The Original Petition was thereupon filed challenging the order under Section 14. Sometime later, the original petition was amended, by incorporating numerous other prayers. In its amended form,

the original petition contains the following prayers;

“a). Declare that the petitioner's enterprise is an MSME within the meaning of the MSMED Act of 2006 and the notification S.O.1432(E) dated 29/05/2015 issued by the Central Government under Section 9 thereof, as also the circulars and guidelines issued by the Reserve Bank of India under Section 10 thereof, which provides for a mechanism of resolution of stress and that no proceedings for recovery under the SARFAESI Act, RDB Act or the IBC will lie, in as much as the MSMED Act being a special law qua the aforesaid Acts, and a later law in relation to the RDB Act and the SARFAESI Act, its provisions will prevail over the aforesaid enactments;

b). Declare that the MSME Act in so far as it has not created a special forum/ tribunals to enforce the inter-se rights and obligations/remedies, which it has created in addition to those rights/ obligations/remedies recognized by the common law, the jurisdiction of the Civil Court is not ousted, for it is impossible to oust the jurisdiction of the Civil Court without providing for an alternative forum/tribunal to adjudicate the inter se disputes between parties who are governed by the Act;

c). Declare that the petitioner is entitled to be compensated by Respondents 1,3 and 4, for the loss and injury, which it has suffered on account of the gross breach of trust, culpable negligence, and malicious and tortious action at the hands of the Bank and its officers, as result of violation of ExtsP8 to P13, which loss and injury far exceeds the very claim of the Bank as against the petitioner, and therefore, no amount is due to the Respondents 1,3 and 4 by the petitioner, and Respondents 1,3 and 4 have no enforceable rights as against the petitioner;

d). Declare that the very Application, C.M.P. No.1337/2022 before the Ld.CJM.Manjeri, is vitiated by misrepresentation and fraud, and thus void ab initio and still born in the eyes of law and is liable to be rejected summarily in as much as the affidavit of the 1st respondent Bank, is nothing but falsehood on oath, misrepresentation and wilful concealment of tacts and a gross violation of the requirements to be stated by the Authorized Officer on oath as contemplated in Section 14(1) of the SARFAESI Act;

e). Declare that the guidelines and notifications issued by the Reserve Bank of India from time to time empowering the bank and financial institutions to declare a borrower as a willful defaulter is without authority of law and further that the Plaintiffs, may a borrower is not liable to be declared as a wilful defaulter except by authority of an act of Parliament or statutory instrument having the force of law;

f). Declare that the Petitioner is entitled to be benefited from the fall in the repo rate of RBI that is periodically declared to regulate the inflation in the economy;

g). Declare that the excess interest charged in breach of repo rate regulations of RBI from the Petitioner is liable to be reimbursed to the petitioner forthwith;

h). Grant a perpetual mandatory and prohibitory injunction restraining and prohibiting Defendant Nos.1 to 4, their agent, servants, officers representatives and/or anyone from taking any action for recovery under any law whatsoever in respect of the properties referred to in Ext.P3, or in any manner interfere with the Petitioner's peaceful possession and enjoyment of the said properties;

i). Issue a writ of Certiorari calling for the records leading to the passing of Ext.P3/Order, and the SARFAESI proceedings leading to it, and quash Ext.P3/ Order and the SARFAESI proceedings leading to it, as illegal ;

j). Issue a writ of prohibition against respondents 1,3 and 4, their agents, servants, officers, representatives and/or anyone, restraining them from proceeding against the petitioner, under the SARFAESI Act, 2002, RDB Act, 1993 or any other law, and from classifying the petitioner's account as an NPA, or the petitioner as a wilful defaulter, and from downgrading the credit worthiness of the petitioner;

k). Issue a direction to the Respondents 1,3 and 4, to direct the committee constituted by it under Ext.P8 to consider the petitioner's enterprise, so as to provide all the reliefs/measures mandated to be granted to the petitioner's enterprise;

i). Grant cost of the above proceedings and/or any other consequential relief.”

The learned Single Judge dismissed the Original Petition by judgment dated 22/08/2023. Hence, this appeal.

2. When the appeal was taken up for consideration on 10/10/2023, learned Standing Counsel for the Bank informed that the review petition filed by appellant against the judgment impugned in this appeal is being heard by the learned Single Judge. Thereupon, the appeal was adjourned by two weeks, awaiting the decision in the review petition. The appeal was thereafter taken up on 08/11/2023. On that day, the learned Counsel for the appellant submitted that the review petition had been partly allowed vide order dated 26/10/2023. When we then asked the Counsel whether the appellant wanted to challenge the review order, it was submitted that the appellant does not intend to challenge the order and would like to proceed with the appeal. The effect of review being allowed pending the appeal, as stated in paragraph 37 of the Apex Court judgment in Kunhayammed and Others v. State of Kerala & Another [2000 (6) SCC 359], is as under;

“37. Let us assume that the review is filed first and the delay in SLP is condoned and the special leave is ultimately granted and the appeal is pending in this Court. The position then, under Order 47 Rule 1 CPC is that the review can be disposed of by the High Court. If the review of a decree is granted before the disposal of the appeal against the decree, the decree appealed against will cease to exist and the appeal would be rendered incompetent. An appeal cannot be preferred against a decree after a review against the decree has been granted.

This is because the decree reviewed gets merged in the decree passed on review and the appeal to the superior court preferred against the earlier decree — the one before review — becomes infructuous.”

In view of the above legal position, the writ appeal could have been dismissed as incompetent, the impugned judgment having merged with the order in the review petition. Even if so, we relented to the request of the learned Counsel to hear the appeal on merits.

3. The first contention is that, going by the first proviso to Section 19(1) of the Recovery of Debts and Bankruptcy Act, 1993, action under the SARFAESI Act could have initiated only after withdrawing the Original Application pending before the Debts Recovery Tribunal.

4. It is then contended that the Micro, Small And Medium Enterprises Development Act, 2006 (The MSMED Act) being a welfare legislation, its provisions ought to be interpreted and applied in a benevolent and harmonious manner. Instead of doing that, the learned Single Judge wrongly relied on the Apex Court decision in Kotak Mahindra Bank Ltd. v. Girnar Corrugators Private Ltd. and Others [2023 3 SCC 210] and held that the MSMED Act is superseded by the SARFAESI Act. In Kotak, the question was whether the debts due to a secured creditor under the SARFAESI Act will get primacy over that of an unsecured creditor under the MSMED Act. The Apex Court answered that question by holding that the debts due to the secured creditor will have priority in view of Section 26E of the SARFAESI Act. The above dictum has no application to the fact of the instant case, the issue herein being as to the declaration of the account of a micro enterprise as a Non Performing Asset and initiation of recovery measures under the SARFAESI Act, without following the procedure prescribed in the guidelines in accordance with Section 9 of the MSMED Act. In this regard attention is drawn to the Framework for Revival and Rehabilitation of Micro, Small and Medium Enterprises (‘the Framework’ for short). Referring to the Preamble and Sections 9, 10, 29(3) of the MSMED Act and also certain paragraphs of the Framework, it is contended that the procedure prescribed in the Framework is mandatory in nature. It is pointed out that the objective of the MSMED Act is to facilitate the promotion, development and enhance the competitiveness of micro, small and medium enterprises and matters connected therewith or incidental thereto. As per Section 9 of the Act, the Central Government can issue notifications specifying the programmes, guidelines or instructions for facilitating such promotion, development and enhancement of competitiveness of micro, small and medium enterprises. The Framework issued in exercise of the power under Section 9 is one such notification and hence, statutory in nature. Paragraph 1(1) of the Framework stipulates that the Banks should identify incipient stress in the loan account of micro, small or medium enterprises, before the account turns into a Non Performing Asset.

5. Going by the prescribed procedure, after identifying incipient stress in the account, the Bank should file an application before the Committee for Stressed

Micro, Small and Medium Enterprises. Thereupon, the Committee has to explore options like rectification and restructuring to resolve the stress. The recovery process can be resorted to only if the other options are not feasible. In the appellant’s case, the Bank did not follow the aforementioned procedure before initiating proceedings for recovery and therefore, the entire proceedings is vitiated.

6. The next challenge is against the finding that, since the appellant’s establishment obtained registration under Section 8 of the MSMED Act only on 02/04/2023, its rights and privileges as a micro enterprise would accrue only from that date. Here, the contention is that the appellant’s proprietary concern was considered and treated as a micro enterprise by the bank from the time when the loan was first granted. It is submitted that the appellant’s account has been debited for the guarantee-fee applicable to MSMEs under the Credit Guarantee Fund Scheme for micro and small enterprises introduced by the Government of India. Moreover, the Framework being in the realm of procedural law, will have retrospective effect. Referring to paragraph 1(2) of the Framework, it is submitted that a micro enterprise can opt for resolution of the incipient stress in its account by approaching the Committee before the accumulated losses of the enterprise equals to half or more of its entire net worth. It is hence contended that, even at this point of time, the appellant could have approached the Committee, but for the adverse findings in the impugned judgment.

7. Learned Standing Counsel for the Bank contended that the writ petition was not maintainable in view of the alternative remedy available under the SARFAESI Act. It is submitted that, as against an order under Section 14, the appellant has an effective remedy of filing a securitisation application under Section 17 of the Act. Hence, the writ appeal is liable to be dismissed on that ground alone.

8. It is submitted that the contentions based on the MSMED Act and the Framework are an afterthought, since the appellant’s establishment was registered as a micro enterprise after filing the writ petition and new contentions incorporated thereafter. In reply to the contention that SARFAESI proceedings could not have been initiated without withdrawing the Original Application already filed before the Debts Recovery Tribunal, the answer is unsustainable, in view of the Apex Court decision in Transcore v. Union of India and Another [2008 (1) SCC 125].

9. The contention that the appellant’s establishment is entitled to the privileges under the MSMED Act is refuted by referring to Annexure R1A Circular issued by the Reserve Bank of India by which alone retail and wholesale trades were included as MSMEs as per Office Memorandum dated 02/07/2021 issued by the Ministry of Micro Small and Medium Enterprises. In this regard, attention is also drawn to Exhibit P7 Udyam registration certificate obtained by the appellant, wherein the activity of the micro enterprise is shown as trading falling under the classification 'wholesale trade'. It is hence contended that the appellant’s being an enterprise engaged in wholesale trade, the benefits under the MSMED Act will

be available only from the date, with effect from which, wholesale and retail trades were brought within the purview of the Act. Finally it is submitted that, raising the very same contentions, the appellant has filed a suit before the Bombay City Civil Court at Mumbai and has also caused his men to file civil suits before the courts at Manjeri and Tirur.

10. As rightly contended by the learned Standing Counsel, the contention based on Section 19(1) of the Recovery of Debts and Bankruptcy Act cannot be countenanced in view of the categoric finding in Travancore (supra). The relevant portion of that judgment is extracted hereunder for convenience;

“68.The object behind introducing the first proviso and the third proviso to Section 19(1) of the DRT Act is to align the provisions of the DRT Act, the NPA Act and Order 23 CPC. Let us assume for the sake of argument, that an OA is filed in DRT for recovery of an amount on a term loan, on credit facility and on hypothecation account. After filing of OA, on account of non-disposal of the OA by the tribunal due to heavy backlog, the bank finds that one of the three accounts has become substandard/loss, in such a case the bank can invoke the NPA Act with or without the permission of DRT. One cannot lose sight of the fact that even an application for withdrawal/leave takes time for its disposal. As stated above, with inflation in the economy, value of the pledged property/asset depreciates on day-to-day basis. If the borrower does not provide additional asset and the value of the asset pledged keeps on falling then to that extent the account becomes non-performing. Therefore, the bank/FI is required to move under the NPA Act expeditiously by taking one of the measures provided by Section 13(4) of the NPA Act. Moreover, Order 23 CPC is an exception to the common law principle of non-suit, hence the proviso to Section 19(1) became a necessity.

69. For the above reasons, we hold that withdrawal of the OA pending before DRT under the DRT Act is not a precondition for taking recourse to the NPA Act. It is for the bank/FI to exercise its discretion as to cases in which it may apply for leave and in cases where they may not apply for leave to withdraw. We do not wish to spell out those circumstances because the said first proviso to Section 19(1) is an enabling provision, which provision may deal with myriad circumstances which we do not wish to spell out herein.”

11. The contention that the crucial factor is not registration under Section 8 of the MSMED Act, but whether the appellant’s business concern was considered as a micro enterprise by the bank is also without substance. As rightly held by the learned Single Judge, even if an enterprise satisfies all the requirements for being termed as a micro enterprise, it will become entitled for the rights and privileges under the Act only after granted registration as such enterprise. This is evident from a reading of Section 8 of the Act which mandate the filing of a memorandum by persons intending to establish micro, small or medium enterprises. The Government has issued SO 2052 (E) on 30.06.2017 specifying that any micro, small and medium enterprises shall file Udyog Aadhaar

Memorandum in Form 1 appended to the notification following the prescribed procedure. The appellant having opted to file Udyog Aadhaar Memorandum and obtain Udyam registration only on 02/04/2023, cannot be heard to contend that the enterprise would be entitled for the rights and privileges under the Act even for the period prior to the registration. The fact that wholesale and retail trade were included as MSMEs only on issuance of the Office Memorandum dated 02/07/2021 is another determinative factor.

12. Having gone through the impugned judgment, we find that the learned Single Judge has dealt with all contentions. The appellant’s attempt to re-agitate the decided issues by filing a review petition was also rightly repelled. Hence, we find no reason to interfere with the impugned judgment.

In the result, the writ appeal is dismissed.