(2014) 07 AHC CK 0254

In the Allahabad High Court

Case No : C.M.W.P. No. 33033 of 2009

Prabha Construction APPELLANT

Vs

Bank of Baroda RESPONDENT

Date of Decision : 21-07-2014

Acts Referred:

Constitution of India, 1950 — Article 13(2), 13(4), 226, 227
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 17, 17(1)

Citation : (2014) 11 ADJ 519 : (2015) 3 ALJ 279 : (2015) 2 BC 462 : (2014) 125 RD 615

Hon'ble Judges : Sudhir Agarwal, J

Bench : Single Bench

Advocate : Satendra Pratap Singh and Y.S. Saxena, Advocate for the Appellant; Rakesh Mishra, Ashish Kumar Singh, Piyush Agarwal, Rahul Sripat, S.K. Mishra and Ajay Kumar Singh, Advocate for the Respondent

Judgement

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Sudhir Agarwal, J.—Heard Sri Y.S. Saxena, Advocate assisted by Sri S.P. Singh, learned Counsel for the petitioner and Sri Rahul Sripat, Advocate assisted by Sri Ashish Kumar Singh, Advocate for respondent No. 6. Against the recovery proceedings initiated by Bank of Baroda on proceeding against the secured assets, taking steps under section 17 of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Act, 2002") and challenge thereto by petitioners having failed before Debt Recovery Tribunal (hereinafter referred to as the "DRT") and Debts Recovery Appellate Tribunal (hereinafter referred to as the "DRAT"), this writ petition has up under Article 226 of the Constitution of India with a prayer of issuance of a writ of certiorari for quashing the judgment and order dated 27.5.2009 (Annexure-20 to the writ petition).

2. The brief factual matrix which would be relevant to understand the dispute

may be narrated as under.

3. Petitioner No. 1, M/s. Prabha Construction, is a partnership firm engaged in construction business. Petitioner No. 2, Vinay Bhushan Sood, his wife, Smt. Prabha Sood and their two sons, Ashish Sood and Amit Sood, are said to be the partners in the firm. The firm is a recognized Government contractor carrying on business in respect of State of Uttar Pradesh and Madhya Pradesh.

4. Bank of Baroda agreed to provide Cash Credit Limit facility to petitioners so as to provide them financial assistance in carrying on their business facility. Initially this limit was upto Rs. 15 lacs, which subsequently extended upto Rs. 50 lacs. Another facility was Bank Guarantee Limit which was also increased to Rs. 1 crore.

5. Against aforesaid financial limits the petitioners provided security of their residential house situate at 80-A Civil Lines, Jhansi and land measuring about 3.24 acres situate on Lalitpur Road, Near Guru Nanak Dharamkanta, Bijauli, District Jhansi. Besides, personal guarantee of Dr. G.D. Shukla and Prabha Jeet Singh was also furnished. On account of failure on the part of petitioners in clearing outstanding dues the petitioners account was declared Non-Performing Assets (hereinafter referred to as the "NPA") in the year 2006. Notice under section 13(2) of Act, 2002 was issued by Bank on 22.12.2006 demanding a sum of Rs. 88,64,216/- payable on 30.11.2006. Having no response from petitioners, the Bank took possession of secured assets on 9.6.2007 by issuing notice under section 13(4), whereagainst petitioners-firm preferred Writ Petition No. 28445 of 2007, which was dismissed on 6.7.2007 on the ground of alternative remedy of appeal under section 17 of Act, 2002.

6. Authorised Officer of the Bank got a sale notice of secured assets published in daily newspaper stating that auction would take place on 18.2.2008. Sri V.B. Sood, petitioner No. 2, on 18.2.2008 moved an application before Authorized Officer of the Bank that the firm has been able to manage a sum of Rs. 65 lacs which it would be depositing against loan account on that very day and hence auction scheduled to be held on 18.2.2008 be postponed.

7. The Bank looking to the fact that substantial amount was sought to be deposited, accepted the offer, for the time being, but said that remaining amount of Rs. 75.60 lacs and interest as per compromise would remain secured by equitable mortgage of residential building till clearance of all dues.

8. It is not disputed that Rs. 65 lacs, however, was never deposited with the Bank. The second notice then was published on 21.3.2008 in daily newspaper "Jhansi Jagaran" fixing 29.3.2008 for auction. This notice was challenged by petitioners by filing S.A. No. Nil of 2008, under section 17(1) of Act, 2002 seeking following relief:

"A. The applicant respectfully prays that this Hon''ble Tribunal be graciously be pleased to quash and set-aside the impugned auction notice dated 21.3.2008 issued u/s. 13(2) and 13(4) of the SARFESI Act issued by the respondent''s Bank.

B. The applicant further prays that this Hon''ble Tribunal may be pleased to set aside the auction sale which was held on 29.3.2008.

C. The applicant further prays that this Hon''ble Tribunal may be pleased to direct the respondents Bank to grant three months time to deposit the dues as per compromise entered into the parties.

D. The applicant further prays that this Hon''ble Tribunal pass any such suitable order or direction which this Hon''ble Tribunal may deem fit and proper under the facts and circumstances of the case."

9. Request for ad-interim relief was also pressed before DRT. The interim order was passed by DRT on 11.4.2008 to the following effect:

"Considering all aspect, I am of considered opinion that the issues raised in the stay application of the applicant be heard on 15.4.2008 and in the mean time no measures be taken by the respondent-bank for confirmation of sale of the secured assets.

It is therefore, ordered.

That the respondent-bank is directed not to take any measure for confirmation of sale of the secured assets in favour of the auction purchaser during 12.4.2008 to 14.4.2008 and until hearing of the stay application to be fixed on 15.4.2008.

With these views the application dt. 11.4.2008 of the applicant is thus disposed of.

Let copies of this order be supplied to the parties immediately as per rules.

Fix 15.4.2008 for hearing of the stay application of the applicant and further order."

10. The Bank thereafter filed preliminary objection dated 15.4.2008. Since the Bank informed DRT that auction has already been held on 29.3.2008 and sale certificate was issued to auction purchaser, i.e., respondent No. 6 on 5.4.2008, the DRT rejected appeal under section 17(1) as not maintainable vide order dated 15.4.2008, whereagainst petitioners preferred Appeal No. R-977/08 before DRAT which has also been rejected vide order dated 27.5.2009, impugned in this writ petition.

11. The respondent-Bank has contested the writ petition by filing counter-affidavit stating that sum of Rs. 88,64,216/- fell due as on 30.11.2006, hence notice under section 13(2) was issued on 22.12.2006. No amount was paid, hence, possession of property was taken, by Bank, whereagainst, petitioner filed Writ Petition No. 28455 of 2007, which was dismissed on 6.7.2007, on the ground of alternative remedy of appeal. When Bank proceeded for auction by publication of notice dated 8.1.2008 fixing date of auction as 18.2.2008, the petitioner offered to pay Rs. 65 lacs, relying on almost six months back

compromise dated 5.9.2007, which he failed to abide, yet the Bank granted indulgence but again petitioners disappointed the Bank by committing default. It is said that petitioners represented to offer two Bankers Cheque of Rs. 32.50 lacs each favouring Bank of Baroda A/c Prabha Construction dated 18.2.2008 but both the cheques were never actually deposited with Bank. The Bank informed petitioners about this non-deposit vide letters dated 26.2.2008 and 10.3.2008 but in vain. On 17.2.2008 the purchaser of Bankers Cheque approached the issuer Bank, requesting for cancellation of bath Bankers-Cheque and the same were cancelled.

12. These facts show that petitioners actually misrepresented and played fraud with Bank, on the one hand, showing that they are depositing Rs. 65 lacs but as a matter of fact did not, and in the meantime, took advantage of deferring auction proceedings, founded on such misrepresentation. It is in these circumstances, auction sale notice dated 21.3.2008 was published fixing 29.3.2008 as the date of auction. This was also challenged by petitioner in Writ Petition No. 16291 of 2008 but failed since writ petition was dismissed on the ground of alternative remedy on 2.4.2008. On 29.3.2008 auction was held and residential house of petitioners situate at 80-A, Civil Line, Jhansi was sold for a sum of Rs. 84 lacs to Mr. Anand Sharma, resident of House No. 80, Civil Line, Jhansi, who offered the highest bid and deposited 25% of the sale consideration, i.e., Rs. 21 lacs with Bank on 29.3.2008 itself. The remaining 75% amount, i.e., Rs. 63 lacs has been deposited on 5.4.2008. After receipt of entire amount of Rs. 84 lacs a sale certificate under Rule 9(6) of the Security Interest (Enforcement) Rules, 2002 (hereinafter referred to as the "Rules, 2002") has been issued to auction purchaser by the Bank after confirming sale. It is pleaded that petitioners, in fact, have cheated the Bank and, therefore, are not entitled for equitable relief under Article 226 of the Constitution.

13. The auction purchaser has also contested writ petition by filing a separate counter-affidavit supporting the stand taken by Bank.

14. Sri Y.S. Saxena, learned Counsel for the petitioners, has raised only one issue that before publishing the second auction notice on 21.3.2008, thirty days notice was not given to petitioners.

15. The fact that earlier auction notice petitioners got deferred on representation of payment of Rs. 65/- lacs but no payment was made, has not been disputed. In para 7 of the counter-affidavit the Bank has said about non-depositing of Rs. 65 lacs and to this petitioners in rejoinder affidavit, in para 4, have said as under:

"4. That in reply to the contents of paragraph Nos. 4, 5, 6, 7, 8 and 9 of the counter-affidavit, the contents of the writ petition are reiterated."

16. The facts discussed as above also make it very clear that repeated opportunities were given to petitioners to clear outstanding dues but failed. Still all out attempt is being made to forestall auction proceedings and since the same has already completed, to set at naught. The total effect is neither petitioners

themselves have cleared the dues nor intend to permit Bank to realize entire dues from secured assets. It is continuously involving Bank in litigation. It is thus not a fit case where this Court must interfere in exercise of jurisdiction under Article 226 of the Constitution.

17. Here is a defaulter who for its own benefit is interested in prolonging actual execution of recovery proceedings. It is trying all out to somehow stall the recovery proceedings though they themselves have nothing to do with substance of the matter, i.e., payment of outstanding dues.

18. In Sh. C.B.J. Seth and Others Vs. Chair Person Drat Allahabad and Others, : Sh. C.B.J. Seth and Others Vs. Chair Person Drat Allahabad and Others, , this Court said:

"38. So far as this Court is concerned, it cannot be unworthy to mention that petitioners have approached this Court under Article 226/ 227 of the Constitution. It is an extraordinary equitable remedy. The Court is not bound to entertain writ petition and interfere with the order impugned therein even if there is some kind of irregularity or illegality provided substantial justice has been done and any interference by the Court would be against justice, equity and good conscious . The petitioners are defaulters, owe a huge amount of Bank. They did not bother to contest original application before Tribunal in the suit filed by Bank for recovery of its dues. The Tribunal''s judgment decreeing the suit of Bank attained finality wherein the petitioners liability was determined. The judgment of Tribunal has not been upset by any higher forum. It is not the case of petitioners that they challenged the said judgment at any stage. The property put to auction by Bank is one which admittedly was mortgaged with the Bank. The petitioners also failed miserably to show that the property in question has been sold for inadequate price causing any prejudice whatsoever to them. Can it be said that in the above circumstance it is a fit case where even if some technical faults with magnifying class may be noticed here and there, and that would justify interference by this Court in a writ jurisdiction. Equity is not a one way traffic. One who seeks equity, must do equity. A person who comes to the Court to seek equity should come with clean hands. If it appears to the Court that a nefarious, unscrupulous attempt is being made to endanger public funds in a public body, the Court in equity jurisdiction would not come to rescue to such blameworthy conduct of petitioners. Looking in the widest possible spectrum, to my mind it is not a fit case or even otherwise merits justifying interference of this Court with the impugned order."

19. In M/s. Shree Shanker Oil Mills (Pvt.) Ltd. and another v. Bank of Baroda and others (Writ Petition No. 41296 of 2009), decided on 14.7.2014 also this Court said as under:

"14. In the circumstance, it is not a fit case where under Article 226/ 227 of the Constitution any interference on the part of this Court would be justified. In the matter of non-payment of public dues by industrial borrowers the equity is not a one way traffic but goes on both sides. If petitioners themselves have not adhered to representation made by them, cannot claim a one way equitable approach on the part of financial institution."

20. Looking to the facts and circumstances of the case as also that despite repeated opportunity petitioners have not made payment of outstanding dues, I do not find any material illegality in the auction proceedings and the orders impugned. No interference thus, is called for.

21. Dismissed. Interim order, if any, stands vacated. No costs.

