(2014) 06 AHC CK 0003

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 32222 of 2014

Pt. Nawin Sharma APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 10-06-2014

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 17

Citation : (2014) 6 ADJ 275 : AIR 2014 All 163 : (2014) 5 ALJ 351 : (2014) 6 AWC 6006 : (2014) 4 BC 469

Hon'ble Judges : Tarun Agarwala, J;Ram Surat Ram (Maurya), J

Bench : Division Bench

Advocate : Ashish Agrawal, Advocate for the Respondent

Final Decision : Dismissed

Judgement

1. Heard Pt. Nawin Sharma (the petitioner) in person, Sri Ishan Shishu for respondent-1 and Sri Sanjeev Singh for respondents-2, 3 and 4. The writ petition has been filed for issuing a writ of prohibition, prohibiting respondents-2 to 4 from proceeding under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002, (hereinafter referred to as the Act), till the pendency of the Writ Petition No. 53112 of 2013 and Criminal Contempt Application No. 13 of 2014.

2. It appears that the petitioner took loan from Union Bank of India, Branch A.D.A. Jaipur House, Agra. On default being committed in payment of installments of loan by the petitioner, the Bank started proceedings under the Act. The petitioner filed Writ Petition No. 53112 of 2013 challenging the constitutional validity of the Act. In this writ petition the respondents put appearance and the Court by order dated 9.10.2013 granted four weeks time for filing counter-affidavit. The contesting respondents filed counter-affidavit on 27.10.2013. In paragraph 5 of the counter-affidavit, the contesting respondents stated that due to default being committed in payment of installments, a notice

u/s 13(2) of the Act was issued to the borrower.

3. Thereafter the petitioner sent an application through Speed Post on 16.11.2013 for supply of acknowledgement of receipt of the notice u/s 13(2) of the Act, copy of the demand notice and acknowledgement served upon Smt. Savita Sharma, wife of the petitioner and a copy of the demand notice and acknowledgement served to Sri Banwari Lal, the guarantor. In reply to the aforesaid application the Counsel of the Bank wrote a letter dated 12.12.2013, stating therein that as the dispute is sub-judice before the High Court, as such it was not possible for the Bank to entertain the request or to furnish any information sought by the petitioner.

4. However, subsequently, a fresh notice dated 4.3.2014 u/s 13(2) of the Act was issued to the petitioner, indicating therein that a sum of Rs. 9,33,334/- together with interest from 1.3.2014 at the rate of 12.50% per annum was due against him. The petitioner then sent another letter dated 10.3.2014 through Speed Post, stating therein that as the dispute was sub judice before the High Court, Allahabad as such the notice dated 4.3.2014 was in disregard to the proceeding pending before the High Court. He thereby called upon the Branch Manager of the Bank to show-cause within forty eight hours as to why proceeding for criminal contempt would not be initiated against him. The reply of the aforesaid letter was sent by the Counsel of the Bank on 19.3.2014. The petitioner thereafter filed Criminal Contempt Petition No. 13 of 2014, which was directed to be listed alongwith Writ Petition No. 53112 of 2013 on 10.7.2014 by order dated 29.5.2014.

5. As the petitioner did not deposit the required amount in pursuance of the notice dated 4.3.2014, a notice u/s 13(4) of the Act was issued on 20.5.2014 for taking possession over the mortgaged property. Notice dated 29.5.2014, taking possession over the mortgaged property, was issued u/s 13(4) of the Act. Hence this writ petition has been filed.

6. The petitioner submits that as the validity of the Act has been challenged by the petitioner in Writ Petition No. 53112 of 2013, the parallel proceeding started under the Act is not maintainable and the respondents have no jurisdiction to proceed in the matter. As such by issuing a writ of prohibition they are liable to be prohibited from proceeding in the matter in pursuance of the notices dated 4.3.2014, 20.5.2014 and 29.5.2014. He placed reliance upon the judgment of Supreme Court in Thirumala Tirupati Devasthanams and Another Vs. Thallappaka Ananthacharyulu and Others, in which it has been held that writ of prohibition is normally issued only when the inferior Court or tribunal (a) proceeds to act without or in excess of jurisdiction, (b) proceeds to act in violation of the rules of natural justice, (c) proceeds to act under law which is itself ultra vires or unconstitutional, or (d) proceeds to act in contravention of fundamental rights. The principles, which govern the exercise of such power, must be strictly observed. A writ of prohibition must be issued only in rarest of rare cases. Judicial discipline of the highest order has to be exercised whilst issuing such

writs. It must be remembered that the writ jurisdiction is original jurisdiction distinct from appellate jurisdiction. An appeal cannot be allowed to be disguised in the form of a writ. In other words, this power cannot be allowed to be used "as a cloak of an appeal in disguise". Lax use of such a power would impair the dignity and integrity of the subordinate Court and could also lead to chaotic consequences.

7. We have considered the arguments of the petitioner and examined the record.

8. There is no bar either under the Constitution or any other law which prevents the authorities to proceed in the matter during the pendency of a writ petition in the High Court. Admittedly, no interim order has been granted in the writ petition, restraining the authorities from proceeding against the petitioner. In such circumstances, the authorities are proceeding in accordance with law and their action cannot be said to be illegal or without jurisdiction.

9. Similar controversy came for consideration before Supreme Court in Authorized Officer, Indian Overseas Bank and Another Vs. Ashok Saw Mill, in which as the negotiations between the parties for a one-time settlement, having become failed, the Bank issued a sale notice dated 26.7.2007, inviting sealed tenders for the sale of the secured assets of the firm. The same was challenged by the respondent firm on 18.8.2007, in Writ Petition No. 27472 of 2007 on the ground that it was unable to move the DRT in view of the expiry of the period of limitation prescribed under the Act. After hearing the parties, the High Court refused to grant any interim relief and posted the writ petition for final disposal.

During the pendency of the said writ petition, the respondent firm, alongwith M/s. Ashok Woodworks, filed SARFAESI Application No. 74 of 2007 before the Debts Recovery Tribunal at Madurai for setting aside the sale notice dated 26.7.2007, on the selfsame cause of action. Despite being informed of the pendency of the writ petition for the selfsame reliefs, the said Tribunal by its order dated 7-9-2007, directed the Bank to defer the proposed sale which was scheduled to be held on 7.9.2007.

Supreme Court held that it is clear that while enacting the SARFAESI Act the legislature was concerned with measures to regulate securitisation and reconstruction of financial assets and enforcement of security interest. The Act enables the banks and financial institutions to realise long-term assets, manage problems of liquidity, asset liability mismatches and improve recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. The provisions of Section 13 enable the secured creditors, such as banks and financial institutions, not only to take possession of the secured assets of the borrower, but also to take over the management of the business of the borrower, including the right to transfer by way of lease, assignment or sale for realising secured assets, subject to the conditions indicated in the two provisos to clause (b) of sub-section (4) of Section 13. In order to prevent misuse of such wide powers and to prevent prejudice being caused to a borrower on account of an error on the part of the banks or financial institutions, certain checks and balances have been introduced in Section 17 which allow any person, including the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor, to make an application to the DRT having jurisdiction in the matter within 45 days from the date of such measures having taken for the reliefs indicated in sub-section (3) thereof.

The intention of the legislature is, therefore, clear that while the banks and financial institutions have been vested with stringent powers for recovery of their dues, safeguards have also been provided for rectifying any error or wrongful use of such powers by vesting the DRT with authority after conducting an adjudication into the matter to declare any such action invalid and also to restore possession even though possession may have been made over to the transferee. The consequences of the authority vested in the DRT under sub-section (3) of Section 17 necessarily implies that the DRT is entitled to question the action taken by the secured creditor and the transactions entered into by virtue of Section 13(4) of the Act. The legislature by including sub-section (3) in Section 17 has gone to the extent of vesting the DRT with authority to even set aside a transaction including sale and to restore possession to the borrower in appropriate cases.

10. Otherwise also, it is second writ petition between the same parties in respect of same cause of action i.e. loan taken by the petitioner, on default in repayment of loan has been committed and in order to recover the outstanding amount, proceeding under the Act has been taken by the Bank. The second writ is not maintainable in view of Chapter XXII Rule 7 of the Allahabad High Court Rules. For the reasons stated aforesaid, we do not find any merit in the submissions made by the petitioner, who has appeared in person. No writ of prohibition could be issued to respondents-2, 3 and 4, prohibiting them to proceed pursuant to the notice dated 20th May, 2014 coupled with the fact that it is the second writ petition for the same cause of action. The writ petition is dismissed.

