

(2012) 02 AHC CK 0019

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 71057 of 2011

Ram Umrao

APPELLANT

Vs

Managing Director Indusland Bank Ltd. and Others

RESPONDENT

Date of Decision : 09-02-2012

Acts Referred:

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 3A

Citation : (2012) 4 ADJ 188 : AIR 2013 All 5 : (2012) 3 AWC 2821 : (2013) 2 BC 328 : (2013) 1 BC 589

Hon'ble Judges : Vineet Saran, J; Ashok Pal Singh, J

Bench : Division Bench

Advocate : R.S. Umrao, for the Appellant; B.K. Srivastava, Anubhav Chandra and C.S.C., for the Respondent

Judgement

1. The petitioner had taken a loan of Rs. 11,30,000/- from the respondent-Bank for purchase of a truck. The said loan was granted by the bank on 2.2.2008 and was repayable in 48 monthly instalments ending on 7.1.2012. The petitioner committed default in payment of certain instalments and thus the Bank is said to have issued a notice dated 1.9.2011 to the petitioner mentioning that the sum of overdue instalments in the account of the petitioner was Rs. 2,22,031/- as on 1.9.2011. Besides that, additional finance charges of Rs. 99,915/- plus legal expenses of Rs. 1,000/- alongwith personal visiting charges of Rs. 1,000/- were also leviable and thus a total amount of Rs. 3,23,946/- was determined as payable by the petitioner. As per the said notice, the said amount was to be paid by the petitioner in seven days. When the same was not paid, on 20.9.2011 the possession of the vehicle of the petitioner which was financed, was taken from the petitioner allegedly through the recovery agent. Thereafter on 24.9.2011 the "Final Notice After Repossession" was given to the petitioner calling upon him to pay a sum of Rs. 5,31,177/- as the settlement amount, within seven days and take possession of the vehicle. Challenging the said "Final Notice After Repossession" dated 24.9.2011 this writ petition has been filed. A further prayer

has also been made for a direction in the nature of mandamus commanding the respondent-Bank to release the truck of the petitioner bearing registration No. U.P.-78-BT-1485. We have heard Sri R.S. Umrao, learned counsel for the petitioner as well as Sri B.K. Srivastava, learned Senior Counsel appearing for the respondent-Bank and perused the record. Pleadings between the parties have been exchanged and with consent of the learned counsel for the parties, this writ petition is being disposed of at the admission stage itself.

2. The submission of the learned counsel for the petitioner is that the entire procedure of taking over possession of the vehicle of the petitioner was illegal inasmuch as due process of law has not been adopted by the respondent-Bank and it has resorted to taking forcible possession of his vehicle allegedly through its recovery agent, who was neither duly nor properly appointed by the Bank in terms of the guidelines issued by the Reserve Bank of India. According to his submission, the person taking possession of the vehicle was not even the agent who was appointed by the Bank but some other person. It is also contended by the learned counsel for the petitioner that the overdue amount found to be payable (as per the statement of account of the Bank itself issued on 26.8.2011) was only Rs. 1,11,864.33 paise whereas the overdue amount shown in the notice dated 1.9.2011 was Rs. 2,22,021/- and what is now being demanded by the respondent-Bank vide the impugned notice dated 24.9.2011 is an highly inflated amount of Rs. 5,31,177/- which is wholly arbitrary and cannot be justified in law.

3. Sri B.K. Srivastava, learned Senior Counsel, justifying the action of the respondent-Bank, has submitted that the appointment of the recovery agent by the Bank was in terms of the "Repossession Agency Agreement" executed on 2.8.2011 between the respondent-Bank and one M/ s Baiswara Associates of Kanpur and thus the action of the Bank in taking possession of the vehicle through such agency was fully justified. It is further submitted that the respondent-Bank has validly included such other charges as were payable by the petitioner under the loan agreement executed by the petitioner with the Bank on 2.2.2008 and in case there was any dispute with regard to the amount sought to be recovered from or paid by the petitioner, the petitioner could have approached the Bank and the matter could have been settled between the parties.

4. In the light of the aforesaid submissions made by the learned counsel for the parties, we are to examine the action and manner of the respondent-Bank in taking over possession of the vehicle of the petitioner which was financed by the Bank and also the determination of the overdue amount by the respondent-Bank as payable by the petitioner.

5. Before proceeding any further, it would be relevant to mention that in view of increasing cases of harassment of the defaulting borrowers by recovery agents engaged by the Banks and to stop the eroding reputation of the Banking Sector as a whole, the Reserve Bank of India, on April 24, 2008, has also issued certain guidelines, some of which are as follows :

(1) Banks should have a due diligence process in place for engagement of recovery agents in conformity with the earlier guidelines of Reserve Bank of India on outsourcing of financial services.

(2) Banks should inform the borrower the details of agency firms.

(3) Banks to ensure that agents carry with them copy of notice, authorization letter and identity card during recovery process.

(4) Whenever recovery agency is changed bank to notify the borrower of such change.

(5) The notice to borrower and the authorization letter of the agent should, among other details, to also include the telephone number of the recovery agency.

(6) Banks to ensure tape recording of the content/text of the calls made by recovery agents to the customers and vice versa.

(7) In case a grievance/complaint has been lodged by a borrower banks are not to forward his case to recovery agency till they have finally disposed of the grievance of the concerned borrower.

(8) Each bank to have a mechanism whereby the borrower's grievance with regard to recovery process can be addressed and the details of such mechanism furnished to the borrower.

(9) Banks to ensure that their recovery agents are properly trained.

(10) Banks to ensure that repossession clause in contract with the borrower is legally valid and clearly brought to the notice of the borrower.

(11) Terms and Conditions of repossession clause in the contract to contain provisions regarding notice period before taking possession; circumstances under which notice period can be waived; the procedure for taking possession of the security; a provision regarding final chance to be given to the borrower for repayment of loan before the sale/auction of the property; the procedure for giving repossession to the borrower and the procedure for sale/auction of the property.

6. Alongwith the counter-affidavit, the "Repossession Agency Agreement" dated 2.8.2011 between the Bank and the said M/s Baiswara Associates has been filed as Annexure CA-5. The said agreement contains the "Obligations of the Agent", which includes sending of information/ telegram alongwith the authorization letter issued by the Bank to the concerned police station where the asset is available and where the act of repossession is to be carried out and furnish proof of such service to the Bank. Similar information is also to be sent to the concerned police station where the borrower/co-borrower resides. Certain documents are also required to be kept and made readily available for production, such as copy of loan agreement, copies of reminders/notices, copy of

authorization letter etc. by the agent at the time of taking repossession of a vehicle. The agent immediately on seizure is required to get an inventory list prepared, of the items available in the vehicle under the signature of the borrower/ driver alongwith signature of the two witnesses. The said agreement also contains certain obligations of the Bank which includes sending of information immediately after repossession by the Bank to the concerned police station under whose jurisdiction the vehicle is repossessed, to the borrower/co-borrower and to the police station where the branch office is located. The said agreement also provides that the agent shall not sub-delegate the authority given to him to any other person. Alongwith the agreement the "KYC of Repossession Agency" has also been enclosed. The said KYC form provides for information regarding the particulars of the agency and the names of its employees. In its particulars the name of repossession agency has been disclosed as Baiswara Associates of Kanpur with Mr. Sanjeev Singh as its sole proprietor. However, no mention of any employee has been made in the column meant for name of its employees.

7. Sri Srivastava does not dispute the fact that as per the guidelines of the Reserve Bank of India, the agents are also supposed to undergo training, which would mean that either the proprietor of the agency or its employees who are responsible for execution should undergo such training. In the absence of the names of the employees in the KYC of the agent and there being no material placed on record by the respondent-Bank to show that the proprietor of the Baiswara Associates himself was a trained person to take possession of the vehicle, the genuineness of the agency, and the validity of the agreement with the agency itself becomes doubtful. Besides this, it is not the case of the Bank that information of the appointment of the recovery agent or its change was ever given to the borrower, as is required under the RBI guidelines.

8. As such from the above it cannot be said that the agent appointed by the Bank was a duly or properly appointed agent as per the guidelines issued by the Reserve Bank of India who had disclosed complete information at the time of agreement including the names of its employees who were to act on behalf of the agency or that the Bank had performed its obligations while appointing such agent, as per the RBI guidelines.

9. The repossession agency agreement is dated 2.8.2011 and repossession of the vehicle of the petitioner has been taken allegedly by the agency on 20.9.2011. As stated by Sri. Srivastava, learned Senior Counsel for the respondent-Bank, the repossession has been taken by its authorized agency by M/s Baiswara Associates but a bare perusal of the "Repossessed Vehicle Inventory List" which is dated 20.9.2011 (and has been enclosed as Annexure-CA-4 to the counter-affidavit filed by the Bank) would be sufficient to belie his said statement. The seal affixed on the said inventory is that of "JCS Financial Services 6B Parking Security, Pakri, Kanpur Nagar" and signed by its official concerned on 20.9.2011 at 5.15 p.m. In the entire document the name of the agency with which the

Bank had entered into an agreement, namely, "M/s Baiswara Associates" has neither been mentioned nor there is any seal affixed of the said agency. Thus, prima facie M/s Baiswara Associates, which was the agent appointed by the Bank, had not taken the possession of the vehicle of the petitioner. From the documents produced by the Bank also it cannot be said that it was any officer or employee of the agency (M/s Baiswara Associates) appointed by the Bank who had taken repossession of the vehicle of the petitioner. Even otherwise, it has nowhere been stated or any material placed on record by the Bank to show that the agent had carried out its obligations of informing the concerned police stations i.e. from where the vehicle was seized and where the petitioner (borrower) was residing, prior to taking possession of the vehicle. The document with regard to repossession also does not bear the signature of two witnesses, as was required under the own agreement filed by the Bank. On behalf of the petitioner, it bears only the signature of the alleged driver.

10. It is thus clear from the above that not only the recovery agent had taken the repossession in violation of the terms and conditions as laid down in the own agreement of the Bank with the agency, but the agent M/s Baiswara Associates authorized by the Bank had sub-delegated its authority to another agent in gross violation of the specific prohibitory condition laid down by the Bank.

11. The Apex Court in the case of ICICI Bank Ltd. v. Prakash Kaur, (2007)2 SCC 711, has deprecated the practice of the Banks of hiring recovery agents and deputing muscle-men, to seize the vehicles and has observed that the Banks should resort to the procedure recognized by law for taking possession of the vehicle of the borrowers, who may have committed default in payment of the instalments. Observation by the Apex Court was made in the following terms: (SCC Page 714, para 16):

16 - Before we part with this matter, we wish to make it clear that we do not appreciate the procedure adopted by the Bank in removing the vehicle from the possession of the writ petitioner. The practice of hiring recovery agents, who are muscle-men, is deprecated and needs to be discouraged. The Bank should resort to procedure recognized by law to take possession of vehicles in cases where the borrower may have committed default in payment of the instalments instead of taking resort to strong-arm tactics.

12. In the above case of ICICI Bank v. Prakash Kaur (supra), it has also been observed by the Apex Court that the recovery of loan or seizure of vehicles could be done only through legal means. This observation was made by the Apex Court in the following terms (SCC Page 720, para 28) :

28 - In conclusion, we say that we are governed by the rule of law in the country. The recovery of loans or seizure of vehicles could be done only through legal means. The banks cannot employ goondas to take possession by force.

13. In yet another case Citicorp. Maruti Finance Ltd. v. S. Vijayalaxmi in Civil Appeal No. 9711 of 2011 decided on 14.11.2011, the Apex Court consisting of a

Bench of three Judges (Hon''ble Altmas Kabir, Hon''ble Cyriac Joseph and Hon''ble Surinder Singh Nijjar, JJ) has on the issue of illegal and/ or wrongful recovery of vehicles by use of force has reiterated its above view as under :

The aforesaid question has since been settled by several decisions of this Court and in particular in the decision rendered in ICICI Bank Ltd. v. Prakash Kaur (supra). It is, not, therefore, necessary for us to go into the said question all over again and we reiterate the earlier view taken that even in case of mortgaged goods subject to Hire- Purchase Agreements, the recovery process has to be in accordance with law and the recovery process referred to in the Agreements also contemplates such recovery to be effected in due process of law and not by use of force. Till such time as the ownership is not transferred to the purchaser, the hirer normally continues to be the owner of the goods, but that does not entitle him on the strength of the agreement to take back possession of the vehicle by use of force. The guidelines which had been laid down by the Reserve Bank of India as well as the Appellant Bank itself, in fact, support and make a virtue of such conduct. If any action is taken for recovery in violation of such guidelines or the principles as laid down by this Court, such an action cannot be struck down.

14. It would also be not out of place to mention here that it has not been the case of the respondent- Bank that they complied with the guidelines of the Reserve Bank of India. As such, the whole action of the respondent-Bank in taking back the possession of the vehicle of the petitioner, details of which have been given here-in-above, cannot be justified and it clearly appears that the Bank had resorted in taking repossession of the vehicle by the help of muscle-men.

15. It thus becomes evident that the repossession was taken by the Bank in flagrant violation of the guidelines issued by the Reserve Bank of India and also the law laid down by the highest Court of the country.

16. No doubt an agreement had been entered into between the petitioner and the bank which provides for "Lender's Right" which may include the right of the Bank to take possession of the vehicle in case of default, but what is to be considered here is as to whether the Bank itself could determine that there was a default and thereby start proceedings to take possession of the vehicle financed by it without resorting to the procedure prescribed by law. In the present case, what we notice is that no prior information was given to the petitioner before taking possession of the vehicle. In the counter-affidavit a notice is said to have been sent to the petitioner on 1.9.2011, a copy of which has been filed as Annexure CA-3 to the counter-affidavit. From a perusal of the said notice dated 1.9.2011 it is clear that neither the name mentioned in the notice is that of the petitioner nor the address is that of the petitioner which is given in the impugned notice (Final Notice After Repossession) dated 24.9.2011 which is the one which was received by the petitioner. The notice dated 1.9.2011 is addressed to "Sri Ram Maurya s/o Sri Ayodhya Prasad Maurya, R/o Kunderampur, Post Birhai,

Tehsil Ghatampur, District Kanpur (U.P.)" whereas the name of the petitioner in the notice dated 24.9.2011 "Sri Ram Umrao s/ o Ayodhya Prasad, R/o Kunderampur, Amouli, Fatehpur". Thus from the above it is clear that the respondent-Bank has proceeded against the petitioner even without giving a valid notice to him, meaning thereby there was no occasion for the petitioner to reply to the Bank about the correctness of its notice or to produce evidence to show as to whether there was any default made by him till such date or not.

17. In case of default in repayment of its loan, it is always open for the Banks to get the agreement with its borrower enforced through the process of law. Under the common law, the Bank could have approached the Court for enforcement of the agreement. Even the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the "Act of 2002") which gives special power to the Bank for realization of its dues also provides for certain safeguards. Section 13(2) of the Act of 2002 has been interpreted by the Apex Court in the case of Mardia Chemicals that the borrower has a right to submit his reply to the said notice. Pursuant to the decision of the Apex Court, sub section (3A) of the Section 13 has been inserted making it obligatory on the financial institutions (including Banks) to pass an order after considering the reply submitted by the borrower. It is only thereafter that proceedings for taking over possession can be initiated u/s 13(4) of the Act of 2002.

18. The Bank or financial institution cannot be permitted to take a decision on their own that there has been a default and proceed to take possession of the hypothecated vehicle without giving an opportunity to the borrower to present his case. In this manner the Banks would be judging their own cause with the right of execution, as they themselves would unilaterally determine that there has been a default and proceed to execute their own decision by taking possession of the hypothecated vehicle through their own appointed agencies, which may be muscle-men. Adopting such a recourse would clearly be a blatant violation of the mandate of Hon"ble Supreme Court.

19. Coming to the next issue, which is with regard to the amount which is said to be due to be paid by the petitioner, it may be observed that as per the statement of account issued by the Bank on 26.8.2011 (Annexure-2 to the writ petition) the overdue found as on the said date was Rs. 1,11,864.33 paise. Then by the alleged notice dated 1.9.2011 brought on record by the Bank, which is admittedly addressed to a wrong person, the overdue amount as on 1.9.2011 has been shown to be Rs. 2,22,031 /- plus additional finance charges of Rs. 99,915/- plus other charges amounting to Rs. 3,23,946/-. The learned counsel for the Bank, when asked as to under which provision the additional finance charges of Rs. 99,915/- had been added, miserably failed to justify the said amount. However, the unilateral increase in the overdue amount did not stop here. By the time possession of the vehicle was taken after the notice dated 1.9.2011 and merely 24 days had passed, the said amount had swollen to Rs,

5,31,177/- as would be clear from the impugned notice dated 24.9.2011. Not only this, alongwith the counter-affidavit the Bank is said to have obtained an affidavit from the petitioner on 2.12.2011 mentioning that as on 30.11.2011 the amount due was Rs. 5,65,000/-. Alongwith the counter-affidavit the respondent-Bank has also filed the statement of account as on 3.1.2012 which shows that the overdue amount as on that date was Rs. 3,21,298.43 paise. Then respondent-Bank has also filed the settlement proposal dated 4.1.2012 according to which on the said date the settlement amount was Rs. 5,25,504.13 paise. Thus from the own statements of account of the Bank as well as the notice issued to the petitioner, it is prima facie evident that there is a huge variation in the amount which has been found to be over due or to be paid by the petitioner.

20. In the facts of the present case, from the own records of the respondent-Bank it is clear that the petitioner has been put to an immense harassment. As per the statement of account dated 26.8.2011, and the total amount which was due to be paid by the petitioner till that date was Rs. 15,65,000.33 paise, whereas he already had paid till then Rs. 14, 53,136/- meaning thereby that the petitioner had paid a very substantial part of the loan amount and still the respondent-Bank resorted to the action of taking possession of the vehicle of the petitioner in an illegal and arbitrary manner without following the process of law.

21. Admittedly, in the present case no proper notice addressed to the petitioner had ever been issued prior to the taking over of possession of the vehicle on 20.9.2011. The respondent-Bank was so callous that it did not even bother to ensure that the notice dated 1.9.2011 was sent at the correct address with correct name of the petitioner. It is noticed that even the impugned "Final Notice After Repossession" dated 24.9.2011 also does not give the details as to how the amount of Rs. 5,31,177/- was recoverable and the same appears to have been issued in a mechanical manner without even mentioning the fact as to on which date the due notice had been given to the petitioner, as the column in that regard has been left blank. As such, the impugned notice dated 24.9.2011 is liable to be quashed. Such action of the respondent-Bank, in firstly issuing the notice to a wrong person and then taking possession of the vehicle of the petitioner through an agency which was not at all appointed by it and the agency with which agreement was made by the Bank not appointed as per the guidelines of the Reserve Bank of India and above all the procedure adopted by the agency taking possession of the vehicle of the petitioner on 20.9.2011 being in complete violation of the Banks own agreement and guidelines of the Reserve Bank of India, cannot at all be justified.

22. For the foregoing reasons, this writ petition succeeds and is allowed. The "Final Notice After Repossession" dated 24.9.2011 (Annexure-4 to the writ petition) is quashed and the respondents are directed to hand over the possession of the vehicle (truck bearing registration No. UP-78-BT 1485) to the petitioner forthwith but not later than seven days from the date petitioner files a certified copy of this order before the respondent No. 3-Branch Manager,

Indusland Bank Ltd. It is further provided that the petitioner shall not be liable to pay any interest on the loan amount from the date when the possession of the vehicle of the petitioner has been taken from the petitioner and till the date such possession is re-delivered to the petitioner. It is also made clear that the repossession of the vehicle will be given to the petitioner in a perfect running condition free from all encumbrances and in case there is any dispute with regard to the condition of the vehicle, the petitioner shall be entitled to raise his grievance either with the Bank or take suitable legal action against the respondent-Bank. The high handed and illegal manner in which the Bank has repossessed the petitioner's vehicle through an agent, which cannot but be described but as by use of "musclemen", in spite of the repeated directions of the Apex Court and the manner in which the petitioner has been harassed, we also impose an exemplary cost of Rs. 1,00,000/- (Rs. One Lakh) to be paid to the petitioner by the respondent-Bank so that in future it may deter the Bank from taking such recourse for realization of dues, as has been resorted to in the present case.