(2016) 01 CAL CK 0035

In the Calcutta High Court

Case No : WP 366 of 2015

Samarendra Nath Bhattacharjee APPELLANT

Vs

State Bank of India and Others RESPONDENT

Date of Decision : 15-01-2016

Acts Referred:

Constitution of India, 1950 — Article 226, Article 227
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19(1)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act,

Citation : (2016) 01 CAL CK 0035

Hon'ble Judges : Arijit Banerjee, J.

Bench : Single Bench

Advocate : Kumar Gupta, Rajesh Gupta, Micky Chowdhury, Rohit Jalan and R.K. Jalan, Advocates, for the Appellant; S. Banerjee, H.C. Yadav and Chandan Kr. Lal, Advocates, for the Respondent

Final Decision : Disposed off

Judgement

Arijit Banerjee, J.—1. In the instant writ petition the petitioner challenges the notices dated 2nd January, 2015 and 14th March, 2015 issued by the respondent Bank under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in short SARFAESI Act) in respect of flat No. 2, Block-KB 10, Sector-III, Salt Lake, Kolkata 700098 (hereinafter referred to as ''the said Flat'').

The petitioner''s Case:--

2. The Governor of State of West Bengal executed a deed of lease in respect of Plot No. KB-10, Sector-III, Salt Lake City, Kolkata 700098 in favour of M/s. Ekobana Cooperative Housing Society Ltd. (in short ''the Society''), for a period of 999 acres subject to the terms and conditions contained in the deed of lease. In terms of the said lease deed no right in the said land could be transferred without the written permission of the Urban Development Department, State of

West Bengal, except for creation of mortgage for repayment of loan obtained for house building purposes.

3. By a deed of conveyance dated 17th March, 2003, the Society conveyed the right, title and interest in respect of flat No. 2 on the ground floor of KB-10, Sector-III, Salt Lake City, Kolkata 700098 i.e. the said flat, to and in favour of the petitioner, subject to the conditions of the original lease deed. In terms of Clause 20 of the deed of conveyance, the petitioner was to fulfil all the terms and conditions laid down in the lease deed executed by the State of West Bengal in favour of the Society. Further, Clause 4 of the deed of conveyance prohibits the petitioner from transferring the said flat or any part thereof without the permission of the Society as well as the Government.

4. Maffick Home Products Pvt. Ltd. is a company, the Managing Director whereof happens to be the son of the petitioner. The said company required business loan. By a letter dated 5th May, 2006 addressed to the Board of Directors of the said company, the petitioner recorded his consent to act as a guarantor and for use of the said flat as a collateral security for repayment of loans/cash credit facilities that the said company may obtain from any Bank.

5. On 18th May, 2006, the petitioner signed a clarification relating to the transferability and ownership of the said flat at the behest of the respondent Bank which had agreed to advance loan to the said company.

6. On 26th July, 2006 the Bank sanctioned credit facilities in favour of the said company for which seven persons including the petitioner gave their personal guarantees. The sanction letter stated, inter alia, that on execution of documents and after creation of security the borrower may avail all the credit facilities.

7. On 26th July, 2006 the petitioner deposited the original deed of conveyance in respect of the said flat with the Bank.

8. The petitioner was informed that unless permission is granted by the Government of West Bengal for mortgaging the said flat, the loan will not be disbursed by the Bank.

9. On 31st July, 2006 the petitioner applied to the Secretary, Urban Development Department, Government of West Bengal, seeking permission to mortgage the said flat in favour of the respondent Bank.

10. By a letter dated 3rd August, 2006 the petitioner informed the respondent Bank that he had already applied for permission to mortgage the said flat. He requested the bank to grant him time to obtain the necessary permission and not to block disbursement of the loan since the said company badly needed financial support in the form of working capital loan.

11. On 15th September, 2006, the loan was disbursed by the respondent Bank although the Government of West Bengal had still not granted permission for creating mortgage over the said flat.

12. By a letter said 6th November, 2006, the Land Manager and Officer on Special Duty and Dy. Secretary to the Government of West Bengal rejected the petitioner''s prayer for permission to mortgage the said flat as a collateral security.

13. On 21st December, 2006, the petitioner made an appeal before the Principal Secretary, Urban Development Department with a prayer for reconsideration of his case.

14. By a letter dated 25th January, 2007, the Officer on Special Duty and Ex-Officio Jt. Secretary to the Government of purportedly granted permission to the petitioner for mortgage in the said flat.

15. A notice dated 21st January, 2015 was issued by the respondent Bank under Section 13(2) of the SARFAESI Act treating the said flat as a security.

16. The petitioner replied to the said notice by his letter dated 9th March, 2015 contending, inter alia, that since the Government of West Bengal had denied permission to the petitioner to mortgage the said flat, no security interest could be credited in respect of the said flat and the Bank could not treat the said flat as its security.

17. By its letter dated 14th March, 2015 the Bank rejected the petitioner''s contention and contended that he had properly created equitable mortgage in respect of the said flat and permission of the Government of West Bengal, Urban Development Department had been granted by letter dated 25th January, 2007.

18. The petitioner contends that he was not aware of any letter dated 25th January, 2007 whereby the Government granted permission for mortgaging the said flat. Although the letter appears to be addressed to him, he contends that he never received any such letter. The petitioner made enquiries under the Right to Information Act and has come to learn that no permission dated 25th January, 2007 was granted by the Government of West Bengal for creating mortgage in respect of the said flat and no case was found where permission was granted to create a collateral security over a cooperative flat.

19. The petitioner contends that the purported letter dated 25th January, 2007 is a manufactured document and has no authenticity at all. He contends that in the absence of permission from the Government of West Bengal, no valid mortgage could be created in respect of the said flat in favour of the respondent Bank.

Contention of the Respondent:--

20. In consideration of the Bank having agreed to advance a loan of Rs. 30 lakhs to M/s. Maffick Home Products Pvt. Ltd., the writ petitioner executed an undertaking dated 26th July, 2006 in favour of the Bank to execute a legal mortgage with or without possession at the option of the Bank in favour of the Bank in respect of the said flat.

21. Subsequently, the writ petitioner credited equitable mortgage over and in

respect of the said flat in favour of the Bank by deposit of title deed.

22. By a letter dated 5th May, 2006 addressed to the Board of Directors of the said company the petitioner gave consent for keeping his flat as collateral security for obtaining loan from the Bank.

23. By a letter dated 18th May, 2006 addressed to the Bank, the petitioner clarified that he did not require permission either from the Government or from the said Society since he intended to transfer by way of mortgage the said flat to a Nationalized Bank like the respondent No. 1.

24. By a letter dated 3rd August, 2006 addressed to the respondent No. 1 the writ petitioner sought time for obtaining permission from the Government and agreed that in case he failed to get such permission, he would sell the said flat and repay the entire loan advanced by the respondent Bank to the said company.

25. The writ petitioner by his letter dated 31st July, 2006 requested the Urban Development Department, Government of West Bengal for granting permission to use the said flat as collateral security for the loan advanced by the respondent Bank to the said company of which the Managing Director was the son of the writ petitioner. Initially, such permission was not granted but by a letter dated 25th January, 2007 addressed to the petitioner, the government granted such permission.

26. The allegation of the writ petitioner that the letter dated 25th January, 2007 is a valid and fabricated document is mala fide. After creating mortgage in respect of the said flat in the year 2006, the petitioner did not question the legality or validity of the said flat till filing of the present writ petition.

27. Upon the borrower''s failure to repay the said loan, the Bank initiated proceedings under the SARFAESI Act. The writ petitioner filed an application before the Debts Recovery Tribunal being SA No. 29 of 2010 challenging the proceeding initiated by the Bank. The said application was dismissed by the Ld. DRT, Calcutta on 12th June, 2012.

28. The respondent Bank initiated proceedings before the DRT for recovering the loan advanced to the said company, being OA No. 219 of 2010.

29. The Ld. Counsel for the Bank submitted that it is incorrect to contend that mortgage in respect of the said flat could not have been created in favour of the Bank without the permission of Government.

30. The title deed was deposited by the petitioner with the Bank in 2006. Until filing of the instant writ petition no grievance was made by the petitioner that the title deed was being wrongly withheld by the respondent Bank.

31. The contention that the letter dated 25th January, 2007, granting permission to the writ petitioner to create mortgage in respect of the said flat, is a forged and fabricated document, is an afterthought. The petitioner is trying to cheat the respondent Bank. Huge public money is involved and the writ petition should not

be entertained.

32. Whether or not the letter dated 25th January, 2007, is a genuine document, is a disputed question of fact which cannot be decided in the writ jurisdiction.

33. Ld. Counsel for the Bank relied on a decision of the Hon''ble Supreme Court in the case of Kanaiyalal Lalchand Sachdev v. State of Maharashtra reported in , (2011) 2 SCC 782 in support of his contention that Section 17 of the SARFAESI Act provides for an efficacious alternative remedy to any aggrieved person by way of an appeal before the DRT. Hence, a petition under Articles 226 and 227 of the Constitution should not be entertained. Ld. Counsel also relied on a decision of the Hon''ble Apex Court in the case of Indian Bank v. M/s. Blue Jaggers Estate Ltd. reported in , AIR 2010 SC 2980, wherein at paragraph 17 of the judgment it was observed that the court cannot lose sight of the fact that the Bank is a trustee of public funds. It cannot compromise the public interest for benefiting private individuals. Those who take loan and avail financial facilities from the Bank are duty bound to repay the amount strictly in accordance with the terms of the contract. Any lapse in such matters has to be viewed seriously and the Bank is not only entitled but duty bound to recover the amount by adopting all legally permissible methods. The Parliament enacted the SARFAESI Act because it was found that the legal mechanism available till then was wholly insufficient for recovery of the outstanding dues of Banks and financial institutions. The third decision relied upon by Ld. Counsel is that of the Hon''ble Supreme Court in the case of M/s. Transcore v. Union of India reported in , AIR 2007 SC 712. While discussing Section 19(1) of the Recovery of Debts due to Banks and Financial Institutions Act, 1993, the Hon''ble Supreme Court observed that the remedies under the SARFAESI Act and the DRT Act are complementary to each other and, therefore, the doctrine of election has no application. There are three elements of election, namely, existence of two or more remedies; inconsistencies between such remedies and a choice of one of them. If any one of the three elements is not there, the doctrine will not apply. If in truth there is only one remedy, then the doctrine of election does not apply. The SARFAESI Act, 2002 is an additional remedy to the DRT Act, 1993. Together they constitute one remedy and, therefore, the doctrine of election does not apply. Further, the doctrine of election of remedies is applicable only when there are two or more co-existent remedies available to the litigants at the time of election which are repugnant and inconsistent with each other. There is no repugnancy nor any inconsistency between the remedies available under the DRT Act, 1993 and the SARFAESI Act, 2002 and, hence, the doctrine of election has no application.

Court''s View:--

34. The short question that arises for determination is whether or not the respondent Bank can claim the said property to be its secured asset. Section 2 (1)(zc) of the SARFAESI Act defines ''secured asset'' as the property on which security interest is created. Section 2 (1)(zf) of the Act defines ''security interest'' as right, title and interest of any kind whatsoever upon property,

credited in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31. In the facts of the case, what this court is required to decide is whether a mortgage or charge was created in respect of the said flat by the writ petitioner in favour of the respondent Bank.

35. At the outset I am compelled to observe that the conduct of the writ petitioner does not appear to be above board. The contention of the petitioner is that in the absence of permission from the Government of West Bengal, no mortgage could have been created in respect of the said flat. However, in his letter dated 18th May, 2006, addressed to the respondent Bank, the petitioner stated that for transferring the said flat, he did not require to take permission either from the Government or from the cooperative society since he intended to transfer the same to a nationalized bank being the respondent Bank. Such inconsistent stand of the writ petitioner makes this court a little suspicious about his bona fides.

36. Be that as it may, the question remains as to whether or not a valid and legally enforceable mortgage was created in respect of the said flat in favour of the respondent Bank as security for the loan advanced by the Bank to the said private limited company. It is not disputed that the title deed in respect of the said flat was deposited by the writ petitioner with the respondent Bank in 2006 and the same is still in the custody of the respondent Bank. Till filing of the instant writ application, the writ petitioner does not appear to have made any grievance about the wrongful withholding of the said title deed by the respondent Bank. In fact, from the correspondence on record, it is evident that the writ petitioner intended to create an equitable mortgage by deposit of title deed in respect of the said flat in favour of the respondent Bank. In other words, the writ petitioner offered the said flat to the respondent Bank as a secured asset in consideration of the Bank disbursing the loan of Rs. 30 lacs to the said private limited company.

37. It is also significant that in the letter dated 3rd August, 2006, written by the writ petitioner to the respondent Bank, the petitioner requested for six months time for the purpose of obtaining permission from the Government of West Bengal for creating the mortgage, failing which he undertook to sell out his said flat to pay back the entire loan that the Bank had agreed to disburse to the said private limited company. Thus, the writ petitioner by his representation and conduct induced the Bank to disburse the loan in favour of the said private limited company of which the Managing Director is the son of the writ petitioner.

38. The Bank contends that permission was duly granted by the Government of West Bengal for mortgaging the said flat by letter dated 25th January, 2007 issued by the OSD and Ex-Officio Jt. Secretary to the Government of West Bengal to the writ petitioner. The writ petitioner denies the authenticity of the said letter and contends that the same is a forged/fabricated/manufactured document and that he never received such letter. This is a dispute which cannot be resolved in

exercise of writ jurisdiction of this court. The Writ Court is not the proper forum and is not well-equipped for resolution of such a dispute.

39. Banks and Financial Institutions deal with public money. They not only have the right but the duty to recover moneys lent and advanced to borrowers. To expedite disposal of legal actions initiated at the instance of Banks and Financial Institutions for recovering their dues, the DRT Act, 1993 was promulgated. However, this also left a lot to be desired as regards the recovery of the dues of Banks and Financial Institutions from unscrupulous borrowers. Hence, the SARFAESI Act, 2002 was enacted by the Parliament. As held by the Hon''ble Supreme Court the SARFAESI Act provides an additional remedy to the Banks and Financial Institutions and not a remedy which is alternative to the remedy provided by the DRT Act. The right of the Bank under the SARFAESI Act should not be lightly interfered with. It is in greater public interest that undue fetter is not put on the rights of the Banks and Financial Institutions to recover their dues by taking recourse to the provisions of the SARFAESI Act. Needless to say, if the Banks and Financial Institutions transgress their jurisdiction or act beyond the four corners of the statute, the court will strike down such action.

40. In the instant case, the respondent Bank has issued notice under Section 13(2) of the SARFAESI Act to the writ petitioner treating the said flat as the Bank''s secured asset. The Bank has also approached the DRT and has filed proceeding for recovering its dues. In my opinion, the writ petitioner should respond to the Bank''s notice under Section 13(2) of the SARFAESI Act and if the Bank takes any action under Section 13(4) of the SARFAESI Act in respect of the said flat, the remedy of the writ petitioner would be to file appeal before the Debts Recovery Tribunal having jurisdiction in the matter under Section 17 of the SARFAESI Act.

41. The writ petitioner contends that he resides in the said flat. His apprehension is that one fine morning the Bank will suddenly take possession of the said flat rendering him homeless. In view of such apprehension which may not be wholly unfounded and which may have serious adverse consequences for the writ petitioner I deem it proper to pass the following order.

42. In the event, the Bank decides to take possession of the said flat, it shall communicate such decision to the writ petitioner in writing but shall not take actual physical possession of the said flat before expiry of a period of 15 days from the date of receipt of such communication by the writ petitioner. This will, however, not prevent the Bank from taking symbolic possession of the said flat in the interim without interfering with the physical possession of the writ petitioner. This would give sufficient time to the writ petitioner to approach the DRT with the issues which are the subject matter of the present writ petition including the question as to whether or not a valid enforceable mortgage has been created by the petitioner in favour of the respondent Bank in respect of the said flat and to seek appropriate interim protection. The remedy by way of appeal to the DRT is a much more efficacious and comprehensive one and in the event the petitioner

approaches the DRT as aforesaid, the DRT will decide all issues in accordance with law.

43. In view of the aforesaid, the interim order that was passed in this matter and is continuing till date stands vacated. With the aforesaid observations and directions this writ petition stands disposed of. There will, however, be no order as to costs.

44. Urgent certified photocopy of this judgment, if applied for, be given to the parties upon compliance of necessary formalities.