

(2016) 10 CHH CK 0034
In the Chhattisgarh High Court
Case No : Writ Petition C. No. 1951 of 2016

Sanjay Bajpai Builders Pvt. Ltd	Vs	APPELLANT
Diwan Housing Finance Corpn. Ltd		RESPONDENT

Date of Decision : 19-10-2016

Acts Referred:

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

Citation : (2017) ACD 575

Hon'ble Judges : Shri. Prashant Kumar Mishra, J.

Bench : Single Bench

Advocate : Shri B.P. Sharma with Shri Manay Nath Thakur, Advocates, for the Petitioners

Final Decision : Dismissed

Judgement

Shri Prashant Kumar Mishra, J. (CAV) - The petitioners have preferred this writ petition under Article 226 of the Constitution of India seeking declaration that the entire action of the respondent-Diwan Housing Finance Corporation Limited (for short "DHFC") since inception i.e. issuance of notice dated 24.5.2016 under Section 13 (2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short "the Act") is illegal and arbitrary. The petitioners have further prayed for restraining the respondent from taking symbolic and/or actual physical possession of the secured assets described in the impugned notice.

2. Facts of the matter, as projected in the writ petition, are that the petitioners have obtained loan of Rs. 1,36,99,000/- on 29.3.2012, however, it committed a default in repayment of the loan, therefore, the respondent-DHFC has issued notice to the petitioners under Section 13(2) of the Act for repayment of Rs.1,37,19,888/-, failing which it shall proceed to secure possession of the secured assets under Section 13(4) of the Act. The petitioners have submitted

reply to the notice mentioning that original borrower Mr. Sanjay Bajpai has died, therefore, proceeding under the Act is not maintainable without issuing notice to the legal heirs of Mr. Sanjay Bajpai. It was also stated that notice has been issued to a dead person namely Mr. Sanjay Bajpai, therefore, it is void ab initio and non est.

3. It is argued by learned counsel for the petitioner that the term "borrower" defined under Section 2(1)(f) of the Act does not include legal heirs of the borrower, therefore, notice under Section 13(2) is without jurisdiction. It is also submitted that the provisions of the Act are not applicable to the legal heirs of the borrower, therefore, notice issued by the DHFC is without jurisdiction and is thus not maintainable.

4. The present petition has not been preferred by any legal heirs of the deceased Mr. Sanjay Bajpai. It has been preferred by the Company namely M/s Sanjay Bajpai Builders Pvt. Ltd., through its Director Shri Yogeshwar Shukla, who is also arrayed as petitioner No.2. In the notice (Annexure-P/1) apart from deceased Mr. Sanjay Bajpai, petitioner No.1 M/s Sanjay Bajpai Builders Pvt. Ltd. is also a co-borrower No.1. Thus the notice was not only against deceased Mr. Sanjay Bajpai but was also against the Company who is co-borrower, therefore, as against the Company, notice under Section 13(2) holds good. Since this petition is not preferred by legal heirs of deceased Mr. Sanjay Bajpai, the question as to whether notice also issued to Mr. Sanjay Bajpai is maintainable or not is not germane in this petition. It is not the case of the petitioners that the company is not in possession of the secured assets but it is in possession of legal heirs of deceased Mr. Sanjay Bajpai.

5. Under Section 13(3A) of the Act, it is provided that if, on receipt of the notice under sub-section (2), the borrower makes any representation or raises any objection, the secured creditor shall consider such representation or objection and if the secured creditor comes to the conclusion that such representation or objection is not acceptable or tenable, he shall communicate within fifteen days of receipt of such representation or objection the reasons for non-acceptance of the representation or objection to the borrower.

6. In the case in hand, the impugned notice was issued to the petitioner on 24.5.2016 which was duly replied by the petitioners on 24.6.2016 (Annexure-P/2). The objections were considered and rejected by the DHFC within 15 days i.e. on 30.6.2016 (Annexure-P/3). Once its objections have been dealt with and rejected, the remedy available for the petitioners is to prefer an appeal before the Debts Recovery Tribunal as held by the Supreme Court in the matter of *Devi Ispat Limited and Another v. State Bank of India and Others* (2014) 5 SCC 762. In the said matter, the Supreme Court held thus in paragraphs- 7, 9 & 10:-

"7. After the dismissal of its writ petition, Devi Ispat made a representation to the Bank under Section 13(3- A) of the Act on 22-3-2013. This was followed almost immediately thereafter by an intra-court appeal filed against the order of

the learned Single Judge. Although the appeal was filed on 1-4-2013 (and we have gone through the contents of the appeal memo) there is no mention of Devi Ispat having made a representation to the Bank under Section 13(3-A) of the Act. Be that as it may, the representation was considered by the Bank and rejected on 2-4-2013. The Division Bench was informed of this during the hearing of the intra-court appeal on 26-4-2013.

9. While challenging the order dated 26-4-2013 passed by the Division Bench, the learned counsel submitted that Devi Ispat had no alternative but to file a writ petition challenging the notice issued by the Bank on 18-1-2013. We find no merit in this contention :

9.1. Firstly, Devi Ispat had an alternate remedy to make a representation to the Bank under the provisions of Section 13(3-A) of the Act and there was no reason to by-pass the statutory mechanism.

9.2. Secondly, Devi Ispat did in fact make a representation to the Bank under Section 13(3-A) of the Sarfaesi Act and that representation was rejected on 2-4-2013 during the pendency of the intracourt appeal. The statutory remedy having been availed of by Devi Ispat, nothing really survived in the dispute raised.

9.3. Thirdly, we now find from the written submissions submitted by the Bank that it has taken possession of the secured assets of Devi Ispat on 25-5-2013 and 27- 5-2013 under the provisions of Section 13(4) of the Sarfaesi Act and a possession notice was also published in the newspapers on 31-5-2013.

10. On the facts on record and the statutory remedy having been availed of, we see no reason to interfere with the impugned order passed by the Calcutta High Court. However, it is left open to Devi Ispat to take such appropriate steps as may be considered necessary for safeguarding its interests."

7. In the present case also, the petitioners have represented to the DHFC by submitting reply which was duly considered and rejected, therefore, having availed statutory remedy, it has to resort to a remedy provided under Section 17 of the Act by preferring an appeal before the Debts Recovery Tribunal. The writ petition is not appropriate remedy for the petitioners.

8. For the foregoing, the writ petition is dismissed as not maintainable.