
(2011) 09 SHI CK 0034
In the High Court Of Himachal Pradesh
Case No : CWP No. 1740 of 2010

Sarup Singh Thakur and Another	APPELLANT
Vs	
India Bulls Housing Finance Ltd. and Others	RESPONDENT

Date of Decision : 16-09-2011

Acts Referred:

Debts Recovery Tribunal Act, 1993 — Section 34(1)
Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13, 13(3A), 13(4), 14, 17
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 35

Citation : (2011) 09 SHI CK 0034

Hon'ble Judges : Deepak Gupta, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Deepak Gupta, J.—The Petitioners, by means of this petition, have prayed for the grant of the following amongst the other reliefs:

- (i) That a writ of certiorari may be issued to quash and set aside the proceedings initiated by the Respondent No. 4 against the Petitioners (issue of warrant of possession) as per the Securitization and Re construction of Financial Assets and Enforcement of Security Act, 2002 and to declare them null and void.
- (ii) That a writ of mandamus may be issued for the adjudication of the concerned loan transaction in dispute through Arbitrator and for the appointment of an Arbitrator.
- (iii) That a writ of prohibition may be issued to prohibit the Respondents from further initiating any action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Act, 2002.

2. Briefly stated, the facts of the case are that according to the Petitioners, the Respondent, which is a Non-banking Finance Company, forged the loan

agreement, Annexure P-1, and clubbed three loans into one loan. The Petitioners allege that the Respondents are not entitled to invoke the provisions of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (hereinafter referred to as the Act).

3. On the other hand, Respondents No. 1 and 2 have raised a preliminary submission that the writ petition is not maintainable since there is an equally efficacious and alternative remedy available to the Petitioners of filing an appeal to the Debt Recovery Tribunal.

4. Faced with this preliminary submission, Mr. Thakur submits that there is no security within the meaning of the Act which the Respondents can enforce. Secondly, according to him, they have not classified the loan as a non-performing asset. His third contention is that an appeal u/s 17 of the Act lies only in respect of action taken u/s 13 and in the present case, the Petitioners have challenged the action of the Magistrate u/s 14 of the Act. His last contention is that u/s 31(a) of the Act, the contractual liabilities created are not amenable to the Securitization Act.

5. The Apex Court in *United Bank of India Vs. Satyawati Tondon and Others*, has dealt in detail with the questions raised before this Court. The relevant portion of the judgment reads as follows:

4. Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under Sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that Sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application u/s 17(1). Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made there under. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with Sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the course taken by the secured creditor under Sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made there under, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt. Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made u/s 17 is required to be disposed of. The proviso to this Sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application

within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously. Section 18 provides for an appeal to the Appellate Tribunal.

5. Section 34 lays down that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent there with contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

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17. There is another reason why the impugned order should be set aside. If Respondent No. 1 had any tangible grievance against the notice issued u/s 13(4) or action taken u/s 14, then she could have availed remedy by filing an application u/s 17(1). The expression 'any person' used in Section 17(1) is of wide import. It takes within its fold, not only the borrower but also guarantor or any other person who may be affected by the action taken u/s 13(4) or Section 14. Both, the Tribunal and the Appellate Tribunal are empowered to pass interim orders under Sections 17 and 18 and are required to decide the matters within a fixed time schedule. It is thus evident that the remedies available to an aggrieved person under the SARFAESI Act are both expeditious and effective. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

6. This matter is squarely covered by the aforesaid judgment and the remedy, if any, available to the Petitioners is that of filing an appeal u/s 17.

7. I am also constrained to observe that the Petitioners have tried to mislead this Court. On 03.05.2010, a submission was made on behalf of the Petitioners that

no equitable mortgage has been created at the time of agreement. This submission was recorded and, therefore, further proceedings against the Petitioners were stayed.

8. On 08.08.2011, when the matter was heard in part, this Court was pleased to pass the following order:

8.8.2011

Present: Mr. Varun Thakur counsel for the Petitioners.

Mr. Vijay Kumar Verma counsel for Respondents No. 1 and 2.

Mr. Vivek Singh Thakur, Addl. A.G. for Respondents No. 3 and 4.

Heard in part.

The learned Counsel for the Petitioners is not giving any clear cut answer to the query of this Court whether his clients had created an equitable mortgage with regard to the property which is sought to be sold by the bank and if so, at what stage. The only answer being given is that at the time of the agreement the mortgage had not been created. This is no answer. A mortgage can be created even thereafter. It is not necessary that the mortgage has to be created at the time when the loan was taken. The Petitioners have obtained stay order more than a year back and it is unfortunate that this simple question is not being answered. The Respondents No. 1 and 2 are directed to produce the record of the case on 5th September, 2011. They shall also produce the register and the original title deed of the property. The Petitioners may also file any affidavit that they want to file. List on 5th September, 2011.

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When the matter was listed again, it was stated that no proper equitable mortgage has been created. On the other hand, the Respondents produced the title deeds of the property which, prima facie, indicate that an equitable mortgage was created.

9. As far as the declaration of the loan as non-performing asset is concerned, this fact is stated in the notice issued by the Respondents to the Petitioners.

10. The action of taking possession u/s 14 is in furtherance of the remedies available to the creditor in terms of Section 13 of the Act and, therefore, such action is also amenable to the appellate jurisdiction u/s 17. The other questions raised by the Petitioners can be raised in appeal. The Appellate Authority has a right to decide all questions which are being raised in this petition. Therefore, I have purposely not gone into the validity of the questions because the appropriate remedy of the Petitioners is to file an appeal.

11. In view of the aforesaid facts, since an alternative remedy is available to the Petitioners and in view of the fact that they have mis-stated the facts to the Court, they are not entitled to invoke the writ jurisdiction of this Court. The Writ

Petition is accordingly dismissed with costs assessed at Rs. 20,000/-.