

(2010) 08 KL CK 0336
In the High Court Of Kerala
Case No : W.R (C) No. 30737 of 2009

Sasi and Another

APPELLANT

Vs

Housing Development Finance Corporation Ltd. and Others

RESPONDENT

Date of Decision : 17-08-2010

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), 14, 17, 34, 35

Citation : AIR 2011 Ker 1 : (2011) 1 KLT 567

Hon'ble Judges : P.R. Ramachandra Menon, J

Bench : Single Bench

Advocate : P.B. Suresh Kumar, K.P. Sujesh Kumar, K.N. Sasidharan Nair and M. Sruthy, for the Appellant; K.K. Chandran Pillai, SC and HDFC, for the Respondent

Final Decision : Dismissed

Judgement

P.R. Ramachandra Menon, J.—Is Ext. P1 verdict passed by the Civil Court, directing the Respondent/secured creditor to furnish a statement of accounts and granting a decree of prohibitory injunction from proceeding against the assets of the borrower, till a final decree is passed on the basis of the statement of accounts to be furnished, is a "bar" for the secured creditor from proceeding against the secured assets in terms of the SARFAESI Act, forms the subject matter of consideration in this case.

2. The Petitioners, who are the husband and wife availed a housing loan of Rs. 3.5 lakhs from the Respondent Housing Development Finance Corporation Ltd. (HDFC in short) creating security interest over the property comprising of nearly 4.5 Ares with residential building, which was to be repaid in 180 equal monthly installments. But the repayment could not be effected on time. According to the Petitioners, the HDFC demanded exorbitant amounts by way of additional interest, incidental charges etc. which were contrary to the terms of the agreement and resorted to coercive steps, which made them to approach the

Munsiff's Court, Thiruvananthapuram by filing O.S. No. 122 of 2006 for settlement of accounts and for permanent prohibitory injunction. The Respondents contested the matter and on conclusion of the trial, Ext.P1 preliminary decree was passed, directing the Respondent/Defendant to furnish statement of accounts, also granting prohibitory injunction from proceeding against the assets of the Petitioners/Plaintiffs before the final decree to be passed on the basis of the statement of accounts to be furnished and considered.

3. The case of the Petitioners is that, Ext.P1 judgment/decreed has become final, the same having not been subjected to challenge. But the fact remains that the Respondent Corporation without complying with the direction contained in Ext.P1 verdict, issued Ext.P4 notice u/s 13(2) of the SARFAESI Act on 5.7.2007 with the intention to proceed against the secured assets. It is said that, the Petitioners sent a reply to Ext.P4. While so, the Respondent Corporation filed Ext.P5 application before the Chief Judicial Magistrate, Thiruvananthapuram u/s 14 of the SARFAESI Act, seeking for necessary assistance to take physical possession of the secured asset and to have it sold in public auction. On receipt of a copy of Ext.P5, the Petitioner entered appearance before the Chief Judicial Magistrate, Thiruvananthapuram and submitted their version, also producing a copy of Ext.P1 judgment/decreed contending that no further steps could be pursued, contrary to the terms of the decree. After hearing both the sides, the learned Chief Judicial Magistrate found that Ext.P1 decree was "not a bar" and that the dispute if any, had to be got agitated before the Debt Recovery Tribunal. Accordingly Ext. P6 order was passed appointing an Advocate Commissioner to take physical possession of the property and to have it handed over to the HDFC and to report compliance. The Petitioner is challenging the correctness and sustainability of the order passed by the Chief Judicial Magistrate in this Writ Petition.

4. The course and events pursued by the Respondents and the correctness and sustainability of Ext. P6 have been sought to be substantiated by filing a statement. When the matter came up for consideration before this Court on 29.10.2010, coercive steps were intercepted on condition that the Petitioners deposited a sum of Rs. 50,000/- within two weeks, which is stated as complied with. The interim order was extended further, but the same got expired in the meanwhile. Thereafter I.A. No. 4250 of 2010 was filed by the Petitioners to revive and extend the interim order and after considering the same on 6.4.2010, the interim order was revived and extended, on condition that the Petitioners deposited a sum of Rs. 2 lakhs within one month. Aggrieved of the said interim order, imposing the condition upon the Petitioners, they challenged the same by filing W.A. No. 821 of 2010. It is stated that, since no interference was to be made by the Division Bench, permission was sought for to withdraw the Writ Appeal and accordingly, it was dismissed as withdrawn on 11.6.2010. The Petitioners are still to satisfy the condition imposed by this Court even as on this day and as such, this Court prima facie does not find it as a fit case to exercise the discretionary jurisdiction under Article 226 of the Constitution of India, since

the Petitioner is very much having an effective alternate remedy as provided under the Statute and further since the Writ Petition is still to be admitted.

5. The learned Counsel for the Petitioners submits that, the alternate remedy under the Statute, particularly u/s 17 of the SARFAESI Act is not at all effective, in view of the nature of the contentions raised by the Petitioners in the Civil Suit, which has culminated in Ext.P1 judgment. The learned Counsel further submits that, the jurisdiction of the Civil Court is not ousted in toto and Civil Suit is maintainable in respect of the matters, which are not provided to be dealt with under the RDDBFI Act/SARFAESI Act. The actual extent of liability can be decided only by the Civil Court and as such, the bar of ousting the jurisdiction of Civil Court u/s 34 is not applicable to the case in hand; submits the learned Counsel. More so, when, the Petitioners have already got a decree in their favour, as borne by Ext.P1, which was not liable to be ignored by the Chief Judicial Magistrate, Thiruvananthapuram, while passing Ext. P6. Reliance is also placed on the decision rendered by the Apex Court in Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., and Nahar Industrial Enterprises Ltd. Vs. Hong Kong and Shanghai Banking Corporation, besides making a reference to the verdict of the Apex Court in Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, and Sunder Dass Vs. Ram Prakash,

6. The learned Counsel for the Respondents submits that the idea and understanding of the Petitioners, as to the scope and jurisdiction of the Civil Court is thoroughly wrong and misconceived. It is contended that Ext.P1 decree is totally without jurisdiction; the same having been passed contrary to the mandate under Sections 34 and 35 of the SARFAESI Act. By virtue of the contents of Section 34, no Civil Court shall have the jurisdiction to entertain any suit or proceedings in respect of any matter which a Debt Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act.

7. The learned Counsel submits that, such bar is only in respect of an "action taken" and at the time of filing the suit in the year 2006, no action had been taken by the Bank under the SARFAESI Act. By virtue of Ext.P1 verdict passed before taking any such action, directing to serve a copy of the statement of accounts and also granting prohibitory injunction, till such final decree is passed after serving the statement of accounts, the Respondents are bound by the same.

8. It has to be noted that the mandate of Section 34 is not with respect to the "action taken" alone, as it also contemplates the "action to be taken". The right of the secured creditor to proceed against the borrower/defaulters can be by way of different means i.e. by approaching the DRT/Civil Court or by resorting to the remedy under the SARFAESI Act. It is the settled law that the amount due cannot be sought to be realized by resorting to the steps under the Revenue Recovery Act or otherwise, unless the same is got quantified by any valid and

legally sustainable proceedings, for which a decree may be necessary to be passed by the competent Civil Court/DRT. But the proceedings under the SARFAESI Act stand entirely on a different footing and the objects and reasons for bringing about such legislation, even after providing a separate machinery by way of RDBFI Act, was taken note of by the financial sector in India on comparison with the banks and financial institutions in the international segment. The prolonged litigations and increase of non performing assets quite adversely affected the economy of the State. Various committees were constituted by the Central Government as "Narasimham Committee I and II" for the purpose of examining the Banking sector reforms and considered the needs for changes in the legal system and suggested enactment of new legislation for financial institutions to take possession of the securities and sell them "without intervention of the Court". It was taking note of the said recommendations, that the necessary ordinance was promulgated in June 2002, followed by necessary enactment. As mentioned already, it has been specifically stipulated u/s 34, that the jurisdiction of the Civil Court will stand ousted in respect of the matters which the DRT/DRAT is empowered under the Act to determine and no injunction shall be granted by any Court or authority in respect of any "action taken" or "to be taken" in pursuance of any power conferred under the SARFAESI Act or under the RDBFI Act. It is separately provided u/s 35 of the SARFAESI Act, that the provisions of the Act shall have effect, notwithstanding anything inconsistent therewith, contained in any other law for the time being in force or any instrument having effect by virtue of any such law. This being the position, there is no power or jurisdiction for any Civil Court to have granted any injunction in respect of the matters coming within the purview of DRT/DRAT and for this reason itself Ext.P1 judgment/decreed passed by the Civil Court granting prohibitory injunction cannot be held sustainable in the eye of law.

9. The next question to be considered is whether the Petitioners are having a remedy for fixation of the correct quantum of liability by approaching the DRT, filing a petition u/s 17 against the action taken u/s 13(4). The said question had come up for consideration of this Court earlier in T. Bhuvanendran Vs. LIC Housing Finance Ltd. and Others, . It has been answered by this Court in the "positive" and this being the position, it is a matter, which comes within the purview of DRT and as such, no dispute can ever be raised before the Civil Court. For this reason also, Ext.P1 judgment/decreed cannot be given effect to.

10. Yet another aspect to be noted is that, the basic issue raised by the Petitioners in the suit filed before the Civil Court, as revealed from Ext.P1, was mainly for settlement of accounts and for injunction. The cardinal contention raised by the Petitioners is that the Defendants/Respondents proposed to take over the possession of the property without obtaining any decree from a Civil Court, which hence was sought to be intercepted (para 2). Three issues were raised by the Civil Court as given in para 4 of Ext.P1, which are:

(1) Are the Plaintiffs entitled to get a decree for settlement?

(2) Are the Plaintiffs entitled to get a decree for injunction?

(3) Reliefs and costs.

After discussing the pleadings and evidence on record, issue No. 1 was answered in the "positive", holding in para 10 that the Court was of the view that the Plaintiff was definitely entitled to get a preliminary decree "for statement of accounts".

11. However, considering issue No. 2, as to the prayer for injunction, it is noted in para 11 of Ext.P1 that according to PW1, the Plaintiffs had never created any mortgage by giving the title deeds in respect of the plaint schedule property. It has been held that the said version is against the averments in the plaint that, the Plaintiffs entrusted their title deed with the Defendants as security to the loan amount. Though no sufficient material is placed before this Court to analyse the dispute, it has been clearly observed in Ext. P1, in the next sentence, that there was no need to adjudicate such an issue at that stage. In other words, whether security interest" had been created over the property or not, was not considered or discussed by the Civil Court while passing Ext.P1.

12. Further, the case put forth by the Petitioners/Plaintiffs before the Civil Court was that, the Respondents/Defendants were proceeding with the steps to attach and dispose of the plaint schedule property for realisation of the due amount without obtaining any decree from any Court. It is also observed in para 11 of Ext.P1 that, it was evident from Annexure A 9 notice dated 20.2.2007 issued by the first Defendant (first Respondent herein) that the Defendants were intending to proceed against the Plaintiffs under the provisions of SARFAESI Act. It is further observed in para 11 of Ext.P1 verdict as follows:

It is evident from Ext. A9 notice dated 20.2.2007 issued by the first Defendant that the Defendants are intending to proceed against the Plaintiff under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002. Evidently the Plaintiffs have defaulted in payment of the loan amount, PW1 has admitted the same. The Plaintiffs are not entitled to get an order of injunction on the grounds raised above." But this Court has already found that the Defendants have to furnish a detailed statement of account regarding the claim against the Plaintiff. It is just and proper for the Defendants to proceed with the recovery proceedings, if any, against the Plaintiffs only after complying with the findings of this report. At the same time the Plaintiffs should prove their bona fides by remitting a substantial amount due under the loan transaction. The issue is answered accordingly.

Thus, it is very much clear from the above observations that the Munsiff's Court, at the time of passing the verdict had taken note of the action of the secured creditor by issuing notice dated 20.2.2007 under the SARFAESI Act, to proceed against the "secured assets" for the realisation of the due amount and for this reason, there is a finding that the Plaintiffs were not entitled to get a copy of the order of injunction on the ground raised above. It was after arriving at the

finding that the Plaintiffs were not entitled to get the order of injunction, that the Civil Court, in respect of issue No. 3, ordered in the decretal portion (in para 12) that the Defendants would stand restrained by a decree of prohibitory injunction from proceeding against the assets of the Plaintiffs, till a final decree was passed on the basis of the statement of accounts to be furnished by the Defendants, provided the Plaintiffs paid Rs. 30,000/- towards the loan amount due, within one month. In short, the issue as to whether the Plaintiffs were entitled to get an injunction has already been answered against them, holding that they are not entitled to get permanent injunction on the grounds raised above, while the decree provides for such injunction; thus making the verdict "self-contradictory" and not enforceable.

13. In any view of the matter, the observation in para 11 of Ext.P1 judgment as to whether any security interest has been created on the property in question was not entitled to be adjudicated and further since there is an observation in the very same para, as to Annexure A9 notice dated 20.2.2007 issued by the Bank intending to proceed against the secured asset under the SARFAESI Act, the direction given can be confined, only with regard to the steps for realising the amount "otherwise than" by resorting to the steps under the SARFAESI Act.

14. With regard to the prayer in the Writ Petition, it is very much relevant to note that, the "only prayer" is to set aside Ext. P6 order passed by the learned Chief Judicial Magistrate u/s 14 of the SARFAESI Act. With regard to the scope of jurisdiction of the Magistrate u/s 14, it is very much limited and there is no power, competence or jurisdiction to deal with the merits of the case, but for considering whether the application has been preferred for taking possession of the secured assets by secured creditor and whether the secured asset is situated within the area of the jurisdiction of the concerned Magistrate, to provide necessary assistance. In the above circumstances, this Court finds that the challenge raised by the Petitioner against Ext. P6 placing reliance on Ext. P1 is quite wrong and unfounded and no interference is called for.

The Writ Petition fails and the same is dismissed.