

(2014) 12 CAL CK 0070
In the Calcutta High Court
Case No : Writ Petition No. 1065 of 2014

Shakuntala Jaiswal

APPELLANT

Vs

Allahabad Bank

RESPONDENT

Date of Decision : 02-12-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security
Interest Act, 2002 (SARFAESI) — Section 17

Citation : (2015) 2 CHN 306

Hon'ble Judges : Debangsu Basak, J

Bench : Single Bench

Advocate : Nimish Mishra, Advocate for the Appellant; Om Narayan Rai,
Advocate for the Respondent

Judgement

Debangsu Basak, J.—Measures taken by a secured creditor under the provisions of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act, 2002) is under challenge at the instance of the writ petitioner. The writ petitioner is the owner of an immovable put up for sale by the secured creditor under the provisions of the SARFAESI Act, 2002. The writ petitioner claims that, the secured creditor did not obtain her consent when the secured creditor extended the time to put in the balance purchase price by the purchaser, in terms of Rule 9 of the Security Interest (Enforcement) Rules, 2002 and, therefore, the sale by the secured creditor of the immovable property concerned is null and void.

2. In support of the proposition that, Rule 9 of the Security Interest (Enforcement) Rules, 2002 is mandatory, reliance is placed on J. Rajiv Subramaniam and Another Vs. Pandiyas and Others, as well as Mathew Varghese Vs. M. Amritha Kumar and Others, in this regard. Relying on GM, Sri Siddeshwara Co-operative Bank Ltd. and Another Vs. Sri Ikbali and Others, it is submitted on behalf of the writ petitioner that since the secured creditor did not obtain consent of the writ petitioner to extend the time under Rule 9 of the

Security Interest (Enforcement) Rules, 2002, the sale is vitiated. It is pointed on behalf of the writ petitioner that, the auction of the immovable property concerned was held on May 17, 2014 pursuant to the sale notice dated April 11, 2014. In terms of Rule 9 of the Security Interest (Enforcement) Rules, 2002 the purchaser ought to have deposited 25 per cent of the sale price immediately, that is, on the date of the sale and that the purchaser was required to deposit the balance 75 per cent within 15 days from the date of the sale or within the period extended by consent of the parties. In the instant case, the purchaser did not deposit the balance 75 per cent within the time allowed under Rule 9(3) of the Security Interest (Enforcement) Rules, 2002. The purchaser sought to deposit the balance 75 per cent of the purchase price after expiry of the period. The writ petitioner did not give any consent for such extension of time to deposit the purchase price. The writ petitioner is the owner of the property put up for sale. In view of the provisions of Rule 9 of the Security Interest (Enforcement) Rules, 2002 her consent for extension of time is mandatory. The writ petitioner not having given such consent, the sale is null and void.

3. The respondents contested the writ petition. It is submitted on behalf of the respondents that, the petition can be disposed of without inviting affidavits by treating the averments made in the petition not to be admitted by the respondents.

4. Learned Counsel for the respondents submits that, the writ petitioner had an alternative statutory remedy under the provisions of the SARFAESI Act, 2002. She had chosen to waive her right to approach the Debts Recovery Tribunal under the provisions of the SARFAESI Act, 2002 by not approaching the Debts Recovery Tribunal within prescribed period. The actions complained are of May 2014. Relying on the averments at paragraph 19 of the writ petition, it is submitted on behalf of the respondents that, the writ petitioner was aware that the balance of the purchase price was deposited in the month of September 2014. The writ petitioner had a remedy by way of an approach being made to the Debts Recovery Tribunal under Section 17 of the SARFAESI Act, 2002 against the so-called extension of time. She had 45 days from September 2014 to make such application. The writ petitioner allowed the period of 45 days to prefer an appeal under Section 17 of the SARFAESI Act, 2002 to lapse. The writ petitioner having allowed such statutory period of time to elapse, the writ petitioner is deemed to have waived her right. In this regard reliance is placed on All India Reporter A.V. Venkateswaran, Collector of Customs, Bombay Vs. Ramchand Sobhraj Wadhvani and Another, and All India Reporter K.K. Shrivastava and Others Vs. Bhupendra Kumar Jain and Others, .

5. Learned Counsel for the respondents relied upon United Bank of India Vs. Satyawati Tondon and Others, to submit that, the writ petitioner has an effective alternative remedy available. The writ petitioner by her own conduct allowed the statutory period to move the Debts Recovery Tribunal under Section 17 of the SARFAESI Act, 2002 to elapse. The writ petitioner is not entitled to move the writ

Court.

6. The issue of maintainability of the writ petition is taken up first. In *Satyawati Tondon & Ors. (supra)* the Supreme court was of the view that, when a Section 17 remedy is available the High Court should exercise its jurisdiction under Article 226 of the Constitution of India with greater caution, care and circumspection. This judgment, in my view, cannot be read to mean that, the jurisdiction of the High Court under Article 226 of the Constitution of India in respect of an infraction committed by a secured creditor in its exercise of powers under the SARFAESI Act, 2002 stands ousted.

7. The learned Counsel for the respondents contend that, the writ petitioner has waived her right to challenge the action of the respondents since the writ petitioner did not approach the writ Court within the time limits specified under Section 17 of the SARFAESI Act, 2002. He refers to paragraph 19 of the writ petition and contends that, the writ petitioner was aware of the deposit of the balance amount of the purchase price in the second week of the month of September 2012.

8. I have considered paragraph 19 of the writ petition. I have also considered the writ petition as a whole. There is no evidence on the writ petition that the writ petitioner was aware of the extension of time to deposit the purchase price by the purchaser given by the secured creditor for a period of 45 days prior to the date of the filing of the writ petition. On the basis of the averments made in the writ petition including paragraph 19 thereof, I cannot bring myself to arrive at a finding that the writ petitioner was aware of the action of the secured creditor complained of herein 45 days prior to November 12, 2014 (being the date when writ petition was affirmed).

9. In *A.V. Venkateswaran (supra)* and in *K.K. Shrivastava (supra)* the Supreme Court was of the view that, if a petitioner had disabled himself from availing of a statutory remedy by his own fault in not doing so within the prescribed time, he cannot be certainly be permitted to urge that as a ground for the Court dealing with his petition under Article 226 to exercise its discretion in his favour.

10. On the factual matrix as that of the present petition I do not find that the writ petitioner has disabled herself from moving a writ by not availing of a statutory remedy within the prescribed period. For the prescribed period under Section 17 of the SARFAESI Act, 2002 to commence, it must be shown by the secured creditor that, the writ petitioner was aware of the measure taken by the secured creditor complained of, and that such measure was taken at a given point of time and that a period of 45 days in terms of Section 17 of the SARFAESI Act, 2002 had expired since the date of such measure being taken. In the instant case, the secured creditor has proceeded to extend the time to deposit the balance purchase price without any reference to the writ petitioner. The secured creditor has not been able to establish any particular date on which the writ petitioner derived such knowledge and that a period of 45 days has

elapsed therefrom prior to the filing of the writ petition.

11. The next issue is whether the sale conducted by the secured creditor of the immovable property owned by the petitioner stands vitiated in view of the infraction of Rule 9 of the Security Interest (Enforcement) Rules, 2002 or not by the unilateral extension of time to deposit the purchase price without reference to the writ petitioner. The respondents had put up a property belonging to the petitioner for sale under the SARFAESI Act, 2002 by a sale notice dated April 11, 2014. The date of sale under such sale notice was fixed on May 17, 2014. The sale notice required a purchaser to make an earnest money deposit of an amount equivalent to 10 per cent of the reserve price of the property specified in the sale notice. The sale notice also provided that the successful bidder will have to deposit 25 per cent of the bid amount less the earnest money deposit amount immediately and the remaining amount to be deposited within 15 days from the date of auction. The writ petitioner alleges that, the successful purchaser did not deposit the balance 75 per cent within 15 days from May 17, 2014. This fact is not disputed by the respondents. The purchaser deposited the balance purchase price after the respondents extended the time for the same without reference to the writ petitioner. Again, this fact is not disputed.

12. In support of the contention that, unilateral extension of time by the secured creditor to a purchaser to deposit the balance purchase price renders the sale null and void, reliance is placed on Rule 9 of the Security Interest (Enforcement) Rules, 2002 as well as three authorities of the Supreme Court on behalf of the writ petitioner. Rule 9(4) of the Security Interest (Enforcement) Rules, 2002 requires that the balance amount of purchase price to be paid by the purchaser to the authorized officer on or before the 15th day of confirmation of the sale of the immovable property or such other extended period as may be agreed upon in writing between the parties. The factual matrix of the instance case will demonstrate that, the sale was confirmed in favour of the purchaser on May 17, 2014. It is alleged in paragraph 19 of the writ petition that, the purchaser deposited the balance purchase amount in the second week of the month of September 2014. This averment is not denied by the respondents. It is also not denied by the respondents that, the sale was confirmed on May 17, 2014.

13. In G.M., Sri Siddeshwara Co-operative Bank Ltd. & Anr. (supra) the Supreme Court considered Rule 9 of the Security Interest (Enforcement) Rules, 2002. In paragraph 14 of such report the Supreme Court was of the view that:--

"14. A reading of sub-rule (1) of Rule 9 makes it manifest that the provision is mandatory. The plain language of Rule 9(1) suggests this. Similarly, Rule 9(3) which provides that the purchaser shall pay a deposit of 25% of the amount of the sale price on the sale of immovable property also indicates that the said provision is mandatory in nature. As regards balance amount of purchase price, sub-rule (4) provides that the said amount shall be paid by the purchaser on or before the fifteenth day of confirmation of sale of immovable property or such extended period as may be agreed upon in writing between the parties. The

period of fifteen days in Rule 9(4) is not that sacrosanct and it is extendable if there is a written agreement between the parties for such extension. What is the meaning of the expression "written agreement between the parties" in Rule 9(4)? The 2002 Rules do not prescribe any particular form for such agreement except that it must be in writing. The use of the term "written agreement" means a mutual understanding or an arrangement about relative rights and duties by the parties. For the purposes of Rule 9(4), the expression "written agreement" means nothing more than a manifestation of mutual assent in writing. The word "parties" for the purposes of Rule 9(4) we think must mean the secured creditor, borrower and auction-purchaser."

14. The learned Counsel for the respondents contends that, the observation made by the Supreme Court is obiter dicta. I am afraid, I am not in a position to agree with such contention as the reading of the report does not sustain the same.

15. In Mathew Varghese (supra) the Supreme Court was of the view that, the secured creditor was entitled to enforce the secured asset in conformity with the provisions of the SARFAESI Act, 2002. In J. Rajiv Subramaniyan & Anr. (supra) the Supreme Court considered Mathew Varghese (supra) and was of the view that, the secured creditor as a trustee of the secured asset cannot deal with the same in any manner it likes and that such an asset can be disposed of only in the manner prescribed in the SARFAESI Act, 2002.

16. Applying the ratio laid down in Mathew Varghese (supra), J. Rajiv Subramaniyan & Anr. (supra) and G.M., Sri Siddeshwara Co-operative Bank Ltd. & Anr. (supra) to the facts of this case, the irresistible conclusion is that, the secured creditor while enforcing the secured asset in the instant case did not do so in conformity with the provisions of the SARFAESI Act, 2002 by failing to obtain the consent of the writ petitioner who is the owner of the property put up for sale when extending the time for deposit of the balance purchase price by the purchaser. Such consent of the writ petitioner is mandatory as laid down in J. Rajiv Subramaniyan & Anr. (supra).

17. In such circumstances I find that the sale conducted by the secured creditor in respect of the property of the writ petitioner put up for sale by the notice dated April 11, 2014 is vitiated. Such sale is declared as null and void.

18. It is submitted on behalf of the writ petitioner that, she is in possession of the immovable property concerned. By an interim order the secured creditor was restrained from proceeding under the SARFAESI Act, 2002 in respect of the immovable property concerned. In view of the sale conducted by the notice dated April 11, 2014 being set aside, the interim order is vacated. The secured creditor is at liberty to proceed against the secured asset, including taking possession of the secured asset in accordance with law.

19. W.P. No. 1065 of 2014 is disposed of accordingly. No order as to costs.