(2015) 02 BOM CK 0194

In the Bombay High Court

Case No : Writ Petition No. 9309 of 2013

Shewalkar Developers Ltd. APPELLANT

Vs

Rupee Cooperative Bank Ltd. and Others RESPONDENT

Date of Decision : 24-02-2015

Acts Referred:

Maharashtra Co-operative Societies Act, 1960 — Section 101, 91
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2)

Citation : (2015) 02 BOM CK 0194

Hon'ble Judges : Anoop V. Mohta, J.

Bench : Single Bench

Advocate : Shashank Manohar a/w Shyam Dewani and Chirag Chanani i/by Dewani and Associates, for the Appellant; Pratap Patil, Advocates for the Respondent

Final Decision : Allowed

Judgement

Anoop V. Mohta, J.—Rule, returnable forthwith.

Heard finally, by consent of the parties.

2. The Petitioner has challenged reversal order dated 12 September 2013, passed by the Member of Maharashtra State Cooperative Appellate Court, Mumbai.

3. The basic events are as under:

The Petitioner is a Company incorporated under the provisions of Companies Act, 1956 and engaged in the business of development of land and construction activities. On 9 July 2012, the Respondent Bank had issued notice to the Petitioner for recovery of an amount of Rs.5,12,76,485.43/along with interest and directed to deposit the said amount with the bank within a period of 8 days and in failure of which, they will initiate proceeding against the Petitioner under Section 101 of the Maharashtra Cooperative Societies Act, 1960 (for short, "the

MCS Act"). By the said notice, the amount claimed by the Respondents was stated to be fictitious and on the contrary, as aforesaid the Petitioner stand to receive the above two amounts i.e. Rs.54,61,206/towards maintenance and water supply charges and Rs.2,23,00,690/towards refund of long standing claim from the Respondents. The total comes to Rs.2,77,61,896/. On 12 September 2012, the Petitioner filed a dispute bearing No. 263 of 2012 under Section 91 of the MCS Act and thereby, challenged notice dated 9 July 2012. On the same day, the Cooperative Court, after hearing and going through the record granted ad interim relief and stayed the execution of notice dated 9 July 2012, till the filing of the reply. 4. On 8 October 2012, the Cooperative Court after hearing the arguments of both the parties, confirmed ad interim relief granted on 12 September 2012 and thereby allowed the temporary injunction application below Exhibit 5. On 3 January 2012, the Respondents, instead of challenging the said order, issued notice under Section 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement Security Interest Act, 2002 (for short, "the SARFAESI Act") and called upon the Petitioner to pay an amount of Rs.5,53,78,135.43/as alleged liability as on 30 November 2012 within a period of 60 days. Being aggrieved by notice dated 3 January 2013, the Petitioner filed Writ Petition No. 867 of 2013. On 28 February 2013, this Court stayed order dated 8 October 2012. On 17 April 2013, the Petitioner filed SLP before the Hon''ble Supreme Court, challenging order dated 28 February 2013. The Hon''ble Supreme Court, by order dated 17 April 2013 stayed the proceedings under SARFAESI Act and issued notices.

5. After expiry of the limitation period, Respondents challenged order dated 8 October 2012 by filing Appeal before the Cooperative Appellate Court, Nagpur along with condonation of delay Application No. 6 of 2013. The Petitioner contested the same by filing reply. On 3 July 2013, the Cooperative Appellate Court Pune, being incharge, allowed the said Application. On 5 August 2013, the Petitioner challenged the said order by filing Writ Petition (Stamp) No. 13822 of 2013 before this Court.

6. On 20 August 2013, the charge of Cooperative Appellate Court, Pune was handed over to the Cooperative Appellate Court Bombay. On the same day, Application was filed by the Petitioner to adjourn the proceedings of the said Application, as the Petitioner has challenged order dated 3 July 2013 by filing Writ Petition. It was informed on that day that the Cooperative Appellate Court, Bombay has already passed order below Exhibit 5 and granted ad interim stay in favour to the Respondents till the next date. The Petitioner filed an application to recall the order passed below Exhibit 5. The Cooperative Appellate Court, Bombay passed order on the recalling application and adjourned the matter for hearing on 12 September 2013. On that day, the Respondents filed an application to continue the stay till the disposal of the Appeal. Though objected by the Petitioner, the Member Cooperative Appellate Court, Bombay granted stay till the disposal of the Appeal.

7. On 18 September 2013, the Respondents filed case No. 59 of 2013 before the Assistant Registrar, Cooperative Society, Nagpur for recovery of alleged amount and accordingly notice was issued under Section 101 of the MCS Act against the Petitioner. Being aggrieved by order dated 12 September 2013 passed by the Member, Cooperative Appellate Court, Bombay and notice dated 18 September 2013 under Section 101 of the MCS Act, the Petitioner filed the present Writ Petition.

8. The learned counsel appearing for the Petitioner has pointed out a Division Bench Judgment of this Court, M/s. Top Ten and Shri Narsidas Katkoria Vs. State of Maharashtra and Others., referring to Section 91 and Section 101 of the MCS Act read with Rules of the Maharashtra Cooperative Societies Rules, 1961. The relevant paragraphs are as under:

"20 We may now briefly refer to some other judgments which may have bearing on the present adjudication.

In 2011 (2) LJ Soft (URC) 166, Ravindra Waman Ingle. Vs Sahakar Mitra, the learned Single Judge of this Court has held that when dispute under Section 91 is already instituted before application under Section 101 came to be filed, the Registrar has to take into account said factor to find out the desirability of continuing Section 101 proceedings.

In 2010 (7) Mh.L.J. 538 : 2010 (6) All MR 550, Sundeep Polymers Pvt. Ltd. Vs. State of Maharashtra, the Division Bench has found that when Registrar issues certificate ex parte, without following the procedure prescribed in Chapter VIIIA of 1961 Rules, the certificate is unsustainable.

In Vithal Fatangade and Another Vs. State of Maharashtra and Others, , the learned Single Judge of this Court has found recovery certificate issued without following due procedure and ensuring proper notice to opponents, as bad."

"21 .... Language of both the provisions is plain and unambiguous and both the provisions can be construed harmoniously in this manner. Both the provisions begin with non obstante clause and do not militate with each other, but proceed to advance the legislative intention of enabling a society to have a speedy remedy for recovery of arrears due as land revenue..................".

I have also in Balasaheb Dhondiram Nikam Vs. The Joint Registrar and Ors. Writ Petition No. 2183 of 2014, dated 13 February 2015 considered the scope and power of the Authority under Section 101 of the MCS Act and even on the basis of facts, set aside the certificate under Section 101 of the MCS Act.

9. The principle revolved around all these judgments is, unless an amount so charged by the bank and the Society want to recover, must be "recoverable" crystallized amount. The dispute and/or related aspects, required consideration and basically when the dispute between the parties referring and revolving around the said claim arising out of the transaction and/or agreement between the parties. The Authority, under Section 101 of the MCS Act, is not authorized to

proceed and/or raise demand blindly, pending the crystallization of the amount due between the parties.

10. The learned counsel appearing for the Respondents bank, basically conceded so far as the law is concerned, and so also the issue raised and decided in above judgments. Even otherwise, considering the reasons so given by the Cooperative Court in order dated 8 October 2012, confirming the ad interim relief granted by the Court on 12 September 2012, ought not to have been destroyed, as the same was well within the framework of law, as well as, the record in the facts and circumstances of the case.

11. The learned counsel appearing for the Petitioner, on merits, opposed the contention and specifically contended that the interim order/protective order so granted by the Cooperative Court was without any security in pursuance to the demand so raised by the bank. The Petitioner filed/raised dispute, which is still pending for the final adjudication. This itself means that the amount so referred in notice under Section 101 in question, is based upon the uncrystallized and disputed amount, which in my view, is impermissible. The procedure so adopted by the concerned Authority is clear breach of the MCS Act and the Rules, made thereunder. The whole foundation of recovery of 101 of MCS Act, is based upon the crystallized, due and recoverable amount and not the disputed amount. The parties claim and counterclaim including the set off issue, apart from the interest of respected amount, unless finalized and/or determined, the initiation of the proceedings though based upon the private demand notice in question dated 9 July 2012, cannot be the foundation to accept the case of the bank that they can proceed under Section 101 of the MCS Act and therefore, the Petitioner must be directed to furnish the security and/or deposit the amount, this contention is also unacceptable for the undisputed position, as well as, the law in question.

12. Once the order is against the provisions of law, then there is no question of accepting the said order, the balance of convenience, equity in such matters, lie in favour of the Petitioner and against the Respondents no question of directing to deposit and/or secure the amount under such impugned action under Section 101 of the MCS Act.

13. Strikingly, if the Authority under Section 101 of the MCS Act has no power and/or jurisdiction to decide the dispute so raised and the issue involved therein, therefore, to say that the party may appear before the Authority under Section 101 of the MCS Act and to contest the said Application is also of no assistance and/or sufficient to overlook the basic provisions of law so laid down by this Court. The initiation of proceedings under 101 of the MCS Act, itself is without jurisdiction in the present case, in view of the admitted pendency of the dispute revolving around the agreement and the reasons for the amount so raised and as the Petitioner, even otherwise, would not be in a position to raise any defence and the Authority under Section 101 of the MCS Act, the Authority also would not be in position to decide the dispute, which is pending. The formality of appearing and raising objection under Section 101 of the MCS Act, in my view, is of no use

and sufficient to accept the case of the Respondents Bank and the reasons so given in the reversal order. The interference, by the Appellate Court, in this background, as there was no perversity in the lower Authority order which was well within the framework of law and the record, was uncalled for.

14. Therefore, I am inclined to pass the following order:

ORDER

a) Impugned order dated 12 September 2013 passed by the Member, Maharashtra State Cooperative Appellate Court, Mumbai is quashed and set aside.

b) Order passed by the Cooperative Court, Nagpur dated 8 October 2012, is restored and maintained.

c) However, it is made clear that the observations even if any, made in this judgment should not be influenced in the main trial and the Cooperative Court to proceed with the matter in accordance with law.

d) Considering the facts so referred above, the Cooperative Court to decide Dispute No. 263 of 2012, as early as possible, preferably within one year from today.

e) Petition is allowed.

f) Rule made absolute accordingly.

g) There shall be no order as to costs.