
(2003) 08 MP CK 0049
In the Madhya Pradesh High Court
Case No : Writ Petition No. 663 of 2003

Siddh Industries and Others	Vs	APPELLANT
Union Bank of India and Another		RESPONDENT

Date of Decision : 22-08-2003

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(4), 2, 20, 21

Citation : (2004) 1 BC 402 : (2004) 1 JLJ 332 : (2004) 1 MPLJ 147

Hon'ble Judges : A.K. Gohil, J

Bench : Single Bench

Advocate : Vijay Assudani, for the Appellant; N.N. Jain, for the Respondent

Final Decision : Dismissed

Judgement

A.K. Gohil, J.

In this petition under Article 226 of the Constitution of India petitioners have challenged demand notice dated 27.11.2002 (Annexure "P/5") issued by respondent No. 1 under the provisions of Section 13 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for brevity "the Act of 2002") and thereafter followed by notices for taking possession of the assets dated 3.3.2003, 10.3.2003, and 21.4.2003 (Annexures "P/7", "P/8" and "P.9").

It is not in dispute that the petitioner No. 1 is a proprietorship Firm who was granted total financial assistance of Rs. 143.00 lacs by respondent Bank on 10.4.2000 under the heads of C.C. (HYP) 100.00 lacs; Term Loan for Machinery 25.50 lacs; and Term Loan for Building 17.50 lacs. Petitioner Nos. 2 to 4 are guarantors to the said loan. Petitioners have deposited title-deeds of properties situated at Flat No. 104, Chandramani Apartment, Janki Nagar, Indore; Open Plot Survey Nos. 370, 371 and 372 (12,0000 sq. ft.) at Village Musakhedi, P.H. No. 26, Nemawar Road, Indore; Plot Survey Nos. 369 and 370 at Village Mysakhedi,

P.H. No. 26, Nemawar Road, Indore; Factory Land and Building at Survey No. 374/2, Musakhedi, Indore; and hypothecation of Stock of Pulses. Petitioners have also created equitable mortgage thereon as security. It is also not in dispute that the cash credit facility was agreed to be given from time-to-time against the primary security of stock and book-debts. The petitioners had submitted last stock statement, according to which the value of stock was Rs. 266.38 lacs as on 30.9.2002 and on an inspection by the branch officials of the respondent Bank on 7.11.2002 of the godowns, factory premises, stock of hypothecated goods was not found. It is also not in dispute that it is the allegation of the Bank that the aforesaid stock was either sold/removed without depositing its sale proceeds. It is also not in dispute that notices dated 27.11.2002 u/s 13(2) of the Act, 2002 have been sent to the petitioners which are collectively marked as Annexure - "P/5" recalling the loan on the ground that the account of the petitioner has been classified as Non Performing Account (for brevity "NPA") pursuant to default in making repayment of dues/interest of Rs. 1,18,37,548.53. By Annexure-"P/6" on 14.12.2002 petitioners filed objections. Thereafter by notices dated 3.3.2003, 10.2.2003 and 21.4.2003 (Annexures "P/7", "P/8" and "P/ 9") the respondent Bank directed to take possession of the assets, against which the petitioners have filed this petition.

The submission of the respondent Bank is that the petitioners account has become NPA and on inspection by the branch officials on 7.11.2002 of the godown and factory premises, stock of hypothecated goods was not found. It was further stated that the said hypothecated goods were either sold/removed without depositing its sale proceeds with the respondent Bank. It had also come to their knowledge that the petition has stopped dealing with the respondent Bank and has started depositing the money with other Banks. The petitioners has also closed its factory and has not deposited any money since November, 2002 and has given the complete details of the outstanding amount and denied all the allegations made in the petition and submitted that looking to the conduct of the petitioner, he is not entitled for any relief from the Court and the demand notices u/s 13(4) of the Ordinance, 2002 has been issued legally and properly. u/s 17 of the Act, 2002 an appeal is provided which is not availed, therefore, writ is not maintainable. Therefore, he prayed for the dismissal of the petition.

In rejoinder the petitioners made allegation that the document Annexure- "R/1" is not a memorandum, but it is a contract between the parties and constitute bargain. It was further argued that Section 13 is not having any retrospective effect and the Bank has not provided opportunity of hearing before issuing impugned notices.

I have heard learned Counsels for the parties, considered their submissions and perused the documents filed by them in this petition.

Mr. Vijay Assudani, learned Counsel for the petitioners raised three objections against the show-cause notice; viz-, (i) that the memorandum of depositing title deeds and creating equitable mortgage is an agreement of bargain, therefore, it

should be registered and placed reliance on two decisions reported in Veeramachineni Gangadhara Rao Vs. The Andhra Bank Ltd. and Others, and submitted that the registration of the aforesaid mortgage is necessary otherwise it should be considered that no security interest has been created in favour of the Bank over the properties; (ii) he consequently submitted that the definition provided u/s 2(zf) of the Act, 2002 is not applicable in this case; and (iii) he submitted that as per Sections 20 and 21 of the aforesaid Act, 2002 no central registry has been set up. Therefore, question of enforcement of charge does not arise. Section 2(zf) of the Act 2002 provides that security can only be treated in respect of assets already mortgaged with the Bank and in this case no mortgage and no assets have been mortgaged. Therefore, the enforcement of security is illegal.

In reply, Mr. Jain, learned Counsel for respondent Bank submitted that the cash credit facility to the petitioners for Rs. 100.00 lacs was granted against the primary security of hypothecation of stock and book-debts. But the petitioners failed to maintain the stock and on inspection of the godown and factory premises on 7.11.2002, stock of hypothecated goods was not found which clearly shows that the petitioners violated the terms and conditions of granting cash credit facility and as per the guidelines issued by the Reserve Bank of India on violation of the terms and conditions of the hypothecated stock, the account of the petitioners become NPA. He further submitted that the respondent Bank has legally issued notices u/s 13 of the Act 2002 and when the account became NPA and it was known to the petitioner, therefore, all the objections which he has raised in his reply were known to the petitioner that he has committed the violation of the provisions of law. Therefore, there was no question for providing any opportunity of hearing and no separate order was necessary for their reply and final notice of taking possession was issued to the petitioners. He further submitted that when the account become NPA, the remedies provided under the Act are available to the petitioners. He argued that u/s 29 the provisions of Sections 20 and 21 have not come in force and there is no case for registration of the equitable mortgage and the decision of the Supreme Court cited by the learned Counsel for petitioners are not applicable in the present case as there is no agreement for mortgage and he further submitted that the appeal is maintainable u/s 17 of the Act of 2002 and, thus, prayed for dismissal of the petition.

Having heard learned Counsel for the parties and after perusal of the record, I am of the view that none of the three grounds raised by the petitioners have any merit. The decisions cited by the learned Counsel for petitioners are also not applicable in the present case as there is no agreement of bargain between the parties. The respondent has produced document (Annexure-R/1) which is a memorandum for depositing the title deeds and the same has been drawn by the Branch Manager of the Branch who has legally created equitable mortgage and security in favour of the Bank. This memorandum is not a memorandum of agreement and there is no bargain between the parties for creating mortgage.

Therefore, as per Section 17 of the Registration Act it does not require any registration.

Following definitions given in the Act, 2002 are being reproduced to understand the controversy in the matter:

"Financial Assistant" means any loan or advance granted or any debentures or bonds subscribed or any guarantees given or letters of credit established or any other credit facility extended by any Bank or financial institution;

"Financial asset" means debt or receivables and includes--

- (i) a claim to any debt or receivable or part thereof, whether secured or unsecured; or
- (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- (iii) a mortgage, charge, hypothecation or pledge of movable property; or
- (iv) any right or interest in the security, whether full or part underlying such debt or receivables; or
- (v) any beneficial interest in property, whether movable or immovable, or in such debt receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- (vi) any financial assistance;

"hypothecation" means a charge in or upon any movable property, existing or future, created by a borrower in favour of a secured creditor without delivery of possession of the movable property to such creditor, as a security for financial assistance and includes floating charge and crystallisation of such charge into fixed charge on movable property;

"non-performing asset" means an asset or account of a borrower, which has been classified by a Bank or financial institution as sub-standard, doubtful or loss asset, in accordance with the directions or under guidelines relating to asset classifications issued by the Reserve Bank;

"property" means--

- (i) immovable property;
- (ii) movable property;
- (iii) any debt or any right to receive payment of money, whether secured or unsecured;
- (iv) receivables, whether existing or future;
- (v) intangible assets, being know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature;

"security interest" means right, title and interest of any kind whatsoever upon property created in favour of any secured creditor and includes any mortgage, charge, hypothecation, assignment other than those specified in Section 31.

In view of the aforesaid definitions, it is clear that the Act clearly provides definition about financial assistance, financial assets, hypothecation, non-performing asset, property and also secured asset and the security interest. Thus, the case of the petitioners is clearly included within the aforesaid provisions of law.

Section 13 of the Act, 2002 itself start with non obstante clause that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882, any security interest created in favour of any secured creditor may be enforced, without the intervention of Court or Tribunal, by such creditor in accordance with the provisions of this Act which clearly provides that after the enforcement of the security interest now the intervention of the Court or the Tribunal is not necessary.

Section 29 of the Act 2002 specifically provides that the provisions of Sections 20 and 21 shall not come into the force till the central registry is established and learned Counsel for the parties admit before me during the course of the argument that uptill now no central registry has been set up by the Central Government. Therefore, on the face of it, it is clear that in view of Section 29 provisions of Sections 20 and 21 of the Act 2002 are not applicable.

This argument of the petitioners that the security created by way of equitable mortgage is not a security within the definition of Section 2(zf) of Act 2002, also carries no weight. Once the equitable mortgage is validly created and title deeds are deposited and memorandum is drawn and facility of loan is availed then it cannot be argued by the petitioners that they have not created any security in favour of the respondent Bank and, therefore, the same cannot be enforced. On all the three grounds, learned Counsel for the petitioners could not satisfy me that any case is made out for interference in the impugned show-cause notice. On the contrary I find that it is a case in which they have either illegally sold/ removed the hypothecated stock from the godowns and factory premises which is a serious kind of violation of the terms and conditions. After the enforcement of the Act 2002, the respondent Bank is legally entitled to enforce the security interest created in the properties and is also legally entitled for taking possession over the same.

I have also perused the preamble of this Act. According to which the ordinance has been promulgated with a view to provide machinery to the financial institution to recover their loans. In view of the aforesaid ordinance, which has now been enacted as an Act, the authorities cannot claim any right and cannot drag on the litigation for years together without, making payment to the financial institution.

Learned Counsel for respondent Bank cited before me an un-reported Division

Bench decision of the Allahabad High Court in Civil Misc. Writ Petition No. 13559 of 2003 passed on 8.4.2003 (Saleem Ahmad and Ors. v. State Bank of India and Ors.) in the matter of Section 13 of the Act, 2002 and the Division Bench of the Allahabad has recently held as under:

"Section 13(4) of the Act to some extent is *pari materia* with Section 29 of the State Financial Corporations Act, 1951 and the latter provision does not envisage of any opportunity of hearing before taking steps against the borrower, who defaulted making payment to the Financial Corporation. The principle of *audi alteram partem*" in our considered opinion, does not apply to each and every situation. So far the Act is concerned, sufficient safeguard has been provided to protect the interest of the borrower, inasmuch as right to appeal has been provided to him or any person aggrieved by the measures taken u/s 13(4). With regard to the question of liability to pay time barred-debt, which according to Shri Rajvanshi, the petitioners have pleaded in the suit, the same can be raised in the appeal as provided in Section 36 of the Act that no secured creditor shall be entitled to take all or any of the measures under Sub-section (4) of Section 13, unless his claim in respect of the financial asset is made within the period of limitation prescribed under the Limitation Act. In substance, the petitioners can prefer an appeal to the Debts Recovery Tribunal as per Section 17 of the Act and can take the plea of limitation."

Therefore, I find support from the aforesaid dictum of the Division Bench of the Allahabad High Court that sufficient safeguard has been provided in the Act to protect the interest of the borrower and the rule of *audi alteram partem* is not applicable in the case as has been argued on behalf of the petitioner and inasmuch as right to appeal has been provided to him or any person aggrieved by the measures taken u/s 13(4). In this case also it is not in dispute before me that u/s 17 the petitioner is having effective remedy of filing statutory appeal. Therefore, learned Counsel for respondent has rightly pointed out that this petition, directly in the High Court is not maintainable.

Accordingly, this petition, on all the grounds, being devoid of any merit and substance is hereby dismissed. Parties to bear their own costs.