

(2011) 12 MAD CK 0012

In the Madras High Court

Case No : Writ Petition No. 26582 of 2011 and M.P. No's. 1 and 2 of 2011

Sivakumar Textiles

APPELLANT

Vs

Debt Recovery Appellate Tribunal 4th Floor, Indian Bank
Circle Office, 55, Ethiraj Salai, Chennai, The Authorised
Officer ICICI Bank Ltd., ICICI Bank Towers RAOG, SP No.24,
South Phase, 4th Floor West Wing, Ambattur Industrial
Estate, Ambattur and ICICI Bank Ltd., RAPG II Floor, Classic
Towers, 1547, Trichy Road, Coimbatore

RESPONDENT

Date of Decision : 20-12-2011

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(2), 13(3), 13(3A), 13(4)

Citation : AIR 2012 Mad 57 : (2012) 3 BC 45

Hon'ble Judges : K.K. Sasidharan, J;D. Murugesan, J

Bench : Division Bench

Advocate : V.P. Raman, for the Appellant; O.M. Prakash for M/s. Ramalingam
and Asso./RR-2 and 3, for the Respondent

Final Decision : Allowed

Judgement

D. Murugesan, J.—The petitioners, viz., Sivakumar Textiles and its sole proprietor, have come up before this Court assailing the order of the Debts Recovery Appellate Tribunal, the first respondent herein, passed in I.A.No.1188 of 2011 in AIR (SA) No.796 of 2011 dated 04.10.2011.

2. The facts in nutshell are as follows :

The petitioners availed agricultural loan on 21.02.2006 from the third respondent-ICICI Bank, to the tune of Rs. 2.33 crores and created an equitable mortgage by mortgaging agricultural properties including a piece of land with buildings as security for the said loan. As the petitioners defaulted in repayment of loan, the third respondent-bank proceeded against the petitioners by invoking the provisions of the SARFAESI Act and issued a notice dated 28.10.2009 u/s 13(2)

of the Act calling upon them to pay a sum of Rs. 2,89,03,317.54 within a period of 60 sixty days from the date of the notice. As the petitioners have not responded to the said notice, possession notice dated 27.10.2009 u/s 13(4) of the Act was issued taking symbolic possession of four properties described therein. One of the properties was brought for auction on 08.12.2009 by the bank, against which, the petitioners preferred Sarfaesi Appeal No.123 of 2009 before the Debts Recovery Tribunal, Coimbatore.

3. By an interim order dated 01.11.2010, the petitioners were directed to pay a sum of Rs. 25,00,000/- and the same was complied with. Again, by order dated 27.04.2011, the petitioners were directed to pay further sum of 25% to the third respondent, which was challenged before the Debts Recovery Appellate Tribunal u/s 18 of the Act. In compliance of the order of the Debts Recovery Appellate Tribunal, a further sum of Rs. 60,00,000/- was deposited with the 2nd respondent.

4. In the meantime, the Sarfaesi Appeal was dismissed by the Debts Recovery Tribunal, Coimbatore, by order dated 06.09.2011 sustaining the possession notice dated 27.10.2009. As against the said order, the petitioners have filed AIR (SA) No.796 of 2011 before the Debts Recovery Appellate Tribunal along with an interlocutory application in I.A.No.1188 of 2011 seeking waiver of pre-deposit. Before the Appellate Tribunal, the respondent-bank claimed by way of counter-affidavit that the petitioners are liable to pay a sum of Rs. 3,27,13,618.47p as on 2.9.2011, of course, after giving due credit to all the payments made by the petitioners pursuant to the notice u/s 13(2) of the Act.

5. The Debts Recovery Appellate Tribunal, by the impugned order dated 04.10.2011, directed the petitioners to deposit Rs. 81,78,404/- being 25% of Rs. 3,27,13,618.47 as claimed by the respondent-bank, on or before 17.11.2011 with a further direction restraining the Authorised Officer to proceed further in the event the amount is deposited and in case of default, to proceed further. It is the said order which is challenged in this writ petition on the sole ground that as per the second proviso to Section 18(1) of the Act, the Debts Recovery Appellate Tribunal ought to have directed to pay 25% on the amount claimed by the third respondent in the possession notice dated 27.10.2009 or on the amount determined by the Debts Recovery Tribunal and not on the amount claimed by the third respondent before the Debts Recovery Appellate Tribunal as on 02.09.2011 and that too, by way of counter-affidavit, which is unsustainable and untenable.

6. A counter-affidavit has been filed on behalf of respondents 2 and 3, in which it is stated that the property which was brought for sale is not an agricultural property and the same has been put to commercial use. According to the respondents, the provisions of the Act empowers the Appellate Tribunal to direct deposit of 50% of the amount claimed by the secured creditors or as determined by the Debts Recovery Tribunal, whichever is less and the Debts Recovery Appellate Tribunal has rightly taken into consideration the earlier deposits of the

petitioners and accordingly, ordered for deposit of 25% on the amount claimed by the bank as on 2.9.2011 when the appeal was pending.

7. We have heard Mr. V.P. Raman, learned counsel appearing for the petitioners and Mr. O.M. Prakash, learned counsel appearing on behalf of respondents 2 and 3.

8. The core question to be considered is as to whether the Debts Recovery Appellate Tribunal was right in directing the petitioners to deposit 25% of the amount of Rs. 3,27,13,618.47p as claimed by the third respondent before the Debts Recovery Appellate Tribunal in an application filed seeking for waiver of pre-deposit while preferring appeal questioning the order of the Debts Recovery Tribunal.

9. As the above question leads to the interpretation of second proviso to Section 18(1) of the SARFAESI ACT, Section 18 is reproduced hereunder:-

18. Appeal to Appellate Tribunal. - (1) Any person aggrieved, by any order made by the Debts Recovery Tribunal u/s 17, may prefer an appeal alongwith such fee, as may be prescribed to the Appellate Tribunal within thirty days from the date of receipt of the order of Debts Recovery Tribunal:

Provided that different fees may be prescribed for filing an appeal by the borrower or by the person other than the borrower:

Provided further that no appeal shall be entertained unless the borrower has deposited with the Appellate Tribunal fifty per cent, of the amount of debt due from him, as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less:

Provided also that the Appellate Tribunal may, for the reasons to be recorded in writing, reduce the amount to not less than twenty-five percent of debt referred to in the second proviso.

(2) ...

10. Before we delve upon to the second proviso to Section 18 of the Act, we may refer to certain provisions relating to the recovery proceedings under the SARFAESI Act. Chapter III of the Act deals with enforcement of security interest. In terms of Section 13, for the purpose of making a demand from a defaulted borrower, the debt should be classified as a non-performing asset. Thereafter, the bank/ financial institution is entitled to issue notice u/s 13(2) giving sixty days time to the borrower from the date of notice to discharge the liabilities in full. Sub-section (3) of Section 13 contemplates that while such notice is given, the secured creditor shall give details of the amount payable by the borrower and the secured assets intended to be enforced in the event of non-payment of secured debts. A provision of making representation/ objection is also made for the borrower u/s 13(3-A). The representation/objection may be on many grounds, viz., in regard to the quantum of debt, seeking time for payment or alleging that

the provisions of the Act shall not be applicable in view of Section 31 of the Act and so on. In the event of non-compliance of the notice u/s 13(2) and also in the event of rejection of the representation/objection made u/s 13(3-A), the secured creditor may recourse to further proceed by taking measures to secure the debt and issue possession notice u/s 13(4) of the Act. Till such time the possession notice is issued, the borrower has no right to challenge the notice u/s 13(2) or the refusal of the secured creditor to accept the representation/objection of the borrower made u/s 13(3-A), as the challenge to the measures taken under the recovery proceedings, by invoking Section 17 would be available to the borrower only after possession notice is issued. Even after the possession notice is issued, the borrower is entitled to exercise his right of redemption by making payment in terms of Section 13(8) of the Act, wherein and whereunder the secured creditor shall not proceed for sale or transfer of the secured asset and no further steps shall be taken to transfer or sell the secured asset in the event the borrower pays the dues together with all costs, charges and expenses.

11. A careful reading of the above provisions of Section 13 would show that on the one hand, they empower the secured creditor to take action including measures to recover the debt due from the borrower, on the other hand, they also provide certain safeguards for the borrower to repay the money, even after the notice u/s 13(2) or the notice u/s 13(4) or after the sale notice is issued. The provisions of the Act are stringent enabling the banks/financial institutions to recover the debt due to them without recourse to the usual litigation of filing suits in civil Courts. In that context, each provision must be strictly complied with by the banks/financial institutions. On the other hand, while facing such stringent provisions, the rights of the borrower or the guarantor, as the case may be, as provided under the Act also must be construed with certain extent of flexibility in their favour. Before the secured creditor issues notice u/s 13(2), they must declare the debt as a nonperforming asset and such declaration must be in tune with the Reserve Bank of India guidelines. The borrower would be entitled to question such classification on the ground that the classification is not in accordance with the Reserve Bank of India guidelines. This valuable right is available even at the time when the notice u/s 13(2) is issued, but by availing the remedy under Article 226 of the Constitution of India. Likewise, even while the secured creditor gives sixty days time to the borrower, in the event the secured creditor is of opinion that the time can be extended for payment, it can be extended and it is not as if that after the sixty days time is over, the secured creditor cannot extend the time enabling the borrower to make payment. This interpretation is possible in view of the fact that the proceedings initiated under this Act by the secured creditors is intended only to recover the dues.

12. Likewise, even after the possession notice is issued, in terms of sub-section (5) of Section 13, if any payment is made by any person, who has acquired any secured asset from the borrower and from whom any amount is due or may become due to the borrower, the secured creditor shall give such person a valid discharge as if he had made payment to the borrower. This provision is also

intended to safeguard the borrower from facing further recovery proceedings. Likewise, after the symbolic possession is taken u/s 13(4) and the dues are paid in terms of Section 13(8), the secured creditor shall not sell or transfer the secured asset.

13. In the event the borrower is not satisfied as to the measures taken by the secured creditor by issuance of notice u/s 13(4), he may prefer appeal to the Debts Recovery Tribunal u/s 17 with a further provision of appeal u/s 18 to the Debts Recovery Appellate Tribunal, in case any order adversely affecting him is passed by the Debts Recovery Tribunal. u/s 17, the borrower or any person, aggrieved by any of the measures referred to in sub-section (4) of Section 13, may appeal to the Debts Recovery Tribunal. That appeal is in respect of the amount claimed u/s 13(2) of the Act. The provision of Section 13(4) does not contemplate any indication as to the quantum of debt to be shown in the possession notice necessarily meaning thereby that for the purpose of challenging the recovery proceedings made u/s 13(4), the demand made u/s 13(2) is alone relevant. Section 18 contemplates a further appeal to the Debts Recovery Appellate Tribunal by a person who is aggrieved by the orders of the Debts Recovery Tribunal. In that sense, the amount demanded u/s 13(2) alone has relevance, as the proceedings u/s 13(4) which was questioned u/s 17 are the proceedings which culminated into one of further appeal u/s 18 of the Act.

14. That apart, in the event if any provision is to be interpreted, if the words of the statute are plain and clear, there is no room for applying the principles of interpretation. However, in case of any interpretation is required, such interpretation must be made keeping in mind the intent of the legislature.

15. Section 18(1) contemplates a provision of appeal to the Debts Recovery Appellate Tribunal by any person aggrieved over the orders of the Debts Recovery Tribunal. Second proviso to the said section contemplates that before an appeal is entertained, the Debts Recovery Appellate Tribunal shall direct the borrower to deposit 50% of the amount due from him as claimed by the secured creditors or determined by the Debts Recovery Tribunal, whichever is less. While the said proviso employs the words `amount of debt due from the borrower as claimed by the secured creditors', it must necessarily relate back to the claim made by the secured creditor in the notice u/s 13(2). Otherwise, the legislature would have restricted the wordings by using "the amount of debt due from him", without including the further wordings "as claimed by the secured creditors". In the event the amount of debt due from the borrower is alone mentioned in the proviso, such claim may be as per section 13(2) notice or an amount that could have been mentioned u/s 13(4) or an amount that could have been claimed by the secured creditors while opposing an application for waiver. However, when the legislature had used the words "the amount of debt due from the borrower as claimed by the secured creditor", it would have no other meaning except the amount claimed in the notice u/s 13(2).

16. The above interpretation is alone possible, as it is reasonable and is

strengthened by further fact that there is an alternate provision namely that the amount could be as determined by the Debts Recovery Tribunal. In the event, the Debts Recovery Tribunal determines the amount, then 50% of the amount must also be with reference to the amount as determined by the Debts Recovery Tribunal. However, there is a further rider in the said proviso that in the event the amount claimed by the secured creditor is less than the amount determined by the Debts Recovery Tribunal, 50% of the amount to be deposited would be with reference to the amount claimed by the secured creditor and not the amount determined by the Debts Recovery Tribunal. As the borrower has a remedy of appeal to the Debts Recovery Appellate Tribunal, which is the final fact-finding body, his right of appeal may be defeated in the event the second proviso to Section 18 is interpreted to mean that 50% of the amount to be deposited by the borrower would be with reference to the amount claimed by the secured creditor at the time when the Debts Recovery Appellate Tribunal considers the application for waiver. If such interpretation is given, it will lead injustice to the borrower while availing the appellate remedy and shall consequently result in undue hardship.

17. Keeping the above principles in mind and keeping certain benefits conferred on the borrower as well, while the recovery measures are taken by the secured creditor, we could only see that 50% of the amount to be deposited as a pre-condition or an amount as directed by the Debts Recovery Tribunal which would be not less than 50% would be only with reference to the amount claimed u/s 13(2) of the Act.

18. In this context, we may also refer to the judgment of a Division Bench of Delhi High Court in Poonam Manshani vs. J and Poonam Manshani Vs. J and K Bank Ltd. and Another, . Though the point in issue was not decided on a detailed discussion, the Division Bench of the Delhi High Court has observed that the amount of debt due, ignoring the interest component, would be the amount specified in the notice u/s 13(2). We may also refer to the judgment of the Supreme Court in Narayana Chandra Ghosh Vs. UCO Bank and Others, . In that case, the Apex Court has approved an order of the Debts Recovery Appellate Tribunal directing deposit of 50% of the debt due by the borrower as claimed by the secured creditor u/s 13(2).

19. For all the above reasons, we hold that the impugned order directing the petitioner to deposit 25% of Rs. 3,27,13,618.47p as claimed by the respondent-bank in the counter-affidavit before the Debts Recovery Appellate Tribunal is unsustainable and if at all, 25% of the amount to be deposited by the petitioner for preferring the appeal should be only with reference to the sum of Rs. 2,89,03,317.54.

20. Accordingly, the impugned order of the Debts Recovery Appellate Tribunal dated 04.10.2011 is set aside and the writ petition is allowed. The Debts Recovery Appellate Tribunal is directed to entertain the appeal in the event the petitioner deposits 25% of the amount demanded in the notice u/s 13(2) of the

Act and decide the same on its own merits. No costs. Consequently, connected M. Ps. are closed.