(2018) 06 MP CK 0120

In the Madhya Pradesh High Court

Case No : Writ Appeal No.119 Of 2018

Smt. Anjana APPELLANT

Vs

Bank Of India & Ors RESPONDENT

Date of Decision : 26-06-2018

Acts Referred:

Constitution of India, 1950 — Article 226, 227, 300(A)
Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 — Section 13(2), 13(3)(A), 13(4), 14, 14(1), 14(A), 17, 17(1)

Citation : (2018) 06 MP CK 0120

Hon'ble Judges : PANKAJ KUMAR JAISWAL, J;SUNIL KUMAR AWASTHI, J

Bench : Division Bench

Advocate : V.K. Tankha, Varun Tankha, D.S. Panwar, Rohit Mangal

Final Decision : Dismissed

Judgement

This intra-court appeal has been filed by the appellant against the order dated 18/09/2017 passed in W. P. No.5917/2017 by which learned Writ Court

has held that an action under the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (in brevity ""the

SARFAESI Act"") constitutes an action taken after the stage of Section 13(4) and, therefore, the same would fall within the ambit of Section 17(1) of

the SARFAESI Act and dismissed the writ petition as not maintainable with liberty to the appellant to approach the Debts Recovery Tribunal (DRT)

under Section 17 of the SARFAESI Act.

2. The brief facts of the case are that the appellant is engaged in the business of transportation and she received a loan of Rs. 94,80,000/- from the

respondent No.1-Bank of India for the purchase of 8 passenger buses on 21/11/2012. In order to secure the said loan, the petitioner has created surety by way of hypothecation of 8 new Tata double door buses. The loan was liable to be repaid by way of 62 equal monthly installments of Rs. 1,98,120/-

w.e.f. 31/10/2014. However, she has failed to make payment of monthly installment, therefore, her account was declared as Non Performing Assets

(NPA) w.e.f. 30/06/2015. Demand Notice under Section 13(2) of the Sarfaesi Act were issued on 01/07/2015, 11/07/2015 and 14/07/2015 regarding

deposit of entire arrears amount within a period of 60 days, however, these notices were returned back as not claimed by the appellant. Thereafter,

the respondent No.1-Bank got published notice in daialy news paper-â?Dainik Bhaskarâ? on 27/10/2015 and also intimated the appellant about the

proceedings under the Sarfaesi Act but the appellant did not respond to the notice, then respondent No.1-Bank of India approached to the Additional

District Magistrate, Ujjain, seeking assistance to take possession of the buses.

3. The Additional District Magistrate, Ujjain issued notice to the appellant under Section 14 of the Sarfaesi Act. After taking reply of the appellant,

Additional District Magistrate, Ujjain did not find any satisfactory reason for non-payment of the loan amount and passed the final order under Section

14(A) of the Sarfaesi Act on 22/08/2017 for taking the physical possession of 8 buses.

4. The appellant challenged the order dated 22/08/2017, passed by Additional District Magistrate, Ujjain by filing W.P. No. 5917/2017. The learned

Writ Court has dismissed this petition by holding that the appellant is having remedy to file an appeal under Section 17 of the Sarfaesi Act before Debt

Recovery Tribunal (DRT) . It is this order, which has been impugned in this intra-court appeal.

5. Learned Senior Counsel for the appellant submits that the respondent No.1-Bank of India has not complied with the provision of Section 13(3)(A)

of the Sarfaesi Act, wherein it is mandatory to communicate the reason for non acceptance of the representation/objection. Learned writ court has

ignored the fact that notice under Section 13(2) of the Sarfaesi Act got published in the daily news paper â??Dainik Bhaskarâ? on 27/10/2015, which

extends a fresh period of 60 days to the appellant for filing objection/ representation under Section 13(3)(A) of the Sarfaesi Act. The appellant had

filed such representation/objection on 31/12/2015 after receiving the copies through email dated 24/12/2015. It is further submitted that the alleged decision on the representation of the appellant has never been complied by the respondent No.1-Bank of India before filing of the application under

Section 14(1) of the Sarfaesi Act. The application filed under Section 14(1) of the Sarfaesi Act by the respondent No.1-Bank of India was premature

and invalid thus the order dated 22/08/2017, passed by the Additional District Magistrate, Ujjain is also invalid and obtained by misrepresentation and

concealment of the facts by respondent No.1-Bank.

6. He further submitted that learned Single Judge has committed error while deciding the second Review Petition No. 1259/2017 by placing reliance in

the case of Standard Charted Bank Vs. Noble Kumar and others, (2013) 9 SCC 620, which reads as under:-

â??In view of our conclusion on the scope of Section 17 recorded earlier it would normally have been open to the Respondent to prefer an appeal

under Section 17 raising objections regarding legality of the decision of the Magistrate to deprive the Respondent of the possession of the secure asset.

But in view of the fact that the Respondent chose to challenge the decision of the magistrate by invoking the jurisdiction of the High Court under

Article 226 of the Constitution of India and in view of the fact that the Respondent does not have any substantive objection as can be discerned from

the record, we make it clear thhat the Respondent in the instant case would not be entitled to avail the remedy under Section 17 as the Respondent

stalled the proceedings for a period of almost 4 years. It is worthwhile remembering that the Respondent did not even chose to raise any objections to

the demand issued under Section 13(2) of the Act. However, we make it clear that it is always open to the Respondent to seek restoration of his

property by complying with Sub-section 8 of Section 13 of the Act.â??

7. It is also submitted by the learned counsel for the appellant that learned Writ Court has also not appreciated the factual legal position in the context

of alternative remedy. There is statutory violation by not issuing notice under Section 13(2) of the Sarfaesi Act, the same being a contravention of

statute and in violation of principles of natural justice. It is also in violation of the constitutional right to hold property under Article 300(A), thus, writ

remedy would lie.

8. Learned counsel for the respondent has supported the impugned order and prays for dismissal of the Writ Appeal.

9. Section 13 of the Act, is the grace of the controversy involved in the present case and contains detail mechanism for inforcement of Security

interest. It would be necessary and advantageous to reproduce Section 13 of the Sarfaesi Act, which reads as under:-

â?? Section 13 in The Securitisation And Reconstruction Of Financial Assets And enforcement Of Security Interest Act, 2002

13. Enforcement of security interest.-

(1) Notwithstanding anything contained in section 69 or section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created

in favour of any secured creditor may be enforced, without the int rvention of the court or tribunal, by such creditor in accordance with the provisions

of this Act.

(2) Where any borrower, who is under a liability to a secured creditor under a security agreement, makes any default in repayment of secured debt or

any instalment thereof, and his account in respect of such debt is classified by the secured creditor as non- performing asset, then, the secured creditor

may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor within sixty days from the date of notice failing

which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4).

(3) The notice referred to in sub- section (2) shall give details of the amount payable by the borrower and the secured assets intended to be enforced

by the secured creditor in the event of non- payment of secured debts by the borrower.

(4) In case the borrower fails to discharge his liability in full within the period specified in sub- section (2), the secured creditor may take recourse to

one or more of the following measures to recover his secured debt, namely:-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured

asset;

(b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the

secured asset;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is

due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

(5) Any payment made by any person referred to in clause (d) of sub- section (4) to the secured creditor shall give such person a valid discharge as if

he has made payment to the borrower.

(6) Any transfer of secured asset after taking possession thereof or take over of management under sub- section (4), by the secured creditor or by the

manager on behalf of the secured creditor shall vest in the transferee all rights in, or in relation to, the secured asset transferred as if the transfer had

been made by the owner of such secured asset.

(7) Where any action has been taken against a borrower under the provisions of sub- section (4), all costs, charges and expenses which, in the opinion

of the secured creditor, have been properly incurred by him or any expenses incidental thereto, shall be recoverable from the borrower and the money

which is received by the secured creditor shall, in the absence of any contract to the contrary, be held by him in trust, to be applied, firstly, in payment

of such costs, charges and expenses and secondly, in ischarge of the dues of the secured creditor and the residue of the money so received shall be

paid to the person entitled thereto in accordance with his rights and interests.

(8) If the dues of the secured creditor together with all costs, charges and expenses incurred by him are tendered to the secured creditor at any time

before the date fixed for sale or transfer, the secured asset shall not be sold or transferred by the s cured creditor, and no further step shall be taken

by him for transfer or sale of that secure asset.

(9) In the case of financing of a financial asset by more than one secured creditors or joint financing of a financial asset by secured creditors, no

secured creditor shall be entitled to exercise any or all of the rights conferred on him under or pursua t to sub- section (4) unless exercise of such right

is agreed upon by the secured creditors representing not less than three- fourth in value of the amount outstanding as on a record date and such action

shall be binding on all the secured creditors: Provided that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of section 529A of the Companies Act, 1956 (1 of 1956): Provided further that in the case of a

company being wound up on or after the commencement of this Act, the secured creditor of such company, who opts to realise his security instead of

relinquishing his security and proving his debt under proviso to su- section (1) of section 529 of the Companies Act, 1956 (1 of 1956), may retain the

sale proceeds of his secured assets after depositing the workmen' s dues with the liquidator in accordance with the provisions of section 529A of that

Act: Provided also that liquidator referred to in the second proviso shall intimate the secured creditor the workmen' s dues in accordance with the

provisions of section 529A of the Companies Act, 1956 (1 of 1956) and in case such workmen' s dues cannot be asc rtained, the liquidator shall

intimate the estimated amount of workmen' s dues under that section to the secured creditor and in such case the secured creditor may retain the sale

proceeds of the secured assets after depositing the amount of such estimate dues with the liquidator: Provided also that in case the secured creditor

deposits the estimated amount of workmen' s dues, such creditor shall be liable to pay the balance of the workmen' s dues or entitled to receive the

excess amount, if any, deposited by the secured creditor w th the liquidator: Provided also that the secured creditor shall furnish an undertaking to the

liquidator to pay the balance of the workmen' s dues, if any. Explanation.- For the purposes of this sub- section,-

(a) "" record date"" means the date agreed upon by the secured creditors representing not less than three- fourth in value of the amount outstanding on

such date;

(b) "" amount outstanding"" shall include principal, interest and any other dues payable by the borrower to the secured creditor in respect of secured

asset as per the books of account of the secured creditor.

(10) Where dues of the secured creditor are not fully satisfied with the sale proceeds of the secured assets, the secured creditor may file an

application in the form and manner as may be prescribed to the Debts Recovery Tribunal having jurisdiction or a competent court, as the case may be,

for recovery of the balance amount from the borrower.

(11) Without prejudice to the rights conferred on the secured creditor under or by this section, secured creditor shall be entitled to proceed against the

guarantors or sell the pledged assets without first taking any of the measured specifies in clause (a) to (d) of sub- section

(4) in relation to the secured assets under this Act.

(12) The rights of a secured creditor under this Act may be exercised by one or more of his officers authorised in this behalf in such manner as may

be prescribed.

(13) No borrower shall, after receipt of notice referred to in sub- section (2), transfer by way of sale, lease or otherwise (other than in the ordinary

course of his business) any of his secured assets referred to in the notice, without prior written content of the secured creditor.â??

10. Section 13(2) of the Sarfaesi act provides where any borrower, who is under a liability to a secured creditor under a security agreement, makes

any default in repayment of secured debt or any instalment thereof, and his account in respect of such debt is classified by the secured creditor as

non- performing asset, then, the secured creditor may require the borrower by notice in writing to discharge in full his liabilities to the secured creditor

within sixty days from the date of notice failing which the secured creditor shall be entitled to exercise all or any of the rights under sub- section (4) of

the Sarfaesi Act. Section 13(3) of the Sarfaesi Act provides that the notice issued under Section 13 (2) was contained details of the amount payble by

the borrower as also the details of the secured assets intended to be enforced by the bank or financial instituion. By Section 13(3) of the Sarfaesi Act

borrower is permitted or given an opportunity to make representation/objection to the secured creditor against the classification of NPA and for not

exercising the power of Section 13(4) of the Sarfaesi Act and if the Bank or Financial Institution come to the conclusion that the

representation/objection of the borrowere is not acceptable, then reason for non acceptance are required to be communicated to the borrower within

one week.

11. In the present case, the respondent No.-1-Bank issued notice under Section 13(2) of the Sarfaesi Act to the appellant on 01/07/2015 and after that

on 11/07/2015 and 14/07/2015, however, all these notices were return unserved with a report that they are not claimed by the appellant. Then the

respondent No.1-Bank got published notice in daily newspaper â??Dainik Bhaskarâ? on 27/10/2015. The respondent No.1-Bank has separately intimated the appellant about the proceedings under the Sarfaesi Act but the appellant did not respond to the notice. The appellant vide letter datred

17/11/2015 acknowledge the receipt of the documents relating to the loan sanction. The respondent No.1-Bank sent a notice to the appellant on

23/11/2015, in which it is clearly mentioned that she has committed default in repayment of the principal debt and outstanding dues as on 30/06/2015 is

Rs. 88,20,223/-, therefore, her credit facicility is declared as Non Performing Asset (NPA) w.e.f. 30/06/2015. She has replied the said notice on

19/12/2015, which clearly indicates that she was having knowledge about the steps taken by the secured creditors as required under Section 13(2) of

the Sarfaesi Act. But even then she has not moved any objection/representation within a period of 60 days as prescribed under Section 13(3)(A) of

the Sarfaesi Act, therefore, she cannot take advantage of the plea that the respondent No.1 has not communicated her regarding non acceptance of

her representation/objection within prescribed period. Under these circumstances the judgments relied by the learned counsel for the appellant of

Madras High Court, III (2011) BC 7 (Mad.) DB, in the case of Darshan Singh Vs. State of Punjab, (2007) 14 SCC 262, Sushik Kumar Vs. N.C.T. Of

Delhi, 2009 SCC Online DE 2511, 2007(AIR)(Guj) 126, II(2009) (Orrisa) BC 635(DB), I (2010) (Allahabad) BC 176 (DB)and reported in (II) (2009)

BC 635 (DB) and IV (2011) BC 401 (Bom) DB are not applicable in the facts and circumstances of the present case.

12. Section 14 of SARFAESI Act reads as under :-

Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset.-

(1) Where the possession of any secured assets is required to be taken by the secured creditor or if any of the secured assets is required to be sold or

transferred by the secured creditor under the provisions of this Act, the secured creditor may, for the purpose of taking possession or control of any

such secured assets, request, in writing, the Chief Metropolitan Magistrate or the District Magistrate within whose jurisdiction any such secured asset

or other documents relating thereto may be situated or found, to take possession thereof, and the Chief Metropolitan Magistrate or as the case may be,

the District Magistrate shall, on such request being made to him-

(a) take possession of such asset and documents relating thereto; and

(b) forward such asset and documents to the secured creditor.

(2) For the purpose of securing compliance with the provisions of sub- section (1), the Chief Metropolitan Magistrate or the District Magistrate may

take or cause to be taken such steps and use, or cause to be used, such force, as may, in his opinion, be necessary.

(3) No act of the Chief Metropolitan Magistrate or the District Magistrate done in pursuance of this section shall be called in question in any court or

before any authority.

13. In the case of Kanhaiyalal Lalchand Sachdev & others V/s. State of Maharashtra & others, 2011 (2) SCC 782, the Apex Court held that against

an action taken under Section 14 of the SARFAESI Act, the remedy lies to move an application to the tribunal. The court observed thus :-

â??22. We are in respectful agreement with the above enunciation of law on the point. It is manifest that an action under Section 14 of the Act

constitutes an action taken after the stage of Section 13(4).and therefore, the same would fall within the ambit of Section 17(1) of the Act. Thus, the

Act itself contemplates an efficacious remedy for the borrower or any person affected by an action under Section 13(4) of the Act, by providing for

an appeal before the DRT.

23. In our opinion, therefore, the High Court rightly dismissed the petition on the ground that an efficacious remedy was available to the appellants

under Section 17 of the Act.It is well settled that ordinarily relief under Articles 226/227 of the Constitution of India is not available if an efficacious

alternative remedy is available to any aggrieved person.â??

14. On due consideration of the aforesaid and the law laid down by the Five Judges Bench of this court in the case of Kanhaiyalal Lalchand Sachdev

& others(supra), we are of the view that the appellant has an effective alternative remedy to approach the Debt Recovery Tribunal under Section 17

of the SARFAESI Act, therefore, the writ appeal filed by the appellant has no merit and is accordingly, dismissed with a liberty to the appellant to

avail the remedy of appeal under Section 17 of the SARFAESI Act, in accordance with law.

No order as to costs.

