
(2012) 10 DEL CK 0276

In the Delhi High Court

Case No : Writ Petition (C) No. 6558 of 2012

Smt. Satya Bhama Gupta

APPELLANT

Vs

HDFC Bank and Others

RESPONDENT

Date of Decision : 15-10-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 198 DLT 289 : (2013) 133 DRJ 57

Hon'ble Judges : Vipin Sanghi, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Rakesh Tiku with Mr. Hemant Chaudhri, Mr. S.W. Haider and Mr. Chanchal Kumar, for the Appellant; Ashwani Kumar Mata, with Mr. Kunal Tandon, Jaspreet Singh Kapur, Advocates for R-1/Bank, Mr. P.K. Handa, Vice President, HDFC Bank and Mr. Kuldeep Singh, Senior Manager, HDFC Bank, for the Respondent

Final Decision : Dismissed

Judgement

Sanjay Kishan Kaul, J.

CM No. 17350/2012

Allowed subject to just exceptions.

WP(C) No. 6558/2012 and CM No. 17349/2012

1. M/s Manohar Lal Gupta & Co. Private Limited/R-2 availed of loan facilities from Centurion Bank of Punjab Limited which was subsequently merged into HDFC Bank Limited/R-1. Since R-2 was engaged in business of civil engineering in Government contracts, there were various loan facilities availed of including for bank guarantees issued to third parties which bank guarantees were in turn secured by margin money amounting to 15% of the bank guarantee's value in the shape of FDRs. The petitioner amongst others was a guarantor of the loan and had provided security of the residential property AM-3, Shalimar Bagh Delhi for the loan facility. We may add that Mr. Manohar Lal Gupta has been impleaded as R-3 here while his two children Mr. Arun Gupta and Ms. Nishi Gupta are R-4

and R-5. The petitioner is the wife of Mr. Manohar Lal Gupta. It is the case of the petitioner that on 29.12.2009 a sum of Rs. 1,11,12,426/- by means of FDRs was available with R-1/Bank which were liable to be credited to the account of R-2 much prior to that date but that was not done. On the other hand, R-1 declared the account of R-2/Company as a NPA (Non Performing Asset) on 29.12.2009. This was subsequently followed up with the notice dated 25.08.2010 u/s 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 ("the SARFAESI Act" for short) to the R-2 as well as the petitioner making a claim of Rs. 3,70,48,252.38. This notice was followed by steps u/s 13(4) of the SARFAESI Act and on 08.02.2011 a notice was issued for taking over possession of the immovable property. It is at this stage that the petitioner filed an application SA No. 7 of 2011 before the DRT-II, Delhi.

2. The said SA along with the SA filed by Sh. Ravi Gupta, another son of Sh. Manohar Lal Gupta, were heard together on the question of interim relief and an order was pronounced on 21.02.2011. This order notes that there were three properties qua which equitable mortgage had been created including the Shalimar Bagh Property owned by the petitioner. Two other properties were E-103, Kamla Nagar-110007 and farm land at Village Jati, District Sonipat, Haryana. In para 6 of the order dated 21.02.2011, the submissions of Mr. Arun Gupta, R-4 and Ms. Nishi Gupta, R-5 have been recorded giving their no objection if the amount is recovered from the sale of other two secured immovable assets. R-5 was stated to have deposited some FDRs for bank guarantee which were stated to be now available and that could be adjusted against the dues. The plant and machinery hypothecated in favour of the bank was also volunteered to be sold but it was prayed that action should not be taken against the Shalimar Bagh property. The two respondents expressed intention to clear the liability of the bank. It was in view of these requests that the DRT vide order dated 21.02.2011 directed the surrender of possession of the other two mortgage properties to facilitate the bank to sell the same and subject to that Shalimar Bagh property would not be taken possession of.

3. R-2 to R-4 herein aggrieved by this order filed Miscellaneous Appeal No. 115 of 2011 before the DRAT. The appeal was disposed of on 02.09.2011 by a consent order whereby, in the case of non payment of the amount of Rs. 82.50 lacs, upon sale of property at village Sirsa, Sonipat, the Kamla Nagar property was to be sold by the Bank, and if there was any shortfall then Rs. 15 lakhs was to be deposited with the Bank by the appellants commencing from October, 2011. This order was however modified by the order dated 21.11.2011, on the counsel for the Bank pointing out that the land at Sirsa District, Sonipat had been sold and the sale amount deposited with the Bank. The original documents were delivered to the prospective purchasers as per directions passed on that date. Another aspect clarified was that the outstanding amount had been mentioned at Rs. 3.20 crores approximately in the order dated 31.08.2011 while the amount was actually Rs. 3,53,07,987.96.

4. R-2 to R-4 however committed default in payment of installments of Rs. 15 lakh by 15th of each calendar month after the month of October, 2011 and thus moved Miscellaneous Application No. 115 of 2011. In terms of the order dated 26.03.2012, 15 days' time was further granted to deposit the defaulted installments. It was made clear that in the event of default, the Respondent no. 1 Bank would be at liberty to proceed with the matter in accordance with order dated 02.09.2011 and that the receiver appointed by the ACMM shall have the authority to proceed further.

5. R-2 to R-4 were still not satisfied and thus filed WP(C) No. 2006 of 2012 before this court. In terms of the order dated 11.04.2012 a Division Bench of this court to which one of us (Sanjay Kishan Kaul, J.) was a member noticed that indulgences had been shown to the petitioners in that writ petition even earlier to facilitate payment, but they defaulted. It was also noticed with regret that the company had in the interregnum period of time diverted all the funds received to clear liabilities under the contracts under execution without paying that money for clearing the outstandings due to R-1/Bank. However, the petitioners therein pleaded that further sums had been released to the petitioners under an award which will be deposited and further gave undertakings to channelize all amounts received towards their accounts. An undertaking was given that future installments will be paid as per order dated 02.09.2011 of the DRAT and the installments for the month of April, 2012 of Rs. 15 lakhs will be paid on or before 12.04.2012 which would leave the defaulted amount as per notice at Rs. 50 lakhs. On pleading of the petitioners an indulgence was shown for the last time as noticed to clear their outstanding liability on or before 30.06.2012 with the assurance that no further proceedings will be instituted seeking any further extension of time qua these amounts or meeting the obligations under the consent order dated 02.09.2011 before any forum whatsoever subordinate to the High Court. The undertaking was accepted.

6. Thereafter, the petitioner herein, preferred I.A. No. 428/2012 in the pending S.A. No. 7 of 2011 seeking directions to R-1/Bank to give credit in respect of the FDRs and accrued interest given as margin money against the bank guarantee (stated to have been issued to third parties as part of the sanctioned facility) on the date immediately upon their expiry; to pass an order confirming that the classification of R-2's account as NPA and the notice u/s 13(2) as bad; to consequently declare notice u/s 13(4) as void; and to declare that R-1/Bank is not entitled to realize from the petitioner and R-2 to R-5 more than a sum of Rs. 3.70 crores as shown in the notice u/s 13(2). The said application, however, came to be dismissed by the DRT vide order dated 28.06.2012, wherein it was observed that in view of the undertaking given before this Court, the petitioner was precluded from raising such pleas. It was also observed that no case for set off or adjustment was made before the High Court and that any such adjustment or set off with regard to any amount due to the borrower could only be decided after the undertaking given before the High Court was complied with.

7. The petitioner claims that R-2 to R-4 complied with the order dated 11.04.2012 of the High Court and thereafter moved IA No. 478/2012 in SA No. 7 of 2011 praying for a direction against R-1/Bank to give them credit in respect of FDR of Rs. 19.93 lakhs and accrued interest as the bank guarantee for which this FDR was to be margin money had expired on 10.05.2012. This application was however opposed by the R-1/Bank on the ground that in an NPA account the bank cannot be directed to release the amount of the margin against the said bank guarantee to the borrower as the beneficiary was also allegedly claiming to have invoked the said bank guarantee. Though the bank guarantee had expired on 10.05.2012, the beneficiary was still disputing the claim and threatening legal action and if a court of law were to direct the bank to make the payment of the said bank guarantee to the beneficiary and treated the same as having been rightly invoked, then the bank would be left high and dry with no margin money and no recourse to recovery. The application was disposed of on 01.08.2012 by the DRT. In that order the Presiding Officer, DRT opined that the communications addressed by the Bank showed that a definite stand was taken that there was no valid invocation and that the Bank would not honour the payment with the Bank being discharged from the liability. Thus the sum of Rs. 19.93 lakhs in the FDR along with accrued interest was held liable to be credited towards the loan account with effect from 10.05.2012 without charging interest in the NPA account for the adjustable amount.

8. The writ petition states that R-1/Bank filed IA No. 607 of 2012 seeking review of the order dated 01.08.2012 and a previous order dated 06.07.2012. On the other hand the petitioner moved a contempt petition No. 610 of 2012 on account of failure to comply with the order dated 01.08.2012.

9. These two applications along with SA No. 7 of 2011 were disposed of by a common order dated 17.09.2012. The plea of the petitioner that she was never aware of the mortgage being created in respect of the property and that no notice was received by her, were examined. One of the controversies which arose and taken note of by the DRT was that the learned senior counsel for the petitioner sought to rake up the issue of the declaration of account as NPA being bad. This was despite the fact that such a contention was never raised in the application. It was noticed that the principal borrower had never disputed the liability and the plea that the declaration of account as NPA was against the guidelines issued by Reserve Bank of India and that if the FDRs were duly credited the account could not have been declared as NPA were held not capable of being raised in the absence of any pleadings to that effect in the application filed u/s 17 of the SARFAESI Act. Despite holding so, the DRT proceeded to even examine the merits of the plea. In a nutshell the reasons for declaration of the account as NPA were noticed. The account had been out of order for 90 days in continuation from 30.09.2009 and was thus stated to be within the RBI guidelines. The outstanding balance of Rs. 311.69 lakhs as on 30.09.2009 remained overdue for a continuous period of 90 days. This basis was not accepted by the DRT on perusal of the statement of account as various deposits

were made in the month of December, 2009. The amount credited from 30.12.2009 to 01.01.2010 is stated to be Rs. 67 lakhs. Thus the DRT concluded that the account ought not to have been declared as NPA but this contention could not be permitted to be raised. The order of the DRT thereafter proceeds to deal with the issue of rate of interest and relied upon the Full Bench Judgment of the Madras High Court in Lakshmi Shankar Mills (P) Ltd. Vs. Authorised Officer, Indian Bank; AIR 2008 Madras 181 for the proposition that it was not necessary for the Tribunal to adjudicate the exact amount due to the secured creditors as the purpose of an application u/s 17 of the SARFAESI Act is not the determination of the quantum of claim per se as the Tribunal is concerned with the issue of validity of the measures taken by the banks/financial institutions u/s 13(4) of the SARFAESI Act.

10. We would like to add here that the aforesaid judgment of the Full Bench of the Madras High Court was examined by the Division Bench of this court in Ram Murty Pyara Lal and Others Vs. Central Bank of India and Others, . The Division Bench while agreeing with the conclusion of the Full Bench in Lakshmi Shankar Mills" case (supra) however did not agree with certain observations made therein. These observations in the Full Bench judgment were to the effect that it was not necessary for the DRT to adjudicate the exact amount due to the secured creditors. This ratio was held by the Division Bench to be in conflict with para 18 and 54 of the judgment in the case of Mardia Chemicals Ltd. Vs. Union of India (UOI) and Others Etc. Etc., . Since the Supreme Court judgment had held that the proceedings u/s 17 of the SARFAESI Act were in the nature of original proceedings and that even the amount which is claimed to be due to a bank/financial institution could be challenged by a borrower, it was held that all grounds including merits of the disputes, the amount due and the violation of the proceedings of SARFAESI Act and all other applicable laws and rules would necessarily have to be decided in the proceedings u/s 17 of the SARFAESI Act. Thus it was held that the amount which is claimed by financial institution on passing of an order u/s 13(3A) of the SARFAESI Act whereby the amount is claimed against the borrower/mortgagor/guarantor, the said crystallization is not final and it can always be challenged in an application u/s 17(1) of the SARFAESI Act though those proceedings may be titled as "appeal proceedings" as they are really in the nature of Original Side Jurisdiction Proceedings. We specifically posed a query to learned senior counsel for the petitioner whether this judgment which was sought to be referred before us had been brought to the notice of the DRT. Learned counsel conceded that it was not so, but surprisingly "sought to put burden on the Tribunal itself"! The DRT in its order dated 17.09.2012 held that the steps were properly taken u/s 13(4) of the SARFAESI Act. Simultaneously the application filed by the Bank for review of the order dated 06.07.2012 was dismissed but the same was allowed as regards Order dated 01.08.2012, on the ground that the said order has been obtained by the petitioner upon suppression of material fact with regard to invocation of the bank guarantee by the beneficiary. Consequently, the I.A. of the petitioner alleging contempt of order

dated 01.08.2012 came to be dismissed.

11. The petitioner being aggrieved by the order dated 17.09.2012 filed an Appeal No. 347 of 2012 before DRAT u/s 18 of the SARFAESI Act. In terms of the impugned order dated 25.09.2012 it was noticed that out of the original amount claimed under the notice u/s 13(2) of the SARFAESI of Rs. 3,70,48,252.38, an amount of Rs. 3,46,88,731.61 had been deposited which was more than 50 per cent of the amount. It may, however, be added that as per the counsel for the Bank the amount deposited was Rs. 2,57,00,000. The DRAT found that in any case it was more than 50 per cent of the claim amount and thus no further amount was required to be deposited for entertaining the appeal and no pre-deposit was thus required. The appeal was entertained and registered and has been listed for arguments on 16.01.2013. To this extent, the petitioner has no grievance.

12. The grievance however arises in view of what has been recorded thereafter by the DRAT as on instructions from the counsel for the Bank it was stated that as on 17.09.2012 the outstanding due was Rs. 1,66,13,954.85. It is noticed that the appeal stands admitted. However, in the last paragraph it has been stated that if the appellant deposits the installments as per order dated 02.09.2011 (wrongly mentioned as 30.09.2011) of the Tribunal and the order dated 11.04.2012 of the High Court regularly and makes good the defaulted installments within four weeks, parties will maintain status quo of the property in question while in case of default the Bank would be at liberty to proceed in accordance with law.

13. In a nutshell the submission of the learned senior counsel for the petitioner is that since almost the entire part of the notice amount stands deposited and the appeal stands admitted on account of deposit already being made to the extent of more than 50 per cent in terms of Section 18 of the SARAFESI Act, there can be no question of asking the petitioner to pay further amounts. Learned counsel in this behalf has drawn our attention to the statement of account produced which is at page 465 and shows credit of Rs. 34,688,508.80 while the notice amount was about Rs. 3.70 crores. However, what appears to have been lost sight of by learned counsel is that as per the closing balance as on 28.09.2012 there is a debit of Rs. 16,613,954.82. This debit is arising as while there were deposits being made by the borrower, simultaneously there were debit entries towards interest capitalized. We are unable to accept the plea of the petitioner that these debit entries towards interest should be ignored for this purpose. The liability of the borrower and guarantor are both to pay principal and interest.

14. Learned senior counsel for the petitioner also sought to lay emphasis on the fact that the petitioner had every right to establish during the SA proceedings that manner of computation of the account was not proper and the outstandings were not as they were held out. This aspect was alleged to have been ignored by the DRT while relying on the Full Bench Judgment of the Madras High Court in Lakshmi Shankar Mills" case (supra) while the view taken by the Division Bench

of this Court in M/s. Ram Murthy Pyara Lal's case (supra) was to the contrary. In our view this aspect will now have to be examined by the DRAT on merits as the petitioner failed to bring to the notice of the DRAT the judgment of the Division Bench of this Court which was the bounden duty of the counsel. As to what would be the effect thereof, whether the DRAT would decide this issue or the matter would be remanded back to DRT are all questions which have to be left open and we cannot conclude these issues, as the appeal is admitted and pending consideration before the DRAT.

15. We are in the present petition only concerned with the directions passed by the DRAT in the last paragraph with which the petitioner has a grievance. During the proceedings before the DRT, the DRAT and this Court the borrowers never disputed to their liabilities under the sanctioned facilities availed of by them and, in fact, went a step ahead and gave undertakings to remit back the same in a time bound manner. It was in pursuance to the said undertakings and statements made by the borrowers before the DRAT and this Court that consent order dated 02.09.2011 and order dated 11.04.2012 came to be made respectively. The same were never objected to or assailed by the petitioner herein. The said contention, therefore, appears to be in the teeth of the indulgence afforded to the borrowers not only by the DRAT but also by this court.

16. In fact, all that the DRAT has done is to direct the interim arrangement which was arrived at and upheld including by the High Court while the SA was pending, to be continued. The condition imposed was not something which would cause undue hardship to the borrowers and, in fact, was such which they had been following undisputedly. The petitioner cannot by raising such a plea have it both ways i.e. to have the mortgaged properties not proceeded against and at the same time not make good the payments due to R-1/Bank. We can hardly find fault with such an interim arrangement and especially in the given facts of the case.

17. Another aspect emphasized by learned counsel for the R-1/Bank is that the affidavits have been filed by the principal borrowers admitting their liability. The petitioner herein is not really a third party as they are closely related. The company is in the name of the husband of the petitioner and is stated to be run by the two sons. One of the sons is stated to be residing with the petitioner.

18. There is some merit in the plea of the learned counsel for the respondent Bank that these parties seem to be playing a game of relay race where one or the party keeps on challenging some order to keep the issue alive and there have been series of proceedings arising from legal action initiated by these parties at different times and not at one go. We at this stage do not consider it appropriate to observe anything on the merits of the controversy which may prejudice the parties one way or the other but suffice to say that the interim arrangement envisaged during the pendency of the SA and which has been continued by the impugned order of the DRAT cannot be faulted in view of the facts set out hereinabove and the DRAT has already posted the matter at an early date in

January, 2013.

19. In the end, we may note that an endeavour was made to see that if some mutually acceptable arrangement could be arrived at, but there was some backtracking by the petitioner as the petitioner was not only seeking to protect the Shalimar Bagh property with which she was concerned (this court was inclined to protect the said property), but also the other properties. Thus insofar as protecting the mortgage properties is concerned all the parties are in tandem and thus the suggestion that some amount be deposited and protection may be given to the Shalimar Bagh property alone was not found feasible by the learned senior counsel for the petitioner. We thus find no reason to exercise jurisdiction under Article 226 of the Constitution of India. The writ petition is dismissed with costs of Rs. 20,000/- against the petitioner and in favour of R-1/Bank.