(2014) 09 JH CK 0008

In the Jharkhand High Court

Case No : Writ Petition (Civil) No. 3689 of 2014

S.N. Lal Maruti Service Station APPELLANT

Vs

State Bank of India RESPONDENT

Date of Decision : 17-09-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(1), 13(2), 13(4), 13(8), 17

Citation : (2015) 1 AJR 737 : (2015) 2 BC 523 : (2015) 1 JLJR 146

Hon'ble Judges : S. Chandrashekhar, J

Bench : Single Bench

Advocate : Rajiv Ranjan and Ashok Kumar Yadav, Advocate for the Appellant; Rajesh Kumar, Advocate for the Respondent

Judgement

S. Chandrashekhar, J.—Aggrieved by order dated 16.07.2014 in S.A. No. 82 of 2014 passed by the Presiding Officer, the Debts Recovery Tribunal, Ranchi and challenging E-auction notice dated 12.06.2014, the petitioner has filed this writ petition. Further prayer seeking direction upon the respondent-Bank to disclose the name of the bidders and the consideration amount for which the property in question was sold, have also been made.

2. The brief facts of the case are that, the petitioner availed the loan from the respondent-State Bank of India vide loan a/c Nos. 30311583859 and 30311609880. The loan account of the petitioner was declared Non Performing Assets (NPA) and thereafter, the respondent-Bank invoked the provisions of SARFAESI Act, 2002 and issued notice under Section 13(2) to the petitioner. Subsequently, a notice under Section 13(4) was also issued to the petitioner. Challenging the notice issued under Section 13(4), the petitioner filed S.A. No. 82 of 2014 before the Debts Recovery Tribunal, Ranchi. An application in the pending SARFAESI Appeal was filed seeking stay of auction notice dated 13.06.2014. By order dated 16.07.2014, the petitioner was afforded opportunity to deposit 17 lacs. on 17.07.2014 by 12.00 noon. The learned Presiding Officer,

D.R.T. directed the Bank not to resort to sale on 16.07.2014 however, it was made clear that in the event the amount of Rs. 17 lacs is not paid, the Bank shall proceed with E-auction according to law on 17.07.2014 or 18.07.2014, without giving any further notice to the borrower.

2. A counter-affidavit has been filed on behalf of the respondent-Bank raising a preliminary objection to the maintainability of the writ petition. It is stated that the petitioner has already preferred S.A. No. 82 of 2014 under Section 17 of the SARFAESI Act, 2002 and against the impugned order dated 16.07.2014 the petitioner has a remedy of appeal under Section 18 of the SARFAESI Act, 2002. It is stated that notice dated 10.09.2012 was served upon the petitioner and the same was published in two daily newspapers namely "Dainik Hindustan" (Hindi) and "Hindustan Times" (English). The matter was taken to Bank Lok Adalat on 06.11.2012 and the petitioner undertook to pay the entire outstanding loan amount however, the petitioner failed to honour the undertaking given before the Bank Lok Adalat. The date for auction was fixed on 16.07.2014, after giving 30 days'' clear notice to the petitioner. It is stated that on 16.07.2014 at the eleventh hour, the petitioner brought the matter before the Tribunal and offered to pay Rs. 17 lacs. The E-auction has taken place from Ahmedabad but no bidder turned up.

3. Heard the learned counsel for the parties and perused the documents on record.

4. The learned counsel appearing for the petitioner has submitted that once the Debts Recovery Tribunal had granted an opportunity to the petitioner to deposit an amount of Rs. 17 lacs and further direction was issued to the respondent-Bank not to resort to sale on 16.07.2014, the sale conducted in violation of order dated 16.07.2014, is liable to be set-aside. It is further submitted that in the application dated 10.07.2014 in S.A. No. 82 of 2014 which was supported by the supplementary affidavit filed by the petitioner, though a specific plea has been raised by the petitioner that the auction sale notice dated 13.06.2014 has been issued without complying with the mandatory provision of Rule 8 of the Security Interest (Enforcement) Rules, 2002 however, without considering the same, the learned Debts Recovery Tribunal passed order dated 16.07.2014 which is liable to be set-aside. It is further submitted that in view of the decision in Mathew Varghese Vs. M. Amritha Kumar and Others, , the creditor-bank is under a statutory duty to follow the mandate of law. Without following the mandatory procedure under the Security Interest (Enforcement) Rules, 2002, the creditor-Bank proceeded to auction the mortgaged property, which cannot be sanctioned in law.

5. Mr. Rajesh Kumar, the learned counsel appearing for the respondent-Bank has submitted that the petitioner has not approached this Court with clean hands and she has suppressed vital informations from this Court and therefore, she is not entitled for grant of discretionary remedy under Article 226 of the Constitution of India. Relying on a decision of the Hon''ble Supreme Court in Hira Lall and Sons

and Others Vs. Lakshmi Commercial Bank, and in United Bank of India Vs. Satyawati Tondon and Others, it is submitted that since the S.A. No. 82 of 2014 is pending before the Debts Recovery Tribunal, and the petitioner has remedy of appeal under Section 18 of the SARFAESI Act, 2002, the present writ petition is not maintainable. Referring to settlement before Lok Adalat dated 06.11.2012, the learned counsel for the respondent-Bank has submitted that since the petitioner has failed to honour undertaking given before the Bank Lok Adalat and also before the Debts Recovery Tribunal, the writ petition is not maintainable. He relies on a decision of the Hon''ble Supreme Court in Prestige Lights Ltd. Vs. State Bank of India, .

6. I have carefully considered the submission of the learned counsel for the parties and perused the documents on record.

7. Before adverting to the factual aspect of the matter, certain provisions of the SARFAESI Act, 2002 and the Security Interest (Enforcement) Rules, 2002 may usefully be noticed. Section 13(8) of the SARFAESI Act, 2002 mandates that if the dues of the secured creditor together with all costs, charges and expenses incurred by her 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 creditor and no further step shall be taken for transfer or sale of that secured asset.

8. Rule 8(2) of the Security Interest (Enforcement) Rules, 2002 provides that possession notice in terms of Rule 8 (1) needs to be published in two daily newspapers and Rule 8(5) further provides that before effecting sale of immovable property, a valuation of the property from an approved valuer in consultation with the secured creditor shall be done for fixing the reserve price of the property. Rule 8(6) further provides that authorized officer shall serve to the borrower a notice of 30 days'' for sale of the immovable secured assets, under Rule 8(5). A joint reading of Section 13(8) of the SARFAESI Act and Rule 8 (1), 8(5) and 8 (6) read with Rule 9(1) of the Security Interest (Enforcement) Rules, 2002 indicates that a valuable right has been conferred upon the borrower and borrower has been provided an opportunity to pay the entire debt liability even after the sale in favour of the auction purchaser. The object of Rule 8(5) & 8 (6) appears to put the borrower to notice about the auction sale and the price at which the property is intended to be sold.

9. In Mathew Varghese Vs. M. Amritha Kumar and Others, , the Hon''ble Supreme Court has held that unless a clear 30 days'' time is given to the borrower, no sale or transfer can be resorted to by a secured creditor. In the event, any such sale properly notified after giving 30 days'' clear notice to the borrower does not take place as scheduled for reasons which cannot be solely attributable to the borrower, the secured creditor cannot effect the sale or transfer of the secured asset at any subsequent date by relying upon notification issued earlier. The Hon''ble Supreme Court has held as under:

53."…….In other words, once the sale does not take place pursuant to a notice issued under Rules 8 and 9, read along with Section 13(8) for which the entire blame cannot be thrown on the borrower, it is imperative that for effecting the sale, the procedure prescribed above will have to be followed afresh, as the notice issued earlier would lapse. In that respect, the only other provision to be noted is sub-rule (8) of Rule 8 as per which sale by any method other than public auction or public tender can be on such terms as may be settled between the parties in writing. As far as sub-rule (8) is concerned, the parties referred to can only relate to the secured creditor and the borrower. It is, therefore, imperative that for the sale to effected under Section 13(8), the procedure prescribed under Rule 8 read along with Rule 9(1) has to be necessarily followed, inasmuch as that is the prescription of the law for effecting the sale as has been explained in detail by us in the earlier paragraphs by referring to Sections 13(1), 13(8) and 37, read along with Section 29 and Rule 15. In our considered view any other construction will be doing violence to the provisions of the SARFAESI Act, in particular Sections 13(1) and (8) of the said Act."

10. Now coming back to the facts of the case, it appears that a notice under Section 13(2) was issued to the petitioner on 10.02.2010 though, the petitioner denied the same by stating that notice served upon her is undated one. It further appears that notice under Section 13(4) was issued to the petitioner on 28.06.2010 and the possession notice was also duly published in the two daily newspapers on 14.09.2012.

11. Referring to the contention of the learned counsel for the respondent-State Bank of India that the petitioner has suppressed some important information from the Court therefore, she is not entitled for grant of discretionary remedy, I am of the opinion that the conduct of the petitioner needs to be deprecated. However, merely because the petitioner has suppressed some information from the Court, the borrowers cannot be denied the valuable constitutional right conferred upon her. It is well known that the SARFAESI Act, 2002 has been enacted with special object and special powers have been given to the secured creditor to enforce the security interest and therefore, it is more a reason for the financial institution/bank to act fairly and observe all mandatory provisions under the SARFAESI Act, 2002 and the Security Interest (Enforcement) Rules, 2002.

12. Referring to the contention of the learned counsel for the respondent-Bank that since SARFAESI Appeal No. 82 of 2014 is still pending before Debts Recovery Tribunal, Ranchi, the present writ petition is not maintainable, the decision of the Hon''ble Supreme Court in United Bank of India Vs. Satyawati Tondon and Others, needs to be first referred to. The Hon''ble Supreme Court has held as under:

55. " It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and the SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the

right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."

13. It is contended that the plea which has been raised by the petitioner in the present proceeding can be adjudicated by the Debts Recovery Tribunal in the pending SARFAESI Appeal or in the appeal under Section 18 of the SARFAESI Act, 2002. I find that the petitioner has not been able to demonstrate how, the issues which have been raised by her before this Court could not have been effectively adjudicated by the Debts Recovery Tribunal.

14. The petitioner has contended that prima facie it appears that the mandatory provisions of the Security Interest (Enforcement) Rules, 2002 have not been followed by the respondent-Bank and the events, which took place on 16.07.2014 raise reasonable doubt regarding the bona fide in conducting auction sale. The respondent-Bank has taken a plea that on 16.07.2014 itself the auction sale took place from Ahmedabad.

16. From the above submissions made on behalf of the parties and the materials on record, I find that the issues raised by the parties involve questions of fact which can be effectively adjudicated in S.A. No. 82 of 2014. However, learned Debts Recovery Tribunal, Ranchi has not adverted to the issues raised by the petitioner in his application dated 10.07.2014 (with supplementary affidavit) in S.A. No. 82 of 2014 and therefore, the impugned order dated 16.07.2014 cannot sustain. The issues raised by the petitioner regarding non-observance of procedure under the Security Interest (Enforcement) Rules, 2002, have to be decided in S.A. No. 82 of 200?.. Though in view of pendency of S.A. No. 82 of 2014 there is an alternative remedy to the petitioner provided under Section 18 of the SARFAESI Act, 2002, after the parties exchanged detailed affidavits and extensive arguments were made by the counsel appearing for the parties, I refrain from dismissing the writ petition as not maintainable. I am of the definite opinion that it would serve the ends of justice if the matter is remitted back to the Debts Recovery Tribunal and the application filed by the petitioner is heard afresh by the Debts Recovery Tribunal. Accordingly, impugned order dated 16.07.2014 is set-aside. The petitioner is permitted to file additional affidavit in support of application dated 10.07.2014. The application filed by the petitioner is directed to be listed before the Debts Recovery Tribunal on 20.09.2014. I.A. No. 4170 of 2014 is dismissed.

