(2011) 10 DEL CK 0254

In the Delhi High Court

Case No : Writ Petition (C) 7228 of 2005

Somnath Manocha APPELLANT

Vs

Punjab and Sind Bank and Others RESPONDENT

Date of Decision : 17-10-2011

Acts Referred:

Constitution of India, 1950 — Article 62
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2), 13(4), 17, 2, 2(1)(iii)
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Rules, 2004 — Rule 9

Citation : (2011) 9 AD 476

Hon'ble Judges : Dr. S. Muralidhar, J

Bench : Single Bench

Advocate : R.K. Saini with Mr. Sitab Ali Chaudhary, for the Appellant; Khalid Abdullah, for the Respondent

Final Decision : Disposed Off

Judgement

Justice S. Muralidhar

1. Aggrieved by a notice dated 20th November 2004 issued by Respondent No. 1 Punjab & Sind Bank (''Bank'') u/s 13(2) of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (''SARFAESI Act'') and consequent possession notice u/s 13(4) SARFAESI Act dated 13th April 2005 taking over possession of the immovable property bearing old No. 4A, New Municipal No. 32/24, Pratap Nagar, Jagdish Colony, Rohtak (Haryana) [''the property in question''], the Petitioner, who is the owner of the property in question, has filed this present petition.

2. The Petitioner stated that he had purchased the property in question by a registered sale deed dated 16th April 1980. In 1981, the Bank extended loan and credit facilities to one M/s. General Tyre House, a partnership firm in which the relatives of the Petitioner were partners. The Petitioner was one of the three

guarantors in respect of the said loan and credit facilities, which was secured by an equitable mortgage upon the property in question in favour of the Bank.

3. On 10th December 1984 the Bank filed in this Court a suit for recovery of a sum of Rs. 7,75,283.60 against M/s. General Tyre House, its partners and the three guarantors including the Petitioner. The said Suit No. 935 of 1984 instituted under Order XXXVII CPC is stated to be still pending. It is stated by the Petitioner that the principal borrower has, in the said suit, filed a counter claim against the Bank.

4. On 18th December 2002 the SARFAESI Act came into force. The mortgage in the present case falls within the definition of ''financial asset'' u/s 2(l)(iii) SARFAESI Act and the Bank falls within the definition of ''secured creditor'' u/s 2(zd) thereof. u/s 13(4) thereof, the secured creditor is entitled to exercise its rights in respect of the mortgaged property by taking over possession thereof, if the borrower fails to discharge the full liability within 60 days of a notice being issued to him u/s 13(2) SARFAESI Act. Section 36 SARFAESI Act prohibits the secured creditor from taking any of the measures u/s 13(4) thereof unless a claim in respect of the financial assets is made within the period of limitation prescribed under the Limitation Act, 1963 (''LA'').

5. On 20th November 2004 the Bank issued a notice to the principal borrower, its partners and three guarantors including the Petitioner u/s 13(2) SARFAESI Act calling upon them to pay the entire outstanding liability amounting to Rs. 3,84,59,807/- together with interest with effect from 21st November 2004 as well as costs in the sum of Rs. 35,615/-. The Petitioner replied to the said notice on 7th January 2005 referring to Section 36 SARFAESI Act and pointing out that the notice itself was barred by limitation. It was stated that the limitation period in the event of recovery of money secured by mortgage was 12 years from the date when the amount became due under Article 62 of the Schedule to the LA. The amount became due on 11th and 12th October 1982. The claim for money became time barred in the year October 1985, and the claim based on mortgage, in the year 1994. The Bank, by a reply dated 26th February 2005, reiterated its stand. On 13th April 2005 the Bank issued the possession notice u/s 13(4) SARFAESI Act read with Rule 9 of the Security Interest (Enforcement) Rules, 2002. Thereafter, the present writ petition was filed.

6. On 26th April 2005 this Court directed notice to issue in this petition after noting the contention of learned counsel for the Petitioner that the action initiated by the Bank under the SARFAESI Act was time barred. Further, it was directed that in the interim the parties shall maintain status quo in respect of the property in question. Thereafter, the interim order was made absolute on 15th December 2005 and Rule was issued on 22nd May 2008.

7. Mr. R.K. Saini, learned counsel appearing for the Petitioner submitted that the proceedings under the SARFAESI Act were instituted more than 18 years after the filing of the suit and therefore, were time barred u/s 36 SARFAESI Act. Since

the Bank has already filed a suit, it would be unreasonable to permit it to also invoke the provisions of the SARFAESI Act in regard to the outstanding liability of the principal borrower.

8. Mr. Khalid Abdullah, learned counsel appearing for the Bank referred to the counter affidavit filed on its behalf. He submitted that the filing of the suit by the Bank for recovery of money was within the prescribed period of limitation. Consequently, the Bank was, for the purposes of Section 36 SARFAESI Act, entitled to take measures u/s 13(4) thereof since it had made a claim in respect of the financial asset, i.e., the mortgage of the property in question, by filing the suit within the prescribed time of limitation.

9. The above submissions have been considered. The SARFAESI Act was intended to provide an additional remedy to a financial institution to recover its debts. The Statement of Objects and Reasons of the SARFAESI Act acknowledged that the existing legal framework relating to commercial transactions has not kept pace with the changing commercial practice which has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Section 35 SARFAESI Act provides that "the provisions of the said Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law". It is therefore, apparent that the remedy provided under the SARFAESI Act to a secured creditor for recovery of a debt owing to it, is independent of any other remedy available in law. Section 36 SARFAESI Act requires that a claim should have been made by the lender in respect of the financial assets within the period of limitation prescribed under the LA. Section 36 does not mandate that the notice u/s 13(2) SARFAESI Act must be issued within such period of limitation. A ''claim'' in respect of the financial asset, could be by way of any proceedings in accordance with law. Since the SARFAESI Act itself came into force only on 18th December 2002, the legislative intent was that even the sum owned to a secured creditor prior to that date can be sought to be recovered as long as the claim was made within the prescribed period of limitation. A similar view has been expressed by the Gujarat High Court in Ivee Injectaa Ltd. and Another Vs. Junagadh Vibhagiya Nagrik Sahakari Bank Ltd., .

10. In the present case, the Bank had made a claim in respect of the secured financial asset by filing a suit in the year 1984. Admittedly, the suit was filed within the limitation period. Therefore, the essential requirement of Section 36 SARFAESI Act was fulfilled. The Bank validly proceeded to the next step by issuing a notice u/s 13(4) SARFAESI Act. Consequently, this Court finds no merit in the contention of learned counsel for the Petitioner that the notice u/s 13(2) and the possession notice u/s 13(4) SARFAESI Act issued by the Bank were without jurisdiction. The remedy to the borrower who received a possession notice u/s 13(4) SARFAESI Act is to file an appeal to the Debts Recovery Tribunal (''DRT) within 45 days thereof u/s 17 of the SARFAESI Act. In the present case

the Petitioner has a remedy of an appeal to the DRT u/s 17 SARFAESI Act. Without expressing any opinion on merits of the contentions of the parties in regard to the impugned action of the Bank u/s 13(2) and (4) SARFAESI Act, this Court declines to entertain this writ petition. It is clarified that it will be open to the Petitioner to invoke the remedy available to him u/s 17 SARFAESI Act.

11. Considering that there was an interim order made by this Court on 26th April 2005, it is directed that the said interim order will continue for a further period of four weeks to enable the Petitioner to seek appropriate remedy u/s 17 SARFAESI Act before the DRT. It is made clear that the interim order would come to an end on 16th November 2011 or till such time the DRT takes up the Petitioner''s appeal u/s 17 SARFAESI Act, whichever is earlier.

12. The petition is disposed of in the above terms