
(2012) 04 DEL CK 0487
In the Delhi High Court
Case No : LPA No. 942 of 2011

Somnath Manocha

APPELLANT

Vs

Punjab and Sindh Bank and Another

RESPONDENT

Date of Decision : 20-04-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 14, Order 34 Rule 4, Order 34 Rule 5, Order 34 Rule 6
Limitation Act, 1963 — Article 62
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13, 13(2), 13(4), 17, 2(1)
Transfer of Property Act, 1882 — Section 69, 69A

Citation : AIR 2012 Delhi 168 : (2012) 189 DLT 32 : (2012) 129 DRJ 654

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : A.S. Chandhiok, Amicus Curie, Mr. Ritesh Kumar, Mr. Sidharth Tyagi, Mr. Sumit Goyal, Ms. Shweta Gupta, Mr. Vikas Mehta and Mr. Piyush Sanghi, for the Appellant; Rajinder Walia, Advocate for respondent No. 1, Mr. Jagat Arora, Advocate for respondent No. 4., for the Respondent

Judgement

A.K. Sikri, Acting Chief Justice

1. This appeal poses a very interesting, and at the same time, an important question of law pertaining to the interpretation which is to be accorded to Section 36 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Act, 2002 (hereinafter referred to as "SARFAESI Act"). This provision makes the following reading:

"36. Limitation No secured creditor shall be entitled to take all or any of the measures under sub-section (4) of section 13, unless his claim in respect of financial asset is made within the period of limitation prescribed under the Limitation Act, 1963 (36 of 1963)."

The issue as to whether action of the respondent bank invoking the provisions of SARFAESI Act by serving notice of Section 32 of the said Act is barred by

limitation or not, which has arisen in the following background.

2. The respondent bank herein had given certain loans to one M/s. General Tyre House, a partnership firm in the year 1981. For securing this loan, the appellant was one of the guarantors. He also gave the security in the form of equitable mortgage in respect of house property bearing Municipal No. 32/24, Pratap Nagar, Jagdigh Colony, Rohtak (Haryana). The loan could not be paid by M/s. General Tyre House, which forced the bank to file CS (OS) No. 935 of 1984 for recovery of `7,75,283.60 against that firm as well as the appellant and other guarantors. The aforesaid proceedings are still pending adjudication and the Suit has not been decided so far.

3. The Parliament enacted SARFAESI Act which came into effect from 18.12.2002. This Act provides additional remedy to the financial institutions to recover their debts by enforcing the security. Mechanism for that is provided under this Act. The respondent bank chose to avail this additional remedy and thus, in February, 2003 served notice to the appellant u/s 13(2) of the SARFAESI Act for enforcing the aforesaid security in the form of said property mortgage to the bank. This provision reads as under:

"13. Enforcement of security interest

(1) xxx xxx xxx

(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 installment 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 subsection (4)."

4. Though no immediate action was taken on the basis of this notice, fresh notice dated 20.11.2004 u/s 13(2) was served on similar lines calling upon the appellant to pay the entire outstanding liability amounting to `3,84,59,807/- together with interest with effect from 21.11.2004. The appellant replied on 07.1.2005 questioning the validity of this notice on the ground that the action was time barred in view of the provisions of Section 36 of SARFAESI Act read with Article 62 of the Schedule to the Limitation Act. The bank, however, took the stand that notice was not time barred. The appellant again reiterated his plea vide letter dated 02.4.2005 asking the bank not to enforce the provisions of the SARFAESI Act as the proposed action was time barred. Since the notice was not complied with on the aforesaid ground, i.e., the appellant did not discharge the purported liability within 60 days of from the date of notice, the respondent bank issued possession notice dated 13.4.2005 u/s 13(4) of the SARFAESI Act stating that it would take over the possession of the property in question.

5. At this stage, the appellant filed W.P.(C) No. 7228 of 2005 against the

aforesaid action of the bank taking the same plea, viz., the claim of the respondent bank was impermissible as the action was time barred. The said plea of the appellant herein, however, has not convinced to the learned Single Judge and the writ petition has been dismissed vide judgment dated 17.10.2011.

6. In the opinion of the learned Single Judge, the SARFAESI Act was intended to provide an additional remedy to a financial institution to recover its debts as 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 of SARFAESI Act provides that:

"The provisions of this Ordinance 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."

7. Learned Single Judge observed 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 of 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 Limitation Act. Section 36 does not mandate that the notice u/s 13(2) of 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. The judgment of Gujarat High Court in the case of Ivey Injectaa Ltd. Vs. Junagadh Vibhagiyaa Nagrik Sahakari Bank Ltd. [(2006) 129 CC 528 (Guj.)] in support of his conclusion. At the same time, the appellant is relegated to remedy u/s 17 of the SARFAESI Act, which provides for appeal against such notice u/s 13(4) of the SARFAESI Act.

8. It is the contention of the appellant that prior to the coming into force of the SARFAESI Act, the machinery for enforcing the remedy existed under Order XXXIV Rule 4 to 6 of the Code of Civil Procedure, 1908. The procedure was to file a suit for sale of the mortgage property. The said procedure is such that the mortgagee does not need to file a prior suit for recovery of money. "A preliminary decree in a mortgage suit decides all the issues and what is left out is only the action to be taken in the event of non-payment (see Shub Karan Bubna @ Shub Karan Prasad Bubna Vs. Sita Saran Bubna and Others, These issues include the question as to how much is due and payable to the mortgagee, which is the question at issue in a suit for recovery of money as well. Thus, whereas the respondent bank chose to file a suit for recovery of money against the appellant among others, it could have chosen instead to proceed under Order XXXIV. However, it failed to do so. The learned counsel submitted that on the contrary, the respondent bank in par 17 of its plaint in the Suit has averred:

"..... The plaintiff is not claiming any relief against the mortgaged immoveable property in the present suit. It reserves its right to proceed against the said mortgaged property as provided under the provisions of Order XXXIV Rule 14 of the Code of Civil Procedure. Leave is sought from the Hon"ble Court in this regard."

9. The period of limitation for enforcing payment of money secured by mortgage is 12 years as provided in Article 62 of the Schedule of the Limitation Act, 1963. But, the bank never filed any Suit under Order XXXIV of CPC.

10. On this basis, it was argued that the remedy which is now sought to be enforced qua sale of mortgaged property was "claimed in respect of the financial asset" which had become time barred. It was submitted that the period for such a claim is covered by Article 62 in the Schedule to the Limitation Act and since that period has expired, provisions of Section 36 of the SARFAESI Act were attracted. The learned counsel distinguished the judgment of Gujarat High Court in Ivey Injctaa Ltd. (supra) on the ground that in that case, the bank had made claim in respect of mortgaged property within a period of 12 years. It was also argued that in any case, Ivey Injctaa Ltd. (supra) is not an authority for pendency of a civil suit being a claim u/s 36 of SARFAESI Act. Learned counsel, in the alternate, argued that even otherwise, for an altogether different reason, the proceeding under Sections 13(2) and 13(4) would be time barred. The expression "claim in respect of a financial asset" in Section 36 must relate to the claim made under the SARFAESI Act would depend upon claim having been made under this very Act itself. It cannot relate to other claim by way of notice or civil Suit or proceedings under another statute. If the interpretation placed by the learned Single Judge on Section 36 of the SARFAESI Act is correct, then a civil Suit or other claim instituted or made by the Bank within limitation would make any proceeding under SARFAESI Act which is otherwise, outside limitation, as valid. It would be odd to make the proceeding under the SARFAESI Act which is a special statute depend upon a remedy or claim under another law. Especially, when Section 35 gives overriding effect to the provisions of SARFAESI Act over anything inconsistent contained in any other law. He also submitted that if the expression "claim" in Section 36 of the SARFAESI Act is held to include any claim it would include ordinary legal notice, suit etc. This would lead to absurd results. For example, a notice may have been issued by the lender say in the year 1984 within the period of limitation and yet it would be sufficient to render a notice under Debt Recovery Tribunal Act within limitation would make a proceeding under SARFAESI Act as valid.

11. After considering the submission of the learned counsel for the parties, we are of the view that the learned Single Judge is right in his interpretation given to Section 36 of the SARFAESI Act. The Act is intended to provide an additional remedy to the financial institutions to recover their debts. Specific procedure in this behalf is stipulated in Section 13 of the SARFAESI Act which inter alia provides for enforcement of security interest. Section 13 starts with non-

obstante clause and authorizes a secured creditor who enforced any security interest created in its favour without the intervention of Court or Tribunal and in accordance with the procedure prescribed in the Act. Conditions stipulated in sub-Section (2) of Section 13 for enforcing the security are as under:

- (i) The borrower is a secured creditor under a security agreement;
- (ii) Borrower makes any default in repayment of secured debt or any installment thereof;
- (iii) The account of the borrower is classified by the secured creditor as non-performing asset by the secured creditor;
- (iv) Even after notice in writing by the secured creditor to discharge in full his liabilities to the secured creditor within 60 days from the date of notice, the borrower has failed to discharge the liability.

12. This additional remedy is, therefore, available to any secured creditor on fulfillment of the aforesaid conditions. This remedy is in addition to ordinary remedy of civil suit, therefore, merely because bank had earlier filed a suit for recovery of an amount would not mean that it is precluded from enforcing the security under SARFAESI Act. Gujarat High Court in *Ivee Injectaa Ltd.* (supra) has explained this position in the following manner:

"The submission of the learned counsel for the appellant also overlooks the scheme of the Securitization Act which is different from the proceedings under the Code of Civil Procedure. While the CPC provides for two separate and distinct stages- (i) adjudication by the Court of the mortgagee's claims resulting into a decree and (ii) the subsequent stage of execution of the decree with judicial intervention; the Securitization Act confers power on the mortgagees, which are financial institutions, to enforce security without the intervention of any Court or Tribunal and notwithstanding anything contained in Sections 69 and 69A of the Transfer of Property Act, 1882. Of course, the measures for enforcement of security are to be taken after giving the borrower a notice in writing to discharge in full his liabilities of the secured creditors within 60 days from the date of notice and if the borrower gives a reply raising any dispute about the amount due including dispute about interest, the financial institution will have to meaningfully consider the reply and take the decision and thereafter proceed under sub-section (4) of Section 13. Section 17 of the Securitization Act confers a right of appeal before the Debts Recovery Tribunal to any person (including the borrower) aggrieved by any of the measures taken by the secured creditor u/s 13(4) of the Act. Hence, when the secured creditor has already obtained a decree of a Civil Court/Debts Recovery Tribunal, issuance of notice u/s 13(2) of the Securitization Act is not to be construed as institution of a suit in a Civil Court for enforcement of the mortgage, but the proceeding would be in the nature of execution of the decree."

13. We are in agreement with the aforesaid exposition of law. Provisions of

Section 36 of SARFAESI Act are to be read in that context. This Section provides that the claim in respect of "financial asset" is to be made within the period of Limitation Act. "Financial asset: is defined u/s 2(1)(l) of the SARFAESI Act prescribed under the Limitation Act and reads as under:

"(l) "financial asset" means debt or receivables and includes-

- (i) a claim to any debt or receivables or part thereof, whether secured or unsecured; or
- (ii) any debt or receivables secured by, mortgage of, or charge on, immovable property; or
- (iii) a mortgage, charge, hypothecation or pledge of movable property; or any right or interest in the security, whether full or part underlying such debt or receivables; or
- (iv) any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent; or
- (v) any financial assistance;"

14. The requirement of Section 36 is that the claim in respect of "financial asset" is made within the period of limitation prescribed under the Limitation Act. Claim in respect of "financial asset" is defined as defined by Section 29(1) of the SARFAESI Act means debt or receivables and includes a claim to any debt or receivables or part thereof, whether secured or unsecured, and also any beneficial interest in property, whether movable or immovable, or in such debt, receivables, whether such interest is existing, future, accruing, conditional or contingent. Section 2(1)(t) which defines "property" is also relevant. This definition reads as under:

"(t) "property" means-

- (i) immovable property;
- (ii) movable property;
- (iii) any debt or any right to receive payment of money, whether secured or unsecured;
- (iii) receivables, whether existing or future;
- (iv) intangible assets, being know-how, patent, copyright, trade mark, licence, franchise or any other business or commercial right of similar nature;"

15. So far so good. The question is as to whether in the facts of this case, the claim had become time barred. The property in question is mortgaged with the bank. However, the bank did not file Suit for recovery under Order XXXIV of the CPC. Instead, in para 17 of the plaint, specific averment was made that it was

not claiming any relief against the mortgaged immovable property in the said suit and right was reserved to proceed against the said mortgaged property as provided under provisions of Order XXXIV Rule 14 of the CPC.

16. It could not be disputed that under ordinary law, the respondent bank has lost the remedy of enforcing the aforesaid security by way of mortgage as limitation of 12 years as provided in Article 62 of the Schedule to the Limitation Act, 1963 has expired. The bank chose to file only a suit for recovery of money and in spite of averment made in Para 17 of the plaint, it did not file any suit under Order XXXIV of the CPC. No doubt, in terms of order XXXIV Rule 14, the bank was entitled to bring the mortgaged property to sale by instituting a suit for sale in enforcement of the mortgage whereafter obtaining a decree for payment of money, in satisfaction of the claim under mortgage. However, such a suit could be filed within the period of limitation prescribed under Article 62 in the Schedule to the Limitation Act. Thus, under the ordinary law, the bank is precluded from filing a mortgage suit in respect of the aforesaid property.

17. Thus, on the date of notice issued u/s 13(2) of SARFAESI Act, there was no such existing or subsisting right qua mortgage. We agree with the contention of the appellant that the remedy provided under SARFAESI Act is simply a new means of enforcing a preexisting right, i.e., one that existed before the SARFAESI Act came into existence. That remedy is the right to sell a mortgage property and recover the sum which it secures from the sale proceeds. In the present case, since right to file a suit or proceedings stood extinguished, the SARFAESI Act would not revive this extinguished claim. Position would have been different if the bank had filed mortgage suit and such a suit was pending. In *Ivee Injectaa Ltd.* (supra), mortgage suit has already been filed and therefore, claim for enforcing mortgage rights was subsisting as it was pending adjudication. If the period of 12 years had not expired under Article 62 in the Schedule to the Limitation Act and there was still time to file the proceedings of mortgage suit, even that would have saved the right of the Bank to enforce the provision of SARFAESI. But even that action has become time barred. In the facts of this case, we hold that the claim is barred u/s 36 of SARFAESI Act and therefore, it was not open to the bank to proceed under this Act. We, thus, allow this appeal and quash the impugned notice u/s 13(2) and 13(4) of SARFAESI Act issued by the bank.

No order as to costs.